

**INQUIRY INTO BULLYING OF CHILDREN AND YOUNG  
PEOPLE**

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**Legislative Council General Purpose Standing Committee No. 2**

**Inquiry into Bullying  
of Children & Young People**

**19 March 2009**

**Submission by Stepan Kerkyasharian AM  
President of the Anti Discrimination Board of NSW**

The Director  
General Purpose Standing Committee No. 2  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

Dear Committee Members

As President of the New South Wales Anti-Discrimination Board (the ADB), I welcome the opportunity to make a brief submission to the Inquiry into the Bullying of Children and Young People.

The ADB is an independent statutory body that administers the *Anti-Discrimination Act 1977 (NSW)* ("the AD Act"). The AD Act makes it unlawful to discriminate on certain grounds, including age, in certain circumstances.

Functions undertaken by the ADB include conciliating individual and representative complaints about disability discrimination; providing education about disability discrimination; undertaking projects and activities aimed at eliminating disability discrimination; and providing legal and policy advice to government and other interested parties.

I address, below, only the sixth term of reference. I make no comment in relation to the other terms of reference.

## **APPROACHES TO ADDRESS BULLYING IN NSW**

### **1. The NSW Anti-Discrimination Act protects children and young people**

In NSW, bullying of children and young people may, in certain circumstances, amount to unlawful discrimination under the *Anti-Discrimination Act 1977 (NSW)* ("the AD Act").

Children and young people are covered by the AD Act in the same way as adults.

### **2. Children and young people can complain to the Anti-Discrimination Board, and then the Administrative Decisions Tribunal**

Where a child or young person believes they have been discriminated against, they may lodge a complaint with the NSW Anti-Discrimination Board ("the ADB"). They may complain on their own behalf, or in certain circumstances, through an agent, guardian, representative or lawyer. They may also complain as a group, or as a representative of a group.

The ADB may decline the complaint at any stage, but only for good reason. If accepted, the ADB will investigate the complaint. If the matter appears to be covered

by the AD Act, and investigation does not resolve the complaint, the ADB provides conciliators who meet with both parties to try to reach an agreement.

Where the parties are unable to reach a conciliated agreement at the ADB, and in certain other cases, the matter will be heard by the NSW Administrative Decisions Tribunal ("the ADT").

The remedies available from the ADT to those children and young people covered by the AD Act include: orders for compensation; orders prohibiting future unlawful discriminatory conduct; publication of an apology; development of programs or policies aimed at eliminating unlawful discrimination; and declarations that unlawfully discriminatory contracts are unenforceable.<sup>1</sup>

### 3. Not all discrimination is against the law

The AD Act has a three stage structure. First, the AD Act makes certain kinds of discrimination unlawful. Then it sets out exceptions to those rules. Lastly, it gives the President and the Minister the power to grant specific exemptions from the coverage of the AD Act.

.Discrimination in NSW is only unlawful on specified grounds, and in specified circumstances. .For example, it is unlawful to discriminate on the basis of age in the provision of education<sup>2</sup>. However, the AD Act makes a special exception allowing schools to refuse to enrol children under 6 years of age.<sup>3</sup>, and excluding private educational authorities altogether<sup>4</sup>. A specific individual exemption from the AD Act could be granted by the President or Minister to allow age discrimination in education, if sufficient reason were demonstrated.

A good example of the piecemeal coverage provided by the AD Act arose from a recent case of alleged race discrimination in a primary school. Certain children were alleged to have made racist remarks, and engaged in racist conduct, targeted towards specific children from a different race. The case against the school, for allegedly condoning the conduct, was dismissed for lack of evidence. The case against the alleged perpetrators was dismissed because the AD Act does not make it unlawful for a student to discriminate against another student. It is only unlawful for the school to discriminate against the student.<sup>5</sup>

The grounds on which discrimination is unlawful in NSW are:

- Sex discrimination<sup>6</sup>
- Pregnancy discrimination<sup>7</sup>
- Breastfeeding discrimination<sup>8</sup>
- Race discrimination<sup>9</sup>
- Age discrimination<sup>10</sup>
- Marital or domestic status discrimination<sup>11</sup>

<sup>1</sup> *Anti-Discrimination Act 1977 (NSW) s108*

<sup>2</sup> *Anti-Discrimination Act 1977 (NSW) s49ZYL*

<sup>3</sup> *Anti-Discrimination Act 1977 (NSW) s49ZYL(4)*

<sup>4</sup> *Anti-Discrimination Act 1977 (NSW) s49ZYL(3)(a)*

<sup>5</sup> **Director General, Department of Education and Training v ZG on behalf of A,B and C (EOD) [2007] NSWADTAP 50**

<sup>6</sup> *Anti-Discrimination Act 1977 (NSW) Part 3,*

<sup>7</sup> *Anti-Discrimination Act 1977 (NSW) Part 3, s 24(1B)*

<sup>8</sup> *Anti-Discrimination Act 1977 (NSW) Part 3, s 24(1C)*

<sup>9</sup> *Anti-Discrimination Act 1977 (NSW) Part 2*

<sup>10</sup> *Anti-Discrimination Act 1977 (NSW) Part 4G*

<sup>11</sup> *Anti-Discrimination Act 1977 (NSW) Part 4*

- Homosexual discrimination <sup>12</sup>
- Disability discrimination <sup>13</sup>
- Transgender (transsexual) discrimination <sup>14</sup>
- Carers' responsibilities discrimination <sup>15</sup>
- Discrimination because of your relatives, or associate<sup>16h</sup>
- Harassment <sup>17</sup>
- Sexual harassment<sup>18</sup>

The listed grounds of discrimination are only unlawful in certain areas<sup>19</sup>, namely:

- Employment
- State education
- Goods and services
- Accommodation
- Registered clubs

#### 4. Direct and Indirect discrimination are both against the law.

Discrimination can be "direct" or "indirect" Both 'direct' and 'indirect' discrimination are against the law

**Direct discrimination** means someone is treated unfairly compared to someone else in the same or similar circumstances, and this is because of their sex, pregnancy, race, age, marital or domestic status, homosexuality, disability, transgender status or carers' responsibilities. For example, if an employer won't hire someone just because they are "too young", this is likely to be direct age discrimination.

**Indirect discrimination** means a requirement (or rule) that is the same for everyone but has an effect or result that is unequal and unreasonable having regard to the circumstances. For example, an employer who says that they need a person over 180 cm tall to do a certain job could be indirectly discriminating against women, some ethnic groups and younger people, who are less likely to be this height than, men, people from other ethnic groups or adults.. They could claim indirect sex or race or age discrimination if they could show that the job does not really need someone that tall to do it.

<sup>12</sup> *Anti-Discrimination Act 1977 (NSW) Part 4C*

<sup>13</sup> *Anti-Discrimination Act 1977 (NSW) Part 4A*

<sup>14</sup> *Anti-Discrimination Act 1977 (NSW) Part 3A*

<sup>15</sup> *Anti-Discrimination Act 1977 (NSW) Part 4B*

<sup>16</sup> See the definition of discrimination in the relevant Part.

<sup>17</sup> See the definition of discrimination in the relevant Part

<sup>18</sup> *Anti-Discrimination Act 1977 (NSW) Part 2A*

<sup>19</sup> Each Part sets out a separate section for each area.

## 5. Other types of prohibited discriminatory conduct

In certain circumstances, victimisation is also against the law, as are racial vilification, homosexual vilification, and HIV/AIDS and transgender vilification<sup>20</sup>

It is also against the law to advertise in breach of the AD Act<sup>20</sup>, and to aid and abet a breach of the AD Act<sup>21</sup>. Principals and Employers may, in certain circumstances, be liable for the conduct of their agents or employees<sup>22</sup>.

## 6. Exceptions and Exemptions make some discriminatory conduct lawful

However, the AD Act also includes some exceptions. These are generally based on the concepts of "genuine occupational qualification", "undue hardship", and certain special categories of exceptions (eg sport, superannuation), so that discriminatory conduct, otherwise prohibited under the AD Act, is lawful.

In addition, the President and the Minister may grant exemptions from the AD Act. These are orders for specific positions, programs or activities which are allowed to discriminate, either because of necessity, reasonableness or as a form of redressing past discrimination (eg affirmative action policies for women).

## 7. Harmonisation of Federal, State and Territory laws is a priority

Australia has laws about discrimination in every state and territory, and federally. For example, all of them make discrimination on the ground of pregnancy unlawful, but not all of them make religious discrimination unlawful.

In addition, the way the Acts are structured differ. For example, The AD Act includes pregnancy discrimination as part of a larger ground of sex discrimination. In other jurisdictions, pregnancy is a separate ground.

The Australian governments are working together to harmonise discrimination law across Australia. One of the aims is to have as nearly as possible, identical grounds, coverage and exceptions across Australia. The NSW Anti-Discrimination Board is a member of the SACG Harmonisation Working Group.

I hope that these observations are of assistance to the Committee. Should you have any questions, please contact the ADB's Legal Officer, :

Yours sincerely,

Stepan Kerkyasharian AM

**President**

**NSW Anti-Discrimination Board**

19 March 2009

<sup>20</sup> *Anti-Discrimination Act 1977 (NSW)* s 51

<sup>21</sup> *Anti-Discrimination Act 1977 (NSW)* s 52

<sup>22</sup> *Anti-Discrimination Act 1977 (NSW)* s 53