

**INDEPENDENT EDUCATION UNION OF AUSTRALIA**

**SENATE LEGAL AND CONSTITUTIONAL COMMITTEE  
SEX AND AGE DISCRIMINATION LEGISLATION  
AMENDMENT BILL 2010**

October 2010

**Introduction**

The Independent Education Union of Australia (IEUA) is the federally registered union representing close to 70 000 education professionals (teachers and other education staff) in the non-government education sector, many of whom work in community kindergartens, early childhood education centres and community preschools.

The IEUA recognises the importance of strong sex and age discrimination legislation as a mechanism of protecting human rights and have made submissions in 2008 to the *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equity*.

As well as the submission into the Commonwealth Sex Discrimination Act, the IEUA has also provided other relevant submissions such as those to the *Office for Women in the Review of the Equal Opportunity for Women in the Workplace Act 1999*, and to the *House Standing Committee on Employment and Workplace Relations, Inquiry to Pay Equity and Associated Issues related to Increasing Female Participation in the workplace*. We refer to these submissions as relevant to the matters under review within the Sex and Age Discrimination Legislation Amendment Bill 2010.

The IEUA welcomes the opportunity to contribute to this inquiry into the new provisions of the legislation.

In considering the amendments to the Sex and Age Discrimination Legislation, the IEUA considers it imperative that the overall result should not provide a reduction in legal protections and complaint mechanisms currently afforded under State Law. Commonwealth legislation should ensure the same robustness offered by various State legislation.

**1. Proposed amendments to the Sex Discrimination Act 1984 to strengthen protections in the legislation**

The IEUA notes that the intent of the proposed amendments is to give effect to the recommendations of the Senate Standing Committee report into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality. We note that these amendments attempt to address community concerns raised in the inquiry and provide protections to those in workplaces and commend this intent.

**1.1 Amendments to broaden the prohibition on discrimination on the ground of family responsibilities to provide equal protection from discrimination, including indirect discrimination, to both men and women in all areas of their work.**

Discrimination because of family responsibilities is one of the major issues facing both men and women in the workforce. There must be clear and direct protection from it in all forms.

The IEUA welcomes the strengthening of protections against discrimination on the ground of family responsibilities for both men and women.

Currently the Sex Discrimination Act 1984 only provides limited provisions from discrimination because of family responsibilities. Importantly, the Sex Discrimination Act 1984 only protects against dismissal.

This means that many other forms of discrimination falling short of termination are not classed as direct discrimination under the Act and thereby protection is not provided.

It is well recognised that employees who suffer discrimination on the ground of family responsibilities which does not amount to dismissal may be able to lodge a complaint of indirect sex discrimination, as the courts have found that because women undertake the majority of caring duties, being discriminated against because of family responsibilities is a characteristic that relates mostly to women and so can constitute sex discrimination.

However, this logic denies the significant role that men have in undertaking family responsibilities.

The IEUA notes the positive proposed amendments to 7A2 which relates to indirect discrimination against people with family responsibilities. This amendment will make it discriminatory to *impose, or propose to impose a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging people who have family responsibilities.*

**The IEUA supports the strengthening of provisions which ensure that both men and women have protection from direct and indirect discrimination on the grounds of family responsibility.**

**Further we support the broadening of the objects of the SDA to include the elimination, so far as possible, of discrimination on the ground of family responsibilities in the area of work, the removal to dismissal and the amendment for the reference of "area of work" rather than "employees".**

**In particular we support the amendments to 7A2 which provide protections against indirect discrimination of people with family responsibilities.**

## **2. Amendments to provide greater protection to women who are breastfeeding.**

The IEUA notes that the proposed amendments would establish breastfeeding as a separate ground of discrimination, determining that "*breastfeeding is a protected attribute*" and, as a result, the existing protections from discrimination would apply to breastfeeding women.

**IEUA supports all measures to accommodate the needs of breastfeeding women in the workplace and other areas of public life and thus supports the amendment to subsection 7AAA (2) which will provide *that it is discriminatory to impose, or propose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are breastfeeding.***

### **3. Amendments to provide greater protection from sexual harassment for students and workers.**

IEUA notes that the current Sex Discrimination Act 1984 provisions do not protect students or staff from harassment by persons attached to different institutions.

The proposed amendments to Section 28(F) to insert provisions which prohibit sexual harassment of a student by a member of staff of another educational institution, and sexual harassment by an adult student of students or staff at another educational institution is positive.

Further the proposed amendment to paragraph 28F2 which removes the requirement that a student who suffers sexual harassment must be an adult student will now provide protections against sexual harassment of students irrespective of their age.

These amendments strengthen the Act by prohibiting sexual harassment which occurs at inter-school activities such as sporting carnivals, debating competitions or joint school theatrical productions and where educational institutions are co-located or share facilities.

However recognition to the rising incidences of cyber harassment need to be addressed.

Communication technologies like mobile phones, email, internet instant messaging programs such as MSN messenger, blogs and social networking community websites like Facebook play an important part in many people's social lives including youth.

Yet too often these technologies are used to sexually harass and bully others. The extent of cyber bullying is not currently contained by conventional notions of boundaries such as "the workplace".

**IEUA believes that it is imperative for legislation to provide strong protections by specifically making reference to cyber harassment.**

### **4. Amendments to strengthen the test for sexual harassment**

The IEUA notes that the test for sexual harassment is now amended so that a reasonable person need only anticipate the possibility (thereby broadening the 'would have anticipated' guideline under the Sex Discrimination Act of 1984) that the unwelcome sexual conduct would offend, humiliate or intimidate the harassed person.

The IEUA supports the strengthening of this provision.

However, concerns exist regarding the application of the comparator test and causation elements for the direct discrimination test.

The current provisions of the Sex Discrimination Act 1984 prohibits direct discrimination on the grounds of pregnancy, described in Section 7(1). It includes treating a woman less favourably because of a characteristic that appertains to women who are pregnant, "*than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant*".

The direct pregnancy discrimination provisions of the *Sex Discrimination Act 1984* are limited in addressing the workplace disadvantage that women experience as a result of pregnancy.

To prove direct discrimination on the ground of pregnancy, a woman must show that the act complained of was because of the taking of maternity leave (the causation test) and that she was treated less favourably (in circumstances that are the same or not materially different) from how the discriminator treats or would treat someone who is not pregnant (the comparator test).

**The IEUA believes that the comparator test needs to be reconsidered as it requires the comparison with another employee on leave. No distinction is made between maternity leave and any other sort of leave. It fails to recognise that maternity leave should not be treated in the same way as other forms of leave and should be given special protection.**

#### **5. Amendments to Section 39 Exemptions – Voluntary Bodies Requirement for further amendments to Section 38 Exemptions (Educational Institutions Established for Religious Purposes)**

The IEUA notes the proposed amendment to Section 39 which will make it unlawful for voluntary bodies to discriminate against a person on the ground of their breastfeeding or family responsibilities as a positive initiative.

However, the IEUA would seek a further strengthening of provisions along the same lines for Section 38 of the *Sex Discrimination Act 1984* which specifically states "*if the first mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed*".

In relation to IEUA members, the application of this exemption is often the most concerning, as over 90% of non-government schools have a religious affiliation.

**The IEUA believes that is essential to ensure that proposed amendments make it unlawful for Educational Institutions Established for Religious Purposes, as defined in Section 38 of the Act, to discriminate against a person on the ground of their breastfeeding or family responsibilities.**

The concept of "good faith" is subjective, too wide ranging, and is a major exception to the application of the prohibitions otherwise imposed by the legislation.

The existence of the current exemptions undermines the validity of the protections of the *Sex Discrimination Act 1984*.

The fundamental purpose of anti-discrimination legislation is that it be beneficial to the human rights of the citizens of the Australian community and that it prohibits discrimination on a range of grounds of attributes and areas of activities.

Yet, a wide range of exemptions are attached to the operation of the *Sex Discrimination Act 1984* generally in relation to religious, charity and voluntary bodies, religious education institutions, competitive sport, insurance and superannuation and court or tribunal decisions.

These exemptions have been persistently criticised as being too lenient and legitimising discriminatory behaviour which is contrary to recognised international human rights norms.

In the majority of cases, these exemptions are inconsistent with existing State Legislations, having broader application and less protection to employees .

**The IEUA believes that it is not an acceptable situation to have in existence a Commonwealth Sex Discrimination Act which provides for reduced legal protections and complaint mechanisms compared to State legislation.**

The IEUA believes that it is imperative that, if there must be exemptions relating to the area of employment, they be clearly and narrowly articulated, they incorporate concepts of “reasonableness” (not merely “good faith”) and they relate only to the employee’s conduct during a selection process, in the course of their work and/or in doing something connected with their employment. Employees’ private lives should remain private.

The legislation must strike a reasonable balance between protecting *the genuine religious interests* of Educational Institutions Established for Religious Purposes and protecting the rights of those working in such institutions.

## **6 Amendments relating to Age Discrimination Act 2004**

**The IEUA supports the proposed amendments to the Act 2004 to establish the office of the Age Discrimination Commissioner within the Australian Human Rights Commission.**

It is noted that the AHRC already has the powers and functions under the Act to seek to address the problems of age discrimination. A designated Commissioner to oversee and engage with stakeholders, including industry and community representatives positively adds to the Act, and is vital in addressing occurrences of age discrimination in the workplace and in society.