

EQUAL OPPORTUNITY

What's happening with discrimination in South Australia?

ANNE HEWITT delves into the state's out-of-date anti-discrimination laws

When South Australia introduced the *Prohibition of Discrimination Act (SA)* in 1966 it was at the cutting edge of Australia's anti-discrimination law — this was the very first piece of anti-discrimination legislation in Australia. However, since the 1960s South Australia has fallen to the back of the pack in terms of its regulation of discrimination. No significant amendments have been made to the *Equal Opportunity Act 1984 (SA)* since the 1997 introduction of provisions regarding sexual harassment.¹ South Australia is now one of the few states which fail to prohibit discrimination based on religious belief, political opinion or activity, parental status, association with a child, pregnancy or mental illness.

A review of the *Equal Opportunity Act 1984 (SA)* was commissioned more than 14 years ago, and amending legislation was first proposed in 2002, but was delayed as a result of the 2002 state elections. Finally, legislation was proposed in 2006 to modernise the Act 'to ensure comprehensive protection of South Australians against unjustified discrimination'.² The amending legislation would have extended prohibitions on discrimination to cover (among other things): marital status; identity of a spouse; pregnancy; association with a child (including breast feeding); caring responsibilities; religious appearance or dress,³ mental illness and non-symptomatic conditions such as HIV.⁴

However, the 2006 Bill didn't progress far, or fast. The Liberal party and Family First both expressed strong opposition to the Bill. The second reading debate in the House of Assembly was completed on 21 February 2007, following which the Bill was referred to Committee. The Bill dropped off the notice paper, was restored on 1 May 2007, and lapsed again due to the prorogation of parliament. A new version of the Bill was introduced on 26 November 2008. The 2008 Bill is similar to the previous version, but some of the more controversial amendments have been reduced or removed.

The delays in passing these important amendments to the law, and the reduction in the scope of the amendments proposed, are both cause for concern. Why has this happened? The answer appears to be that there is substantial opposition to some of the amendments.

So, who is objecting to the amendments and why?

As the parliamentary debates on the 2006 Bill illustrate, there were a number of objections being made to the scope and nature of the proposed amendments. Many of these objections relate to the fact that protection

is already offered to victims of particular types of discrimination under Commonwealth legislation, or that the scope of the proposed prohibitions is too broad.⁵ Not all of these objections will be considered here. However, it is interesting to consider a number of objections to the proposed amendments expressed by religious groups.

Prior to the introduction of the Bill in 2006 several Christian religious groups in South Australia expressed clear objections to any introduction to a prohibition on religious discrimination in the state. In a 2006 interview, Attorney-General Michael Atkinson explained the opposition to such a prohibition:

the main Western Christian denominations, the Greek Orthodox archdiocese and the Greek Evangelical Church, opposed it, as did many Christian schools. They feared the new laws would prevent them from freely preaching and practising their religion and from seeking to convert others.⁶

As a result of such objections the government decided not to introduce a prohibition of discrimination based on religion, and instead proposed a limited prohibition on discrimination based on religious dress or appearance in the 2006 Bill. A similarly limited provision appears in the 2008 version of the Bill.⁷

However, despite the limitation in the scope of the proposed amendments in relation to religious discrimination, there remained substantial objection to the 2006 Bill from some religious groups. Many of these objections related to the proposed expansion of the definition of victimisation to include engaging in:

a public act inciting hatred, serious contempt or severe ridicule of the person or a group of persons of which the person is a member on a ground of discrimination that is unlawful by virtue of this Act.⁸

Some religious groups expressed apprehension that this provision would allow actions be taken against religious leaders who criticize or denounce the beliefs or practices of other religious groups.

There was active campaigning on this issue. For example, a search of the internet reveals several active campaigns against the 2006 Bill in the form it was proposed, encouraging individuals to contact members of the House of Assembly in order to persuade them that passing the Bill would limit free speech and freedom of religion. One website includes a template for a letter writing campaign to upper house MPs, which reads in part 'Please vote against clause 61 of the Equal Opportunity (Miscellaneous) Amendment Bill and other parts which would prevent religious institutions from promoting traditional values.'⁹

REFERENCES

1. *Equal Opportunity (Sexual Harassment) Amendment Act 1997 (SA)*.
2. *Equal Opportunity (Miscellaneous) Amendment Bill 2006* was tabled before the House of Assembly on 26 October 2006; South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2006 (M) Atkinson, Attorney-General). A further bill, the *Equal Opportunity (Miscellaneous) Amendment Bill 2008* was tabled before the Legislative Council on 26 November 2008.
3. Proposed s 85T(1) of the *Equal Opportunities Act 1984 (SA)*; see s 61 *Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA)*. In the 2006 version of the Bill discrimination on the ground of profession, trade or lawful occupation and area of residence were also going to be prohibited; this has been removed from the 2008 Bill.
4. By the incorporation of new definitions of 'disability' as (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour and (d) the presence in the body of organisms capable of causing disease or illness: proposed additions to *Equal Opportunity Act 1984 (SA)* s 5(1); see *Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA)* s 5. The same amendments were proposed in the 2006 Bill.
5. See South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2007, 1696–1708, (Mrs Redmond), 1708–9 (Mr Pisoni), 1709–11 (Mr Hamilton-Smith).
6. However Mr Atkinson admitted that Muslim, Jewish, Buddhist, Hindu, Seventh Day Adventist and Scientology leaders were in favour of the introduction of a prohibition on discrimination based on religion. Jeremy Roberts, 'Christian Pressure Waters Down Bill', *The Australian* (Sydney), 20 November 2006.
7. Proposed s 85T(1)(f) of the *Equal Opportunity Act 1984 (SA)*; see s 61 *Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA)*. The reasons for and consequences of this limited prohibition are further discussed in Anne Hewitt 'It's not because you wear hijab, it's because you're Muslim': Inconsistencies in South Australia's discrimination laws' (2007) 1



A similar fear was also reflected in the parliamentary debate regarding the 2006 proposed Bill which demonstrates concern about the possibility of a 'Catch the Fire'¹⁰ style application of the legislation.¹¹ However, as the 2006 Bill did not actually propose to prohibit discrimination based on religious belief, it is improbable that a 'public act inciting hatred, serious contempt or severe ridicule' of a group defined by religious belief would have constituted victimisation 'on a ground of discrimination that is unlawful by virtue of this Act'. Therefore, this particular concern appears unfounded.

Despite this, the proposed expansion of the definition of victimisation which appeared in the 2006 Bill has been removed from the 2008 version.

There were further objections to the 2006 proposed amendments from religious groups — specifically, that the amendments would limit the ability of religious organisations to engage in certain types of discriminatory action.¹² For example, there were amendments that (if passed) would mean that:

- religious hospitals, childcare centres and other organisations would no longer be able to discriminate on the ground of sexuality;¹³
- religious schools would only be able to discriminate in employing staff on the grounds of sexuality if such a policy were advertised to all current and prospective employees, parents and students, and lodged with the Equal Opportunity Commissioner;¹⁴ and
- religious schools would not be allowed to discriminate against students on any of the prohibited grounds — including sexuality and religion.¹⁵

Despite the objections made to these provisions in the 2006 Bill, they have remained in the 2008 proposals.

Where to from here?

As is apparent from the brief discussion above, there are a number of specific objections being made to the proposed amendments to the *Equal Opportunity Act 1984* (SA), as well as general objections to its scope. These objections appear to have been successful in slowing the progress of the legislative amendment to date, and in having some of the proposed amendments (especially to victimisation provisions) abandoned. Whatever the merit of the particular objections, it is important that the discussion move back into the public arena. Now that a new version of the amending legislation has been tabled in parliament the time is ripe for informed public debate on these topics.

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8. Proposed amendment to s 86 of the *Equal Opportunities Act 1984* (SA); see s 61 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA).

9. See <willyouvisitmeinprison.com> at 9 February 2009.

10. In which the Victorian Civil and Administrative Tribunal held that the presentation of a seminar and publication of articles regarding the religious beliefs of Muslims by Pastors of the Catch the Fire Ministries incited hatred and contempt of, and revulsion towards the religious beliefs of Muslims and therefore constituted a breach of s 8 of the *Racial and Religious Tolerance Act 2001* (Vic): *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159. See also *Catch the Fire Ministries v Islamic Council of Victoria Inc* [2006] VSCA 284.

11. South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2007, 1704 (Mrs Redmond).

12. See <willyouvisitmeinprison.com> at 9 February 2009.

13. Proposed deletion of existing exception in s 50(2) of the *Equal Opportunities Act 1984* (SA); see s 24 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA) and s 25 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA).

14. Proposed introduction of an exemption on these limited terms in s 34(3) of the *Equal Opportunities Act 1984* (SA); see s 17 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA) and s 18 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA).

15. Proposed new provision s 85ZE of the *Equal Opportunities Act 1984* (SA); see s 61 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA) and s 66 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA).