

RECOMMENDATIONS

Recommendation 1

11.7 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’.

Recommendation 2

11.8 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.

Recommendation 3

11.10 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.

Recommendation 4

11.15 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.

Recommendation 5

11.16 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)*.

Recommendation 6

11.17 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.

Recommendation 7

11.19 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.

Recommendation 8

11.24 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

11.25 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*.

Recommendation 10

11.26 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.

Recommendation 11

11.27 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.

Recommendation 12

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

Recommendation 13

11.33 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.

Recommendation 14

11.34 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)*.

Recommendation 15

11.43 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.

Recommendation 16

11.44 The committee recommends that the 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.

Recommendation 17

11.45 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.

Recommendation 18

11.46 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.

Recommendation 19

11.58 The committee recommends that the HREOC Act 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.

Recommendation 20

11.59 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.

Recommendation 21

11.60 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.

Recommendation 22

11.61 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.

Recommendation 23

11.62 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.

Recommendation 24

11.63 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.

Recommendation 25

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

Recommendation 26

11.73 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.

Recommendation 27

11.74 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.

Recommendation 28

11.75 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.

Recommendation 29

11.83 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.

Recommendation 30

11.84 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.

Recommendation 31

11.85 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.

Recommendation 32

11.86 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.

Recommendation 33

11.87 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.

Recommendation 34

11.90 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.

Recommendation 35

11.97 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.

Recommendation 36

11.98 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.

Recommendation 37

11.99 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.

Recommendation 38

11.100 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.

Recommendation 39

11.101 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*.

Recommendation 40

11.102 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.

Recommendation 41

11.103 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.

Recommendation 42

11.104 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.

Recommendation 43

11.111 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.