

1 November 2010

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010

Equality Rights Alliance (ERA) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the Sex and Age Discrimination Legislation Amendment Bill 2010.

ERA (formerly known as WomenSpeak) is Australia's largest organisational network advocating for women's equality, women's leadership and recognition of women's diversity. We bring together over 50 non-government organisations and social enterprises with an interest in advancing women's equality. ERA is one of six National Women's Alliances, managed by the YWCA Australia with funding from the Australian Government Office for Women. Members of ERA endorse all, or in part, of this submission.

ERA welcomes the proposed changes

ERA welcomes the amendments made by the Bill, which strengthen discrimination protections in Australia. In particular, we welcome the:

- introduction of a full-time Age Discrimination Commissioner;
- extension of the protections against discrimination on the basis of family responsibilities to both women and men in all areas of employment;
- inclusion of breastfeeding as an explicit ground of unlawful discrimination; and
- improved protections from sexual harassment for students and workers.

ERA notes that, in its Concluding Observations on Australia from its 46th session, the Committee on the Elimination of Discrimination of Against Women (the CEDAW Committee) welcomed the previous version of this Bill, which was introduced into Parliament in June 2010, and recommended that the Australian Government re-introduce the Bill before the new Parliament as soon as possible (paragraph 12).

Recommendation 1: The Committee should support expeditious passage of the Bill.

Broader protection is needed for family and caring responsibilities

ERA is concerned that protections against discrimination on the basis of family responsibilities do not encompass the reality of women and men's family and caring responsibilities. Protections are limited to care a 'dependent child' or 'immediate family member' only, and do not encompass the reality of other close, personal relationships for whom people may have caring responsibilities. In particular, ERA is concerned that the protections will not encompass the different cultural concepts of families and family responsibilities, such as kinship.

Protections against discrimination on the basis of family and caring responsibilities should also be extended to other areas of public life, including education, the provisions of goods, services and facilities, and accommodation.

Recommendation 2: The Committee should recommend that the definition of 'family responsibilities' in section 4 of the Sex Discrimination Act should be extended to include broader family and personal relationships for whom people may have caring responsibilities.

Recommendation 3: The Committee should recommend that protections against discrimination on the basis of family and caring responsibilities should be extended to other areas of public life.

Broader reforms are still needed to advance women's substantive equality

Further changes to the *Sex Discrimination Act* are needed to protect and promote women's equality in accordance with Australia's international obligations, such as those under the Convention on the rights of the Elimination of all Forms of Discrimination Against Women (CEDAW). We refer the Committee to the recommendations made in the collaborative submission from leading women's organisations and women's equality specialists to the Committee's 2008 Inquiry into the *Sex Discrimination Act*, which ERA coordinated (as WomenSpeak), see Appendix One. Recommendations included that the *Sex Discrimination Act* be amended to:

- give full effect to CEDAW obligations pertaining to formal equality and substantive equality;
- ensure that in a claim based on intersecting grounds of discrimination, the complainant need not identify which ground is the cause of the disadvantage, provided that they can establish that they were treated less favourably than a person who did not embody the same combination of characteristics;
- empower the Australian Human Rights Commission and Sex Discrimination Commissioner to initiate inquiries into systemic discrimination and other additional functions;
- repeal exemptions for religious bodies and educational institutions established for religious purposes, and require any exemption that is granted under section 44 to promote the objectives of the Act; and

- address the high costs for complainants in bringing cases as well as the risks that they face if they lose a case in the Federal Court and the Federal Magistrates Court.

ERA is concerned that many of the recommendations from the 2008 Inquiry remain unimplemented. We note that, in its Concluding Observations on Australia, the CEDAW Committee also called for Australia to ensure that the key recommendations of the 2008 Inquiry are implemented as part of the proposed legislative reform, and that the mandate of the Sex Discrimination Commissioner be expanded to address all issues of gender equality (paragraph 12).

ERA notes that, in its response to the 2008 Inquiry, the Australian Government committed to considering many of these recommendations as part of its process of consolidating Commonwealth anti-discrimination legislation (the consolidation project). As such, it is essential that the consolidation project is carried out in a way that strengthens anti-discrimination law and builds on the work and recommendations of the Committee in the 2008 Inquiry. The consolidation project should also build on domestic and international experience, and be based on broad consultation.

Recommendation 4: The Committee should call on the Government to commit to a consolidation project that is based on international best practice and broad consultation, including through the development of an options paper, and undertaken in a manner that strengthens anti-discrimination laws, including by implementing the remaining recommendations of the 2008 Inquiry.

Yours faithfully,

Kathy Richards
Manager, Equality Rights Alliance

Appendix One

The following lists the recommendations made in a submission to the 2008 Senate Legal and Constitutional (SLAC) Committee's inquiry in the *Sex Discrimination Act*.

Recommendation 1

That the phrase 'so far as is possible' be removed from the preamble to the SDA.

Recommendation 2

That the objects section of the SDA, to be renumbered s 3(1), be strengthened (see Appendix C).

Recommendation 3

That the qualifying phrase 'to eliminate, so far as possible' contained in ss (b), (ba) and (c) be removed and replaced with the words 'to prohibit', which is already used in the Preamble.

Recommendation 4

That a new ss 3(2) be added as a guide to judicial interpretation, as follows:

It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.

Recommendation 5

That the SDA definitions of discrimination be reviewed to give full effect to CEDAW obligations pertaining to formal equality and substantive equality.

Recommendation 6

Review the SDA to establish the elements of the test for determining the reasonableness of a disadvantaging effect of a condition, requirement or practice. An employer should have to establish a high degree of business necessity, have at the very least considered other alternatives in light of the degree of disadvantage identified, and ensured that the measure was proportionate to the harm it caused.

Recommendation 7

The circumstances in which judges can set aside findings on reasonableness should be prescribed in the SDA.

Recommendation 8

Amend the SDA to address shortcomings pertaining to judicial rulings on motive and onus of proof in sex discrimination cases. In doing so we commend the approach of s 63A of the UK *Sex Discrimination Act 1975* (adopted in 2001) and the EU *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex*.

Recommendation 9

Amend the SDA to re-establish the principle, held in the High Court judgment, *Waters v Public Transport Corporation* (1992), that the services provided, or employment involved in a case, should not be characterised in such a way as to preclude the possibility of a finding of discrimination.

Recommendation 10

Amend the SDA to provide full protection against discrimination against all people with family or caring responsibilities. In amending the SDA an inclusive definition of parental and caring responsibilities should be adopted, including ensuring the extension of rights to same sex couples and same sex attracted individuals.

Recommendation 11

Establish an obligation on employers to make adjustments to enable workers with family or caring responsibilities. In formulating such an obligation it should be clear that an employer can only refuse on the basis of a specific justification and must provide evidence for such a refusal. The obligation should also establish a regulatory timetable for this process. We commend to the attention of the SLAC Committee the model adopted in the UK *Employment Rights Act 2004*.

Recommendation 12

Amend the SDA to ensure that in a claim based on intersecting grounds of discrimination, the complainant need not identify which ground is the cause of the disadvantage, provided that they can establish that they were treated less favourably than a person who did not embody the same combination of characteristics.

Recommendation 13

Reconceptualise the category of 'special measures' as 'actions towards substantive equality' or 'substantive equality measures'.

Recommendation 14

That the *Human Rights and Equal Opportunity Commission Act 1986* be amended to extend the Sex Discrimination Commissioner's capacity to exercise her amicus curiae function beyond the Federal Court and the Federal Magistrates Court. In particular she should be able to intervene in Fair Pay hearings and to apply to make representations before State courts and tribunals.

Recommendation 15

That HREOC and the Sex Discrimination Commissioner be authorised to initiate inquiries into systemic discrimination.

Recommendation 16

That the Sex Discrimination Commissioner be empowered to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA.

Recommendation 17

Director of Equal Opportunity for Women in the Workplace Agency should be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry.

Recommendation 18

The Committee may wish to inquire how the budget measures will affect the work of the SDC and how any strengthening of the role can be assured sufficient resources to be successful.

Recommendation 19

That the Sex Discrimination Commissioner (SDC) be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality.

Recommendation 20

That such reports focus on key performance indicators (please see the WEL submission for further details).

Recommendation 21

That government respond within 15 sitting days to such reports.

Recommendation 22

That a discrete unit be established within HREOC to undertake the research required for the monitoring and reporting role.

Recommendation 23

Amend the SDA to introduce an equality duty which places a legal responsibility on public and private bodies to promote gender equality and eliminate sex discrimination. Ensure that such a measure is accompanied by the publication and auditing of equality plans and a compliance regime which moves from a facilitative role to sanctions as a measure of last resort. Vest responsibility for monitoring of compliance with HREOC (and include reporting on compliance in the new reporting obligation to Parliament), with the prosecution of any breaches to be determined by the Federal Court or Federal Magistrates Court.

Recommendation 24

Amend the SDA and the *Equal Opportunity for Women in the Workplace Act* (EOWA) to strengthen the capacity of the government to 'buy' equality outcomes.

Recommendation 25

Review the SDA to ensure that the provision of compensation properly values the loss suffered in sex discrimination cases – including future loss of pay and career advancement, and also establishes the basis for punitive damages which will contribute to the systemic change required to avoid future discrimination.

Recommendation 26

Strengthen the funding available to support strategic public interest litigation in the field of discrimination and equality law.

Recommendation 27

Strengthen the individual complaints process. We commend to the SLAC Committee the model adopted by the NZ Human Rights Commission, noting also the recent review of the Victorian *Equal Opportunity Act* recommends the adoption of a similar model.

Recommendation 28

Review the capacity of the judicial system to make broader recommendations in discrimination cases, as per provisions in the UK *Equality Act*.

Recommendation 29

Increase resourcing to the SDC to enable the collection, publication and use of de-identified complaint data as an education mechanism for both potential complainants and respondents.

Recommendation 30

Amend the SDA to include similar provisions to the *Race Discrimination Act* s 10 on direct remedy for discriminatory state/territory legislation.

Recommendation 31

Amend the SDA to include similar provisions to the *Disability Discrimination Act* on the development of action plans and standards.

Recommendation 32

That the SDA or a Carers Act ensure that men with caring responsibilities are afforded protection under the act.

Recommendation 33

That the SDC be properly resourced to develop materials demonstrating the business case for preventing and managing sex discrimination and achieving equality.

Recommendation 34

That s 28A (1) be amended to remove the moralistic requirement that the person harassed would be 'offended, humiliated or intimidated' and replace it with a requirement 'that the person harassed would find the conduct unwelcome'.

Recommendation 35

Review s 28A (1b) & (2) to ensure that the use of modern technological tools such as multimedia SMS messages and the internet can also be the instrument of harassment and great offence.

Recommendation 36

That sex-based harassment be expressly proscribed by the SDA. This should be defined to include verbal disparagement, threatening gestures, improper bodily contact and bullying.

Recommendation 37

Repeal both s 37 and s 38 of the SDA.

Recommendation 38

Amend s 44 to include the proviso that any exemption granted must promote the objects of the SDA.

Recommendation 39

That the SLAC recommend the review of the entire anti-discrimination framework in Australia with a view to the adoption of an Equality Act.

Recommendation 40

That such a review look to the lessons of the UK in this matter, both in terms of substantive content (including lessons learnt subsequent to its introduction) and procedural mechanisms adopted for the review.