Submission

on the provisions of the

Sex and Age Discrimination Legislation Amendment Bill 2010

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 30 September 2010 the Senate referred the *Sex and Age Discrimination Legislation Amendment Bill 2010* for inquiry and report.

The bill would, if passed, amend the *Sex Discrimination Act 1984* and the *Age Discrimination Act 2004*, to introduce "breast feeding" as a new, distinct ground on which discrimination is prohibited, to apply existing provisions dealing sexual harassment to some additional circumstances, and to introduce a dedicated position of Age Discrimination Commissioner in the Australian Human Rights Commission.

Submissions have been invited from the public and are due to be received by 27 October 2010.

2. Breast feeding as a ground for discrimination

Breast feeding is a natural practice which has proven benefits for the health of children. Measures to encourage breast feeding are welcome.

However, it seems unwarranted for the law to intervene by prohibiting discrimination on the grounds of breast feeding.

Breast feeding can be a time consuming process. It is not a task to be rushed. There are clearly many forms of employment and work situations where it would be difficult to integrate time for breast feeding into the work schedule. It is unclear to what extent making breast feeding a ground for discrimination would be seen as requiring employees to make special provisions for extra breaks during working hours for breast feeding women. Many workplaces would be unsafe or otherwise unsuitable for babies. Would the requirement for employers to accommodate breast feeding during working hours be understood as implying an obligation to provide crèche facilities for children to be cared for between feeds?

Breast feeding is really just one aspect of the direct care a mother gives to her child. This kind of direct, one-on-one care can best be given by a mother who is not engaged in paid employment outside the home. Forcing employers to accommodate, and bear the costs of accommodating breast feeding, perhaps in combination with onsite child care, is a poor substitute for giving better support to all mothers to care full time at home for their own infant children.

In relation to the provision of goods and services it seems that the occasional incident of discrimination by a restaurant or other service provider against a breast feeding women could be adequately dealt with without the intervention of the law. Surely an informal consumer boycott against such a facility would be quite effective! The level of inconvenience of being denied service while breast feeding does not seem sufficient to justify imposing legal obligations on all service providers.

Breast feeding can be, and most often is, carried out in a discreet manner that should cause no offence to anyone present, including families with children. However, there may be women who for a variety of reasons, choose to breast feed in an indiscreet manner, exposing their breasts in a way that may cause offence to others who are present, including families with children. In the absence of a law prohibiting discrimination on the grounds of breast feeding, such incidents can be dealt with simply by other customers or the management asking a woman to be more discreet. If breast feeding is made a ground of discrimination then it may make it more difficult to resolve any such incident because of the fear of being accused of discrimination and facing the onerous process of responding to a complaint.

Recommendation 1:

Breast feeding is natural and commendable but should not be made a distinct ground of discrimination in the Sex Discrimination Act 1984.

3. Sexual harassment

The bill would extend the reach of the sexual harassment provisions to cover incidents involving staff or students aged over 16 from one educational institution who allegedly harass the staff or students of another educational institution if the contact is anyway connected with the first institution.

The definition of sexual harassment stresses the subjective impression of the alleged recipient of the harassment and does not require any deliberate act on the part of the alleged perpetrator.

There is no remedy for false allegations.

There is an emerging literature on the victimisation of those who are unfairly accused of sexual harassment. Dr Rory Ridley-Duff after writing of his personal experience concludes:

> *False allegations are also malicious. They cause harm and emotional hurt to whole families and social networks. This now needs explicit recognition in law. An accusation of sexual misconduct to silence equitable and democratic debate should be illegal.*[1]

In the absence of such a provision, and given the subjective definition, it is inappropriate to widen the application of the sexual harassment provisions. There would be additional difficulties in applying these provisions to relations between staff or students from different educational institutions as it is unclear how such allegations could be appropriately mediated at the institutional level.

Recommendation 2:

Clause 57 of the bill, that would extend the reach of the sexual harassment provisions of the Sex Discrimination Act 1984, should not be supported.

4. Age Discrimination Commissioner

The Australian Human Rights Commission is a partisan organisation that has a record of adopting positions on human rights at odds with the government of the day and many thoughtful Australians.

This track record includes the disgraceful support by the Commission of the Durban II outcomes document which reaffirmed the Durban Declaration and Programme of Action despite this declaration being widely understood to have singled out the State of Israel for its alleged racism.[2]

Given these facts careful consideration should be given before expanding the Commission by the appointment of an additional commissioner.

Age discrimination does not seem to be an area of significant community concern.

For 2008-09 complaints under the *Age Discrimination Act* represented only 7% (151/2253) compared to 43% under the *Disability Discrimination Act*; 24% under the *Sex Discrimination Act*; and 18% under the *Race Discrimination Act*. Of the141 complaints under the *Age Discrimination Act* that were finalised in 2008-09 only 60 (43%) were conciliated. The remainder were terminated or withdrawn. This is significantly lower than the conciliation rate of 48% for all complaints and much lower than the conciliation rate of 55% of complaints under the *Race Discrimination Act*.[3]

There are many legitimate grounds for discrimination on the basis of age, including the need to protect children. The creation of an additional human rights commissioner for age discrimination cannot be justified on the basis of need, and could give rise to an increased number of unmerited complaints.

Recommendation 3:

The proposal to establish an additional human rights commissioner, the Age Discrimination Commissioner, should be opposed.

5. Endnotes

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1. Ridley-Duff, R. *Silencing the victim : the paradox of sexual harassment law*, http://www.scribd.com/doc/9437150/Silencing-the-Victim-The-Paradox-of-Sexual-Harassment-Law

2. *Hansard*, Senate Legal and Constitutional Affairs Committee, Estimates, 25 May 2009, p 39.

3. Australian Human Rights Commission, *Annual report 2008-09*, p 67-81; http://www.hreoc.gov.au/pdf/about/publications/annual_reports/2008_2009/ar09_complete.pdf