

***Dovedeen Pty Ltd v GK***  
**[2013] QCA 116**  
**(17 May 2013)**

<b>Application:</b>	Appeal against orders of Appeal Tribunal of QCAT
<b>Orders made:</b>	Leave to appeal granted and appeal allowed. Set aside the decision and orders of the Appeal Tribunal of QCAT made on 31 July 2012 and in lieu thereof order that the appeal to the Appeal Tribunal against the decision of QCAT made on 25 October 2011 be dismissed. Leave to the parties to make submissions as to costs of the proceedings in the Court of Appeal and in the Appeal Tribunal.
<b>Before:</b>	Fraser and Gotterson JJA & Margaret Wilson J

**Abstract:**

This is an appeal from a decision of the Appeal Tribunal of QCAT.

In the original hearing at QCAT, a self-employed sex worker complained that she had been discriminated against on the basis of the attribute of 'lawful sexual activity' in being denied accommodation at a motel in Moranbah. At the hearing of the complaint she acknowledged that she had been refused accommodation because she was performing the work of a sex worker at the motel, rather than because of her own status as a lawful sex worker. The tribunal at first instance held that GK had not been discriminated against, because she was treated the same as anyone else who wanted to use a room for prostitution. The tribunal also held that if GK had been subjected to direct discrimination, the *Liquor Act 1992* would have operated to override the *Anti-Discrimination Act 1991* because it prohibits the conduct of any business on licenced premises other than that authorised by the licence.

On the appeal to the Appeal Tribunal of QCAT, the Appeal Tribunal overturned the decision on the basis that the tribunal had used the wrong comparator and that the *Liquor Act* did not operate to override the *Anti-Discrimination Act*. The Appeal Tribunal found the correct comparator was someone wanting to use the premises for any lawful purpose other than sex work.

The motel operators appealed to the Court of Appeal of the Supreme Court of Queensland. Although there were originally 6 grounds of appeal, including the operation of the *Liquor Act*, only 2 grounds were pursued at the hearing. An appeal against a decision of the Appeal Tribunal of QCAT can only be made to the Court of Appeal on a question of law, and with the leave of the Court of Appeal. The grounds of appeal pursued at the hearing were that the Appeal Tribunal was in error in finding:

- (i) that there was no distinction between a person's status of a lawfully employed sex worker and the engagement of sex work by that sex worker; and
- (ii) the appropriate comparator was a person who was seeking to use the motel for any lawful purpose.

The Attorney-General was given leave to appear for the purpose of assisting the Court by making submissions as to the proper construction of the term 'lawful sexual activity' – this function is called *amicus curiae*.

The Court of Appeal found that the Appeal Tribunal was wrong about the meaning of 'lawful sexual activity' and that both the Appeal Tribunal and the tribunal at first instance were wrong in how they each identified the comparator.

The Court said the *Anti-Discrimination Act 1991* prohibits discrimination on the basis that a person is a lawfully employed sex worker, however it does not prohibit discrimination on the basis the person intends to perform work as a sex worker at a motel.

### **Significant issues:**

#### **1. Meaning of 'lawful sexual activity'**

The attribute of 'lawful sexual activity' is defined in the Schedule of the Anti-Discrimination Act as *a person's status as a lawfully employed sex worker, whether or not self-employed*. The Court said there is a distinction between having the status or capacity of a sex worker, and performing the work. In concluding that it is the status rather than the performing of the work that is protected, the Court considered:

- The definition in the Anti-Discrimination Act applies unless the context of subject matter indicates or requires otherwise. There is no such indication or requirement in the Act, and the attributes listed in section 7 are at the heart of the operation of the Act.
- The only other place in the Act where lawful sexual activity is used is in section 28, which is an exemption allowing discrimination in work with children where it is reasonably necessary having regard to all the circumstances of the case, including the person's actions. This makes it clear that activity is a relevant circumstance rather than the attribute itself.
- If the definition wasn't in the Act, the Act could be read as prohibiting discrimination in the supply of accommodation because the person has engaged in or will engage in lawful sexual activity in the accommodation. However, the definition precludes that approach as it is only the person's status as a sex worker that is protected.
- The Court compared the definition of lawful sexual activity to the 4 attributes that involve 'activity' – breastfeeding, political activity, trade union activity and religious activity. Of those 4, only religious activity is defined in the Act. That definition makes it clear the attribute of religious activity involves activity or non-activity, unlike lawful sexual activity which is defined as a 'status'.

The Appeal Tribunal was wrong to construe the attribute as extending beyond 'status as a lawfully employed sex worker' to include engaging in prostitution in the motel room.

#### **2. Comparator**

The Court said that in order to apply the test in section 10(1) it is necessary to identify the relevant characteristics of the comparator. Applying *Purvis*, the Court said that the 'circumstances that are the same or not materially different' (in s10(1)) include 'all of the objective features which surround the actual or intended treatment' of the person claiming to be discriminated against.

The tribunal at first instance was wrong to identify the comparator as a person who intended to use the room for the purpose of prostitution, because that person is not necessarily a person without the attribute.

The Appeal Tribunal was wrong to identify the comparator as a person who was seeking to use the accommodation for any lawful purpose other than prostitution or lawful sexual activity, because that description disregards the activities which GK proposed to conduct in the motel room, so the circumstances are not then the same or not materially different as required by section 10(1).

The Court said the most appropriate comparator in the application of section 10(1) is a person who was not an employed sex worker who sought accommodation with a view to a series of separate sexual encounters with different people coming to and going from the motel room.

3. Section 8 – Meaning of discrimination on basis of an attribute

It was argued that engaging in sex work lawfully, or the performance of lawful sex work, was a characteristic of the attribute of 'lawful sexual activity' to extend the definition, pursuant to section 8. The Court did not accept this argument, and said:

The work done by a person in any remunerative occupation is not properly described as a 'characteristic' or typical 'feature or quality' of the person's status as a worker in that occupation; it is simply the activity done by the person to earn remuneration. Section 8 does not extend the reach of the Act in the way for which GK contended.

4. Liquor Act

The issue of the interaction of the *Anti-Discrimination Act 1991* and the *Liquor Act 1992* was not considered in the appeal. The tribunal at first instance and the Appeal Tribunal had different views about this aspect. As it was not pursued in the appeal the issue is unresolved.

The tribunal at first instance held there was an inconsistency between section 152 of the Liquor Act (which prohibits a business being conducted on licensed premises, other than a business authorised by the licence) and sections 82 & 83 of the Anti-Discrimination Act (which prohibits discrimination in the accommodation and pre-accommodation areas). Accordingly the Liquor Act, being the later Act, impliedly repealed the Anti-Discrimination Act to the extent of the inconsistency. In arriving at this finding, the tribunal relied on the decision in *Attrill v State of Queensland*, which has since been overturned by the Appeal Tribunal and the Court of Appeal.

The Appeal Tribunal said there was a distinction between the conduct of 'a business' and the mere conduct of business activity, and held that section 152 of the *Liquor Act 1992* was not inconsistent with any provision of the *Anti-Discrimination Act 1991* insofar as it concerns provision of accommodation to persons who may or will carry on lawful sexual activity in the accommodation.

5. Non-publication orders and Anonymity

In the tribunal, orders for the use of initials only to identify GK were made to protect the privacy of GK. The orders were made under the QCAT Act rather than under section 191 of the Anti-Discrimination Act.

It is clear from the decision that orders of this nature made by the tribunal do not apply to the appeal proceedings in the Court of Appeal. The Court of Appeal has inherent power to make orders to the same effect, but an application needs to be made to the Court.

The decision makes it clear that the Court will be more reluctant than the tribunal to make such orders. Complaint parties who are concerned to retain anonymity might take this into consideration, but should however bear in mind that few matters under the *Anti-Discrimination Act 1991* proceed to the Court of Appeal through appeals.