

Our Ref: P1096/2008

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Canberra ACT 2600

Per email legcon.sen@aph.gov.au

7 August 2008

Dear Sir/Madam,

Submission to the Senate Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality.

We welcome the opportunity to make a submission to this Inquiry. This is a joint submission prepared by Kingsford Legal Centre, with assistance from Women’s Legal Services NSW, the Public Interest Advocacy Centre, and the Public Interest Law Clearing House, on behalf of the National Association of Community Legal Centres and the Combined Community Legal Centres Group (NSW).

The National Association of Community Legal Centres (NACLC) is the peak body representing the eight state associations of community legal centres (CLCs) and 207 CLCs nationally.

CLCs are located throughout Australia in metropolitan, outer-metropolitan, regional, rural and remote Australia. CLCs are experts in “Community Law” – the law that affects our daily lives. They provide services to approximately 350,000 clients per year. They are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

The Combined Community Legal Centres Group NSW (CCLCG) is an incorporated association consisting of, and representing, the network of 39 community legal centres throughout New South Wales.

Kingsford Legal Centre (KLC) is a community legal centre that provides legal advice, assistance and representation to people who live, work or study in the municipalities of Randwick and Botany in NSW on selected legal problems, and a state wide service on matters of discrimination law.

KLC conducts specialist services in discrimination and employment law. Over the last 5 years we have advised a large number of clients in this area:

Table with 2 columns: Year, Employment, Discrimination. Rows for years 2003 to 2008 (to May).

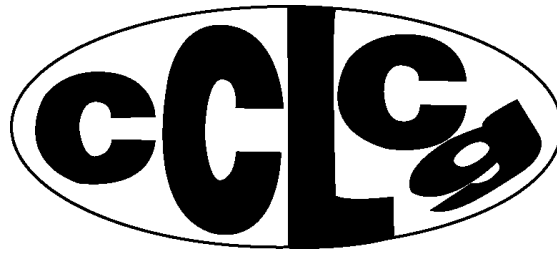
Of particular relevance to this Senate Inquiry is the work KLC has done in advising a number of women on issues related to sex discrimination, including discrimination relating to pregnancy, maternity leave, and sexual harassment in the work place and in educational institutions. There are clearly trends, recurring problems, and repeat perpetrators. Other CLCs within the sector have also reported experience of similar cases. We will refer to case studies in support of our recommendations.

Please find attached our submission for your consideration.

Yours sincerely

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**The National Association of Community Legal Centres  
The Combined Community Legal Centres Group of NSW  
Kingsford Legal Centre**

**Submission to the Senate Inquiry into the effectiveness of the  
Commonwealth *Sex Discrimination Act 1984* in eliminating  
discrimination and promoting gender equality**

August 2008

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## Summary of Recommendations

### **Scope of the SDA & definitions of key terms & concepts (TOR A)**

1. The objects and scope of the *SDA* should very clearly include the promotion of equality for women and a definition of substantive equality.
2. The legislative framework should be reviewed and amended to include a scheme of positive duties, and the consequent capacity to monitor and enforce those duties.
3. The definitions of “family responsibility”, “defacto spouse”, “marital status”, “man” and “woman” should be amended.
4. The direct/indirect distinction should be removed and replaced with a unitary definition.

### ***SDA* implementation of obligations under international conventions (TOR B)**

5. The *SDA* should be amended to state explicitly as one of its objectives the implementation of Australia’s international treaty obligations to promote equality for women, and those obligations should be incorporated in detail into the relevant parts of the legislation.
6. Where international treaty obligations set different standards, the standard most favourable for promoting women’s equality, human rights and fundamental freedoms should be adopted.

### **Powers of the Sex Discrimination Commissioner and HREOC (TOR C)**

7. Legal assistance and representation should be properly provided for individual complainants through additional legal aid funding and the provision of specialist services.
8. The SDC/HREOC should have the power to commence proceedings for enforcement of legal responsibilities under the Act without requiring an individual complainant to initiate the process.
9. The SDC/HREOC should have the appropriate power and resources to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality, and it should be mandatory for Parliament to provide a public response to address the concerns raised by such inquiries within six months of the report being tabled.
10. The SDC/HREOC should have statutory responsibility to independently monitor and report to parliament on gender equality, and it should be mandatory for Parliament to provide a public response to address the concerns raised by the report within six months of it being tabled.
11. The SDC/HREOC should be properly resourced for greater use of both the intervenor and the *amicus curiae* functions.
12. The *SDA* and *HREOCA* should be amended to give the SDC standing to seek leave to appear as amicus when proceedings raise issues of systemic discrimination. The amendments should specify that when the SDC seeks leave on that ground and leave is granted, the terms of leave should give the SDC the ability to tender evidence.
13. The SDC/HREOC should have the resources, capacity and authority to report publicly on the inconsistency of any enactment or proposed enactment with the *SDA*, and Parliament should be required to publicly respond within six months of receiving an inconsistent report.

### **Grounds under the *SDA* (TOR I, K, L)**

14. A broader definition of family members should be inserted to include, among others, same sex partners and family members beyond the “immediate” family.
15. Discrimination on the ground of family and carer responsibilities should be proscribed in all areas of employment, and other areas of public life covered by the *SDA*.
16. The *SDA* should be amended to provide employees with the right to request work arrangements that accommodate carer responsibilities, and require employers to explore all reasonable ways of meeting such requests.
17. Sexual harassment complainants should be offered remote or “shuttle” conciliation conferences, and protection from direct cross-examination by respondents at hearing.
18. The *SDA*, the *RDA*, the *DDA* and *ADA* should be consistently amended to include a separate ground of discrimination where a complaint involves a combination of grounds of discrimination to

take account of the experience intersectional discrimination, and HREOC, the Federal magistrates Court and the Federal Court should be directed to consider whether the discrimination complained of involves an intersection of more than one ground of discrimination.

19. Consideration should be given to amending the SDA to include discrimination on the basis of sexual orientation as an interim measure, and this ground should be included in a broader overarching Equality Act in the longer term.

20. Discrimination on the basis on transgender and intersex status or identity should be included as a ground of unlawful discrimination under the *SDA* and the definition of “woman” should be amended to include transgender and intersex women.

### **Remedies (TOR H)**

21. Quantum of damages in discrimination matters should be increased.

22. Both exemplary and aggravated damages should be made available in determining awards for complainants.

23. There should be provision in the SDA for an expedited conciliation processes, such as occurs in the State and Federal Industrial Relations Commissions.

24. There should be the capacity to go directly to hearing where the subject matter and/or the power inequity between the parties make conciliation inappropriate.

25. HREOC should monitor respondents, including those who reach settlement at conciliation, to permit the SDC/HREOC to investigate, report on and potentially prosecute parties who repeatedly breach the SDC.

26. Remedies to systemic discrimination should be pursued by HREOC which should be charged with the responsibility of enquiring into, regulating, monitoring and enforcing legislative responsibilities to prevent discrimination and promote gender equality

### **Procedural and Technical Issues (TOR M)**

27. Damages awarded for discrimination matters should be increased to a comparable level to tort claims, therefore making contingency fee arrangements viable.

28. The availability of legal aid for representation in unlawful discrimination matters should be increased.

29. There should be routine capping of costs in the Federal Court and the Federal Magistrates Court.

30. A comparative analysis of different models of positive duties across different international jurisdictions should be undertaken with respect to their content, use, application, enforcement and effectiveness in achieving equality.

31. A positive duties model of equality applicable to the Australian context should be developed.

32. A clearer definition of equality should be developed.

### **Prevention of sex discrimination (TOR G)**

33. Educational resources and programmes should be developed to promote gender equality and challenge discrimination as a mandatory component of the k-12 and preschool curriculum.

34. The SDC/HREOC should have the appropriate power and resources to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality and it should be mandatory for Parliament to provide a public response to address the concerns raised by such inquiries within six months of the report being tabled.

35. The *SDA* should be amended to incorporate a positive duties model, including the appropriate monitoring, auditing and reporting mechanisms of a relevant compliance regime.

### **Exemptions (TOR N)**

36. The permanent exemptions contained in sections 37 – 43 of the SDA should be removed.

37. Any exemption should only be granted through an application to the Commissioner. The Commissioner should have the power to grant an exemption for a limited period of up to 12 months where the application demonstrates that no other practicable or reasonable step, other than the exemption can be taken.

38. The SDA and other related legislation should be amended to include a provision to make funding dependent on equality of participation between men and women, in programs that receive federal government funding. More broadly, legislative amendments should be made to require that all government financial decisions consider the gender, race, disability and age implications of those decisions, or subject the decisions to review on those grounds. Review provisions, such as those in the *Administrative Decisions Judicial Review Act* should specify what constitutes systemic discrimination.

39. An inquiry should be undertaken into the funding of male and female sporting organisations that receive federal government funding to determine if those organisations are allocating funds in a discriminatory manner.

40. The Federal Government should require all sporting organisations that receive federal government funding to annually report upon the allocation of funding with reference to gender based accountability standards and a gender audit.

#### **Consistency across jurisdictions and options for harmonisation (TOR D, F)**

41. A national consultation into the introduction of a Charter of Rights should be undertaken, and should include a review of current anti-discrimination legislation.

42. A federal Equality Act should be introduced to supersede the current separate Federal anti-discrimination Acts.

43. In the absence of a federal Equality Act, or in the interim, the Race Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act should be amended to provide consistent processes and definitions, and to allow complaints of intersectional discrimination.

44. To ensure equal protection from discrimination and availability of remedies to every person, irrespective of geographical location, State, Territory and Commonwealth Governments should cooperate to ascertain best practice in anti-discrimination legislation, and undertake to amend current and future legislation to reflect best practice.

#### **Other matters (TOR O)**

45. This Inquiry should form part of a lengthier, more extensive review of legislation to promote equality in Australia.

## Scope of the SDA & definitions of key terms & concepts (TOR A)

### The Scope of the Sex Discrimination Act

1. The *Sex Discrimination Act 1984 (SDA)* is largely aimed at addressing individual complaints of discrimination in limited circumstances. Dr Belinda Smith has clearly articulated the framework of the current legislation in her submission to this Inquiry. Her explanation highlights both the internal coherence of the current model, and the gaps that exist.
2. In short, as an individual, rights-based legislative model, the *SDA* imposes a general negative duty. In other words, in particular public spheres there is a requirement to “not discriminate”. Given this general negative duty, the only way any person can be shown to have breached the duty to “not discriminate” is for an individual to bring a complaint on their own behalf to say that they have been discriminated against.
3. As an individual breach and individual complainant are required to trigger a resolution, the resolution process is one that caters to individuals: a private conciliation between the individual parties, or a public hearing with the individual parties on opposing sides. The options for remedies, necessarily within such a model, provide for individual redress – either compensatory damages or on occasion injunctive relief.
4. There is no positive or specific duties to promote equality. There is therefore no independent third party to take action to encourage the performance of the positive duties, or impose penalties for a breach of those duties. There is no scope for resolution of breaches without an individual complainant or dispute. There is no scope for public sanctions addressing issues of systemic discrimination.
5. These flaws in the *SDA* and how they might be addressed are dealt with throughout this submission.

### Definitions of key terms and concepts

6. Many definitional issues are dealt with in detail throughout this submission, and won’t necessarily be repeated in this section. However, particular definitions set out in section 4 of the *SDA* giving cause for concern include:
  - “family responsibilities” – the definition of family should be expanded to include, among others, same sex partners and family members beyond the “immediate” family; discrimination on this ground needs to be proscribed in all areas, and not be limited to circumstances of termination of employment;
  - “defacto spouse” and “marital status” – must include a person of the same sex;
  - “man” – must include transgender and intersex men;
  - “woman” – include transgender and intersex women.
7. Discussion of these definitions and recommendations are set out under ‘Grounds under the SDA’.
8. The distinction between direct and indirect discrimination is a complex an artificial one, which many applicants do not understand and cannot apply. Further, the very narrow interpretation of the prohibition of direct discrimination<sup>1</sup> means that only formal equality is addressed, ignoring the promotion of substantive equality, which is clearly an objective of CEDAW that should be incorporated into the operation of the *SDA*.
9. The distinction between “direct” and “indirect” discrimination is technically complex and difficult to apply. To determine whether a person has been subject to “direct discrimination”, that person needs to work out whether they have received less favourable treatment; to determine if they have been the subject

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<sup>1</sup> See *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92.



to “indirect discrimination”, that person needs to work out whether the treatment they have received has had a less favourable impact on them.

10. This places the entire burden on the complainant to deal with such a contrived distinction, and risk failing in their complaint if they are unable to argue it. As an alternative to this dual test, a single definition should be used. Once a complainant has established a *prima facie* case of discrimination, a respondent can defend the case by showing that there was no reasonable alternative to the action taken. This is clear and simple, and provides a level of certainty to both parties.

11. It is submitted that the Canadian model should be reviewed as a possible working alternative.

#### **Recommendations**

1. The objects and scope of the *SDA* should very clearly include the promotion of equality for women and a definition of substantive equality.
2. The legislative framework should be reviewed and amended to include a scheme of positive duties, and the consequent capacity to monitor and enforce those duties.
3. The definitions of “family responsibility”, “defacto spouse”, “marital status”, “man” and “woman” should be amended.
4. The direct/indirect distinction should be removed and replaced with a unitary definition.

<p><b><i>SDA implementation of obligations under international conventions (TOR B)</i></b></p>
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**Australia’s obligations under CEDAW and other international instruments**

12. The United Nations *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>2</sup> (CEDAW) is the key international human rights instrument relating to women. It was established in 1979 and entered into force as an international treaty on 3 September 1981.

13. CEDAW provides the basis for realising equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life, as well as education, reproductive health, employment, family law, child care, and social security. Its creation signalled the acceptance by the international community of the necessity of an international bill of rights for women, and an accompanying agenda for action that would guarantee women’s employment of these rights.

14. CEDAW is generally drafted in accordance with a model of substantive equality. The key articles in CEDAW similarly reflect this focus on substantive equality. In particular, Article 1 defines discrimination as:

Any distinction, exclusion or restriction, made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

15. Article 2(b) of CEDAW requires that:

State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or laws, the practical realization of this principle.
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting discrimination against women.
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.
- (g) To repeal all national penal provisions which constitute discrimination against women.

16. These wide ranging provisions map out a comprehensive legal framework to address discrimination against women and institutionalise women's rights to equality with men.

17. Article 3 requires all State parties to take all appropriate measures in all fields, in particular in political, social, economic and cultural fields, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

18. Australia has also ratified other international instruments that require gender inequality to be redressed. Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of

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<sup>2</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), ratified by Australia 28 July 1983.

the law". Thus, Australia is required to prohibit discrimination and provide effective protection against it. Article 2 of the ICCPR also requires Australia to ensure the equal rights of women and men to the enjoyment of the rights set out in the Covenant, to adopt legislative or other measures necessary to give effect to those rights and to ensure that there are effective remedies for violation of those rights. Similarly, article 3 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) requires Australia to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights set forth in the Covenant.

19. Australia is also a signatory to three ILO treaties (numbers 100, 111 and 156) that establish a similar range of obligations to those in CEDAW with respect to reconciling work and family responsibilities. However, a fourth key ILO treaty to which Australia is not a signatory (number 183: the *Maternity Protection Convention*, 2000) provides for 14 weeks paid maternity leave, with a 2000 recommendation extending this provision to 18 weeks paid maternity leave.

### **How have these obligations been implemented in the Sex Discrimination Act?**

20. The *SDA* is the Commonwealth's main implementation of CEDAW. The objects expressly include in section 3(a) "to give effect to certain provisions of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women". However, it does not comprehensively address Australia's obligations under the Convention. This view is shared by the CEDAW Committee, which has expressed concern about the absence in Australia at federal, state and territory levels of 'an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men'.<sup>3</sup>

#### ***The SDA only addresses individual complaints in specified fields of activity***

21. The *SDA* aims to eliminate acts of discrimination within defined spheres of activity. Areas in which discrimination is prohibited include employment, education, accommodation, provision of goods and services, disposition of land, membership of clubs and the administration of Commonwealth laws and programs.

22. In contrast, CEDAW includes a general prohibition of discrimination in article 1. This is not limited to any field of activity and expressly includes "political, economic, social, cultural, civil or *any other field*" (emphasis added).

23. Changes required for *SDA* to meet obligations under international conventions: The *SDA* should include a general prohibition of discrimination, in accordance with article 1 of CEDAW, that aims to ensure the enjoyment of fundamental human rights and freedoms articulated in CEDAW, the ICCPR and ICESCR.

#### ***The SDA exempts areas from its operation***

24. The *SDA* includes a number of exemptions where discrimination is permitted. These include employment by the States and instrumentalities of the States, genuine occupational qualifications, services relating to pregnancy and childbirth, services that can be only provided to members of one sex, accommodation provided to employees or students, the residential care of children, charities, religious bodies, education institutions established for religious purposes, voluntary bodies, acts done under statutory authority, insurance, superannuation, sport, and combat duties and combat-related duties.

25. Exemptions compromise women's rights under CEDAW and other international instruments. Areas that enjoy exemptions are not required to take any steps in eliminating discrimination against women.

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<sup>3</sup> Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth session, CEDAW/C/AUL/CO/5, 3 February 2006, [12].

26. Changes required for SDA to meet obligations under international conventions: All exemptions in the *SDA* should be reconsidered, and exemptions should be removed to implement CEDAW's prohibition of discrimination in all areas.

***The SDA provides for only limited substantive equality***

27. The *SDA* prohibits direct discrimination, which is structured around formal equality. That is, women are required to be treated the same as men. However, in order to achieve substantive equality, women's specific needs and experiences must be taken into account. While the prohibition of indirect discrimination can go some way to addressing substantive inequality, the significant obstacles in succeeding in an indirect discrimination claim (detailed elsewhere in this submission) prevent these provisions from being used to achieve substantive inequality.

28. The CEDAW Committee have stated that legislative protections should have a substantive equality agenda which takes into account the biological differences between women and men, the socially and culturally constructed differences between women and men, and the importance of non-identical treatment of women and men to address such differences.<sup>4</sup>

29. Changes required for SDA to meet obligations under international conventions: The Sex Discrimination Commissioner should be tasked and resourced with the continuous monitoring of laws, programs and practices directed at the achievement of women's substantive equality.

***Systemic discrimination cannot be addressed adequately under the SDA***

30. Systemic discrimination affects the equality status and opportunities of many women and is not always easy to identify or deal with as a single act of discrimination against one individual woman. It is of particular relevance to non-English speaking background women who find it difficult to establish the "causal link" between their ethnicity or sex and the discrimination which results in their disadvantage, for example by narrowing their opportunities to enter the workforce.

31. The *SDA* does not refer expressly to systemic discrimination. However, acts of discrimination affecting individuals or groups may come within the prohibition of indirect discrimination, and would come within a general prohibition of discrimination.

32. Even if the *SDA* prohibits systemic discrimination, as part of general prohibition or expressly, difficulties remain in addressing such problems through a complaints based system. Systemic discrimination is often not viewed as being discriminatory and cannot be eliminated on a case by case basis.

33. While CEDAW does not refer expressly to systematic discrimination it does deal with the issues that underlie it. Article 5(a) states the obligation of State Parties to take appropriate measures to "modify the social and cultural patterns of conduct of men and women". CEDAW also emphasises the importance of addressing all forms of discrimination and requires that effective protection should be established against "any act of discrimination" (article 2).

34. Changes required for SDA to meet obligations under international conventions: In order to meet CEDAW requirements to address all forms of discrimination, the Sex Discrimination Commissioner should be given power to investigate, of her own motion, conduct that appears to be unlawful under the *SDA*.

***The SDA only protects carers against termination of employment***

35. Sections 4A and 14(3A) make it unlawful for an employer to dismiss an employee because of "family responsibilities", that is responsibilities to care or support a dependent child or other immediate family member in need of care and support.

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<sup>4</sup> Committee on the Elimination of Discrimination against Women, *Enhancing Participation of Women in Development through an Enabling Environment for Achieving Gender Equality and the Advancement of Women*, Expert Group Meeting, 8-11 November 2005, [8].

36. CEDAW recognises in its introduction and elsewhere that the biological and social construction of caring labour as a woman's responsibility detract from securing substantive equality.

37. Changes required for *SDA* to meet obligations under international conventions: The *SDA* should provide full protection against discrimination to all people with parental or caring responsibilities in all situations where other discrimination prohibitions apply.

#### **Recommendations**

5. The *SDA* should be amended to state explicitly as one of its objectives the implementation of Australia's international treaty obligations to promote equality for women, and those obligations should be incorporated in detail into the relevant parts of the legislation.

6. Where international treaty obligations set different standards, the standard most favourable for promoting women's equality, human rights and fundamental freedoms should be adopted.

## Powers of the Sex Discrimination Commissioner and HREOC (TOR C)

38. As set out above, the *SDA* is largely aimed at addressing individual complaints in limited circumstances. Discrimination is defined by the Act principally as formal equality and encourages the understanding that discrimination is perpetrated by an individual against another individual for reason of the victim's membership of a particular class or category (women, pregnant women, married women, women with family responsibilities). In the light of such legislative limitation it is not surprising that the Sex Discrimination Commissioner (hereafter the SDC) and HREOC suffer a definite lack of capacity to address systemic discrimination.

39. Sections 10A-15 of the *Human Rights and Equal Opportunity Act 1986 (HREOCA)* and section 48 of *SDA*, sets out HREOC's duties, powers and functions in relation to sex discrimination. The majority of these involve responding to individuals' complaints of unlawful sex discrimination. Other functions – such as research, education, examination of enactments, and reports to the Minister – seek to take a more proactive approach in raising awareness about sex discrimination with the aim of preventing sex discrimination from taking place in the first place. Below is a brief examination of the existing powers of HREOC and SDC with respect to these functions.

### **Powers for inquiries into and conciliation of complaints of alleged unlawful discrimination**

40. HREOC can make inquiries into complaints of alleged unlawful discrimination and attempt to conciliate such complaints. In order to conduct an inquiry, the President has the power to obtain information,<sup>5</sup> direct people to attend a compulsory conciliation conference, and examine witnesses.<sup>6</sup> Failure to attend as directed without a reasonable excuse, can result in a penalty of 10 penalty units.<sup>7</sup> However, while this provision is included, we can find no reference to such a penalty ever being imposed.

41. The powers discussed above, however, only come into effect once a written complaint alleging unlawful discrimination is lodged with the commission.<sup>8</sup> This written complaint must be lodged by “a person aggrieved by the alleged unlawful discrimination”,<sup>9</sup> “2 or more persons aggrieved by the alleged unlawful discrimination”,<sup>10</sup> or on behalf of a person aggrieved.<sup>11</sup> In other words the complaint system is entirely dependent upon HREOC receiving a written complaint from an individual or group of individuals.

### ***Burden on individual complainant***

42. The requirement that the individual affected by the discrimination make the complaint is often too onerous for that person to bear. Victims of discrimination are frequently vulnerable people, made more so by the experience of discrimination. The process of making a complaint, exchanging replies with the respondent, facing the perpetrator during conciliation, standing firm on acceptable outcomes, and if necessary going through the lengthy, costly and traumatic Federal Court process is often beyond the capacity of a person experiencing discrimination.

43. In the event that the respondent is better resourced and moderately sophisticated, the complainant finds herself dealing with a complex and specialised area of law, with the very real threat of a large adverse costs order hanging over her head.

44. With these impediments, in our experience many complainants simply will walk away, or commence proceedings in the State jurisdiction (a no costs jurisdiction). This means that these women are locked out of the opportunity to pursue a fundamental human right of equality, and HREOC loses the opportunity to forcefully proscribe discrimination and promote equality.

<sup>5</sup> Section 46PI *HREOCA*

<sup>6</sup> Section 22(1) *HREOCA*

<sup>7</sup> Section 46PL (1) & (2) *HREOCA*

<sup>8</sup> Section 46P(1) *HREOCA*

<sup>9</sup> Section 46P(2)(a)(i) *HREOCA*

<sup>10</sup> Section 46P(2)(b)(i) *HREOCA*

<sup>11</sup> Section 46P(2)(a)(ii); s46P(2)(b)(ii); s46(2)(c) *HREOCA*

45. In the light of such difficulties and the power imbalance that often exists between individual complainants and certain respondents, it is recommended that legal assistance and representation be properly provided for individual complainants through additional legal aid funding and the provision of specialist services.

46. It is further recommended that the SDC and HREOC have the power to commence proceedings for enforcement of legal responsibilities under the Act without requiring an individual complainant to initiate the process, particularly in the case of repeated breaches of the SDA.

#### ***Power to enforce recommendations***

47. Section 29 of *HREOCA* provides that in response to an inquiry into an act done or practice engaged in by a person found to be “inconsistent with or contrary to any human rights”, which includes complaints of alleged unlawful discrimination, the Commission may make recommendations for:

- “preventing a repetition of the act or a continuation of the practice”;<sup>12</sup>
- “payment of compensation” with respect to loss or damage suffered by a person as a result of the act or practice;<sup>13</sup>
- “the taking of other action to remedy or reduce loss or damage suffered by a person as a result of the act or practice”.<sup>14</sup>

48. The Commission is also required to report the particulars of any recommendations to the Minister,<sup>15</sup> including whether the person has complied with the recommendations.<sup>16</sup>

49. Significantly, the Commission lacks the power to enforce any recommendations made. This lack of enforcement capacity makes the recommendations largely meaningless. It certainly means that HREOC and the SDC are severely hampered in addressing repeated and systemic discrimination. For this inquiry and recommendation power to have any affect it is recommended that the SDC and HREOC have the appropriate power and resources to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality.

#### **Powers seeking to address systemic discrimination and monitor progress towards equality**

50. Arguably, several of HREOC’s functions discussed above aim to address systemic discrimination and monitor progress towards equality. The effectiveness of such functions in achieving this purpose is discussed below.

#### ***Powers with respect to initiating inquiries into systemic discrimination and the monitoring of progress towards equality***

51. Section 48(1)(g) of the *SDA* provides HREOC with the power to initiate inquiries into or report to the Minister with respect to “laws that should be made by the Parliament” or Commonwealth Government action required on matters relating to discrimination on the grounds of “sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment”. Arguably, this includes initiating inquiries into systemic discrimination. However, as HREOC can currently only make recommendations, which are not enforceable, the effectiveness of any such inquiry in promoting equality is necessarily severely limited.

52. Sections 31 and 35 of *HREOCA* may provide HREOC with capacity to report to the Minister on discriminatory practices in the limited sphere of employment, where a settlement has not been possible. Again, the effectiveness of such reporting in stopping or preventing such discriminatory practices is questionable.

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<sup>12</sup> Section 29(2)(b) *HREOCA*

<sup>13</sup> Section 29(2)(c)(i) *HREOCA*

<sup>14</sup> Section 29(2)(c)(ii) *HREOCA*

<sup>15</sup> Section 29(2)(d) *HREOCA*

<sup>16</sup> Section 29(2)(e) *HREOCA*

53. To make such inquiries useful in promoting gender equality it is recommended that the SDC/HREOC have statutory responsibility to independently monitor and report to Parliament on gender equality, and that it be mandatory that parliament provide a public response to address the concerns raised by the report within six months of it being tabled.

#### ***HREOC as intervener***

54. HREOC and the SDC have only limited opportunities to raise the issue of systemic discrimination in court proceedings as an intervener. While broader than the *amicus* role, in that it extends beyond the Federal Court to any court or tribunal matter involving discrimination or human rights, the intervener role is still limited. First, HREOC needs to be aware of “appropriate matters for potential intervention”. This, in itself, is a resource issue. As Fougere acknowledges, HREOC is largely dependent upon the parties or their representatives to bring such matters to their attention.<sup>17</sup> However, the effectiveness of this strategy is reliant upon parties and their representatives knowing HREOC can play such a role. This is not always the case.

55. Secondly, HREOC can only intervene in proceedings that involve issues of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment “with the leave of the court”.<sup>18</sup> Additionally, if the court does grant the Commission leave to appear, this can be “subject to any conditions imposed by the court”.<sup>19</sup>

56. HREOC’s *Guidelines for the Exercise of the Intervention Function* provide that the “intervention issues”, which include sex discrimination as outlined in the *SDA*, “should be significant to the proceedings”.<sup>20</sup> Additionally, the Commission should put the intervention issues before the court “only if these issues are not proposed to be put before the court by the parties to the proceedings or not adequately or fully argued”.<sup>21</sup> Given HREOC’s and, in particular, the SDC’s extensive knowledge and expertise in these areas, their intervention in any proceeding serves a greater purpose than just assisting in a particular matter. Their intervention serves to raise and address these issues of discrimination in the public domain and where appropriate highlight the systemic nature of such discrimination. Thus HREOC’s or SDC’s intervention in court proceedings also serves an important community educative function.

57. The power to intervene in sex discrimination litigation has been exercised only sparingly. As at 6 June 2008, of the 54 cases where HREOC had sought leave to appear as intervener, approximately 4 were on the grounds of sex, marital status, pregnancy or family responsibilities or sexual harassment discrimination.<sup>22</sup> With the object of using the intervention function to raise and address issues of systemic discrimination, and the resources to take on more matters, the expansion of the intervenor function could prove a very useful tool in promoting gender equality.

#### ***HREOC as amicus curiae***

58. The SDC is advised of all applications made to the Federal Court and Federal Magistrates Court involving complaints under the *SDA*. However, as Redman points out,<sup>23</sup> there are practical problems that arise for the SDC and HREOC to act as *amicus*. Among these are the difficulty to ascertain all the issues that might be raised, especially as some only become apparent at late stages in proceedings. There is also

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<sup>17</sup> Christine Fougere, “The Intervention and Amicus Curiae Functions of the Human Rights and Equal Opportunity Commission and its Commissioners”, *National Conference of Community Legal Centres*, 2-5 September 2001, WA, accessed on 10 July 2008 at:

[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/amicus\\_discussion.html#for](http://www.humanrights.gov.au/legal/submissions_court/amicus/amicus_discussion.html#for)

<sup>18</sup> Section 48(1)(gb) *SECTION*

<sup>19</sup> Section 48(1)(gb) *SECTION*

<sup>20</sup> HREOC, *Guidelines on Applications for Interventions in Court Proceedings*, at clause 4, accessed on 11 July 2008 at: [http://www.humanrights.gov.au/legal/submissions\\_court/intervention/interventions\\_in\\_court\\_proc.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/interventions_in_court_proc.html)

<sup>21</sup> HREOC *Guidelines*, Clause 5, note ??

<sup>22</sup> HREOC, “Summary of Interventions the Commission Sought Leave to Intervene,” accessed on 11 July 2008 at: [http://www.hreoc.gov.au/legal/submissions\\_court/guidelines/table\\_interventions.pdf](http://www.hreoc.gov.au/legal/submissions_court/guidelines/table_interventions.pdf)

<sup>23</sup> Redman, R. *Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner*, UNSW Law Journal, Vol,27(3), pp.852-853.



the difficulty that many strong cases settle, obviating the need for an *amicus* role, and removing the opportunity to deal with the systemic issues raised by these cases.

59. However, where cases have involved critical systemic issues involving sex discrimination in the workplace, HREOC has not been involved as *amicus*.<sup>24</sup> It would be advantageous for promoting equality if the SDC and HREOC were resourced to undertake more matters as *amicus curiae* where broad issues of systemic discrimination are raised.

60. The *SDA* and *HREOCA* should be amended to give the SDC standing to seek leave to appear as *amicus* when proceedings raise issues of systemic discrimination. The amendments should specify that when the SDC seeks leave on that ground and leave is granted, the terms of leave should give the SDC the ability to tender evidence. The SDC is the best-placed body in Australia to collect credible evidence about systemic discrimination and to provide this information to the Court. It should be adequately resourced to execute this function. By contrast, proof of individual claims is not always assisted by evidence of systemic practices (and would set the evidentiary burden too high if it was required) and the collection of such information is not often within the means of individual claimants.

### ***Examine enactments and proposed enactments***

61. HREOC also has the power to “examine enactments and ... proposed enactments” to determine whether they are “inconsistent with or contrary to [the *SDA*]” and report the outcome of the examination to the Minister.<sup>25</sup> Such a power could prove informative with respect to monitoring the progress of equality as reflected in legislation. However, as stated above, the law is only as effective as its mechanisms of enforceability. Additionally, section 29(1) of *HREOCA* provides that the report to the Minister contain recommendations for amendment such that “the enactment is not, or the proposed enactment would not be, inconsistent with or contrary to any human right”. Again HREOC’s inability to enforce any recommendations it makes in such a report is problematic.

62. While noting the *SDA* is limited to matters of sex discrimination, it would clearly be more consistent, efficient and effective to consider the wider human rights implications of all existing and proposed enactments. Federal Attorney-General Robert McClelland recently indicated his commitment to ensuring “human rights consultation takes place at the policy development stage” and that “drafting of any Commonwealth legislation consistently takes account of implications for our international human rights obligations” and that “it not be just a formality or afterthought”.<sup>26</sup> Such considerations clearly work towards eliminating discrimination and promoting equality. Such a process would be one potential benefit of a Charter of Rights. This will be discussed further below.

### ***Prepare and publish guidelines***

63. Section 48(1)(ga) of the *SDA* provides that HREOC can prepare and publish guidelines “for the avoidance of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy and discrimination involving sexual harassment”. Such guidelines may be designed to “to promote an understanding and acceptance of, and compliance with, [the *SDA*]”.<sup>27</sup> However, by their very nature, guidelines do not carry enough force to adequately address discrimination. They are not necessarily widely known, HREOC does not have the power to enforce them and there is no requirement of compliance.

64. It should also be noted that the *SDA* only empowers HREOC to prepare guidelines “for the avoidance” of sex discrimination.<sup>28</sup> Consideration should also be given to the drafting of positive duties and the enforcement of such positive duties which promote gender equality.

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<sup>24</sup> *Ibid.*

<sup>25</sup> Section 48(1)(f) *SECTION*

<sup>26</sup> Robert McClelland, “Australia and International Human Rights: Coming in from the Cold” HREOC, 23 May 2008 accessed on 14 July 2008 at: <http://www.hreoc.gov.au/legal/seminars/index.html>

<sup>27</sup> Section 48(1)(d) *SECTION .1984 (Cth)*

<sup>28</sup> Section 48(1)(ga) *SECTION*

65. If the legislation is to do more than provide individual redress for some women who have been able to bring a complaint, then the public interest element of enforcing equality principles must be recognised and supported.<sup>29</sup> This requires providing the SDC and HREOC with sufficient resources and power to carry out the functions discussed above.

#### **Recommendations**

7. Legal assistance and representation should be properly provided for individual complainants through additional legal aid funding and the provision of specialist services.
8. The SDC/HREOC should have the power to commence proceedings for enforcement of legal responsibilities under the Act without requiring an individual complainant to initiate the process.
9. The SDC/HREOC should have the appropriate power and resources to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality, and it should be mandatory for Parliament to provide a public response to address the concerns raised by such inquiries within six months of the report being tabled.
10. The SDC/HREOC should have statutory responsibility to independently monitor and report to parliament on gender equality, and it should be mandatory for Parliament to provide a public response to address the concerns raised by the report within six months of it being tabled.
11. The SDC/HREOC should be properly resourced for greater use of both the intervenor and the *amicus curiae* functions.
12. The *SDA* and *HREOCA* should be amended to give the SDC standing to seek leave to appear as amicus when proceedings raise issues of systemic discrimination. The amendments should specify that when the SDC seeks leave on that ground and leave is granted, the terms of leave should give the SDC the ability to tender evidence.
13. The SDC/HREOC should have the resources, capacity and authority to report publicly on the inconsistency of any enactment or proposed enactment with the *SDA*, and Parliament should be required to publicly respond within six months of receiving an inconsistent report.

<sup>29</sup>Redman, R. *Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner*, UNSW Law Journal, Vol.27(3) 2004, pp.849-857, p.855.

## Grounds under the *SDA* (TOR I, K, L)

### Current grounds – a general overview

66. The coverage of the *SDA* is limited to discrimination on the basis of sex, marital status, pregnancy or potential pregnancy, family responsibilities or discrimination involving sexual harassment in limited areas of public life. As outlined above, prescribing only some forms of sex discrimination as “unlawful” is arbitrary and contrary to articles 1 and 2 of CEDAW.

67. The following gaps cause particular concern.

### Family responsibilities

68. As outlined above, the definition of family responsibilities is presently too narrow. Under section 3 of the *SDA*, one of the objects of the Act is:

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities;

69. Section 4A of the *SDA* defines family responsibilities as:

(1) In this Act, *family responsibilities*, in relation to an employee, means responsibilities of the employee to care for or support:

- (a) a dependent child of the employee; or
- (b) any other immediate family member who is in need of care and support.

(2) In this section:

*“child”* includes an adopted child, a step-child or an ex-nuptial child.

*“dependent child”* means a child who is wholly or substantially dependent on the employee.

*“immediate family member”* includes:

- (a) a spouse of the employee; and
- (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee.

*“spouse”* includes a former spouse, a de facto spouse and a former de facto spouse.

70. Section 7A of the *SDA* states that for the purposes of the *SDA*, an employer discriminates against an employee on the ground of the employee’s family responsibilities if:

- (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
- (b) the less favourable treatment is by reason of:
  - (i) the family responsibilities of the employee; or
  - (ii) a characteristic that appertains generally to persons with family responsibilities; or
  - (iii) a characteristic that is generally imputed to persons with family responsibilities.

71. In this way, only direct discrimination on the basis of family responsibilities is covered and only within a very limited area of employment, namely dismissal.<sup>30</sup> Notably, it is not considered unlawful to discriminate on the grounds of family responsibilities in a number of other areas of public life, such as education, goods and services. Furthermore, the concept of family responsibilities is narrowly conceived, and while section 4A of the *SDA* provides that an “immediate family member” includes the “spouse” or “defacto spouse” of the employee, these terms are defined such as to exclude recognition of same sex partners.

72. As these limitations are clearly contrary to objects of CEDAW, and as it is recommended here that the *SDA* be amended to give effect to the objectives of CEDAW, in relation to discrimination on the grounds of family responsibility it is recommended that discrimination on the ground of family and carer responsibilities be proscribed in all areas of employment. Further, that a broader definition of family

<sup>30</sup> Section 14(3A) *SECTION*

members be inserted to include, among others, same sex partners and family members beyond the “immediate” family.

73. To better give effect to objects of CEDAW and ensure that women with carer responsibilities can fulfil them, women need a right to request work arrangements that allow carer responsibilities to be met, and employers should have an obligation to try all reasonable ways of accommodating such requests.

74. Both men and women should be protected against discrimination on the basis of carer responsibilities.

75. The legislation recently passed in Victoria, *Equal Opportunity Amendment (Family Responsibilities) Act 2008* is an example of how this might be accomplished:

S13A An employer must not, in relation to the work arrangements of a person offered employment, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.

**Example**

An employer may be able to accommodate a person's responsibilities as a parent or carer by offering work on the basis that the person could work additional daily hours to provide for a shorter working week or occasionally work from home

76. Similar provisions for principals and firms to do the same are found at sections 15A and 31A.

**Sexual harassment**

77. Sexual harassment is dealt with in sections 28A-28L of the *SDA*. Sexual harassment has been unlawful in the Commonwealth of Australia since 1984 and yet as then Sex Discriminator Commissioner, Pru Goward noted in 2002 it is a “perennial issue, deeply embedded in many Australian workplace cultures”.<sup>31</sup>

78. In order to learn more about the general incidence and nature of sexual harassment in the Australian community, in 2003, HREOC commissioned a national telephone survey with respect to this issue. The telephone survey of 1006 randomly selected interviewees found that 41% of all women and 14% of all men had experienced sexual harassment at some time in public life,<sup>32</sup> with 28% of women and 7% of men aged between 18-64 years having been sexually harassed at work.<sup>33</sup> With respect to the nature of sexual harassment, “over half of the sexual harassment experienced in the workplace involved physical forms of sexually harassing conduct, including unwelcome touching, hugging, cornering, kissing or unnecessary familiarity”.<sup>34</sup> Significantly, it was found that “68% of the targets of workplace sexual harassment do not formally complain, often because they believed there would be no management support”.<sup>35</sup>

79. In July 2008, Sex Discrimination Commissioner, Elizabeth Broderick, identified sexual harassment as one of five key areas that she will focus on during her time as Commissioner.<sup>36</sup> Following her National Listening Tour she reported that she heard stories of sexual harassment in “every state, industry and workplace that she visited”.<sup>37</sup> The Commissioner noted: “Nearly one in five sex discrimination complaints received by HREOC in 2006-2007 related to sexual harassment, the overwhelming majority of incidents occurring in the workplace.”<sup>38</sup> The Commissioner also commented upon the prevailing view that “when people did complain about sexual harassment, they were further victimised”.<sup>39</sup>

<sup>31</sup> HREOC, *20 Years On: The Challenges Continue. Sexual Harassment in the Australian Workplace*, HREOC, Sydney, 2004 at 4.

<sup>32</sup> *20 Years On* at 5.

<sup>33</sup> *20 Years On* at 6.

<sup>34</sup> *20 Years On* at 6.

<sup>35</sup> *20 Years On* at 5.

<sup>36</sup> HREOC, *2008 Gender equality: What matters to Australian women and men – The Listening Tour Community Report*, HREOC, Sydney, 2008, at 20.

<sup>37</sup> *Ibid*, at 14.

<sup>38</sup> Elizabeth Broderick, “Let’s not take another quarter century to end sexual harassment”, *The Advertiser*, 11 January 2008 at 18, accessed on 17 July 2008 at:

[http://www.hreoc.gov.au/about/media/media\\_releases/op\\_ed/20080111\\_harrass.html](http://www.hreoc.gov.au/about/media/media_releases/op_ed/20080111_harrass.html)

<sup>39</sup> *Ibid*.

80. Community legal centres report that the vast majority of complaints or queries about sexual harassment arise in the context of employment. Further, it seems common that sexual harassment in the workplace leads to the woman who complains of harassment leaving the workplace. At Kingsford Legal Centre, none of the clients represented or advised on an ongoing basis have continued in their workplace after making a complaint of sexual harassment. Thus the loss suffered by the complainants includes the trauma and distress of the harassment, a sense of betrayal, the loss of a job or career, the loss of opportunity to progress in their chosen workplace, and of course the loss of income and the stress and the flow on problems caused by that.

### **Case study 1**

Ms M complained of sexual harassment at work. The perpetrator was her direct manager, who also managed the workplace as a whole. The harassment was severe enough to lead to criminal charges being laid. The manager and the company each retained solicitors, and adopted a very aggressive stance, denying any wrong-doing. Ms M was so severely traumatised by her treatment at work, and the subsequent reaction of her employer, that she developed a psychiatric injury. She had no history of mental illness prior to this. She took a period of compensated leave, and never returned to the workplace. Ms M stated that she could never go back, despite enjoying the work.

81. The process of dealing with a sexual harassment claim is identical to any other discrimination claim under the *SDA*. This means that women are put in the position of having to deal with the perpetrator during a conciliation conference, and potentially having to face the perpetrator in an adversarial court process. Both the conciliation process and the hearing, far from giving effect to beneficial legislation, can have the effect of exacerbating the trauma already experienced by the complainant.

82. This exacerbation, coupled with the often very small awards of damages, the risk of costs, and the absence of a capacity to “make sure this doesn’t happen to anybody else”, act as barriers to some women pursuing sexual harassment claims.

83. It is notable that comparatively very few complaints of sexual harassment in areas of public life outside employment are dealt with. This reflects both the centrality of work in women’s lives, and potentially, the willingness to put up with or dismiss sexual harassment experienced outside work as something that is too difficult to challenge or change.

84. To assist women through the process of making a complaint of sexual harassment it is recommended that complainants be offered a conciliation conference conducted remotely or by way of “shuttle conference”. Further, in the event of a hearing, respondents should be prevented from directly cross-examining the complainant. Rather, cross-examination should be done through a legal representative or, if the respondent is in person, questions should be directed through the magistrate or judge. These procedures would assist to protect women against a prevalent form of violence.

### **Intersectionality**

85. Intersectional discrimination refers to the very unique experience of discrimination where the victim’s identity encompasses more than one category of potential discrimination such as race, ethnicity, gender, disability, age, and sexuality. These multiple identities interact and intersect on various levels.

86. For example, the experience of discrimination of an able bodied 30 year old Anglo-Saxon woman at work is going to be very different to the experience of discrimination of an elderly Aboriginal woman at work, or a Vietnamese woman, or a hearing impaired woman.

87. An analogy that has often been used to explain this intersectionality is that of a cake. Each of its constituent elements – flour, sugar, eggs, milk, cocoa and so on – are fundamentally different from the eventual combined product of a chocolate cake. Further, the individual ingredients can no longer be separated out and identified. The cake is not merely the accumulation of various ingredients. It is an entirely new entity. Similarly the experience of discrimination where the victim is an African Muslim woman is fundamentally different from that of an Anglo-Saxon woman or an African man. The discrimination experienced is not merely sex discrimination plus race discrimination plus religious

discrimination. It is a new and unique experience of discrimination based on the intersection of her multiple identities.

88. The issue of intersectionality has been raised at the United Nations. Article 13 of the *Beijing Declaration* explicitly commits governments to addressing the issue of intersectionality by:

Intensify[ing] efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.<sup>40</sup>

89. Domestically, the recently released HREOC *Gender Equality: What Matters to Australian Women and Men – The Listening Tour Community Report* identifies the issue of intersectionality at play within Australian society in its identification of the “complex interplay of discrimination” based on, for example, race and gender, migrant or refugee status and gender, and gender and disability.<sup>41</sup>

90. While there are isolated cases of the determination of multiple forms of discrimination in the one matter, the issue of intersectional discrimination has not been addressed adequately. For example in *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* Sir Ronald Wilson found that the complainant had experienced unlawful discrimination on the basis of sex (both sex discrimination and sexual harassment) as well as race.<sup>42</sup> While, the award of damages reflected the experience of multiple forms of discrimination<sup>43</sup> the complainant was awarded an equal amount on the grounds of unlawful discrimination on the basis of sex and race. This does not seem to reflect the fact the complainant experienced different forms of discrimination under the umbrella of sex discrimination.

91. However, some grounds of discrimination, such as sexual orientation and class, are not covered by federal legislation. Even where discrimination is unlawful, it may be difficult to prove. Consequently, intersectional discrimination may continue not to be adequately recognised.

92. Significantly, the recently released paper about the UK Equality Bill draws attention to the need to more adequately consider ways that discrimination claims can be brought on combined multiple grounds.<sup>44</sup> A commitment to explore this area further has been made and attention should be given to further developments in this area.

### **Sexual Orientation**

93. Discrimination against women on the basis of their sexual orientation is not covered under the *SDA*. We recommend that consideration be given to amending the *SDA* to add “sexual orientation” to the list of prohibited grounds of sex, marital status, pregnancy or potential pregnancy, and carers’ responsibilities. This may be an interim measure.

94. To provide long-term protection from discrimination on the grounds of sexual orientation, this ground should be included in a broader overarching Equality Act. The potential for such legislation will be addressed below in relation to TOR D and F.

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<sup>40</sup> United Nations, *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995*, A/CONF.177/20/Rev.1 Chap. I, Resolution 1, Annex I, accessed on 24 July 2008 at: <http://www.un.org/womenwatch/confer/beijing/reports/>

<sup>41</sup> HREOC, *Gender Equality: What Matters to Australian Women and Men – The Listening Tour Community Report*, HREOC, Sydney, July 2008 at 16-17.

<sup>42</sup> *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 17 (20 July 1994) accessed on 23 July 2008 at: <http://www.austlii.edu.au/au/cases/cth/HREOCA/1994/17.html>

<sup>43</sup> The complainant was awarded damages of \$11,000 for unlawful sex discrimination and \$11,000 for unlawful race discrimination.

<sup>44</sup> Government Equalities Office, *Framework for a Fairer Future – The Equality Bill*, June 2008 at 31 accessed on 31 July 2008 at: <http://www.equalities.gov.uk/publications/Framework%20FAIRER%20FUTURE.pdf>

## Transgender

95. At section 4 of the *SDA* a woman is defined as “a member of the female sex irrespective of age”. It is not clear from this definition whether transgender women, or women of indeterminate sex (intersex) are included in the protections offered by the *SDA*.

96. In taking a human rights approach and offering protection from all forms of discrimination against women it is appropriate that the definition of “woman” be amended to include transgender and intersex women. As an addition to the current definition of “woman” the definition provided in section 4 of the *Equal Opportunity Act 1995* (Vic) might prove a useful template:

- (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)—
  - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
  - (ii) by living, or seeking to live, as a member of the other sex; or
- (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)—
  - (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
  - (ii) by living, or seeking to live, as a member of that sex;

97. In addition, it is appropriate to amend the *SDA* to include transgender and intersex status or identity as a ground of unlawful discrimination.

98. To provide long-term protection from discrimination on the grounds of transgender or intersex status, this ground should be included in a broader overarching Equality Act.

### Recommendations

14. A broader definition of family members should be inserted to include, among others, same sex partners and family members beyond the “immediate” family.
15. Discrimination on the ground of family and carer responsibilities should be proscribed in all areas of employment, and other areas of public life covered by the *SDA*.
16. The *SDA* should be amended to provide employees with the right to request work arrangements that accommodate carer responsibilities, and require employers to explore all reasonable ways of meeting such requests.
17. Sexual harassment complainants should be offered remote or “shuttle” conciliation conferences, and protection from direct cross-examination by respondents at hearing.
18. The *SDA*, the *RDA*, the *DDA* and *ADA* should be consistently amended to include a separate ground of discrimination where a complaint involves a combination of grounds of discrimination to take account of the experience intersectional discrimination, and HREOC, the Federal magistrates Court and the Federal Court should be directed to consider whether the discrimination complained of involves an intersection of more than one ground of discrimination.
19. Consideration should be given to amending the *SDA* to include discrimination on the basis of sexual orientation as an interim measure, and this ground should be included in a broader overarching Equality Act in the longer term.
20. Discrimination on the basis on transgender and intersex status or identity should be included as a ground of unlawful discrimination under the *SDA* and the definition of “woman” should be amended to included transgender and intersex women.

## Remedies (TOR H)

99. This discussion of remedies should be read together with those outlined above under TOR C: “Powers of the Sex Discrimination Commissioner and HREOC”.

100. The current legislative model deals primarily with formal equality, and relies on individual complainants to bring the action and enforce compliance with the legislation. As Smith very clearly and usefully explains,<sup>45</sup> it is entirely internally consistent that the remedies available under the current legislation are aimed at individual redress, rather than systemic change. However, even these available individual remedies are insufficient.

### Individual redress

#### *Low awards*

101. The damages awarded in sex discrimination cases are extraordinarily low. Specific information about the awards can be obtained from *Federal Discrimination Law*.<sup>46</sup> While awards for sexual harassment are slightly higher, they still fail to take into account what may actually have been lost by the complainant who brings the case. That is, she may have lost her career, her opportunities for training and advancement, and she may be ostracised in a small community.

102. Chris Ronalds SC points out that:

The damages in the discrimination arena under this head (hurt, humiliation and distress) are relatively modest and amounts between \$8000-\$20000 are common. It appears that the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment. On some occasions, there was not sufficient or any evidence to support a claim for such damages.<sup>47</sup>

103. In *Shiels v James* Raphael FM suggested, in the context of a sexual harassment matter, that the authorities indicated a range for damages for hurt and humiliation of \$7,500-\$20,000.<sup>48</sup> However, Branson J in *Commonwealth v Evans* commented, without expressing a concluded view, that this range seemed “higher than the authorities fairly support”.<sup>49</sup>

104. Given that individual remedies are all that are provided under the current legislation, and that such a remedy is frequently limited to an award of damages, such low awards are manifestly inadequate to compensate for the loss suffered. For some women who experience sex discrimination and sexual harassment, the inadequacy of the remedy makes it not worth bringing a formal complaint, or seeing it through to its conclusion at hearing, particularly given the financial and emotional cost of bring a successful action, much less the risk of costs for an unsuccessful one. Thus the lack of an appropriate remedy discourages complaints, or at the very least acts as a disincentive for women to use the *SDA* to address discrimination.

105. Further, HREOC’s most recent report in response to the SDC’s Listening Tour indicates that “according to participants, those who do complain come up against limitations and financial barriers in

<sup>45</sup> Belinda Smith, “It’s About Time – For a New Regulatory Approach to Equality,” *Federal Law Review* (2008) forthcoming at 15-20; Belinda Smith, “Not the Bath and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict”, *Sydney Law Review* 28(4) 2006 at 694, 712-714;

<sup>46</sup> HREOC, *Federal Discrimination Law Online* accessed on 5 August 2008 at <http://www.hreoc.gov.au/legal/FDL/chap7.html#723> and <http://www.hreoc.gov.au/legal/FDL/chap7.html#724>.

<sup>47</sup> Ronalds, C. *Discrimination Law and Practice* (3rd ed, 2008), at 223.

<sup>48</sup> [2000] FMCA 2, [79].

<sup>49</sup> [2004] FCA 654.



the process”<sup>50</sup> and that there is a very real possibility this can impact upon the “accepting of lower outcomes in conciliation”.<sup>51</sup>

106. It is submitted then that provision be made for damages to be assessed with a view to equality with a common law torts claim in terms of quantum.

### ***Aggravated and exemplary damages***

107. The use of exemplary and aggravated damages, while providing a remedy for an individual complaint, can also influence systemic change, particularly in the case of repeat discriminators. However, it is unclear whether aggravated or exemplary damages are available under the *SDA*.

108. Section 46PO(4)(d) of *HREOCA* states:

(4) If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

109. In *McGlade v Lightfoot*, Carr J indicates that his powers to grant damages are not limited by s46PO(4) of the *HREOCA* as “the list of specified orders in s 46PO(4) is not exhaustive - see the use of the word ‘including’”.<sup>52</sup> This, combined with the Court’s power to make “such orders ... as it thinks fit”<sup>53</sup> may mean that mean that exemplary damages can be awarded.<sup>54</sup>

110. In another case, while the complainant made a claim for aggravated damages in *Font v Paspaley Pearls & Ors*, Raphael FM held these were more aptly described as “exemplary damages” and awarded \$7,500 in exemplary damages.<sup>55</sup>

111. However, in *Hughes (formerly De Jager) v Car Buyers Pty Ltd & Ors*<sup>56</sup> the Magistrate held that:

It is clear from s.46PO(4) that the respondent can only be ordered to pay to an applicant “damages by way of compensation for any loss or damage suffered because of the conduct of the respondent”. It follows, in my opinion, that although the court has power to award aggravated damages, it does not have power to award exemplary damages.

...

I respectfully disagree with Raphael FM's conclusion in *Font v Paspaley Pearls* (2002) FMCA 142 that such a power exists.

112. Aggravated damages have been awarded where the defendant behaved "high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination"<sup>57</sup>, and an element of

<sup>50</sup> HREOC, *Gender Equality: What Matters to Australian Women and Men. The Listening Tour Community Report*, HREOC, Sydney, July 2008 at 16 accessed on 24 July 2008 at:

[http://www.humanrights.gov.au/sex\\_discrimination/listeningtour/ListeningTourCommunityReport.pdf](http://www.humanrights.gov.au/sex_discrimination/listeningtour/ListeningTourCommunityReport.pdf)

<sup>51</sup> Five Years On: An Update On The Complaint Handling Work Of The Human Rights And Equal Opportunity Commission accessed at: [http://www.hreoc.gov.au/complaints\\_information/publications/five\\_years\\_on.html#toc2](http://www.hreoc.gov.au/complaints_information/publications/five_years_on.html#toc2)  
52 *McGlade v Lighthouse* [2002] FCA 1457 (26 November 2002) at 80 accessed on 22 July 2008 at:

<http://www.austlii.edu.au/au/cases/cth/FCA/2002/1457.html>

<sup>53</sup> Section 46PO(4) *HREOCA*

<sup>54</sup> Jonathon Hunyor, Human Rights: Remedies for Unlawful Discrimination”, *Law Society Journal*, Sydney, August 2005 accessed on 22 July 2008 at:

[http://www.hreoc.gov.au/legal/publications/law\\_society\\_journals/2005/remedies.html#f9](http://www.hreoc.gov.au/legal/publications/law_society_journals/2005/remedies.html#f9)

<sup>55</sup> *Font v Paspaley Pearls & Ors* [2002] FMCA 142 (23 July 2002), Para 165-167 accessed on 24 July 2008 at:

<http://www.austlii.edu.au/au/cases/cth/FMCA/2002/142.html>

<sup>56</sup> *Hughes (formerly De Jager) v Car Buyers Pty Ltd & Ors* [2004] FMCA 526 (31 August 2004) per Walters FM at paragraph 68

<sup>57</sup> per Lockhart J in *Hall v Sheiban* (1989) 20 FCR 217, 239 citing May LJ in *Alexander v Home Office* [1988] 2 All ER 118.

aggravation may also exist where the relationship is one of employer and employee.<sup>58</sup> Aggravated damages have also been awarded on basis of manner in which respondent conducted proceedings.<sup>59</sup>

113. Legislative amendment to provide clarity about the availability of both aggravated and exemplary damages is required. It is recommended that both heads of damages be available in determining awards for complainants.

### **Conciliation**

114. While conciliation conferences are a great assistance to many complainants and respondents to reach a mutually satisfactory outcome, such a conference is not always appropriate. These circumstances include:

- Overly lengthy conciliation processes. These increase the burden on an already stressed complainant.
- In instances of sexual harassment, it is inappropriate and potentially damaging to have the complainant sit in the same room as the respondent to negotiate a settlement.
- Conciliation allows parties to settle on a confidential basis. This may mean that repeat respondents are not identified publicly, but simply continue with their discriminatory practices

115. Therefore, alternatives to the current conciliation processes need to be available when necessary. These may include:

- expedited conciliation processes, such as occur in the State and Federal Industrial Relations Commissions;
- the capacity to go directly to hearing where the subject matter and power inequity between the parties make conciliation inappropriate;
- monitoring of respondents, including those who reach settlement at conciliation, to permit the SDC/HEROC to publicly investigate, report on and potentially prosecute parties who repeatedly breach the *SDA*.

### **Systemic remedies (see also TORs A, C & M)**

116. The Sex Discrimination Commissioner has recently recognised the concerns around the lack of systemic remedies available under the *SDA*: “While the *Sex Discrimination Act 1984* (Cth) provides a legal avenue for redress, some participants expressed concern about the ability of individual complaints alone to deliver broader cultural change.”<sup>60</sup>

117. Individual remedies under the *SDA* are unable to fulfil the objectives of CEDAW, namely, to eliminate all forms of discrimination against women. To achieve the objects of CEDAW a legislative regime allowing systemic remedies is essential.

118. In order to sensibly have systemic remedies, and maintain the internal coherence and consistency of the Act, there must be legislative amendment to allow the articulation of specific positive duties; a body other than an individual complainant to initiate proceedings under the Act; a process that takes into account parties other than an individual complainant and respondent; and remedies that address a systemic problem of discrimination. In other words, systemic remedies rely on a statutory authority such as HREOC which should be charged with the responsibility of enquiring into, regulating, monitoring and enforcing legislative responsibilities to prevent discrimination and promote gender equality.

<sup>58</sup> *Hall v Sheiban* (1989) 20 FCR 217, 240.

<sup>59</sup> *Elliott v Nanda* ('Nanda') (2001) 111 FCR 240.

<sup>60</sup> HREOC, *Gender Equality: What Matters to Australian Women and Men. The Listening Tour Community Report*, HREOC, Sydney, July 2008 at 16 accessed on 24 July 2008 at: [http://www.humanrights.gov.au/sex\\_discrimination/listeningtour/ListeningTourCommunityReport.pdf](http://www.humanrights.gov.au/sex_discrimination/listeningtour/ListeningTourCommunityReport.pdf)

119. In order to achieve this it may be that an authority separate to HREOC is required to carry out conciliation conferences, once the complaint is accepted and very early stage investigation is undertaken. This would allow conciliations to be carried out by an impartial body, and while enabling HREOC to monitor, intervene, or prosecute for breach as required. This practical question is discussed further below under TOR M.

**Recommendations**

21. Quantum of damages in discrimination matters should be increased.
22. Both exemplary and aggravated damages should be made available in determining awards for complainants.
23. There should be provision in the SDA for an expedited conciliation processes, such as occurs in the State and Federal Industrial Relations Commissions.
24. There should be the capacity to go directly to hearing where the subject matter and/or the power inequity between the parties make conciliation inappropriate.
25. HREOC should monitor respondents, including those who reach settlement at conciliation, to permit the SDC/HREOC to investigate, report on and potentially prosecute parties who repeatedly breach the SDC.
26. Remedies to systemic discrimination should be pursued by HREOC which should be charged with the responsibility of enquiring into, regulating, monitoring and enforcing legislative responsibilities to prevent discrimination and promote gender equality

## Procedural and Technical Issues (TOR M)

### Costs barrier

120. Community legal centre solicitors have reported that clients who have the option of making a complaint to a State or Territory anti-discrimination body or to HREOC will take the potential costs risk into account in making that decision. Many clients will choose to use the State/Territory body after being advised that this is a “no costs jurisdiction” should the matter go to hearing. For those clients who have the capacity to earn an income, or any assets to lose, the risk of an adverse costs order in the Federal Court or Federal Magistrates Court if they lose is a risk they cannot afford to take.

### Case Study 2

After being dismissed, Ms D made complaints of disability and sex discrimination in the workplace to HREOC. The employer refused to participate in the conciliation conference, and refused to negotiate a settlement outside the formal process. On advice from HREOC Ms D then sought advice from a community legal centre. A pro bono barrister’s opinion was obtained which indicated that Ms D had reasonable prospects of success at hearing. Ms D was advised of this, together with advice of the likely costs order should she be unsuccessful at hearing. Ms D and her husband had three children. They had no significant savings, but they jointly owned a home in which they had a small amount of equity.

Ms D decided that the risk of losing her home to pay for an adverse costs order was too great to take. She chose to walk away, rather than seek a remedy in the Federal Magistrates Court.

121. HREOC has argued that a costs jurisdiction would assist parties in obtaining legal representation but that solicitors should be limited to charging their clients party/party costs.<sup>61</sup> HREOC has proposed several ways that complainants in unlawful discrimination matters could protect themselves from adverse costs orders or unnecessary costs,<sup>62</sup> such as an application to cap costs pursuant to Order 62A.1 *Federal Court Rules*, which states:

The Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis.

However, this mechanism has not been successfully used. *Federal Discrimination Law* states: “There are no decided cases in relation to O 62A in the context of the unlawful discrimination jurisdiction”.<sup>63</sup>

122. Clearly a costs capping mechanism can be used successfully, as has been demonstrated in migration matters where costs have been routinely capped. Such a process could easily be applied to unlawful discrimination matters.

123. While the concern about the lack of availability of legal representation is a valid and real one, it is our submission that retaining discrimination cases in a costs jurisdiction is neither the only, nor the by any means the best solution. It is worth noting that unlawful dismissal matters are dealt with in both the Federal Court and the Federal Magistrates Court, and that this is a “no costs” jurisdiction, where contingency agreements are often relied upon.

<sup>61</sup> As expressed in its submission to the Senate Legal Panel Constitutional Committee, see *Report on Human Rights Legislation Amendment Bill 1997*, June 1997, at p.61.

Cited in Susan Roberts and Ronni Redman, “New role for HREOC and Federal Court in human rights complaints”, *Law Society Journal* (2000) 38 (7) at 70 accessed on 23 July 2008 at:

<http://www.lawsociety.com.au/JournalSearch/JournalArticle.aspx?ArticleId=8103#fn4>

<sup>62</sup> HREOC, *Supplementary Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Legislation Committee on the Human Rights Legislation Amendment Bill 1996 (Cth)* at paragraph 3.5, accessed on 24 July 2008 at: [http://www.hreoc.gov.au/legal/submissions/hrla96\\_supp.html](http://www.hreoc.gov.au/legal/submissions/hrla96_supp.html)

<sup>63</sup> HREOC, *Federal Discrimination Law Online*, June 2008, accessed on 24 July 2008 at: [http://www.hreoc.gov.au/legal/FDL/chap8.html#8\\_1\\_2b](http://www.hreoc.gov.au/legal/FDL/chap8.html#8_1_2b)

124. Family law matters are also dealt with in the Federal Magistrates Court, and this is a “no costs” jurisdiction. Many of these would involve “in person” litigants. Some would also be legally aided. There certainly seems to be no shortage of lawyers prepared to take on unlawful dismissal and family law matters.

125. Therefore, possible solutions to barrier of costs include:

- increasing damages awarded for discrimination matters to a comparable level to other tort claims, therefore making contingency fee arrangements viable;
- increasing the availability of legal aid for representation in unlawful discrimination matters;
- providing for the routine capping of costs in the Federal Court and the Federal Magistrates Court.

126. Lastly, it is submitted that it is better to keep the Court as the final arbiter, rather than remove the jurisdiction to a Tribunal. It is important that the jurisprudence is developed in a Court of record, and that the seriousness and importance of anti-discrimination law is not diminished.

### **Creating a “positive duties” legislative model**

127. A positive duties model of equality is a proactive model that shifts the focus from enforcement of individual rights through “naming, blaming and claiming”<sup>64</sup> to the bringing about of institutional change. This means that the right to equality is “available to all and not just those who complain”.<sup>65</sup>

128. Fredman contrasts the positive duties approach to equality with the negative duty, complaints based model as follows:

At the root of the positive duty ... is a recognition that the societal discrimination extends well beyond individual acts of racist prejudice. Equality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility. Positive duties are therefore proactive rather than reactive, aiming to introduce equality measures rather than to respond to complaints by individual victims.

This has important implications for both the content of the duty and the identification of the duty bearer. In order to trigger the duty, there is no need to prove individual prejudice, or to link disparate impact to an unjustifiable practice or condition. Instead, it is sufficient to show a pattern of under-representation or other evidence of structural discrimination. Correspondingly, the duty-bearer is identified as the body in the best position to perform this duty. Even though not responsible for creating the problem in the first place, such duty bearers become responsible for participating in its eradication. A key aspect of positive duties, therefore, is that they harness the energies of employers and public bodies. Nor is the duty limited to providing compensation to an individual victim. Instead, positive action is required to achieve change, whether by encouragement, accommodation or structural change.<sup>66</sup>

129. The shift in focus is an important one. The complaints based model is “adversarial and conflictual”<sup>67</sup> and “creates a fault-based system whereby an organisation is not required to do anything unless fault can be identified and attributed to it”.<sup>68</sup> Such a model “frames individual discriminatory acts as interpersonal disputes, rather than looking at inequality as a public problem that harms us all”.<sup>69</sup> As

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<sup>64</sup> Sara Charlesworth, “Understandings of Sex Discrimination in the Workplace: Limits and Possibilities,” *The Clare Burton Memorial Lecture 2007* at 5, drawing on the work of W. Felstiner, R. Abel & A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...” *Law & Society Review* (1980-1981) 15, 631-54.

<sup>65</sup> Sandra Fredman, “Changing the Norm: Positive Duties in Equal Treatment Legislation”, *Oxford Legal Studies Research Paper No 3/2006* at 4.

<sup>66</sup> Sandra Fredman, “Equality: A New Generation?” *Industrial Law Journal* 30(145) (2001) at 12.

<sup>67</sup> Sandra Fredman & Sarah Spencer, “Delivering Equality: Towards an Outcome- Focused Positive Duty,” *Submission to the Cabinet Office Equality Review and to the Discrimination Law Review*, June 2006 at 7 accessed on 31 July 2008 at: <http://www.edf.org.uk/news/Delivering%20equality%20submission%20030606-final.pdf>

<sup>68</sup> Belinda Smith, “It’s About Time – For a New Regulatory Approach to Equality,” *Federal Law Review* (2008) forthcoming at 16.

<sup>69</sup> Belinda Smith & Shirley Southgate, “New Models in Anti-Discrimination Law – Developing Strategies to Campaign for Change”, *NSW Community Legal Centres State Conference*, 7-9 April 2008 at 5.

Fredman and Spencer argue, this model provides insufficient motivation for an organisation to review its policies or practices.<sup>70</sup> In contrast, a positive duties model has the capacity to foster a spirit of co-operation and co-learning. This can happen, for example, when institutions are required to publish action plans which undergo a peer review.<sup>71</sup> Additionally, it can also happen through the active participation of those experiencing the discrimination working with those with the power to make the change to identify and redress the broader causes of inequality.<sup>72</sup>

130. It should be noted, however, that while a positive duties model has much to recommend it, that its effectiveness is largely dependent on the content of such a duty, the definition of equality and the effectiveness of enforcement mechanisms. Each of these is addressed below.

### ***Content of a positive duty***

131. Four of the five objectives of the current *SDA* focus upon the elimination of discrimination. The fifth objective “to promote recognition and acceptance within the community of the principle of the equality of men and women”<sup>73</sup> is weak and ineffective. “Recognition” and “acceptance” may encourage the raising of awareness of the need for equality. Indeed the educative work of HREOC and SDC empowered by section 48(1)(e) of the *SDA* and as discussed in TOR G has been commended and is instrumental in the changing of attitudes with respect to gender equality. However, of itself this is not enough to achieve substantive equality. A strong positive duty which requires action that will bring about equality and can be enforced is required and needs to be further supported with specific duties that form the content of the positive duty.<sup>74</sup>

### ***Definition of equality***

132. A robust, multi-dimensional definition of equality is needed so that equality is widely understood as requiring much more than the simplistic notion of “same treatment”. A positive duties model depends on such a definition.

### ***Enforcement mechanisms***

133. Fredman argues that voluntary compliance with a positive duty to promote equality is not on its own sufficient.<sup>75</sup> It needs to be accompanied with varying levels of increasing regulatory force, including the possibility of sanctions.<sup>76</sup> The first tier of compliance should be about encouragement and support.<sup>77</sup> This includes training and education. The next level of compliance can consist of scrutinising reports and equality plans.<sup>78</sup> In Northern Ireland, for example, this is undertaken by the Equality Commission of Northern Ireland. With the provision of further resources, this could be a function undertaken by HREOC. With respect to scrutinising implementation there is a role for inspections and audits.<sup>79</sup> If these compliance requirements are not adhered to Fredman suggests considerable investigative and review powers can be vested in the Equality Commission who would be empowered to issue compliance notices

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<sup>70</sup> Sandra Fredman & Sarah Spencer, “Delivering Equality” at 7.

<sup>71</sup> For example see the practices of European Union in Fredman, *Changing the Norm* at 16.

<sup>72</sup> See for example Canadian Taskforce discussed in Fredman, *Changing the Norm* at 8. Also see *Northern Ireland Act 1998*, Schedule 9, paragraph 5(a) accessed on 31 July 2008 at:

[http://www.bailii.org/uk/legis/num\\_act/1998/ukpga\\_19980047\\_en\\_1.html#sch9](http://www.bailii.org/uk/legis/num_act/1998/ukpga_19980047_en_1.html#sch9); Also see Fredman, *Equality: A New Generation?* at 12.

<sup>73</sup> Section 3(d) SECTION

<sup>74</sup> For examples of some specific duties in operation in the UK see Belinda Smith & Shirley Southgate, “New Models in Anti-Discrimination Law – Developing Strategies to Campaign for Change”, *NSW Community Legal Centres State Conference*, 7-9 April 2008 at 7.

<sup>75</sup> Fredman, *Changing the Norm* at 10.

<sup>76</sup> Fredman, *Changing the Norm* at 10.

<sup>77</sup> Fredman, *Changing the Norm* at 11.

<sup>78</sup> Fredman, *Changing the Norm* at 11.

<sup>79</sup> Fredman, *Changing the Norm* at 12.

which could be enforced by a court.<sup>80</sup> Significantly one of the purposes of the new UK Equality Bill is the strengthening of enforcement mechanisms.<sup>81</sup>

134. Accompanying a positive duties model, regulations and standards need to be introduced to provide all parties with certainty, to enable accountability, and to allow for the enforcement of positive duties. There are several models of positive duties of equality in existence in Canada, Ireland and the UK.<sup>82</sup> An examination of these models would be very useful in the consideration of the type of positive duty of equality that could be adopted in Australia.

135. It seems likely that in order to properly monitor and assist in compliance, and enforce sanctions against those in breach of the Act HREOC could not also participate as an impartial and unbiased conciliator. If this is the case, it is submitted that this important function should be removed to a separate authority that retains its expertise and can continue to quality assure the work of conciliation officers, as is currently done within HREOC.

### **Recommendations**

27. Damages awarded for discrimination matters should be increased to a comparable level to tort claims, therefore making contingency fee arrangements viable.
28. The availability of legal aid for representation in unlawful discrimination matters should be increased.
29. There should be routine capping of costs in the Federal Court and the Federal Magistrates Court.
30. A comparative analysis of different models of positive duties across different international jurisdictions should be undertaken with respect to their content, use, application, enforcement and effectiveness in achieving equality.
31. A positive duties model of equality applicable to the Australian context should be developed.
32. A clearer definition of equality should be developed.

<sup>80</sup> Fredman, *Changing the Norm* at 12.

<sup>81</sup> Government Equalities Office, *Framework for a Fairer Future – The Equality Bill*, June 2008 at 8 accessed on 31 July 2008 at: <http://www.equalities.gov.uk/publications/Framework%20FAIRER%20FUTURE.pdf>

<sup>82</sup> See for example, Sandra Fredman, “Changing the Norm: Positive Duties in Equal Treatment Legislation”, *Oxford Legal Studies Research Paper No 3/2006* at 4 -7. Also see s75 Northern Ireland Act 1998 accessed on 31 July 2008 at: [http://www.bailii.org/uk/legis/num\\_act/1998/ukpga\\_19980047\\_en\\_1.html#pt7-pb2-11g75](http://www.bailii.org/uk/legis/num_act/1998/ukpga_19980047_en_1.html#pt7-pb2-11g75) ;

## Prevention of sex discrimination (TOR G)

136. As discussed above under TOR C, HREOC also has the power to examine enactments and proposed enactments to identify inconsistencies with the *SDA* and make recommendations to the Minister for amendments. Additionally, HREOC has the power to prepare and publish guidelines for the avoidance of sex discrimination. However, in their current form both of these functions have significant limitations due to HREOC's inability to enforce these recommendations or guidelines.

### Undertake research, education and other programs

137. One of HREOC's functions involves the "undertak[ing] of research, educational programs and other programs" for the purpose of eliminating discrimination and promoting gender equality.<sup>83</sup> The inclusion of such a function recognises the crucially important role that education has to play in challenging and changing attitudes with respect to sex discrimination and in preventing sex discrimination. This is supported by the acknowledgement that discrimination is "a problem of attitude"<sup>84</sup> and the repeated references to the importance of education in overcoming this<sup>85</sup> in the *Sex Discrimination Bill Second Reading Speech*.

138. The important role of education in preventing discrimination continues to be well recognised today. Indeed, at the launch of the inaugural meeting of the National Council to Reduce Violence against Women and Children, Prime Minister Kevin Rudd, in speaking of the Government's commitment to reducing violence against women and the Council's upcoming priorities, noted two important educative priorities. The first relates to the development of resources for high school students about "developing respectful relationships" and "the impact of domestic violence and sexual assault".<sup>86</sup> The second relates to White Ribbon Day community education activities in rural and regional communities "to promote culture-change that will reduce violence against women".<sup>87</sup> Significantly, the issue of funding for such initiatives was also acknowledged.<sup>88</sup>

139. Education can take many forms, including, as mentioned above, teaching resources for high school students and community education programs that engage the wider community. Such education resources and programs, however, are only possible with adequate funding. With only limited resources, HREOC has produced a variety of excellent educational resources catering for upper primary students, secondary students, school teachers and tertiary pre-service education students which seek to address the issue of sex discrimination.<sup>89</sup> The Sex Discrimination Commissioner, Elizabeth Broderick also recently undertook a Listening Tour around Australia. This was an excellent strategy designed to engage the Australian community in discussions about the main issues relating to sex discrimination whereby people could identify the issues of most concern and propose ways to address these issues. In this way, HREOC is encouraging the active participation of the Australian community in finding solutions so as to prevent sex discrimination.

140. While HREOC's educational work must be commended, there is a noticeable gap with respect to educational resources for preschoolers and lower primary students. This gap in human rights educational resources for this age bracket is not unique to HREOC. However, the gap is significant given it is well

<sup>83</sup> Section 48(1)(e) *SECTION*

<sup>84</sup> For example, J. Spender, "Sex Discrimination Bill 1983: Second Reading," *Commonwealth Hansard*, 5 March 1984; G. Hand, "Sex Discrimination Bill 1983: Second Reading," *Commonwealth Hansard*, 5 March 1984;

<sup>85</sup> For example, A. Adermann, "Sex Discrimination Bill 1983: Second Reading," *Commonwealth Hansard*, 5 March 1984; J. Spender, "Sex Discrimination Bill 1983: Second Reading," *Commonwealth Hansard*, 5 March 1984; J. Mountford, "Sex Discrimination Bill 1983: Second Reading," *Commonwealth Hansard*, 5 March 1984;

<sup>86</sup> "PM Launches Inaugural Meeting of National Council to Reduce Violence against Women and Children" 4/6/08 accessed on 10 July 2008 at:

[http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek\\_nsf/content/nat\\_council\\_violence\\_05june08.htm](http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek_nsf/content/nat_council_violence_05june08.htm)

<sup>87</sup> *Ibid.*

<sup>88</sup> \$1 million has been allocated over 4 years to support White Ribbon Day education activities in rural and regional communities, see note??

<sup>89</sup> For example see HREOC, "Youth Challenge," accessed on 11 July 2008 at:

<http://www.hreoc.gov.au/education/youthchallenge/unit4/index.html>



documented that children are influenced by the attitudes of those around them from as young as 3 years of age.<sup>90</sup> A holistic education strategy aimed at preventing discrimination must also target the very young. Adequate resources must be provided if this is to be achieved.

141. HREOC's writing of reports and submissions, arguably falls within both its research and educative function as well as its reporting function as provided for in s48(1)(g) *HREOCA*. Reports and submissions can play an important role, for example, in raising awareness about systemic discrimination and in providing recommendations with respect to responding to such discrimination. However, as Sex Discrimination Commissioner, Elizabeth Broderick, notes in her oral submission before the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave, "I am now the 4th Sex Discrimination Commissioner to advocate for a national paid leave scheme".<sup>91</sup> That recommendations made by HREOC can be repeatedly made and largely ignored highlights a significant gap in HREOC's powers, namely the power to regulate and enforce legislative responsibilities to prevent discrimination and promote gender equality.

142. As discussed above under TOR M, a positive duties model would enable preventive measures to be introduced. This could be achieved by having specific tasks and obligations aimed at preventing and eliminating discrimination incorporated into action plans. Clearly organisations will need training and resources to assist them to develop such plans. Monitoring, auditing and reporting can then form a definite part of the compliance regime.

#### **Recommendations**

33. Educational resources and programmes should be developed to promote gender equality and challenge discrimination as a mandatory component of the k-12 and preschool curriculum.
34. The SDC/HREOC should have the appropriate power and resources to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality and it should be mandatory for Parliament to provide a public response to address the concerns raised by such inquiries within six months of the report being tabled.
35. The *SDA* should be amended to incorporate a positive duties model, including the appropriate monitoring, auditing and reporting mechanisms of a relevant compliance regime.

<sup>90</sup> For example, TROCAIRE, "A Framework for Early Learning," Ireland, July 2004, at 5, accessed on 11 July 2008 at: <http://82.195.132.36:5050/j/pdf/early/Trocaire.pdf>

<sup>91</sup> Elizabeth Broderick, "Oral evidence - Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave, 20 May 2008 accessed on 10 July 2008 at: [http://www.humanrights.gov.au/legal/submissions/2008/PML\\_20080520.doc](http://www.humanrights.gov.au/legal/submissions/2008/PML_20080520.doc)

## Exemptions (TOR N)

143. The permanent exemptions from sex discrimination are arguably incompatible with Australia's international treaty obligations. If sporting or religious bodies were granted permanent exemptions from the prohibition of discrimination on the grounds of disability or race there would be vocal condemnation. Such permanent exemptions from sex discrimination prohibitions are equally unacceptable and should be equally condemned.

### Religion and educational institutions established for religious purposes (ss 37 -38 SDA)

144. The SDA at section 37(d) provides a wide discretion for discrimination against women in relation to:

any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

145. This permits religious bodies freedom to discriminate according to the doctrines of their religion in ordaining, appointing and training priests, ministers and participants in that religion. Further, it privileges particular interpretations of religious doctrines, over the obligation for equality on the basis of sex for all people in Australia. Such preferential treatment is incompatible with CEDAW, as is outlined above.

146. Automatic exemptions for religious and other bodies should be removed from the Act, because they entrench discrimination against women in significant male-dominated sectors of Australian society. As the exemptions are automatic, religious bodies are not required to justify exemption, or demonstrate if and how they are promoting the equality of women as far as is possible within the parameters of their doctrines, tenets or beliefs. Nor are they required to demonstrate if and how they ensure that individual officers responsible for employment, training and education always act in good faith when they discriminate "in order to avoid injury to the religious susceptibilities of adherents of [their] religion or creed" (section 38).

147. Automatic exemption for religious bodies takes no account of the following:

- *Religious bodies are, to a greater or lesser degree, male-dominated.* The views of female adherents – those who are disadvantaged by the exemption – are not able to be heard because of the nature of the exemption. Systemic discrimination against women is thus entrenched, prolonging a situation where issues of equality and discrimination are absent from the agenda of the (mostly male) leadership. As it stands, the Act abandons significant numbers of women in certain occupations, roles and activities and fails to protect their rights - the rationale for the Act in the first place.
- *The doctrines, tenets or beliefs of religious bodies change over time.* For example, since the SDA came into force in 1984, the Anglican Church of Australia has provided for the admission of women into all three levels of its ordained ministry. Approximately one sixth of its clergy are now women (see *The Australian Anglican Directory 2008*), including two women bishops. However, although in 18 of the 23 dioceses women are now officially accorded full equality, anecdotal evidence suggests that women clergy are at times discriminated against in employment because of their gender in ways that would not otherwise be acceptable under the Act. More than 600 women clergy around Australia are left without any legal protection against gender-based discrimination in their employment.
- *Automatic exemption has significant flow on effects.* For example, there is no incentive for an exempted religious body to ensure that it provides significant, let alone mandatory, levels of representation for women in areas that do not conflict with its doctrines, tenets or beliefs. An example would be representation levels of women on lay church bodies. The automatic exemption makes it difficult for women adherents to argue for a satisfactory level of representation. If religious bodies had to apply for exemption, demonstrating commitment to equality principles wherever possible for them could be required as part of the application process.

- *Automatic exemption allows religious bodies to resist re-examination of their beliefs regarding the role of women.* If exemption had to be applied for at regular intervals, re-examination would be required from time to time, and female adherents would take encouragement to challenge the status of current beliefs. At present, women members of major religious bodies that claim their beliefs prevent extending full equality to women, have little opportunity or incentive to challenge their situation. Many feel that the discrimination they face is not taken seriously by wider society. Removing automatic exemption would redress that perception.

148. So long as automatic exemptions exist, the Act is fundamentally flawed and compromised, and a significant body of women, left without the protection of law against discrimination, are effectively discriminated against by the Act.

### **Sport (section 42)**

149. Currently section 42 of the *SDA* allows for lawful discrimination in the area of sport, contrary to Australia's obligations under article 10(g) of CEDAW. The section operates to allow women (and girls) to be excluded from sports on the following grounds:

- (1) Nothing in Division 1 or 2 renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.
- (2) Sub-section (1) does not apply in relation to the exclusion of persons from participation in-
  - (a) the coaching of persons engaged in any sporting activity;
  - (b) the umpiring or refereeing of any sporting activity;
  - (c) the administration of any sporting activity;
  - (d) any prescribed sporting activity; or
  - (e) sporting activities by children who have not yet attained the age of 12 years.

150. Some sporting bodies have exclusionary policies that reflect this section in the legislation. The policies prevent females from participating with males once over a particular age. Examples include Australian Rules Football which prohibits females from participation in male competition once over the age of 14.<sup>92</sup>

151. It is our submission that section 42, which was part of the original 1984 enactment, is an outdated example of poor practice. Internationally, such exclusionary policies are not mandatory and merit rather than gender determines an athlete's ability to compete. Within Australia, the age limit of 12 provided as the legal age of exclusion, has been superseded by football codes, leaving the Act behind. Finally, it seems that the operation of section 42 is contributing to discrimination in the manner in which funding is distributed to male and females by sporting bodies. Below we outline examples to illustrate all three points.

152. Participation in sport produces overwhelmingly positive outcomes for women and girls and any bar to participation at any level and in any sport must be based upon only transparent and equally overwhelming independent evidence.

### ***International Comparisons***

153. The 1974 introduction of Title IX into the *Civil Rights Act 1964* by the United States Federal Government created a dramatic shift in opportunities afforded to girls and women in sport. Title IX states:

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<sup>92</sup> Greater Sydney Juniors, Competition Rules and Bylaws 2008  
<http://www.mosmanswans.com.au/Files/rules%20and%20bylaws%202008.pdf> at 28 July 2008.

No person in the United States shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal assistance.<sup>93</sup>

154. This legislation places direct responsibility on schools, colleges and universities to provide equal opportunity or risk losing federal government funding. It has been applied to all programs offered by schools including and especially sport. Some commentators have linked the explosion in girls' soccer teams throughout the 1970s and 1980s in the US to the introduction of Title IX.<sup>94</sup> It is important to note that federal funding is a sizable portion of school budgets. Connecting funding to equal treatment is a powerful means of shifting behaviour. No equivalent provision exists in Australia and no reporting appears to occur on gender based spending within sport or other programs receiving federal government funding.

155. Even though Title IX contains an exemption like that in section 42 of the *SDA*, it is reserved for contact sports. As this exemption is discretionary, girls and women who are capable of playing these sports with men, based on their skill and ability, have been allowed the opportunity of competing with the boys and men. Young women have played varsity level<sup>95</sup> gridiron football, which extends to the age of 18 or 19. Holley Mangold in Ohio, USA, was allowed to continue playing gridiron in the normally all-boys competition because her abilities matched those of the boys. She has been able to play gridiron at the highest level attainable secondary school level in the US.<sup>96</sup> In the sport of wrestling, a challenge by a young woman in the late 1990s allowed her to compete with boys at a university level on merit and today entire female leagues are in operation.<sup>97</sup>

### ***Leaving the Act behind...***

156. In early 2004, three girls aged 14, 15 and 16 years old applied to the Victorian Civil Administrative Tribunal to challenge the validity of Victorian Football League's refusal to allow girls under 12 years old to play AFL with boys.<sup>98</sup> Counsel for the girls argued that this exclusion was unlawful discrimination. The Tribunal found for the 14 year old. The Tribunal did not find for the other two girls. However, this decision resulted in a review of the Victorian Football League's policy and the Football Victoria Gender Regulation<sup>99</sup> was introduced which increased the exclusion age from 12 to 14. This decision created national changes in AFL policy. Importantly, this decision highlights the current need for review of section 42, which places an arbitrary age-limit of 12 on participation in certain sports.

157. However even the updated AFL policy is under pressure. As recently as June 2008, two girls aged 14 years old have also challenged the age-limit exclusion. The board of NSW/ACT AFL declined to allow the girls to participate in the boys over 14 competition. It was reported that NSW/ACT AFL relied upon legal advice and "sound welfare and medical advice"<sup>100</sup> to impose this decision. The *SDA* exclusion provided the basis for this decision. The girls in this situation had no alternative all-girls competition in which they could compete and as a consequence were prevented from participation.<sup>101</sup>

158. The AFL's approach contrasts to that in the US where merit is applied rather than gender even in the most masculine defining game of gridiron. Similarly, it seems the AFL and rugby codes of football

<sup>93</sup> Title IX of the *Education Amendments of 1972*, 20 USC.

<sup>94</sup> David Litterer, *Women's Soccer History in the USA: an Overview* (2005) The USA Soccer History Archives <<http://www.sover.net/~spectrum/womensoverview.html>> at 31 July 2008.

<sup>95</sup> Varsity level is the highest level attainable at secondary school.

<sup>96</sup> James Hannah, *Female Lineman vies for starting role on Ohio team* (2007) Associated Press <[http://www.usatoday.com/sports/preps/football/2007-08-15-mangold\\_N.htm](http://www.usatoday.com/sports/preps/football/2007-08-15-mangold_N.htm)> at 31 July 2008.

<sup>97</sup> Judy Bassista, 'Olympics; A Tiny Female Pioneer For Olympic Wrestling', *The New York Times* (New York City), 16 May 2004.

<sup>98</sup> *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158

<sup>99</sup> *AFL Victoria Regulations 2004* (Vic) reg 4

<sup>100</sup> ABC Online, 'Girls fight under-15s AFL ban', *ABC News*, 11 June 2008

<<http://www.abc.net.au/news/stories/2008/06/11/2270776.htm>> at 28 July 2008.

<sup>101</sup> Sydney Morning Herald Online, 'Up in arms as AFL rules them out', *SMH National*, 11 June 2008 <<http://www.smh.com.au/news/national/up-in-arms-as-afl-rules-them-out/2008/06/10/1212863646570.html>> 28 July 2008.

are moving towards merit, capability and strength when it comes to boys who are being allowed to compete in younger age groups to reflect their abilities.<sup>102</sup>

159. Strict guidelines that either deter or prohibit young people from playing sports require serious investigation. The guiding fundamental policy should be that participation and protection in sport is fundamentally more important than age and gender.

### ***Funding Discrimination***

160. It is apparent that at the Olympic, international, national and State/Territory level funding of men's and women's programs within the same sport are vastly unequal. Examples include the sports of soccer and cricket where women have been unpaid at any level and the funding for the national leagues differ dramatically between female and male competitions. A clear example of discrimination is demonstrated by the cancellation of the Women's National Soccer League since 2004<sup>103</sup> due to "lack of funding" at a time when the men's equivalent saw the launch of a new league, recruitment of international players for millions of dollars and an anticipated 20 million dollar men's World Cup campaign.<sup>104</sup> Even the new Women's League which will commence in October 2008 has only been budgeted at 3 to 4 million dollars. For first time players will actually be paid, but the total cap for all players on a team will be \$150,000. The salary cap for each men's team is approximately 1.8 million dollars but no cap applies to sign up "marquee" players.<sup>105</sup>

161. A gap exists in data related to funding, as there are no gender based reporting mechanisms for sporting organisations in Australia. It is suggested that as a condition of receiving Federal Government funding, recipient organisations should have an obligation to collect and report on the allocation of funds to female and male participants.

162. In 2006 a Senate Inquiry into participation by women in sports by the Environment, Communications, Information Technology and the Arts Committee<sup>106</sup> took evidence on the impacts of the inequalities in the funding of women's and men's sport. The Committee found that this inequality directly resulted in lack of retention in many all female sports as they are not "professional".<sup>107</sup>

### ***Benefits of participation in sports***

163. A recent US inquiry into Title IX found that sport participation for women and girls had the following positive impacts:

- a rapid increase in the numbers of women competing in intercollegiate sports; and
- improvement in academic performance for girls participating in high school sports.<sup>108</sup>

164. Further research on this point has found that:

- participation in physical activity contributes to the overall physical and psychological health of individuals of all ages and social groups;<sup>109</sup>

<sup>102</sup> *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158

<sup>103</sup> Michael Cockerill, 'Women's League launches a brave new era', *The Age* (Sydney), 29 July 2008.

<sup>104</sup> Tom Smithies, 'Costly campaign just to get to World Cup', *The Herald Sun* (Melbourne), 5 February 2008.

<sup>105</sup> David Sygall and Adrian Proszenko, 'Rich A-League clubs exploiting salary-cap loophole', *The Age* (Melbourne) 18 November 2007.

<sup>106</sup> Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *About time! Women in sport and recreation in Australia* (2006)

<sup>107</sup> Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *About time! Women in sport and recreation in Australia* (2006) [4.9]

<sup>108</sup> The Secretary of Education's Commission on Opportunity in Athletics 'Open to All: Title IX at Thirty', 28 February 2003 at <<http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>> 8 May 2008.

<sup>109</sup> Submission to Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, Canberra, 7 June 2006, 1-2 (National Heart Foundation of Australia).

- the public investment in recreational and sporting activities provides an important dividend to terms of both public health and social cohesion; and<sup>110</sup>
- participation in recreational and sporting activities is therefore a practical and efficient way to increase physical activity, thereby maximising the health and social dividends to the community.<sup>111</sup>

165. Exemptions from discrimination in sport discourage women's participation, and in some cases may prevent women pursuing sporting opportunities and careers. Clearly, as is demonstrated internationally, there are alternatives to a permanent exemption in relation to sport. Given this, and the benefit of encouraging women's participation, there can be no justification for retaining this exemption.

### Voluntary Bodies

166. The broad exemption for voluntary bodies is unjustified and should be removed. Section 39 of the *SDA* states:

Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person on the ground of the person's sex, marital status or pregnancy, in connection with:

- the admission of persons as members of the body; or
- the provision of benefits, facilities or services to members of the body.

167. Section 4 of the *SDA* defines a voluntary body as:

**voluntary body** means an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:

- a club;
- a registered organisation;
- a body established by a law of the Commonwealth, of a State or of a Territory; or
- an association that provides grants, loans, credit or finance to its members.

168. Historically, the exemption arose because there was a concern at the time that the Bill was being considered that the legislation would affect the activities of organisations such as Rotary and Lions clubs.<sup>112</sup> It has also been argued that voluntary bodies are an extension of private life and that the government should not interfere with the right of free association.<sup>113</sup> However voluntary bodies can have significant impacts upon people's lives<sup>114</sup> and should not be generally exempt from the provisions of the *SDA*.

### Case Study 3

Ms X was a long-term member and volunteer of a large charitable organisation. The organisation operated at a national level with a high profile and a large annual budget. Ms X was sexually harassed, and victimised when she made a complaint about the harassment. She was also excluded from equal participation in the benefits and activities of the organisation (such as training). Ms X was unable to have her complaint dealt with by HREOC due to this exemption, and so lost the benefit of the training and social activities provided by the organisation.

<sup>110</sup> Submission to Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, Canberra, 30 June 2006, 5 (Victorian Health Promotion Foundation, VicHealth).

<sup>111</sup> Submission to Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, Canberra, 30 June 2006, 5 - 6 (Victorian Health Promotion Foundation, VicHealth).

<sup>112</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Act 1984: A Review of Exemptions*, 1992, Commonwealth of Australia, p.89.

<sup>113</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Act 1984: A Review of Exemptions*, 1992, Commonwealth of Australia, p.90.

<sup>114</sup> *Ibid*, p.90.

169. Further, the exemption fails to take into account that there are voluntary bodies that are largely supported by government subsidies such as the Red Cross, and that many employment positions within voluntary bodies are paid, rather than voluntary.<sup>115</sup>

170. Under section 25 of the *SDA*, clubs do not have this exemption.<sup>116</sup> However, the definition of a club in the *SDA* is very limited<sup>117</sup> and most sporting clubs will fall under the exemption in section 39. This has restricted the access of women to the membership, facilities and benefits of sports clubs and allowed women to be excluded from men's clubs.<sup>118</sup>

171. The *SDA* is now 25 years old. Voluntary organisations have had sufficient time to remove discriminatory requirements from their rules and adapt their practices to meet the objects of the *SDA*. Allowing discriminatory practices to remain is unjustified.

### **Superannuation**

172. Sections 41A and 41B of the *SDA* are exemptions permitting discrimination when conferring a superannuation benefit on the grounds of either sex or marital status. Section 14(4) of the *SDA* outlaws such discrimination in all other circumstances.

173. Under section 41A of the *SDA*, superannuation funds are permitted to discriminate on the grounds of sex and marital status, if the discrimination is in the superannuation conditions and is based on actuarial or statistical data from a reasonably reliable source. This section also allows funds to discriminate by providing lower or no dependent benefits to members with no spouses or children in case of death or incapacity. Further, discrimination in the vesting, preservation or portability conditions of a fund will not be unlawful provided that it is indirect discrimination.

174. Under section 41A(1)(b)(ii) of the *SDA* funds may provide less or no dependent benefits to single or childless people in the case of death or incapacity. Privileging married people and parents ignores the great variety of family relationships that women create, and has the effect of denying benefits to the dependents of such women. There is no justification for such discrimination.

175. As same sex couples are not included in the *SDA*'s definition of "de facto spouses", discrimination against them and their children in relation to dependent benefits is also permitted.<sup>119</sup> This clearly implies that same sex couples and their children are somehow of less value and that discrimination against them is not a serious matter.<sup>120</sup>

176. Section 41B of the *SDA* provides for a lower standard of compliance to be adhered to and applies to existing members, including those who ceased to be members before the commencement of the section, who have been given an option of at least two months to obtain non-discriminatory benefits and have not chosen to exercise that option. Under this exemption, funds may discriminate on the grounds of sex or marital status if the discrimination is in the conditions of the funds. This exemption will *only* operate where a fund has not received an exemption from the Commission.<sup>121</sup>

177. When the *SDA* was passed, it was intended that the broad superannuation exemption in the Act would only operate for a two-year period.<sup>122</sup> This was extended because of the complex issues

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<sup>115</sup> *Ibid.*

<sup>116</sup> SECTION , section 25.

<sup>117</sup> Section 4 SECTION : **club** means an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that:

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises.

<sup>118</sup> *Sex Discrimination Act 1984*, section 92.

<sup>119</sup> *Sex Discrimination Act 1984*, section 4.

<sup>120</sup> Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements*,

[http://www.hreoc.gov.au/Human\\_RightS/samesex/report/pdf/SSSE\\_Report.pdf](http://www.hreoc.gov.au/Human_RightS/samesex/report/pdf/SSSE_Report.pdf), 2007, accessed on 24 July 2008.

<sup>121</sup> *Ibid*, section 44.

<sup>122</sup> Senator Hill, Speech on the Sex Discrimination Amendment Bill 1991: Second Reading, 8 May 1991, p.2958.

involved.<sup>123</sup> However it is submitted that the superannuation funds have been allowed a transitional period of an even longer duration than necessary, and that all superannuation funds should now be made to comply with the requirements of the *SDA*.

#### **Recommendations**

36. The permanent exemptions contained in sections 37 – 43 of the *SDA* should be removed.
37. Any exemption should only be granted through an application to the Commissioner. The Commissioner should have the power to grant an exemption for a limited period of up to 12 months where the application demonstrates that no other practicable or reasonable step, other than the exemption can be taken.
38. The *SDA* and other related legislation should be amended to include a provision to make funding dependent on equality of participation between men and women, in programs that receive federal government funding. More broadly, legislative amendments should be made to require that all government financial decisions consider the gender, race, disability and age implications of those decisions, or subject the decisions to review on those grounds. Review provisions, such as those in the *Administrative Decisions Judicial Review Act* should specify what constitutes systemic discrimination.
39. An inquiry should be undertaken into the funding of male and female sporting organisations that receive federal government funding to determine if those organisations are allocating funds in a discriminatory manner.
40. The Federal Government should require all sporting organisations that receive federal government funding to annually report upon the allocation of funding with reference to gender based accountability standards and a gender audit.

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<sup>123</sup> *Ibid.*



## Consistency across jurisdictions and options for harmonisation (TOR D, F)

### Charter of Rights

178. A Federal Charter of Rights would provide protection of general, free-standing human rights. Rights to protection from discrimination and promotion of equality form a subset of these rights. Currently, within Australian domestic law, there is no mechanism for a complaint of a breach of human rights that is not connected with a complaint of discrimination. Australia therefore has very limited human rights protection regime.

179. Inquiries such as this one, and reviews of other anti-discrimination legislation could be integrated into a national consultation into the possibility of a Charter of Rights and mechanisms for the protection of human rights within Australia. A referral to The Australian Law Reform Commission to investigate and report on the implementation and harmonisation of human rights protection in Australia could usefully form part of the national consultation.

### Equality Act

180. Under the current pieces of Commonwealth anti-discrimination legislation<sup>124</sup>, limited grounds of protection from discrimination are provided. In order to provide broader protection and freedom from discrimination, and implement Australia's international treaty obligations, including those under the *International Covenant of Civil and Political Rights*, the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of all forms of Racism*, and *CEDAW*, it is submitted that a single *Equality Act* would be a preferable legislative mechanism. Clearly, a single Act would provide a means of harmonising the processes for promoting equality, addressing systemic discrimination and inequality, and dealing with individual complaints.

### Retention of Commonwealth and State/Territory Jurisdictions

181. It is submitted that the retention of both State/Territory and Commonwealth jurisdictions is important to provide a safety net of protections from discrimination, to encourage best practice and to enable locally appropriate mechanisms of promoting equality.

182. It is essential to retain locally appropriate and easily accessible complaints handling services. It is likely that many unrepresented complainants would be unwilling or unable to lodge complaints to a body that is physically located in another State or Territory.

### Consistency within Federal anti-discrimination legislation

183. In the absence of an Equality Act, or in the interim, it is submitted that the different pieces of Commonwealth anti-discrimination laws which have been introduced at different points over the past 33 years should be amended to provide consistent processes and definitions. Further, that each Act provide the opportunity to make a complaint of discrimination under more than one ground, and that intersectional complaints involving more than one ground are made possible.

### Consistency across States Territories and Federal jurisdictions

184. Any person, irrespective of where they are in Australia, should have the same protections and remedies available to them in the event that they experience discrimination. To this end, cooperation between the State, Territory and Commonwealth Governments is required to first determine best practice equality and anti-discrimination legislation, and subsequently to amend existing legislation, or introduce new legislation to provide consistent Australia-wide legislative protection from discrimination. Such consistency would require ongoing governmental cooperation to ensure any future amendments are mirrored consistently across the jurisdictions.

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<sup>124</sup> *Race Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth)

**Recommendations**

41. A national consultation into the introduction of a Charter of Rights should be undertaken, and should include a review of current anti-discrimination legislation.
42. A federal Equality Act should be introduced to supersede the current separate Federal anti-discrimination Acts.
43. In the absence of a federal Equality Act, or in the interim, the Race Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act should be amended to provide consistent processes and definitions, and to allow complaints of intersectional discrimination.
44. To ensure equal protection from discrimination and availability of remedies to every person, irrespective of geographical location, State, Territory and Commonwealth Governments should cooperate to ascertain best practice in anti-discrimination legislation, and undertake to amend current and future legislation to reflect best practice.

## Other matters (TOR O)

### Process and timeframe for submissions to this inquiry

185. We welcome the opportunity to participate in this Senate inquiry. We trust this will be only the initial stage of an extensive review of legislation relating to the elimination of discrimination and the promotion of equality.

186. In order to seek well considered and researched submissions which respond to the terms of reference and suggest points for reform, it is our submission that an adequate time must be provided. Four weeks is not adequate. It seems that this is part of a trend of inadequate timeframes with respect to the review of sex discrimination and promotion of gender equality. The Australian Law Reform Commission's Review of the *SDA* in 1994 was described as having "very wide terms of reference (and an almost impossible deadline)" by Regina Graycar and Jenny Morgan, two of the Commissioners.<sup>125</sup>

187. An example of a better process and timeframe is the review of the Victorian Equal Opportunity. The Discussion Paper was released in November 2007 with submissions due by 14 January 2008.<sup>126</sup> These consultations informed The Options Paper which was released in March 2008 with submissions due by 16 May 2008.<sup>127</sup> An additional review process took place with respect to the review of exceptions and exemptions The Consultation Paper was released in February 2008 with submissions due 18 April 2008.<sup>128</sup>

188. Another example is the consultation process in the UK with respect to the proposal for a Single Equality Bill. The Discrimination Law Review was launched in February 2005 to "consider the opportunities for creating a clearer and more streamlined discrimination law framework which produces better outcomes for those who experience disadvantage".<sup>129</sup>

189. As a result the Government published a series of documents to assist with consultations relating to its proposals for a Single Equality Bill. These documents included:

- a Consultation Document which seeks views on the Government's proposals;
- an Initial Regulatory Impact Assessment which estimates the costs and benefits of the proposals;
- an Equality Impact Assessment which looks at how the proposals affect people because of their sex, race, disability, age, sexual orientation and religion or belief.

190. The documents were published in 12 June 2007 and the consultation period concluded on 4 September 2007. This, we suggest, allows time for a more rigorous and comprehensive process.

<sup>125</sup> Cited by Bronwyn Naylor, "Equality Before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report *Equality Before the Law*," *Monash University Law Review* (1997) 23(2) at 424, footnote 8.

<sup>126</sup> Department of Justice, Victoria, *Equal Opportunity Review Discussion Paper*, Department of Justice, Victoria, November 2007 accessed on 24 July 2008 at:

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+Review+Discussion+Paper>

<sup>127</sup> Note extension of time such that submissions closed on 16 May 2008. Department of Justice, Victoria, *Equal Opportunity Review Options Paper*, Department of Justice, Victoria, March 2008 accessed on 24 July 2008 at: <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+Review+Options+Paper>

<sup>128</sup> Department of Justice, Victoria, *Equal Opportunity - The Exceptions Review Consultation Paper*, Department of Justice, Victoria, February 2008 accessed on 24 July 2008 at:

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+-+The+Exceptions+Review+Consultation+Paper+%28PDF%29>

<sup>129</sup> Discrimination Law Review, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain - Overall summary of: Consultation Document; Initial Regulatory Impact Assessment; Equality Impact Assessment*. Department for Communities and Local Government, London, June 2007 at 3 accessed on 27 July 2008 at: <http://www.communities.gov.uk/documents/corporate/doc/322984.doc>

191. We look forward to the opportunity to continue to participate in a thorough and ongoing review of legislation to promote equality.

**Recommendation**

45. This Inquiry should form part of a lengthier, more extensive review of legislation to promote equality in Australia.