



FAXED
16/1/98

16 January 1998

Ms Judy Gamin MLA
Chair
Legal, Constitutional & Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Gamin

Re: **THE CRIMINAL LAW (SEX OFFENDERS REPORTING) BILL 1997**

Thank you for inviting the Anti-Discrimination Commission Queensland (ADCQ) to comment upon the above Bill.

In the Commissioner's absence I am responding to your invitation. I attach for the Committee's consideration the Commission's comments on the Bill.

Should you wish to clarify any aspects of the comments please do not hesitate to call me on (07) 3239 6092.

Yours sincerely

Margo Couldrey

MARGO COULDREY
Director
Policy, Complaints and Community Relations

COMMENTS BY ANTI-DISCRIMINATION COMMISSION QUEENSLAND

RE

CRIMINAL LAW (SEX OFFENDERS REPORTING)BILL 1997

1. The Anti-Discrimination Act 1991(ADA)

The ADA 1991 prohibits discrimination on the basis of impairment (s.7(1)(h)) in the area of administration of State laws & programs. (s.101)

I have attached copies of sections 7 and 101 for your information as well as sections 8 and 10 which outline the meaning of discrimination.

Impairment is defined in the ADA as:

"Impairment", in relation to a person, means -

- (a) *the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or*
- (b) *the malfunction, malformation or disfigurement of a part of the person's body; or*
- (c) *a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or*
- (d) *a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or*
- (e) *the presence in the body of organisms capable of causing illness or disease; or*
- (f) *reliance on a guide dog, wheelchair or other remedial device;*

whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that-

- (g) *presently exists; or*
- (h) *previously existed but no longer exists.*

2. Relevance of the ADA to the Bill

There appears to be one potential area in which the Bill might be discriminatory in the terms of the ADA and that concerns the provisions built around the concept of "unsoundness of mind" (s.3(1) meaning of "Sex Offender").

I note that principally, there are two categories of "sex offenders" who must obey the reporting requirements imposed by the Bill. One of those categories includes "an adult who has been acquitted of an offence on the ground of unsoundness of mind".

I note that the term "unsoundness of mind" is not defined in the Bill. It may therefore encompass conditions which fall within the definition of "impairment" under the ADA.

Arising out of the absence of a concise definition is the potentially discriminatory use of this particular provision in relation to persons with psychiatric, intellectual or mental impairments. The Bill does not appear to justify the inconsistencies brought about by exposing one group of persons, namely those acquitted on the basis of "unsoundness of mind" and those acquitted for other reasons. The question which arises is "what explains the Bill's intent to subject those of "unsound mind" to the reporting regime when they have in fact been acquitted of the crime with which they have been charged?" The apparent inconsistency and unclear intent is highlighted by the fact that the Bill does require persons acquitted for other reasons, for example, because the evidence of the child was uncorroborated, to be subjected to the reporting regime. The Bill proposes to subject one category of acquitted persons, namely those with an impairment, to "differential treatment" which may fall within the definition of discrimination under the ADA.

In addition, including persons acquitted on the basis of unsoundness of mind alongside those who have been convicted is potentially discriminatory. It takes a group of people with an attribute, namely "impairment" and imposes on them reporting requirements which might be quite reasonable to impose on those convicted of a sex offence in relation to a child but which might be quite unreasonable to impose upon those properly acquitted of the crime.

In Summary

The Bill's requirements do not appear discriminatory insofar as they require **convicted** sex offenders to abide by its provisions, but it is potentially discriminatory insofar as it requires those **acquitted** of a relevant offence on the basis of "unsoundness of mind" to abide by its provisions. Without a thorough explanation supporting the inclusion of a special category of "acquitted" persons within the Bill, it will remain potentially discriminatory against those suffering from a (temporary or permanent) impairment, in the terms of the ADA 1991.

Queensland Anti-Discrimination Act 1991

Discrimination on the basis of certain attributes prohibited

7(1) The Act prohibits discrimination on the basis of the following attributes:

- (a) sex;
- (b) marital status;
- (c) pregnancy;
- (d) parental status;
- (e) breastfeeding;
- (f) age;
- (g) race;
- (h) impairment;
- (i) religion;
- (j) political belief or activity;
- (k) trade union activity;
- (l) lawful sexual activity;
- (m) association with, or relation to, a person identified on the basis of any of the above attributes.

7(2) Breastfeeding is an attribute for which discrimination is prohibited only for the purposes of Division 4 of Part 4 (Goods and services area).

Queensland Anti-Discrimination Act 1991

Meaning of discrimination on the basis of an attribute

8. Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of -

- (a) a characteristic that a person with any of the attributes generally has; or
- (b) a characteristic that is often imputed to a person with any of the attributes; or
- (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or
- (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.

Example of paragraph (c) -

If an employer refused to consider a written application from a person called Viv because it assumed Viv was female, the employer would have discriminated on the basis of an attribute (female sex) that Viv (a male) was presumed to have.

Queensland Anti-Discrimination Act 1991

Meaning of direct discrimination

10. (1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

Example -

R refuses to rent a flat to C because -

- C is English and R doesn't like English people
- C's friend, B, is English and R doesn't like English people
- R believes that English people are unreliable tenants.

In each case, R discriminates against C, whether or not R's belief about C's or B's nationality, or the characteristics of people of that nationality, is correct.

- (2) It is not necessary that the person who discriminates considers the treatment is less favourable.
- (3) The person's motive for discriminating is irrelevant.

Example -

R refuses to employ C, who is Chinese, not because R dislikes Chinese people, but because R knows that C would be treated badly by other staff, some of whom are prejudiced against Asian people. R's conduct amounts to discrimination against C.

- (4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.
- (5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.

Queensland Anti-Discrimination Act 1991

Division 10 - Administration of State laws and programs area

101. A person who -

- (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or
- (b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in -

- (c) the performance of the function; or
- (d) the exercise of the power; or
- (e) the carrying out of the responsibility.