

Mr Paul Barsdell  
Secretary  
Senate Foreign Affairs, Defence and Trade References Committee  
Parliament House  
Canberra ACT 2600

Dear Mr Barsdell

**Inquiry into Recruitment and Retention of ADF Personnel**

Thank you for allowing the Human Rights and Equal Opportunity Commission (the Commission) to make a submission to your Inquiry into Recruitment and Retention of ADF Personnel. As the Human Rights Commissioner, I am responsible for administering provisions of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA) that pertain to breaches of human rights in Australia. I am also particularly responsible for administering provisions concerning discrimination on the basis of sexual preference.

My submission is addressed to parts (2)(c) and (2)(f) of your terms of reference. In particular, it examines potential breaches of international law arising out of discrimination against homosexual members of the ADF regarding allowances and benefits for members' "spouses" and "dependants" under Defence Determination 2000/1.

1. Provision of benefits and allowances to "spouses" and "dependants" under Defence Determination 2000/1

The pay and conditions of service for members of the ADF are set out in Defence Determination 2000/1. Defence Determination 2000/1 provides for the payment of a wide range of benefits and allowances to and in respect of the "spouses" and "dependants" of members of the ADF. "**Spouse**" is defined in Chapter 14 of Defence Determination 2000/1<sup>1</sup>, which contains the dictionary of terms used in this Determination, as including "a person who is living with the member as a spouse on a genuine domestic basis although not legally married to the member."

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<sup>1</sup> The predecessor to Chapter 14 was Defence Determination 1991/45. This Determination contained definitions in similar terms to those in Defence Determination 2000/1.

In *Commonwealth of Australia v HREOC and Muller*<sup>2</sup> Moore J in the Federal Court considered the meaning of "spouse" in a Determination made under section 82D of the *Public Service Act 1922* (Cth)<sup>3</sup>. The definition of "spouse" in that Determination was in identical terms to that in Defence Determination 2000/1. Moore J found that a same sex partner was not a "spouse" within the meaning of the term in the relevant Determination. This was because:

*"the definition, in extending the ordinary meaning of the word spouse, was conferring the status on a person who was in a relationship with the [member] which might be, but was not, one in which they could be married. That is to say, they were not married but could be. ...[T]he Marriage Act 1961 does not authorise the marriage of people of the same sex. Thus ... the premise implicit in the definition cannot be satisfied in relation to same sex couples."*

This decision was affirmed in *Commonwealth of Australia v HREOC and Kelland*<sup>4</sup>.

In Defence Determination 2000/1 a "**dependent**" is defined as "one of the following persons who normally live with the member:

- (a) the member's spouse;
- (b) a dependent child;
- (c) a person acting as a housekeeper or guardian to a dependent child; and
- (d) any other person who the Chief of Defence Force is satisfied should be treated as a dependant of the member because of exceptional circumstances."

As the same sex partners of members of the ADF who live with that member as a spouse on a genuine domestic basis do not fall within the definition of "spouse" after the decisions in *Muller* and *Kelland* nor, by extension, the definition of "dependent", those members of the ADF are not able to access benefits and allowances payable to heterosexual members of the ADF.

## 2. Complaints received by the Commission

Over the past few years the Commission has received at least four complaints from members of the ADF alleging that the Department of Defence has discriminated on the basis of sexual preference by denying them access to employment benefits and allowances. Those complaints were terminated in accordance with section 32(3)(a) of the HREOCA on the basis that there was no "act" or "practice" as required under section 3 of that Act in order to make the complaint examinable by the Commission. There was no "act" or "practice" because the denial of employment benefits and allowances occurred by reason of the automatic operation of legislation<sup>5</sup>. That is, the relevant Defence Determinations<sup>6</sup> did not allow for the exercise of any discretion in

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<sup>2</sup> 17/7/97 FedCt(NSW) 0634/97.

<sup>3</sup> This Act has since been repealed and is now replaced by the *Public Service Act 1999* (Cth). Determinations are now made under section 24 of this Act.

<sup>4</sup> (1998) EOC 92-932.

<sup>5</sup> *Department of Defence v Burgess & HREOC* [1997] 960 FCA (18 September 1997).

<sup>6</sup> *Sumner v PSS Board and Commonwealth of Australia* [1998] HREOCA 16; *Vietnam Veterans' Association of Australia NSW Branch v Alex Cohen & Ors (Constituting the Specialists Medical Review Council)* [1996] 981 FCA 1.

interpreting the definition of "spouse". As a result of *Muller and Kelland*, "spouse" did not include a same sex partner.

### 3. Breach of a human right under Defence Determination 2000/1

"Human rights" are defined in section 3 of the HREOCA as including the rights and freedoms recognised in the International Covenant on Civil and Political Rights (ICCPR). The ICCPR right which is of relevance in this case is the right to equality before the law contained in article 26 of the ICCPR. This article provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The principle of non-discrimination is reinforced by article 2 of the ICCPR which provides that:

Each State party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Convention, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICCPR does not define discrimination. The Human Rights Committee (the Committee) has stated that the term "discrimination" in this article should be understood to mean "any distinction, exclusion, restriction or preference which is based on any ground such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"<sup>7</sup>.

Article 26 governs all fields of public administration. The Committee has specifically addressed the impact of article 26 on a State party's legislation:

Article 26 is therefore concerned with the obligations imposed on State parties concerning their legislation and the application thereof. This, when a State party adopts legislation it must comply with the requirement of article 26 that its content should not be discriminatory<sup>8</sup>.

Discrimination arising from a distinction, exclusion, restriction or preference on the basis of sexual preference or orientation is not specifically contemplated by the matters set out in article 26. However, in *Toonen v Australia*<sup>9</sup> the Committee expressed the view that the reference to "sex" in

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<sup>7</sup> United Nations Human Right Committee, General Comment No.18 (1989), paragraph 7.

<sup>8</sup> Ibid paragraph 12.

<sup>9</sup> United Nations Communication 488/1992.

articles 2 and 26 of the ICCPR is to be taken as including sexual orientation. Sexual preference or orientation also clearly falls within the "other status" category in article 26.

Discrimination arising from a distinction, exclusion, restriction or preference on the basis of sexual preference or orientation will therefore constitute a breach of article 26 if there is no reasonable and objective basis for the differentiation or if it is not a proportional means of achieving a legitimate end<sup>10</sup>. In the case of ADF employment pay and conditions it is difficult to see what reasonable and objective basis there would be for the creation of a distinction between homosexual and heterosexual members of the ADF. Therefore, prima facie, it would appear that the creation of any such distinction is a breach of a human right, namely, article 26 of the ICCPR.

#### 4. Nullification or impairment of equality of opportunity or treatment in employment or occupation under Defence Determination 2000/1

As is discussed above, "spouse" is defined in Chapter 14 of Defence Determination 2000/1 in a way that denies homosexual members of the ADF and their partners access to employment benefits and allowances which are available to heterosexual members of the ADF and their partners. The creation of this distinction between homosexual and heterosexual members of the ADF clearly has the effect of nullifying and impairing equality of treatment in employment within the ADF.

It also clearly constitutes discrimination on the basis of sexual preference within the meaning of the HREOCA and the Convention concerning Discrimination in respect of Employment and Occupation (ILO 111).

By ratifying ILO 111 Australia has undertaken, inter alia, to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof (article 2).

"Discrimination is defined in article 1 of ILO 111 as:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) such other distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned.

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<sup>10</sup> United Nations Human Right Committee, General Comment No.18 (1989), paragraph 13.

Part 4 of the HREOCA (which contains s.31(a)) aims to give effect to Australia's obligations under ILO 111. The HREOCA adopts the definition of discrimination in ILO 111<sup>11</sup>. On 21 December 1989 the *Human Rights and Equal Opportunity Commission Regulations* (Cth) came into effect. Regulation 4 added sexual preference as a ground of discrimination in accordance with article 1(b) of ILO 111.

5. Legislative amendment required to address the breach of human rights and remedy the impairment of equality of treatment in employment within the ADF

It is the definition of "spouse" in Chapter 14 of Defence Determination 2000/1 which prevents homosexual members of the ADF from accessing the same employment benefits and allowances as heterosexual members. Amendment of this definition to include the same sex partners of ADF members is required in order to remove discrimination on the basis of sexual preference and restore equality of treatment in employment in accordance with Australia's obligations under ILO 111.

The amendment of the definition of "spouse" in Defence Determination 2000/1 to include the same sex partners of ADF members would be an extremely easy task. Any amendment of the definition in Chapter 14 to achieve this end is permissible under s.58B of the Act. The Minister or his delegate would need to make an instrument containing an amended definition of "spouse". For example, the current definition could be amended to read:

"Spouse": a person who is living with the member as a spouse on a genuine domestic basis, including a person who is of the same sex as the member.

This instrument of amendment would then need to be placed before both Houses of Parliament and if it was not disallowed within 15 days it would become operative.

It is important to note that legislative amendment of this definition is the only means by which this discrimination suffered by homosexual ADF members can be ameliorated. The majority of the ADF members who complained to the Commission had explored and exhausted all legal avenues of redress open to them including internal grievance procedures and the Defence Ombudsman.

I hope that these comments are useful to the Inquiry.

Yours sincerely

Dr Sev Ozdowski OAM  
**Human Rights Commissioner**

August 2001

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<sup>11</sup> See section 3 of the HREOCA.