

**THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS**

**EFFECTIVENESS OF THE *SEX DISCRIMINATION ACT 1984* IN ELIMINATING
DISCRIMINATION AND PROMOTING GENDER EQUALITY**

GOVERNMENT RESPONSE

The Australian Government welcomes the report of the Senate Standing Committee on Legal and Constitutional Affairs on the effectiveness of the Commonwealth *Sex Discrimination Act 1984* (SDA) in eliminating discrimination and promoting gender equality.

The SDA, which has now been in place for over 25 years, has been an important tool in addressing discrimination and changing attitudes about the participation of women and men in a range of areas of public life. The SDA prohibits discrimination on the basis of sex in employment, educational institutions, and in the provision of goods and services. The SDA, similar to other anti-discrimination laws, has been an important mechanism in changing community perceptions and setting appropriate standards to recognise that men and women should be able to fully participate in the social, economic and public life of Australian society.

The Committee's recommendations can be broadly categorised into two groups. First, recommendations that are specific to the issue of sex discrimination and second, recommendations that are also relevant to other areas of anti-discrimination legislation. The Government's consideration of the Committee's Report has been informed by the National Human Rights Consultation into the promotion and protection of human rights, which coincided with the Committee's Report.

In relation to those recommendations which are specific to sex discrimination, the Government proposes to act immediately and amend the SDA to:

- ensure the protections from discrimination provided by the SDA apply equally to women and men, through reference to additional international instruments which create obligations in relation to gender equality
- establish breastfeeding as a separate ground of discrimination
- provide greater protection from sexual harassment for students and workers, and
- extend protection from discrimination on the grounds of family responsibilities to both women and men in all areas of employment.

Those recommendations with wider implications for federal anti-discrimination laws will be considered by the Government in light of its broader commitment to streamline and harmonise Commonwealth anti-discrimination legislation as part of the Government's response to the National Human Rights Consultation.

The Government thanks the Senate Committee for its report which will inform the future direction of federal anti-discrimination legislation. Ensuring that anti-discrimination law meets the needs of contemporary Australians is an important part of ensuring the promotion and protection of human rights.

Recommendation 1

The committee recommends that the preamble to the Act and subsections 3(b), (ba) and (c) of the Act be amended by deleting the phrase 'so far as is possible'.

Response

Noted.

The phrase 'as far as possible' is also used in the objects clauses of the *Disability Discrimination Act 1992* (DDA) and *Age Discrimination Act 2004* (ADA). The Government will consider this recommendation as part of the process of consolidating Commonwealth anti-discrimination legislation (the consolidation project).

Recommendation 2

The committee recommends that subsection 3(a) of the Act be amended to refer to other international conventions Australia has ratified which create obligations in relation to gender equality.

Response

Noted.

The objects clauses of the DDA and ADA do not refer to international instruments. The Government will consider this recommendation as part of the consolidation project.

Recommendation 3

The committee recommends that the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.

Response

Noted.

The existing position at common law is that there is an intention that Parliament does not intend to infringe international law, such that courts will prefer an interpretation consistent with international law, though some formulations of the test restricts this to cases where there is an ambiguity in the text. In addition to the common law rule, section 15AB of the *Acts Interpretation Act 1901* allows recourse to international law in specified circumstances (eg ambiguity) where the treaty is referred to in the Act.

The *Racial Discrimination Act 1975* (RDA), the DDA and the ADA also implement Australia's international obligations. The Government will consider this recommendation as part of the consolidation project.

Recommendation 4

In order to provide protection to same-sex couples from discrimination on the basis of their relationship status, the committee recommends that:

- references in the Act to 'marital status' be replaced with 'marital or relationship status'; and
- the definition of 'marital status' in section 4 of the Act be replaced with a definition of 'marital or relationship status' which includes being the same-sex partner of another person.

Response

Noted.

Expanding the prohibition on marital status discrimination to include same-sex relationships may impact on the private sector. There may also be effects on State and Territory laws relating to adoption, artificial conception procedures and the recognition of changes of sex on cardinal documents. The Government will consider this recommendation further, in consultation with key stakeholders and the States and Territories.

Recommendation 5

The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991* (ACT)

Response

Noted.

The ADA and DDA also use the comparator test. Any new definition of discrimination would need to be applied consistently across all grounds of discrimination to ensure consistency. The Government will consider this recommendation as part of the consolidation project.

Recommendation 6

The committee recommends that section 7B of the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.

Response

Noted.

This test for indirect discrimination is also used in the ADA and the RDA, however the DDA uses a different test. For consistency, the suitability of any new test for indirect discrimination in one Commonwealth anti-discrimination law would need to be considered in the context of the complementary anti-discrimination laws. The Government will consider this recommendation as part of the consolidation project.

Recommendation 7

The committee recommends that subsection 9(10) of the Act be amended to refer to ICCPR, ICESCR, and the ILO conventions which create obligations in relation to gender equality, as well as CEDAW, in order to ensure that the Act provides equal coverage to men and women.

Response

Accepted.

Australia has ratified the following international conventions, in addition to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), directed at promoting gender equality:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Labour Organisation Convention No. 111 - Discrimination (Employment and Occupation) Convention 1958
- International Labour Organisation Convention No. 100 – Equal Remuneration Convention 1951, and
- International Labour Organisation Convention No. 156 – Workers with Family Responsibilities Convention 1981.

Section 9 draws on a number of Commonwealth heads of power to bring the Act within the constitutional power of the Commonwealth. All heads of power except subsection 9(10) – external affairs – apply equally to men and women. Subsection 9(10) only has effect in relation to discrimination against women, to the extent that the provisions give effect to CEDAW. If a complaint falls in an area where no other head of power applies, such as an unlawful act by an unincorporated body, subsection 9(10) operates to cover women but not men.

The Government believes that the *Sex Discrimination Act 1984* (SDA) should afford equal protection to men and women, and give effect to Australia's international obligations. Widening the constitutional basis of the SDA is necessary to ensure that men are equally covered under protections for family responsibilities (see below recommendation 13).

The Government will introduce legislation to implement this recommendation.

Recommendation 8

The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the *Racial Discrimination Act 1975*.

Recommendation 9

The Committee recommends that the Act be amended to include a general equality before the law provision modelled on section 10 of the *Racial Discrimination Act 1975*.

Response

Noted.

Section 9 of the RDA provides for a broad prohibition on discrimination in ‘the political, economic, social, cultural or any other field of public life’. Section 10 is concerned with the operation and effect of laws. Both sections 9 and 10 of the RDA can invalidate inconsistent State laws.

There are no equivalent provisions in other Commonwealth anti-discrimination legislation. The ADA, DDA and SDA adopt a different approach to the RDA and list areas of public life in which discrimination is proscribed.

Inserting a general prohibition provision and equality before the law provision in other anti-discrimination legislation would represent a significant change in approach by the Commonwealth and needs to be considered further in the context of the consolidation project. The recommendations are likely to have a significant impact on State and Territory legislation and would require extensive consultation before implementation.

The Government will consider these recommendations as part of the consolidation project.

Recommendation 10

The committee recommends that the Act be amended:

- to provide specific coverage to volunteers and independent contractors; and
- to apply to partnerships regardless of their size.

Response

Noted.

There are differing approaches to partnerships in Commonwealth anti-discrimination legislation. The ADA and SDA apply to partnerships of 6 or more persons, whereas the DDA applies to partnerships of 3 or more persons. The RDA applies to all partnerships, regardless of their size.

The RDA covers volunteers and independent contractors given the broad scope of section 9. The ADA, DDA and SDA cover contract workers; however there is some uncertainty about the scope of the coverage. Volunteers are not specifically covered in the ADA, DDA and SDA as they do not fall within the traditional definition of ‘employee’.

The Government recognises the inconsistent approaches and gaps in coverage and will consider this recommendation as part of the consolidation project.

Recommendation 11

The committee recommends that subsection 12(1) of the Act be amended and section 13 repealed to ensure that the Crown in right of the states and state instrumentalities are comprehensively bound by the Act.

Response

Noted.

The ADA, DDA and RDA all bind the States and State instrumentalities, while the SDA does not bind the States and State instrumentalities unless expressly provided for. While a person can pursue a claim against a State or State instrumentality under the relevant State law, there may be limitations in relation to the amount of damages. State laws may also provide less protection than the equivalent Commonwealth law.

The Government recognises that other Commonwealth anti-discrimination legislation has a wider coverage than the SDA and will consider this recommendation as part of the consolidation project.

Recommendation 12

The committee recommends that the Act be amended to make breastfeeding a specific ground of discrimination.

Response

Accepted.

Breastfeeding is specifically listed as a characteristic that appertains generally to women in subsection 5(1A). Discrimination on the basis of breastfeeding is therefore already captured as direct sex discrimination under section 5. However, making breastfeeding a separate ground of discrimination alongside marital status, pregnancy or potential pregnancy emphasises that breastfeeding is a protected attribute.

The Government will introduce legislation to implement this recommendation.

Recommendation 13

The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.

Response

Accepted.

Under subsection 14(3A) of the SDA, discrimination on the ground of family responsibilities is only unlawful where the employee is dismissed. Unlike other grounds of discrimination, the definition is also restricted to direct discrimination. Women are able to use the indirect sex discrimination provision to get around this limitation as they have a disproportionate responsibility for the care of children. Men are unable to argue indirect discrimination on the ground of family responsibilities.

The *Fair Work Act 2009* now protects employees from 'adverse action', which is not limited to dismissal, on the ground of family responsibilities. It would be desirable to bring protections under the SDA in line with the Fair Work Act to ensure consistency across Commonwealth laws.

The Government will introduce legislation to implement this recommendation.

Recommendation 14

The committee recommends that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995 (VIC)*.

Response

Noted.

The Government's Fair Work Act and National Employment Standards operate together to promote flexible workplaces that balance the need for employees to manage their work and family responsibilities with the genuine requirements of businesses. This includes access to personal/carer's leave to respond to personal illness, injury or unexpected emergencies - which is the first time a federal statutory entitlement to unpaid carers leave has extended to casual employees - and a right to request a change in working arrangements in certain circumstances.

The General Manager of Fair Work Australia is required to conduct research and report every three years on the circumstances in which employees make requests for flexible working arrangements, the outcome of such requests and the circumstances in which such requests are refused. The Government has also committed to a post-implementation review of key legislative proposals contained in the Fair Work Act, including the National Employment Standards, of which the right to request flexible working arrangements is part.

In addition, the Fair Work Act provides that all modern awards and enterprise agreements must include a model flexibility clause, which will allow employers and individual employees to make arrangements that suit their particular needs.

Recommendation 15

The committee recommends that the definition of sexual harassment in section 28A of the Act be amended to provide that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated.

Response

Accepted.

The current test for sexual harassment relies on the reasonable person test, that is, a reasonable person would have anticipated that the aggrieved person would be offended, humiliated or intimidated. This is a stricter test than under some State legislation, including section 119 of the *Anti-Discrimination Act 1991* (Qld), which refers to anticipation of the 'possibility that the other person would be offended'. The Government accepts that a broader test is needed to effectively address incidences of sexual harassment, particularly in the workplace.

The Government will introduce legislation to implement this recommendation.

Recommendation 16

The committee recommends that section 28A of the Act be amended to provide that the circumstances relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:

- the sex, age and race of the other person;
- any impairment that the other person has;
- the relationship between the other person and the person engaging in the conduct; and
- any other circumstance of the other person.

Response

Accepted.

The current definition provides that the court is to have regard to 'all the circumstances' in which a reasonable person would have anticipated that the aggrieved person would be offended, humiliated or intimidated.

Inserting a statutory guide to what circumstances are relevant does not affect the matters which should be considered but will clearly direct the court to consider the individual circumstances of the case in assessing what is reasonable conduct.

The Government will introduce legislation to implement this recommendation.

Recommendation 17

The committee recommends that section 28F of the Act be amended to:

- provide protection to students from sexual harassment regardless of their age; and
- remove the requirement that the person responsible for the harassment must be at the same educational institution as the victim of the harassment.

Response

Accepted.

Section 28F of the SDA does not make it unlawful for an adult student to sexually harass a student under 16 years of age, or for a staff member or adult student to sexually harass a victim who attends another institution.

There is no persuasive policy reason for the existing age limit on the victim. Students under 16 years of age should receive equal protection as those over 16 years of age.

The current requirement that the harasser and victim attend the same institution reflects the policy intention that sexual harassment, as with discrimination, should be limited to specified areas of public life. This recommendation potentially imposes on a staff member or an adult student a higher degree of liability for sexual harassment than imposed on the general public in similar circumstances. For example, a teacher may be liable for sexually harassing a student with whom they have no existing relationship outside of the education and employment context, while another adult who is not a teacher engaging in the same conduct would not be liable.

The Government recognises, however, that where there is a connection between the conduct of the staff member towards a student of another educational institution and the staff member's employment, liability for sexual harassment should be imposed. For example, a staff member who sexually harasses a student of another educational institution at an inter-school event should be liable under section 28F. Similarly, an adult student should be liable for sexually harassing a student who attends another institution where there is a connection between the conduct and their attendance at an educational institution.

The Government will introduce legislation to implement this recommendation.

Recommendation 18

The committee recommends that the Act be amended to protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment.

Response

Accepted.

The SDA proscribes sexual harassment in specified areas of public life, including employment and the provision of goods, services or facilities. It is unlawful for an employee to sexually harass another employee, and the employer may be held vicariously liable. It is also unlawful for a worker to sexually harass another person, including a customer, in the course of providing goods, services or facilities. However it is not unlawful for a customer to sexually harass a worker. Workers are equally as vulnerable to sexual harassment from customers as from colleagues or employers and should be afforded the same protections. The Government accepts that they should be afforded protections from sexual harassment by persons with whom they come into contact in connection with their employment.

The Government will introduce legislation to implement this recommendation.

Recommendation 19

The committee recommends that the HREOC Act¹ should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated.

Response

Noted.

The Federal Court of Australia already has the power to join proceedings and to hear separate but related applications together. The Federal Court also hears and determines applications brought under the *Australian Human Rights Commission Act 1986* (AHRC Act) which allege unlawful discrimination under two or more different grounds of discrimination as one application.

The AHRC does not prevent the Commission from dealing with complaints brought in relation to numerous grounds of discrimination as the one complaint. The Commission has in the past joined multiple grounds of discrimination and awarded remedies under each relevant Act (*Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 17).

¹ The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* changed the name of the *Human Rights and Equal Opportunity Commission Act 1986* to the *Australian Human Rights Commission Act 1986*. The legislation also changed the name of the Commission to the Australian Human Rights Commission.

Recommendation 20

The committee recommends that subsection 46PO(1) of the HREOC Act be amended to make the standing requirements for lodging an application with the Federal Court or the Federal Magistrates Court consistent with the requirements for lodging a complaint with HREOC as set out in subsection 46P(2) of the HREOC Act.

Response

Noted.

This recommendation aims to give public interest organisations and trade unions standing to commence legal proceedings on behalf of one or more persons aggrieved by the alleged unlawful discrimination.

If implemented, it would not be necessary for a public interest organisation or trade union to show that it is a 'person aggrieved' by the alleged discrimination in its own right. The public interest organisation or trade union would still need to identify an aggrieved person or class of aggrieved persons on whose behalf the action is being brought.

The Government accepts that there is value in enabling public interest organisations to pursue representative actions on behalf of vulnerable and disadvantaged people, where the organisation has demonstrated connection with the subject matter of the dispute. If accepted, the recommendation would apply to litigation on all grounds of discrimination. The Government will consider this recommendation further as part of the consolidation project.

Recommendation 21

The committee recommends that subsection 46PO(2) of the HREOC Act be amended to increase the time limit for lodging an application with the Federal Court or Federal Magistrates Court from 28 days after termination of the complaint to 60 days.

Response

Accepted.

This recommendation was implemented by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*.

Recommendation 22

The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the *Sex Discrimination Act 1975 (UK)* so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

Response

Noted.

It is not appropriate for legislation to purport to compel the court to make certain orders. The outcome sought by the recommendation may be achieved by inserting provisions that provide for certain presumptions to be made in favour of an applicant with the onus on the respondent to rebut them.

A reversal of the onus of proof would need to be applied consistently across all grounds of discrimination. The Government will consider this recommendation as part of the consolidation project.

Recommendation 23

The committee recommends that the remedies available under subsection 46PO(4) of the HREOC Act where a court determines discrimination has occurred be expanded to include corrective and preventative orders.

Response

Noted.

Under subsection 46PO(4) of the AHRC Act, the Federal Court may 'make such orders (including a declaration of right) as it thinks fit'. A number of remedies are then listed; however, this does not limit the court's discretion to award other remedies.

As part of the consolidation process, the Government will consider the implications of expanding the enumerated remedies that may be awarded under subsection 46PO(4) to include, for example, corrective and preventative orders.

Recommendation 24

The committee recommends that increased funding be provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for sex discrimination and sexual harassment matters.

Response

Noted.

The Government will consider this recommendation in light of the availability of resources. The future approach to the Commonwealth's funding of legal assistance services, including those that are the subject of this recommendation, will be developed having regard to the Government's Strategic Framework for Access to Justice in the Federal Civil Justice System and the negotiation of the National Partnership Agreement on legal aid.

Recommendation 25

The committee recommends that the Act be amended to remove the exemption for voluntary organisations in section 39.

Response

Noted.

There are differing approaches to voluntary organisations in Commonwealth anti-discrimination legislation. The ADA and SDA provide exemptions for voluntary bodies in connection with the admission of persons as members, or the provision of benefits, facilities and services to members. There are no equivalent exemptions under the DDA or RDA.

The Government recognises that some other Commonwealth anti-discrimination legislation has a wider coverage than the SDA and will consider this recommendation as part of the consolidation project.

Recommendation 26

The committee recommends that the definition of 'clubs' in section 4 be expanded so that:

- the prohibition on discrimination with respect to clubs applies to a broader range of organisations; and
- those organisations have access to the automatic exception in subsection 25(3) permitting single-sex clubs.

Response

Noted.

'Clubs' is defined in the SDA to mean an association of 30 or more persons. The definition in the DDA does not have a membership threshold. The RDA and ADA do not list 'clubs' as an area of public life to which the protections apply. Section 9 of the RDA would apply to discrimination in respect to clubs; however the ADA arguably allows clubs to discriminate in relation to membership and enjoyment of benefits provided by the club.

The definition of 'clubs' and the scope of exemptions which relate to clubs will be considered as part of the consolidation project.

Recommendation 27

The committee recommends that provisions such as sections 31 and 32, which clarify that certain differential treatment is not discriminatory, should be removed from Part II Division 4 which deals with exemptions and instead be consolidated with section 7D.

Response

Noted.

Section 31 of the SDA permits rights or privileges to be granted to a woman and not a man if in connection with pregnancy or childbirth. This is consistent with article 4(2) of the CEDAW which allows 'special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.'

Section 32 of the SDA allows services to be provided to members of one sex if the nature of the services is such that it can only be provided to members of one sex.

Sections 31 and 32 clarify that certain differential treatment is not discriminatory. Sections 31 and 32 are currently contained in Division 4 which deals with exemptions. The Government will take this recommendation into account in the design of consolidated Commonwealth anti-discrimination legislation.

Recommendation 28

The committee recommends that section 44 of the Act be amended to clarify that the power of HREOC to grant temporary exemptions is to be exercised in accordance with the objects of the Act.

Response

Noted.

The Commission can grant temporary exemptions under the ADA, DDA and SDA. The Commission's guidelines for granting temporary exemptions already provide that consideration be given to the objects of the Acts.

Recommendation 29

The committee recommends that the Act and the HREOC Act should be amended to expand HREOC's powers to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a state or under state laws.

Response

Noted.

The broader issue of the Commission's inquiry functions will be considered as part of the consolidation project.

Recommendation 30

The committee recommends that paragraph 48(1)(gb) of the Act be amended to explicitly confer a function on HREOC of intervening in proceedings relating to family responsibilities discrimination or victimisation.

Response

Partially accepted.

Paragraph 48(1)(gb) of the Act gives the Commission power to intervene, with leave of the court, in discrimination cases that relate to sex, marital status, pregnancy or potential pregnancy or sexual harassment. It does not cover intervention in proceedings relating to family responsibilities discrimination or victimisation.

The Government accepts that the Commission should be able to intervene in cases involving family responsibilities discrimination. This will complement the broadening of protection against discrimination on the grounds of family responsibilities (see above recommendation 13).

The Government will introduce legislation to implement this aspect of the recommendation.

Victimisation is a criminal offence under the SDA, RDA, ADA and DDA. Currently the Commission is not empowered to intervene in proceedings relating to victimisation of a person bringing a complaint under any of these Acts, and this recommendation therefore has implications beyond the SDA.

Conferring power on the Commission to intervene in proceedings relating to victimisation will be considered as part of the consolidation project.

Recommendation 31

The committee recommends that subsection 46PV(1) of the HREOC Act be amended to include a function for the special purpose commissioners to appear as amicus curiae in appeals from discrimination decisions made by the Federal Court and the Federal Magistrates Court.

Response

Noted.

Under subsection 46PV(1), special purpose commissioners may appear as amicus curiae in certain proceedings with the leave of the court. It is unclear if subsection 46PV(1) applies to consequent appeals. The Government will consider this recommendation as part of the consolidation project.

Recommendation 32

The committee recommends that paragraph 48(1)(gb) of the Act and subsection 46PV(2) of the HREOC Act be amended to empower HREOC to intervene in proceedings, and the special purpose commissioners to act as amicus curiae, as of right.

Response

Noted.

Consideration needs to be given to the impact that an appearance as of right by a special purpose commissioner or the Commission may have on the conduct and cost of the proceeding, particularly where the proposed involvement may be opposed by the parties. The Government needs to examine further whether the court should retain the capacity to make orders as to the nature of the Commissioner's involvement. The Government will consider this recommendation as part of the consolidation project.

Recommendation 33

The committee recommends that the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years.

Response

Noted.

The Aboriginal and Torres Strait Islander Social Justice Commissioner is currently required, under the AHRC Act, to submit a yearly report to Parliament on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islander persons.

The Government will consider similar statutory functions for the Sex and Disability Discrimination Commissioners, including the appropriate reporting cycle for all such reports, as part of the consolidation project.

Recommendation 34

The committee recommends that HREOC be provided with additional resources to enable it to:

- carry out an initial public education campaign in relation to changes to the Act;
- perform the additional roles and broader functions recommended in this report; and
- devote additional resources to its functions to educate the public about the Act.

Response

Noted.

The Government will consider this recommendation in the Budget context.

Recommendation 35

The committee recommends that further consideration be given to reviewing the operation of section 38 of the Act, to:

- retain the exemption in relation to discrimination on the basis of marital status; and
- remove the exemption in relation to discrimination on the grounds of sex and pregnancy; and
- require a test of reasonableness.

Response

Noted.

Section 38 of the SDA exempts educational institutions established for religious purposes from the operation of the discrimination provisions. This exemption does not apply to sexual harassment or discrimination on the ground of family responsibilities; however, it does apply to sex, marital status or pregnancy in certain defined contexts. All States and Territories anti-discrimination legislation include similar exemptions.

Consideration needs to be given to whether a test of 'reasonableness' would provide protections additional to that already contained in the SDA, which is that the discrimination occurs in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

The Report makes several recommendations about the current exemptions in the SDA, such as recommendation 25 (voluntary organisations) and recommendation 26 (clubs). The Government will consider these recommendations together as part of the consolidation project.

Recommendation 36

The committee recommends that further consideration be given to removing the existing permanent exemptions in section 30 and sections 34 to 43 of the Act and replacing these exemptions with a general limitations clause.

Response

Noted.

The ADA, DDA and SDA all contain a number of permanent exemptions which will need to be reviewed as part of consideration of this recommendation. The Government will need to consider further how a general limitations clause would operate. The Government will consider this recommendation as part of the consolidation project.

Recommendation 37

The committee recommends that further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.

Response

Noted.

This recommendation represents a significant shift towards a regulatory model of anti-discrimination legislation. This approach is not used in other Australian jurisdictions.

In the United Kingdom, the *Equality Act 2006 (UK)* provides that the Commission for Equality and Human Rights may investigate whether or not a person has committed an unlawful act if it suspects that the person concerned may have committed an unlawful act.

If adopted, this approach would need to be applied consistently across all grounds of discrimination. The Government will consider this recommendation as part of the consolidation project.

Recommendation 38

The committee recommends that further consideration be given to amending the Act to give HREOC the power to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the Act.

Response

Noted.

As with recommendation 37, this approach represents a significant shift in the functions of the Commission; and it would need to be applied consistently across all grounds of discrimination. The Government will consider this recommendation as part of the consolidation project.

Recommendation 39

The committee recommends that further consideration be given to expanding the powers of HREOC to include the promulgation of legally binding standards under the Act equivalent to the powers exercised by the Minister under section 31 of the *Disability Discrimination Act 1992*.

Response

Noted.

The promulgation of binding standards under the DDA is a complex process and the Government will need to consider carefully the effectiveness of binding standards in the gender equality context.

Consideration also needs to be given to the interaction with the National Employment Standards and the outcomes of the review of the *Equal Opportunity for Women in the Workplace Act 1999* and Agency (the EOWA review). The Government will consider this recommendation as part of the consolidation project.

Recommendation 40

The committee recommends that further consideration be given to amending the Act or the EOWW Act to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.

Response

Noted.

The EOWA review was announced on 1 June 2009 and is due to report in the coming months. The review is examining broadly the effectiveness of the Equal Opportunity for Women in the Workplace Act and arrangements in delivering equal opportunity for women. The review will provide advice on practical ways in which the equal opportunity for women framework could be improved to deliver better outcomes for Australian women. The Government will consider this recommendation further in light of the outcomes of the EOWA review.

Recommendation 41

The committee recommends that further consideration be given to the relationship between the Act and the EOWW Act, in particular, whether:

- the obligations under the EOWW Act and should be incorporated within the Act; and
- the functions of EOWA and HREOC should be combined.

Response

Noted.

As discussed above under recommendation 40, the EOWA review will report on the effectiveness of the Equal Opportunity for Women in the Workplace Act and arrangements in delivering equal opportunity for women. The terms of reference provide that the review: 'Consider the EOWW Act and Agency within the framework of existing proposed workplace-related and human rights legislation and policy.'

The Government will consider this recommendation further in light of the outcomes of the EOWA review.

Recommendation 42

The committee recommends that the Attorney-General's Department conduct consultations regarding the further possible changes to the Act outlined in recommendations 35 to 41 and report publicly on the outcomes of that consultation within 12 months.

Response

Noted.

The process of consolidating Commonwealth anti-discrimination legislation will involve consideration of recommendations 35 to 41 and include stakeholder consultation.

Recommendation 43

The committee recommends that HREOC conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act. The inquiry should report by 2011 and should also consider:

- what additional grounds of discrimination, such as sexual orientation or gender identity, should be prohibited under Commonwealth law;
- whether the model for enforcement of anti-discrimination laws should be changed; and
- what additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.

Response

Noted.

The National Human Rights Consultation received submissions on the issues covered in recommendation 43.

Further consultation on additional grounds of discrimination will be undertaken as part of the consolidation project.