

Re: ALEXANDER <<PROUDFOOT>> And: HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION No. ACT G55 of 1990 FED No. 112 Administrative Law (1991) EOC 92-354/100 ALR 557

COURT: IN THE FEDERAL COURT OF AUSTRALIA  
AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY  
GENERAL DIVISION

Neaves J.(1)  
HRNG  
CANBERRA  
#DATE 22:3:1991

The applicant appeared in person.

Counsel for the respondent: Mr B.J. Knox

Solicitor for the respondent: Ms M. Chalmers  
ORDER

The decision made on or about 15 August 1990 by Ms Margaret Doyle in relation to a complaint made by the applicant to the Human Rights and Equal Opportunity Commission under s.50 of the Sex Discrimination Act 1984 (Cth) be set aside.

The matter be remitted to the Human Rights and Equal Opportunity Commission to be dealt with in accordance with the requirements of the Sex Discrimination Act 1984 (Cth).

The respondent pay the applicant's costs of the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

JUDGE1

The applicant, Dr Alexander <<Proudfoot>>, has applied to the Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the Judicial Review Act") for an order of review in respect of a decision under the Sex Discrimination Act 1984 (Cth) made by Ms Margaret Doyle, a member of the staff of the Human Rights and Equal Opportunity Commission ("the Commission"). The Commission, which was established by the Human Rights and Equal Opportunity Commission Act 1986 (Cth), is named as the respondent to the application. The decision is described in the application as a decision that the applicant's complaint dated 8 July 1990 made under s.50(1) of the Sex Discrimination Act "would not be notified to a Commissioner". The reference to "a Commissioner" may be taken as being a reference to the Sex Discrimination Commissioner appointed under s.96 of the Sex Discrimination Act.

2. It is convenient to begin by referring to certain of the provisions of the Sex Discrimination Act. The objects of the Act are set out in s.3. Those objects are -

- "(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women;
- (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the

activities of clubs and the administration of Commonwealth laws and programs;

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace and in educational institutions; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women."

The expression "services" in par.(b) is defined in s.4(1) to include services of the kind provided by a government, a government authority or a local government body.

3. Section 5(1) provides:

"(1) For the purposes of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if, by reason of -

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex."

The reference in s.5(1) to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of two or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act (s.8).

4. Section 9(3) provides that the Act has effect in relation to acts done within a Territory. Section 9(4) provides that the prescribed provisions of Part II and the provisions of Division 3 of Part II have effect as provided by s.9(3) and the provisions of s.9 that follow s.9(4) and not otherwise.

Section 9(7) provides that the prescribed provisions of Part II of the Act have effect in relation to acts done, by or on behalf of the Commonwealth or the Administration of a Territory or a body or authority established for a public purpose by a law of the Commonwealth or a law of a Territory, in the exercise of a power conferred by a law of the Commonwealth or a law of a Territory. The expression "prescribed provisions of Part II" means the provisions of Divisions 1 and 2 of Part II other than ss.19, 26 and 27 (s.9(1)).

5. Section 22(1), a provision within Division 2 of Part II, provides:

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status or pregnancy -

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available

- to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."

6. Section 26(1) provides:

"(1) It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, marital status or pregnancy in the performance of that function, the exercise of that power or the fulfilment of that responsibility."

The expression "Commonwealth law" is defined in s.4(1) to include an Ordinance of a Territory. The expression "Commonwealth program" is defined in that sub-section to mean a program conducted by or on behalf of the Commonwealth government.

7. Division 4 of Part II is headed "Exemptions". Within that Division, s.33 provides:

"Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act."

8. The functions of the Commission include the function of inquiring into alleged infringements of Part II and endeavouring by conciliation to effect a settlement of the matters to which the alleged infringements relate (s.48(1)(a)), the function of promoting an understanding and acceptance of, and compliance with, the Act (s.48(1)(d)) and the function of doing anything incidental or conducive to the performance of any of its other functions (s.48(1)(h)). Section 49(1) provides:

"(1) The functions of the Commission under paragraph 48(1)(a) and the function of the Commission under paragraph 48(1)(h), to the extent that it relates to the performance of the first-mentioned functions, shall be performed by the Commissioner on behalf of the Commission."

The expression "the Commissioner" is defined in s.4(1) to mean the Sex Discrimination Commissioner appointed under s.96.

9. Section 50(1) provides:

"(1) A complaint in writing alleging that a person has done an act that is unlawful by virtue of a provision of Part II may be lodged with the Commission by -

- (a) a person aggrieved by the act, on that person's own behalf or on behalf of that person and another person or other persons aggrieved by the act;
- (b) 2 or more persons aggrieved by the act, on their own behalf or on behalf of themselves and another person or other persons aggrieved by the act;
- (c) a person or persons included in a class of persons aggrieved by the act, on behalf of the persons

- included in that class of persons; or
- (d) a trade union of which a person or persons, or persons included in a class of persons, aggrieved by the act is a member or are members, on behalf of that person, those persons, or persons included in that class of persons, as the case may be."

10. Section 52 provides:

- "(1) Where -
- (a) a complaint relating to an alleged unlawful act is made to the Commission under section 50; or
  - (b) it appears to the Commission that a person has done an act that is unlawful by virtue of a provision of Part II,
- the Commission shall notify the Commissioner accordingly and the Commissioner shall, subject to sub-section (2), inquire into the act and endeavour, by conciliation, to effect a settlement of the matter to which the act relates.

11. (2) The Commissioner may decide not to inquire into an act, or, if the Commissioner has commenced to inquire into an act, decide not to continue to inquire into the act, if -

- (a) the Commissioner is satisfied that the act is not unlawful by reason of a provision of Part II;
  - (b) the Commissioner is of the opinion that the person aggrieved by the act does not desire, or none of the persons aggrieved by the act desires, that the inquiry be made or continued;
  - (c) in a case where a complaint has been made to the Commission in relation to the act, a period of more than 12 months has elapsed since the act was done; or
  - (d) in a case where a complaint has been made to the Commission in relation to the act, the Commissioner is of the opinion that the complaint was frivolous, vexatious, misconceived or lacking in substance.
- (3) Where the Commissioner decides not to inquire into, or not to continue to inquire into, an act in respect of which a complaint was made to the Commission, the Commissioner shall give notice in writing to the complainant or each of the complainants of that decision, of the reasons for that decision and of the rights of the complainant or each of the complainants under sub-section (4).
- (3A) Subsection (3) does not apply in relation to a decision of the Commissioner that is made at the request of the complainant or all the complainants, as the case requires.
- (4) Where the Commissioner has given a complainant a notice under sub-section (3), the complainant may, within 21 days after receipt of the notice, by notice in writing served on the Commissioner, require the Commissioner to refer the complaint to the Commission.
- (5) On receipt of a notice under sub-section (4), the Commissioner shall refer the complaint to the Commission together with a report relating to any inquiries made by the Commissioner into the complaint.
- (6) The Commissioner may, for the purposes of this Act, obtain information from such persons, and make such inquiries, as the Commissioner thinks fit."

The Commission is required by s.59 to hold an inquiry into a complaint referred to it under s.52(5) unless the complainant notifies the Commission that the complainant does not wish the inquiry to be held or to continue. Division 3 of Part III makes detailed provisions in relation to the conduct of an inquiry by the Commission.

12. Section 104(2) provides:

"(2) The Commissioner may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Commissioner, delegate to -

- (a) a member of the staff of the Commission; or
- (b) any other person or body of persons, approved by the Commission, all or any of the powers exercisable by the Commissioner under this Act, other than this power of delegation."

13. The history of this matter begins with the applicant forwarding to the Commission a letter dated 8 July 1990 reading as follows:

"A.C.T. WOMEN'S HEALTH ORGANISATION AND CENTRE

This is a complaint under s.50(1)(a) and s.50(1)(c) of the Sex Discrimination Act 1984.

My complaint is that the new initiatives for women's health services in the A.C.T., announced by the A.C.T. Minister for Health Mr Humphries on 16 June 1990, discriminate against men in the A.C.T. - a class of persons of which I am a member.

I make no complaint against any aspect of these health services which deals with conditions specific to women (eg pregnancy services: cervical cytology: mammography). My complaint concerns the provision of special services for women, to prevent or treat diseases which are not sex-specific, when no such services are provided for men.

The A.C.T. Government's announcement, reported on page 2 of The Canberra Times 17 June 1990 under the heading '\$640000 boost for women's health', makes it clear the proposed new services are not intended to deal principally with sex-specific diseases. Mr Humphries is reported as saying:

'In its first year the centre will act as a women's health information and education unit.

In the second and subsequent years it will provide new health services for particular groups of women.'

14. The report goes on to state that the centre will 'target new primary health-care services for women with non-English speaking backgrounds, women with disabilities - including chronic pain, addicted and psychologically affected women, women with dependent children and older women.'

15. I note that, under s.22(1) of the Act,

'It is unlawful for a person who ... provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex ... in the manner in which the first-mentioned

person provides the other person with those goods or services or makes those facilities available to the other person.'

It seems that special arrangements are being made for the general primary health care of women, whereas men are to continue to have access only to ordinary health care facilities. This is particularly inappropriate in view of the facts that women already enjoy health status far superior to that of men, and that in provision of health services, there is already a bias in favour of women. The following quotations are taken from the publication 'Health for All Australians', Report of the Health Targets and Implementation (Health for All) Committee to Australian Health Ministers, 1988:

'There have been no formal efforts to develop goals, targets or national strategies for the health of men in Australia but it is clear that the greater incidence of premature death among men ... demands the attention of those developing and conducting programs ...' (page 33)

'Women live longer than men in Australia, with men dying on average 6.4 years earlier than women. Men have higher age-specific death rates for nearly all non-sex specific causes of death at all stages of life (see Table 9).

...

However, women use more health services than men (see Table 10) and pregnancy, childbirth, menopause and other gynaecological problems do not alone account for the greater usage.

...

The obvious contrast - between males' higher mortality rates and females' higher use of physicians - begs explanation.' (page 80)

I am aggrieved by the discrimination being practised by the A.C.T. Government, by those officers of the A.C.T. Administration who are concerned with the development and implementation of these new health services for women, and by the interim committee of women from government and the community (which has) been convened to do the initial work of setting up the centre."

16. On 16 August 1990 the applicant received a letter dated 15 August 1990 signed for the Secretary of the Commission reading as follows:

"Thank you for your letter of 8 July 1990 in which you allege sex based discrimination in the provision of health services in the ACT.

In your letter you quote a newspaper report of increased funding for certain areas of women's health. You expressed an opinion that such a program amounted to sex discrimination in the provision of goods and services and that this was inappropriate in view of your opinion that 'there is already a bias in favour of women'.

As you may be aware one of the objects of the Sex Discrimination Act 1984 is 'to give effect to certain provisions of the Convention of the Elimination of All Forms

of Discrimination Against Women'. Section 33 of the Act, entitled 'Measures intended to achieve equality' provides that it is not unlawful to 'do an act a purpose of which is to ensure that persons of a particular sex .... have equal opportunities with other persons ....'. Further, the Convention, article 4, provides for 'temporary special measures aimed at accelerating defacto equality' between men and women.

It would appear that the services you refer to are exempted from being unlawful discrimination under Section 33 of the Sex Discrimination Act.

Consequently, the Commission is unable to be of assistance to you at this time. The Commission thanks you for the time you have taken to bring your concerns to its attention."

It appears that the letter was signed by an officer of the Commission acting under the direction of the Chief Conciliator.

17. The applicant forwarded to the Commission two further letters which were dated 20 August 1990 and 4 September 1990 respectively. The latter requested a statement of reasons under s.13 of the Judicial Review Act. He received a reply dated 7 September 1990 signed by the Commissioner, Ms Quentin Bryce. The reply read as follows:

"I acknowledge receipt of your letters dated 20 August 1990 and 4 September 1990. I note that they refer to an issue raised in your letter of 6 (sic) July 1990 and to the Commission's response of 15 August 1990.

I confirm the Commission's response in which you were advised that the initiatives in women's health services taken by the ACT Minister for Health, Mr Humphries, constitute a 'special measure'. Consequently, under Section 33, they are exempt from the provisions of the Sex Discrimination Act.

Because the matter you raise is not within the jurisdiction of the Act, I am unable to accept it as a complaint for inquiry. Therefore, the provisions of Section 52 do not apply. There was no need for the Commission to notify me of your letter as the matter to which it refers is not unlawful under the terms of the Act."

18. In response to a further letter dated 11 September 1990 from the applicant to the Commission reiterating his request for a statement of reasons under s.13 of the Judicial Review Act, the applicant received on 10 October 1990 a document purporting to be a statement of reasons under s.13 of that Act. The statement was expressed to have been provided by Ms Margaret Doyle, described as Chief Conciliator, Human Rights and Equal Opportunity Commission. Prior to the receipt of the statement, the applicant had instituted the present proceeding in this Court.

19. Under a sub-heading "Facts", the statement refers to the applicant's letter dated 8 July 1990 and continues:

"Upon receipt Mr <<Proudfoot>>'s letter was referred to the Chief Conciliator of the Commission. The Chief Conciliator is a member of staff of the Commission for the purposes of the legislation administered by the Commission. The letter was referred to the Chief Conciliator as the person responsible for the consideration of enquiries and

complaints on behalf of the Commission to initially consider whether the matters raised by Mr <<Proudfoot>> fell within the operation of the Sex Discrimination Act. If the matter fell within the jurisdiction of the Commission it would be referred to the Sex Discrimination Commissioner pursuant to section 52(1) of the Sex Discrimination Act."

The statement then refers to the letters dated 15 and 20 August and 4 September 1990 and states that the letters dated 20 August and 4 September 1990 were referred by the Chief Conciliator to the Sex Discrimination Commissioner. The statement then refers to the letter dated 7 September 1990 to the applicant.

20. Under a sub-heading "Relevant Legislation", the statement refers to ss.22, 33, 48, 50 and 52 of the Sex Discrimination Act. In the course of reciting those legislative provisions, the statement says:

"The Chief Conciliator is a member of the staff of the Commission engaged by the Commission to perform certain functions under the Sex Discrimination Act (with other Acts) pursuant to the Public Service Act in accordance with section 43(1) of the Human Rights and Equal Opportunity Commission Act."

21. The statement then concludes with the following paragraph under the sub-heading "Reasons for Decision":

"After considering the operation of section 33 of the Sex Discrimination Act, the Chief Conciliator formed the view that the matter raised by Mr <<Proudfoot>> was not one which could be unlawful for the purposes of the Sex Discrimination Act as the proposal was one a purpose of which was to ensure that women, including pregnant women, have equal opportunity to appropriate medical treatment as all other persons. Accordingly, she formed the view that the matter did not fall within the operation of that Act so that the Sex Discrimination Commissioner had no function to exercise under that Act. It was therefore contrary to law and unnecessary for the matter to be investigated or for other preliminary questions to be determined, including whether the complainant was in fact a person aggrieved for the purposes of section 50 of the Act."

22. There are, so it seems to me, two grounds upon which the decision the subject of the present application should be set aside. The first is that, assuming the decision-maker to have had authority to make the decision, the decision involved an error of law in that there was no evidence or other material before her to justify the making of the decision (see Judicial Review Act, ss.5(1)(f) and *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 per Mason C.J. at pp 37-40).

23. The Commission did not tender any evidence, either by way of an affidavit of the decision-maker or otherwise, to establish what evidence or other material was before the decision-maker upon which the decision was reached that the matter of complaint raised by the applicant in his letter dated 8 July 1990 "was not one which could be unlawful for the purposes of the Sex Discrimination Act as the proposal was one a purpose of which was to ensure that women ... have equal opportunity to appropriate medical treatment as all other persons". (It is clear that that language has its source in s.33 of the



Sex Discrimination Act.) In the absence of such evidence, it is permissible to have regard to the statement furnished by the decision-maker pursuant to s.13(1) of the Judicial Review Act. That sub-section requires that a statement furnished pursuant to s.13 set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based. Upon a consideration of the statement, the substance of which is set out earlier in these reasons, I find that the decision-maker had before her no evidence or material other than the correspondence that had passed between the applicant on the one hand and the Commission and the Commissioner on the other and to which reference has already been made. It is obvious that the decision, depending as it does upon an understanding and an assessment of the proposal to which the complaint relates and of the purpose or purposes of that proposal, could not have been reached upon a consideration of that correspondence.

24. There is no evidence that the decision-maker had before her the full text of the proposal or that she had an understanding of it or had made an assessment of it or of its purposes.

25. The second ground for setting aside the decision is that the decision-maker did not have jurisdiction to make the decision (Judicial Review Act, s.5(1)(c)). Section 49(1) makes explicit provision that the function of the Commission to inquire into an alleged infringement of Part II of the Sex Discrimination Act is to be performed on behalf of the Commission by the Commissioner. Section 52(1) provides, again in mandatory terms, that the Commission is to notify the Commissioner where "a complaint relating to an alleged unlawful act is made to the Commission under section 50". Having become seized of the complaint, the Commissioner is required, subject to the provisions of s.52(2), to inquire into the alleged unlawful act. The Commissioner may, however, decide not to inquire into the alleged unlawful act in the circumstances set out in s.52(2). One of the circumstances in which the Commissioner may so decide is if she is satisfied that the act is not unlawful by reason of a provision of Part II, a Part which includes s.33. Where the Commissioner decides not to inquire into the alleged unlawful act, procedures are prescribed whereby the complainant may have the complaint referred to the Commission (s.52(3), (4) and (5)). Upon such reference, the Commission is required by s.59(1) to hold an inquiry into the complaint. The complainant is a party to such an inquiry (s.64) and is to have reasonable opportunity to call or give evidence, examine or cross-examine witnesses and make submissions (s.63(1)). A party may appear personally at such inquiry and may, in certain circumstances, be represented by a solicitor or counsel or an agent (s.65(1)).

26. In my opinion, it is clear from the structure of the statute as disclosed by the provisions to which I have shortly referred, that the question whether s.33 of the Act operates to preclude a provision contained in Division 1 or 2 of Part II of the Act from rendering unlawful the act in relation to which a complaint is made under s.50(1) is not to be decided at the threshold by a member of the staff of the Commission acting otherwise than as a person to whom the relevant power of the Commissioner has been delegated under s.104(2). That question is one committed by the statute to the consideration of the Commissioner (or her delegate) upon the complaint being referred to her under s.52(1).

27. It follows, in my opinion, that the applicant has made out his case that the complaint relating to an alleged unlawful act which he made to the

Commission under s.50 has not been entertained in accordance with the requirements of the statute. I should add that I have found no reason for the Court, in the exercise of its discretion, refusing the applicant the relief to which he is otherwise entitled.

28. One further matter should be mentioned. The relief claimed by the applicant includes an order under s.16(1)(d) of the Judicial Review Act "directing that the Commissioner to whom the complaint is referred should be some Commissioner other than Quentin Bryce". At the commencement of the hearing, counsel for the respondent informed the Court that, without conceding that Ms Bryce was in any way disqualified from dealing with the applicant's complaint under s.50 of the Act, Ms Bryce would not, in fact, deal with the complaint but would, pursuant to s.104(2), delegate her power in that regard to a person approved by the Commission. In the light of that statement, it is unnecessary to consider this aspect of the matter further.

29. The decision of Ms Doyle is set aside and the matter remitted to the Commission to be dealt with in accordance with the requirements of the Sex Discrimination Act. The Commission must pay the applicant's costs of the application.