PART OF THE SOLUTION OR PART OF THE PROBLEM?:

A SOCIALIST RESPONSE TO ANTI-DISCRIMINATION EMPLOYMENT LAW

A PAPER FOR THE 1981 HOMOSEXUALITY AND SOCIALISM CONFERENCE

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CONTENTS:

1. INTRODUCTION

Our oppression as homosexuals extends to all aspects of our lives. We are particularly vulnerable to oppression in the area of employment.

We are cautious about being honest about our sexual preference to our workmates and employers. Some will remain totally 'closeted' at work and pay the price of maintaining two identities. It is a self-destructive process. Those who chose to be open or are caught out face harassment from workmates and employers. This can range from verbal abuse to physical violence to dismissal.

Instances of discrimination can be particularly obvious, such as in cases of name calling and bashings. Discrimination can also be particularly difficult to prove: an employer can seize on any reason for dismissing you other than that of your sexuality, Unsatisfactory work performance is the excuse most often used.

Many who suffer discrimination or harassment will not fight back. Often there is no easy solution. Protesting about discrimination can make you liable to further discrimination. Fear plays a prominent part in our lives.

This paper looks at the question of whether gays can utilise the law in the fight for our rights. Conclusions are drawn on issues of specific concern for socialists.

The paper firstly examines the state of anti-discrimination employment law, concentrating on the area of discriminatory dismissals.

2. THE CONTRACT OF EMPLOYMENT

2.1 Termination by notice

In most instances the employer enjoys a virtually unfettered right to dismiss an employee.* No legal redress is available against an employer who discriminates if the contract of employment is terminated in the correct manner.

* It is difficult to summarize the law of termination of employment. The texts are confusing and in some instances contradictory. I apologise for any errors.

.../2

If a procedure for termination is established then that procedure must be followed. Most awards or determinations of industrial tribunals (which cover most workers in Australia) provide for a minimum period of notice to be given in cases of termination of employment. Usually notice of one week, or payment in lieu, is all that is required.

If no procedure for termination is established and the contract is for a specified period, then the contract must be allowed to run its full course.

If no procedure for termination is established and the contract is of indefinite duration, then reasonable notice must be given. The particular circumstances of the case must be examined when determining what constitutes reasonable notice. Custom and regularity of payment are important considerations. There is some suggestion that for occupations of the type normally covered by industrial award that notice of one week is all that is needed. (Arlesheim v Werner (1958) SASR 136 at p. 140)

In the states of Queensland and Tasmania, statutory provisions may overide the common law position. In Queensland notice of seven days is required when a worker is employed under a weekly agreement. Tasmanian legislation only covers non-award employment. Under that legislation if the employment is of indefinite duration and payment of wages is weekly or fortnightly, then notice of one week or fortnight respectively must be given. In any other case, the contract is terminable on notice of one month.

One of the few Australian cases of alleged anti-homosexual discrimination cases fought under common law principles (perhaps the only case) is that of Greg Weir. Weir, a bonded trainee teacher, was refused a job by the Queensland Department of Education in February 1977 because he spoke openly about his homosexuality. Proceedings have commenced for breach of contract on the part of the Department. In April 1981 pre-trial procedures are continuing. A national appeal had to be established to raise the legal fees, which are anticipated to be in excess of $5,000.

2.2 Summary dismissal

The employer is entitled to summarily dismiss an employee if an employee commits an act that is deemed to be 'misconduct'.

For an employee's action to constitute misconduct it must be incompatible with the faithful discharge of service to the employer. The courts have held that "there is no fixed rule in law defining the degree of misconduct that will justify dismissal". (Clouston and Co. Ltd v Curry 1906 AC 122 at p. 129)

Acts considered 'disabling' or 'disgraceful' have been held to be 'misconduct' in some circumstances.

Sexual acts and acts relating thereto have been held to constitute misconduct, depending on the relevance of such acts to the position and duties of the employee and the effect such acts have on the employer's goodwill or reputation. In a Canadian case (Mc Pherson v City of Toronto 918 LR 326) it was held that the summary dismissal of a fireman for boasting of his adulterous relations with a neighbour's wife was justified.

A relevant Australian case (Orr v University of Tasmania 1956 Tas. SR 155) concerns a professor who was dismissed by a university on several grounds the most relevant allegation being that he seduced and had sexual intercourse with a female student. It was thought essential that an academic "should maintain a detached and dispassionate attitude towards his students."

There is little doubt that the case would be decided differently today, but the case does demonstrate the way in which the common law may be used against a worker.

Cases of summary dismissal are difficult to fight because the employer is not obliged to give reasons for his actions at the time of dismissal. (Sykes and Yerbury 1980; 71)

3. INTERVENTION BY THE STATE

Anti-discrimination initiatives on the part of the state have to be seen in the general context of the increasingly conformative role of the state in western capitalist countries. No longer is intervention limited to coercive methods: the purpose of such conformative acts is to "contain, incorporate and moderate conflicts inside capitalist society." (Barratt-Brown, quoted in Gregory 1979: 138)

4. ANTI-DISCRIMINATION LEGISLATION

Anti-discrimination legislation (ADL) now exists in a number of western capitalist nations, including the USA, UK, Canada and Australia. It generally takes one of two forms. The first form prohibits discriminatory acts which can be proved to fall within one of the specified areas.

4.1 Specific areas

Australian ADL is of this form. Not one of the acts prohibits discrimination on the grounds of sexual orientation. An examination of the history of such legislation is worthwhile, simply so that an assessment of its worth may be made. (For an excellent description of ADL in Australia see Ronalds 1979)

The first ADL in Australia was the South Australian government's Prohibition of Discrimination Act 1966. The Act had limited application and relief under the act was difficult to obtain. It was necessary for the Attorney-General to issue a certificate before prosecution could commence. Such certificates were issued on only four occasions in the 10 year life of the Act.

ADL was next enacted in 1975. After four attempts, the Labor Government finally had its Racial Discrimination Bill passed. The South Australian parliament passed the Sex Discrimination Act in 1975 and the Racial Discrimination Act in 1976

The N.S.W. Anti-Discrimination Act prohibits discrimination on the grounds of race, sex and marital status. In its original form the bill covered six other areas: age, religous conviction, political conviction, physical condition, mental disability and homosexuality. After amendments in the Upper House, these areas were deleted.

The Victorian Government in 1977 enacted its Equal Opportunity Act, covering discrimination on the grounds of sex and marital status.

ADL had been proposed for Tasmania, but has not been enacted. There is no suggestion that Queensland or Western Australia will introduce ADL.

It is convenient to consider the legislation under the following headings: definition, coverage of employment relationships, exemptions, enforcement procedures, onus of proof and remedies.

Definition

Discrimination can take two forms; direct and indirect. Direct discrimination concerns specific and overt actions. Indirect discrimination is when a policy as implemented results in discrimination. An example of indirect discrimination would be a height requirement for a job of 5'8". That requirement would significantly reduce the number of women who could apply for job. Only the S.A. Sex Discrimination Act makes it unlawful to commit acts of indirect discrimination.

.../4

The basic method of proving discrimination is by comparison with a real or hypothetical person. An employer discriminates against a worker if he/she treats the employee less favourably in similar circumstances than he/she treats or would treat a person of another sex, race, etc.

Coverage of employment relationships

Some forms of employment relationships are not of the traditional boss-worker pattern. Contract work, commission agency and partnerships do not involve contracts of service and hence do not meet the common law definition of employee. The S.A. Sex Discrimination Act, the N.S.W. Act and the Victorian Act each cover contract workers and commission agents, but only the S.A. and Victorian acts cover partners.

Enforcement procedures

The legislation provides for conciliation procedures in the first instance, except in the case of the S.A. Racial Discrimination Act. Conciliation is usually a quick and effective procedure. The majority of complaints are settled at this stage.

If conciliation proves ineffective, the complaint may then go to hearing. Such hearings are time consuming and can be costly if lawyers are used.

Exemptions

An appalling number of exemptions are allowed. Some exemptions are necessary, e.g. for jobs in which an attribute is a genuine occupational qualification (e.g. gender can be in the case of an actor). But exemptions relating to employment in a private household and those for businesses employing less than six people, which exists in some of the legislation, negates the benefit of ADL.

Most legislation provides for exemptions for an individual or organisation upon application to a tribunal. Such exemptions may be able to be utilised for positive discrimination programmes.

Onus of proof

Onus of proof lies with the complainant under all the legislation except that of N.S.W. That Act provides that if a respondent wants to establish that its conduct is permissible under the Act, then the onus of proof lies with the respondent.

Given the immense difficulties associated with proving guilt (e.g. statements made when witnesses are not present) , there is a good case for equal or even reverse onus of proof. The concept of reverse onus of proof operates in the United States and the United Kingdom. If the complainant can demonstrate that a prima facie case exists, then the onus shifts to the employer to prove that the action was not discriminatory.

Remedies

Remedies available are those of fines, damages and orders for specific performance, with the exception of the Racial Discrimination Act (SA) which only provides for fines. Substantial damages may be awarded. In the case Deborah Wardley, refused a job by Ansett as a pilot, the Equal Opportunity Board awarded damages of $14,500.

4.2 Employment protection

The second form of legislation is of the 'employment protection' type. Britain's Employment Protection Consolidation Act 1978 is supposed to entitle every employee to the right not to be unfairly dismissed by an employer.

Sackings on the grounds of homosexuality can be challenged under this Act. However, the record of the tribunals is deplorable.

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The London-based Gay Rights-at-Work committee in their excellent pamphlet Gays at Work describe three cases of discriminatory sackings. Only one case was successful. (This 1975 case is of little significance given the ruling in the later Saunder's case)

The sacking of a female clerk for wearing a badge with the words "Lesbians ignite" was held not to be unfair. The woman's claim was rejected by an industrial tribunal. On appeal, the decision of the tribunal was that "employers have a 'limited right' to require an employee not to wear a sign or symbol that could be expected to offend fellow employees and customers". (Gays at Work: 6)

The decision in the Saunder's case was even worse. John Saunders, a handyman employed at a youth camp, was sacked solely because of his homosexuality. On appeal, the Employment Appeals Tribunal held that it was 'reasonable' for an employer to dismiss someone simply for being gay if they had any contact with children! So much for employment protection (sic) legislation.

5. INDUSTRIAL TRIBUNALS

5.1 The Australian Conciliation and Arbitration Commission

The existence of a compulsory system of arbitration is unique to Australia. The Australian Conciliation and Arbitration Commission has acted on discrimination, particularly on sex discrimination.

However inadequate the Commission's decisions on equal pay and maternity leave may be, they are nonetheless important precedent cases of the Commission acting on discrimination.

The most important case on discrimination so far concerns the sacking of a woman worker by the Rockhampton City Council for the sole reason of her impending marriage. The Council refused to employ married women. Although the Commission could not save the particular woman's employment the full bench decided to vary the relevant award by prohibiting an employer making "any distinction, exclusion or preference on the basis of sex, other than a distinction, exclusion or preference based on the inherent requirements of a particular job." (Decision print no. D6553)

So far no case on discrimination on the grounds of sexual orientation has been dealt with by the Commission. If the Commission is willing to act on sex discrimination though, it is reasonable to expect that it will act on sexuality discrimination.

The power of the Commission to act on discriminatory sackings is limited. It cannot act after the event. (see the decision of the High Court in R. v Staples and Morris; ex parte Australian Telecommunications Commission (1980) 22 AILR para. 273)

The effect of award variations such as that in the Rockhampton City Council case is to make discrimination in relation to termination (but not hiring) a breach of the award. It could not, as a matter of law, secure reinstatement.

The power of the Commission to insert anti-discrimination provisions into awards is limited. To have jurisdiction, the law requires that ambit exists in the log of claims on which the award is founded. It appears that there have been few variations of awards similar to that made in the Rockhampton City Council case.

5.2 State tribunals

Unlike the Australian Commission, the industrial tribunals of New South Wales, Queensland, South Australia and Western Australia do have power to order re-instatement of an employee. The question to be decided in such cases is whether the employer has acted fairly. Orders could be sought for reinstatement of an employee who suffers a discriminatory sacking.

.../6

There is no major precedent cases in this area, though cases on the principle of discrimination in the Australian Commission are relevant.

6. CONCILIATION AGENCIES

Despite their lack of punitive power, mention should be made of the Australian Government's Committees of Discrimination in Employment and Occupation. The committees were established in each state and nationally with tripartite representation. Their stated aim is the investigation of complaints and the attempted reconciliation of the disputing parties.

The committees will investigate any form of discrimination in employment. In the six years that the committees have existed, only 26 cases of sexuality discrimination have been reported. Only 1 case has been successfully resolved. (CDEO Sixth Annual Report: 25) It is little wonder that Paul Stein, the President of the N.S.W. Anti-Discrimination Board, has described the CDEO's as a "complete waste of time".

The CDEO's are nothing less than diversionary and a means of containment. It is abhorent that trade union representatives remain on these committees.

The N.S.W. Anti-Discrimination Board and the Victorian Anti-Discrimination Bureau will also investigate cases of sexuality discrimination. Despite their lack of punitive powers, the agencies are making genuine efforts to fight sexuality discrimination. An extensive report by the N.S.W. Board on sexuality discrimination is due for release this year.

The Victorian Bureau played a positive role in the case of a social worker who was refused employment by the Melbourne City Mission solely because of his homosexuality. The Bureau confirmed that discrimination had occurred. (The Victorian CDEO found that the allegation could not be substantiated.)

7. EVALUATION

The significance of the law must not be overestimated. The law almost exclusively concentrates on the question of termination of employment. Only specific anti-discrimination legislation covers the question of discrimination in hiring.

The only effective way of combatting the widespread harassment and intimidation of homosexuals is by educational-liberationist activities. In this way we are not treating the symptoms of homophobia, but attacking its cause.

Few cases of discrimination can be fought under the common law. It is an expensive and cumbersome means of fighting discrimination, useful only in a few cases. Usually notice of one week or less is all that is needed to lawfully terminate the contract of employment. Only for a small number of workers, usually professionals, is longer notice required.

No anti-discrimination legislation in Australia covers discrimination on the grounds of sexuality. If we are to fight for such legislation we must fight for coverage of direct and indirect discrimination, coverage of all forms of employment relationships, strictly limited exemptions, effective and cheap remedies, reverse onus of proof, provision for access to records and information, provision for fines, damages and orders for specific acts, provision for class actions and a charter for education and publicity campaigns for the anti-discrimination agencies.

The Arbitration Commission is yet to consider a case on sexuality discrimination. When it does (it is only a matter of time), and if victory is achieved, that victory will only be very limited. The Commission can only award conditions once employment has commenced. Nor as a matter of law can the Commission secure reinstatement. But the Commission can rule against harassment and intimidation of the employee by the employer.

.../7

The conciliation agencies have little impact. The Australian Government's Committees on Discrimination in Employment and Occupation are an insidious attempt at containment.

8. CONCLUSIONS

What are the implications of this analysis for socialists? As socialists we must firstly point out the lack of rights in capitalist society. We must point out the lack of rights at work and particularly the lack of right to work. We must point out the plurality of the oppression of homosexual workers, including our oppression as homosexuals and our oppression as members of the working class.

Priority must be given to active involvement in the trade unions and workers movement. Industrial action is the best form of defence against the whims of management, whatever form those whims may take. As socialists, we must help build a confident and vital working class movement.

We must dispel the myths surrounding anti-discrimination action on the part of the state. We must point out that such actions are part of the process of containment. We need to acknowledge that such actions can protect the vested interests of the ruling class for by moderating and incorporating conflict it helps stabilise capitalism.

Despite these factors, socialists should not regard the fight for anti-discrimination law as a complete waste of time. Sometimes our trade unions and workmates won't fight for discriminated workers, particularly at times of massive unemployment. Sometimes the discriminated worker is the sole employee of a business and retaliatory action would be difficult to organise. The worth of anti-discrimination laws is that they create yet another opportunity for fighting oppression.

As Gregory argues, socialists should fight for aggressive and positive policies on the part of the anti-discrimination agencies. When they perform their roles too complacently the agencies need to be challenged and the contradictions exposed. (Gregory 1978: 150)

A number of specific conclusions can be drawn on tactical questions for activists in the gay trade unionists' groups. Gay trade unionists should work towards the ACTU taking a test case on discrimination to the Arbitration Commission. The build up to such a case would need a massive publicity campaign at rank-and-file level, explaining the issues to workers and seeking their active support for the rights of workers who suffer a particular oppression. Socialists would, of course, stress that a victory in such a case would be a back up for workers' action, not a substitute for such action. Gay trade unionists must also demand the withdrawal of trade union representatives on the CDEO's.

By consistent and well planned actions in relation to anti-discrimination law, we can extend basic rights to homosexuals, build the working class movement and win support for socialist politics.

References to legal materials

The number of the volume is given first, then the abbreviation of the name of the law reports, then the page number.

Abbreviation	Law Report
AC	The Law Reports Appeal Cases
AILR	Australian Industrial Law Review
LR	The Law Reports
SASR	South Australian State Reports
Tas. SR	Tasmanian State Reports

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