

CHAPTER 5

EFFECTIVENESS OF THE ACT

5.1 This chapter considers evidence regarding the overall effectiveness of the Act and the extent to which it implements Australia's international obligations to eliminate sex discrimination as well as looking more specifically at the effectiveness of the Act in preventing discrimination against men and sexual harassment.

Overall effect of the Act

5.2 In general, evidence to the committee suggested that the Act has had an impact on the most overt forms of sex discrimination but has been less successful in addressing systemic discrimination.¹ 'Systemic discrimination' refers to policies, practices or patterns of behaviour, which are absorbed into the institutions and structure of society, that create or perpetuate disadvantage for a particular group.²

5.3 The submission from HREOC contended that:

[W]hilst the SDA has been successful in contributing to reducing direct discrimination..., there has been less progress on addressing systemic discrimination or achieving substantive gender equality. There is clearly much more that could be done.³

5.4 On the basis of consultation conducted through her national listening tour, the Sex Discrimination Commissioner summarised the position as follows:

My firm conclusion from that tour was that while we had good experience in terms of reducing overt discrimination, or a lot of the formal discrimination against women, our progress towards achieving true gender equality in Australia has stalled. I became convinced that, as a nation, we need to re-energise our efforts to find innovative solutions to the systemic gender inequality that persists in many people's daily lives.⁴

5.5 In response to a question from the committee concerning the overall progress made in addressing gender equality, Professor Margaret Thornton said:

1 The committee notes however that one submission suggested that gender equality may have reached an acceptable level already: Dr Stan Jeffrey KSJ, *Submission 4*, p. 1. While two submissions expressed opposition to CEDAW: Endeavour Forum, *Submission 36*, p. 1; Mr Ross Mitchell, *Submission 81*, p. 2.

2 HREOC, *Submission 69*, p. 36; ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.29; Ontario Human Rights Commission, *Racism and Racial Discrimination - Systemic Discrimination*, Fact Sheet, at <http://www.ohrc.on.ca/en/resources/factsheets/systemic> (accessed 28 October 2008). HREOC gave examples of systemic sex discrimination including the gap between women and men's earnings due to the lack of value ascribed to what is commonly characterised as 'women's work'.

3 *Submission 69*, pp 219-220. See also Emily's List, *Submission 61*, p. 2.

4 *Committee Hansard*, 9 September 2008, p. 2. See also *Submission 69*, p. 35.

Certainly, there has been some progress with where women are located within the workplace, for example, in terms of authoritative and professional positions. On its face, that looks quite positive. If you take a position that focuses on numbers, it looks quite good. But I would suggest that much more than numbers are involved. One has to look beneath the surface at the substantive aspects.⁵

5.6 This assessment of ‘some progress’ was shared by other witnesses including Mr Mathew Tinkler of PILCH:

[T]he Sex Discrimination Act, although well intentioned and having made some very positive steps, really fails to prevent and eliminate sex discrimination in Australia and, in doing so, Australia fails to meet some of its human rights obligations.⁶

5.7 The Australian Baha’i Community suggested that the focus of the Act on providing redress for individual complaints has limited its ability to address discrimination:

The significance of the Commonwealth *Sex Discrimination Act 1984* in giving force to many of Australia’s obligations under CEDAW should not be underestimated. While the Act plays a useful role for the individual complainant, however, particularly in redressing complaints of discrimination in employment and of sexual harassment, it is not without its limitations. With its focus on identified acts of discrimination within specified spheres of activity, the Act addresses discrimination as an isolated incident rather than as a systemic problem.⁷

5.8 A less qualified assessment was made by Mr Daniel Mammone of ACCI who suggested that the Act has contributed to significant changes within Australian industry:

The Sex Discrimination Act is an important part of the overall framework of Commonwealth anti-discrimination laws which, taken as a whole, imposes significant legal obligations on industry and which have contributed to significant changes in human resource practice within industry over the last 20 years. The underlying objectives and assumptions of anti-discrimination law that employees deserve equal treatment in employment enjoy an extremely high level of support within Australian industry.⁸

5.9 Submissions from unions also noted that the Act represents a significant achievement in terms of addressing sex discrimination. For example, the Australian Education Union, stated that the Act is:

5 *Committee Hansard*, 11 September 2008, pp 38-39.

6 *Committee Hansard*, 10 September 2008, p. 23.

7 *Submission 16*, p. 2. See also Independent Education Union of Australia, *Submission 49*, p. 2.

8 *Committee Hansard*, 10 September 2008, p. 11.

...a crucial and landmark piece of legislation and its ability to create an avenue for complaints of sex discrimination to be heard and resolved is a great achievement.⁹

5.10 While the ACTU stated that the Act has “played an important role in protecting women from discrimination”.¹⁰

5.11 However, these two submissions argued that the Act has been less successful in addressing structural disadvantage and effecting cultural change.¹¹ In more concrete terms, the ACTU stated that “women still fare worse than men on a number of key measures of equality in employment”.¹²

5.12 Academic commentary on the Act also paints a complex picture on the issue of its overall effect. For example, whilst arguing that the Act embodies a particularly weak regulatory model, Dr Belinda Smith suggests that the Act has nevertheless played a normative role in relation to sex discrimination. She asserts that:

Generation Y will not put up with what their mothers and fathers might have accepted. The battle line has at least moved forward – it is no longer drawn over blatant and intentional exclusion, but has moved to more indirect and structural forms of discrimination.¹³

5.13 This echo of the theme of ‘some progress but more to be done’ seems consistent with the views of Associate Professor Beth Gaze who wrote on the twentieth anniversary of the Act:

[W]hile I wouldn’t want to be without the SDA, it has aged over the 20 years since enactment. Although it has fundamentally changed our legal and social environment, other changes have undermined some of the gains. It needs revitalising to continue to drive the case for women’s equality in the modern context.¹⁴

Extent to which the Act implements international obligations

5.14 Most of the evidence presented to the committee argued that the Act only partially implements Australia’s international obligations in relation to gender equality. Ms Edwina MacDonald of NACLC outlined those obligations:

9 *Submission 17*, p. 1. See also Diversity Council Australia Inc, *Submission 47*, p. 4.

10 *Submission 55*, p. 2.

11 *Submission 17*, p. 1.

12 *Submission 55*, p. 2.

13 Dr Belinda Smith, ‘A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?’ in C Arup, et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, p. 116.

14 Associate Professor Beth Gaze, ‘The Sex Discrimination Act After Twenty Years: Achievements, Disillusionment and Alternatives’, *UNSW Law Journal*, vol 27(3), 2004, pp 914-921 at p. 921. See also Australian Women Lawyers, *Submission 29*, p. 3.

Australia's obligations with respect to gender equality go beyond CEDAW, which codifies women's rights to non-discrimination and equality with men. Australia is also obliged to ensure the equal right of men and women to the enjoyment of civil, political, economic, social and cultural rights under the ICCPR and also ICESCR. In addition, Australia is also a signatory to ILO treaties that create obligations with respect to reconciling work and family.¹⁵

5.15 She then submitted that:

[T]hese obligations provide an effective human rights framework within which substantive equality for women and men can be achieved. However, at present it is our view that Australia is not meeting all those obligations through the Sex Discrimination Act, or through other legislation.¹⁶

5.16 HREOC supported the assessment that the Act does not fully implement Australia's international obligations:

[I]t has always been acknowledged that the [Act] did not fully implement all obligations under CEDAW nor other relevant international legal obligations in the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and International Labour Organisation ('ILO') Conventions.¹⁷

5.17 Similarly, Australian Women Lawyers, submitted that the Act "remains only a partial response to women's legal inequality".¹⁸

5.18 The Australian Women's Health Network explained the limitations of the Act:

Clearly, the SDA, restricted as it is to individual complaints and the public sphere, falls far short of being able to influence the attainment and enjoyment of the fundamental freedoms that CEDAW envisages.¹⁹

5.19 The Human Rights Law Centre noted that the Act does not implement CEDAW in its totality and contrasted this with the implementation of the International Convention on the Elimination of all forms of Racial Discrimination by the *Racial Discrimination Act 1975*:

Australia's cautious approach to the domestic implementation of CEDAW is in contrast to the approach taken by the Racial Discrimination Act 1975 (Cth) (RDA), which aims to give full effect to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and closely follows the language of that Convention. Ironically, the different approaches taken in regards to racial discrimination and discrimination

15 *Committee Hansard*, 9 September 2008, pp 30-31.

16 *Committee Hansard*, 9 September 2008, p. 31.

17 *Submission 69*, p. 46.

18 *Submission 29*, pp 3-4.

19 *Submission 30*, p. 7. See also Women's Electoral Lobby, *Submission 8*, p. 2.

against women exemplifies the entrenched discrimination that CEDAW is directed at eliminating.²⁰

5.20 Against this evidence that the Act represents only a partial implementation of CEDAW, an officer of the Attorney-General's Department noted that the Act is not the only way in which Australia addresses its obligations under the convention:

[T]he Sex Discrimination Act is a key plank that meets Australia's obligations under the CEDAW, but it is not the only law or program that ensures that we meet those obligations.²¹

5.21 He argued that other Commonwealth legislation including the EOWW Act needs to be considered as well as legislation at a state and territory level.²²

5.22 The UN Committee certainly adopts this broader approach in its consideration of whether states are meeting their obligations under CEDAW. Nevertheless, in 2006, the UN Committee criticised Australia's implementation of CEDAW in several areas.²³ Dr Sara Charlesworth noted some of the UN Committee's concerns:

Australia's implementation of CEDAW was criticised by the Committee in a number of respects including the lack of adequate structures and mechanisms to ensure effective coordination and consistent application of the Convention in all states and territories, the absence of an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men, the lack of sufficient statistical data, disaggregated by sex and ethnicity on the practical realization of equality between women and men in all areas covered by the Convention, and information on the impact and results achieved of legal and policy measures taken.²⁴

Areas of continuing discrimination and inequality

5.23 Significant evidence was presented to the committee of continuing areas of sex discrimination or substantive inequality which have not been overcome despite the passing of the Act. Most of this evidence concerned discrimination which was employment related including a lack of pay equity, limited access to paid parental leave, and women being under-represented in particular professions and leadership positions.

20 *Submission 20*, pp 7-8. See also HREOC, *Submission 69*, p. 8.

21 *Committee Hansard*, 11 September 2008, p. 5.

22 *Committee Hansard*, 11 September 2008, p. 5. See also ACCI, *Submission 25*, p. 33.

23 United Nations, *Report of the Committee on the Elimination of Discrimination against Women*, United Nations, New York, 2006 at: <http://www.un.org/womenwatch/daw/cedaw/34sess.htm#documents> (accessed 29 August 2008) pp 40-46.

24 *Submission 39*, p. 5. See also NACLC, *Submission 52*, p. 9; Collaborative submission, *Submission 60*, p. 10; Australian Catholic Religious Against Trafficking in Humans, *Submission 78*, p. 2.

Complaints

5.24 The number of complaints made under the Act is not necessarily an accurate indication of the level of discrimination since people facing discrimination may decide not to pursue complaints under the Act for a wide variety of reasons. For example, they may decide to pursue claims under state or territory anti-discrimination legislation rather than under federal legislation or, in the case of employment discrimination, they may pursue a claim under industrial relations laws. Conversely, an increase in the number of complaints may simply be evidence of an increase in the awareness of rights and the willingness to assert them rather than an increase in discrimination itself.

5.25 Nevertheless, it is interesting that the statistics in relation to complaints received by HREOC show an increase in the number of sex discrimination complaints over the last two years. HREOC advised that:

Complaints received under the SDA have remained consistent at around 350 complaints a year since 2002-03, increasing by 36% in the 2006-07 reporting year and remaining at this increased level in the current year.

...It is predominantly women who make complaints of discrimination and harassment under the SDA. Since 2002-03, women have represented at least 82% of complainants.²⁵

5.26 HREOC further advised the committee that:

...the vast majority of complaints made under the SDA relate to the area of employment. The next main area of complaint is the provision of goods and services. The largest ground of complaint is sex discrimination and this has increased over the past three years. The next most frequent ground of complaint is pregnancy discrimination followed by sexual harassment.²⁶

5.27 However, Professor Thornton told the committee that her more general research on complaints under anti-discrimination legislation across the country suggested both a decline in the number of complaints and the number of complaints going to a formal hearing.²⁷

5.28 Notably, Job Watch which provides a free telephone advice service to Victorian workers including advice in relation to sex discrimination and sexual harassment did not consider that the incidence of discrimination and harassment was declining.²⁸ Mr Ian Scott of Job Watch told the committee:

Over the last five years, JobWatch has received approximately 850 calls per year in relation to sex based discrimination, and about 90 per cent of those

25 *Submission 69*, p. 187. See also Women's Electoral Lobby, *Submission 8*, p. 12.

26 *Submission 69*, p. 191.

27 *Committee Hansard*, 11 September 2008, p. 41. See also paragraph 6.17.

28 Mr Ian Scott, Job Watch, *Committee Hansard*, 10 September 2008, p. 44.

callers were women. ...We say that sex based discrimination is still a problem and a problem that mainly relates to women.²⁹

5.29 Job Watch assisted the committee by providing a statistical breakdown of the calls it receives in relation to sex discrimination. Amongst other things, that breakdown demonstrated that most callers are in the 25 to 34 years age group (52.6 percent) or the 35 to 44 years age group (27.8 percent) and that:

The main types of sex discrimination inquiries JobWatch receives relate to maternity leave, parental and carer status discrimination closely followed by sexual harassment, pregnancy and breast feeding discrimination... Over the last 12 months there has been an increase in all inquiries, except sexual harassment, but the largest increase has occurred in parental and carer status discrimination.³⁰

5.30 The Working Women's Centre South Australia, Northern Territory Working Women's Centre and Queensland Working Women's Service (the Working Women's Centres) also provide direct advice to women on work related issues. The Working Women's Centres advised that:

In 2007 the three Centres provided information to over 6000 women with approximately 14% of these calls relating to issues about maternity entitlements, pregnancy, sex and family responsibility discrimination, returning to work, child care and balancing work and family.³¹

5.31 The Queensland Working Women's Service and Northern Territory Working Women's Centre both reported receiving an increasing number of inquiries regarding both pregnancy and work and family discrimination. While, the South Australian Working Women's Centre noted a slight increase in enquiries about maternity entitlements in 2007-08.³²

Pay equity

5.32 One key area of substantive inequality is the continuing gap between male and female earnings. The Business and Professional Women Australia noted that:

[W]omen in Australia are earning up to 17% less than men, and retiring on less than a third of male savings. This is despite the fact that in the last 25 years there have been substantial changes in women's economic circumstances. *Australian Social Trends* reports that the proportion of women earning their own incomes has risen, and levels of economic autonomy experienced by women have increased. However, women's

29 *Committee Hansard*, 10 September 2008, p. 35. See also Hawkesbury Nepean Community Legal Centre, *Submission 77*, p. 2.

30 *Submission 62*, pp 6 and 8.

31 *Submission 56*, p. 2. See also Shop, Distributive and Allied Employees' Association, *Submission 42*, p. 6.

32 *Submission 56*, p. 2.

relative economic position, as measured by their share of total gross personal income, has remained largely unchanged.³³

5.33 HREOC provided more detail on the causes and practical consequences of the gender pay gap for women:

Currently, women working full-time earn 16 per cent less than men. The gender pay gap is even greater when women's part-time and casual earnings are considered, with women earning two thirds what men earn overall. Women are more likely to be working under minimum employment conditions and be engaged in low paid, casual and part time work. Australian women are overrepresented in low paid industries with high levels of part time work such as retail, hospitality and personal services.

The gender pay gap has a number of critical flow-on effects. Women, having earned less than men and carried a significantly greater share of unpaid work, have significantly less retirement savings compared to men. Current superannuation payouts for women are one third of those for men.³⁴

5.34 Surprisingly, there appears to be a pay gap between men and women even after factors such as differences in occupations, qualifications and experience are taken into account. An officer of the Department of Education, Employment and Workplace Relations recently gave evidence to the House of Representatives Standing Committee on Employment and Workplace Relations inquiry into pay equity on this issue. She noted that :

In terms of gender pay gaps, the gap in Australia is commensurate with the average across the OECD countries and has followed a similar trajectory over time. ...The OECD also reported one quarter of this pay gap remains unexplained, even after considering the impact of direct and indirect factors, such as education, experience, occupation, motivation, expectations and field of study.³⁵

5.35 Similarly, the Law Council noted that:

From the very beginning of their careers within the legal profession, men are paid more than women. For example, in New South Wales when the incomes of solicitors with less than one years experience were compared in 2002, men on average earned \$8,200 more than their female counterparts. In 2007 little has changed, the estimated mean income of male solicitors admitted between one and five years was calculated to be \$70,300 while that of female practitioners was \$63,500.³⁶

33 *Submission 11*, p. 2.

34 *Submission 69*, p. 30. See also Australian Women's Health Network, *Submission 30*, p. 3; Queensland Council of Unions, *Submission 46*, p. 7.

35 *House of Representatives Standing Committee on Employment and Workplace Relations Hansard*, 18 September 2008, p. 1.

36 *Submission 59*, p.21. See also Ms Penny Thew, Law Council, *Committee Hansard*, 10 September 2008, p. 60.

5.36 The Australian Education Union pointed to structural discrimination contributing to the lack of pay equity between men and women including an undervaluing of the work that women have traditionally done and concentration of women in lower paid positions. Mr Angelo Gavrielatos, Federal President of the Union, told the committee:

[W]ithin our own industry, whilst 70 per cent-plus of our workforce are women they are underrepresented in terms of the higher earning rungs of our profession. Those people who went to fields of administration or principalship, et cetera; women are underrepresented in those higher rungs of the profession and certainly overrepresented, if you like, in the lower paid rungs of our industry.³⁷

5.37 Unions New South Wales submitted that the Act does not ensure pay equity for work of comparable value:

This means that whilst men and women who do the same job have some degree of recourse under the Act if there is a disparity in their pay, the Act fails to note the genderised nature of many industries and thus allows for a systematic undervaluing of some work, particularly that performed by women. A key example of this is the significant disparity in pay between apprentice hairdressers and apprentice car mechanics, despite them having to undertake comparable training and purchase comparable trade tools.³⁸

5.38 To remedy this, Unions New South Wales suggested that the Act be amended to require that an award made by an industrial relations commission, or an agreement recognised by a commission, must provide for equal remuneration for men and women doing work of equal or comparable value.³⁹ Similarly, the United Nations Development Fund for Women (UNIFEM Australia) argued that equal pay for equal work should be a specific objective of the Act and legally required by the Act in more explicit terms.⁴⁰

Discrimination within professions

5.39 It appears that the experience of discrimination is not limited to women in precarious or low paid employment. For example, the Association of Professional Engineers, Scientists and Managers Australia submitted that the existing legislation has not eliminated sex discrimination or discrimination on the basis of family responsibilities within the technical professions. The Association outlined areas of discrimination including a lack of pay equity and women being under-represented at senior levels in the professions.⁴¹ The association noted that:

37 *Committee Hansard*, 10 September 2008, p. 62.

38 *Submission 5*, p. 2. See also Association of Professional Engineers, Scientists and Managers Australia, *Submission 48*, p. 6; HREOC, *Submission 69*, pp 31-32.

39 *Submission 5*, p. 2.

40 *Submission 19*, pp 3-4. See also *Committee Hansard*, 9 September 2008, p. 40.

41 *Submission 48*, pp 3-6.

Indications are that despite existing sex discrimination legislation the prevalence and impact of direct discrimination [on] women in technical professions is extensive. A survey of women engineers conducted by Engineers Australia in 2007 found that 42.3% of women respondents had experienced discrimination in their role as an engineer (predominantly gender based), which had increased from 36% in 1999.⁴²

5.40 The Law Council provided similar evidence in relation to the experience of women in the legal profession.⁴³ In particular, the Law Council noted that:

While the number of women entering the profession has increased there has not been a corresponding rise in the numbers of women attaining law firm partnerships. A 2006 survey of partnership appointment found that at 24 of Australia's leading law firms, women make up on average just 18.1% or 429 of 2364 partners.⁴⁴

5.41 Ms Penny Thew of the Law Council also pointed to the attrition of women from the legal industry as a factor preventing any increase in the proportion of female lawyers:

Even though the number of women entering the bar in particular has increased in the very recent past, the level of women at the bar remains fairly static over the last five to seven years in any event. That is in New South Wales, and I understand it is the same in relation to the legal industry generally in New South Wales.⁴⁵

Paid parental leave

5.42 UNIFEM Australia explained that the provision of universal paid maternity leave is a distinct international obligation under CEDAW and pointed out that:

Australia is one of the only two OECD Countries that does not have a requirement for paid maternity leave: Maternity leave is not mandated by the SDA, but is left to the discretion of the employer.⁴⁶

5.43 HREOC's submission noted that the absence of a legislative requirement means that:

Paid maternity leave is accessed by only around one third of employed pregnant women. The use of paid paternity or parental leave by male partners is even lower at 25 per cent.⁴⁷

42 *Submission 48*, p. 3.

43 *Submission 59*, pp 19-22.

44 *Submission 59*, p. 20.

45 *Committee Hansard*, 10 September 2008, p. 59.

46 *Submission, 19*, pp 2-3.

47 *Submission 69*, p. 33.

5.44 UNIFEM Australia recommended that the Australian Government remove its reservation to CEDAW in relation to maternity leave.⁴⁸ Mrs Rosalind Strong the President of UNIFEM Australia submitted that a system of paid maternity leave should be implemented urgently:

We believe that there should be wide consultation within the community, not just with industry, in relation to that matter. We also think that contemporary notions of equality include shared responsibility for care giving, so the issue of paid maternity leave should be extended to include paid paternity leave.⁴⁹

5.45 Some submissions made specific proposals for the introduction of a requirement for paid parental leave. Unions New South Wales recommended there be a legislative requirement for paid parental leave for a minimum of six months.⁵⁰ While the Young Women's Christian Association (YWCA) Australia advocated nine months of paid parental leave funded by both government and employers to provide 75-80% replacement of earnings.⁵¹

5.46 The committee notes that the Productivity Commission released a draft report on 29 September 2008 as part of its inquiry into paid parental leave. The draft report sets out a proposal for a statutory, paid parental leave scheme which would provide a maximum of 18 weeks of paid leave to be shared between parents, with an additional 2 weeks of paternity leave for the father or same sex partner.⁵² The scheme would be largely taxpayer funded, available to employed parents and provide payments at the adult minimum wage for most eligible employees.⁵³ The commission has invited submissions on the draft report and is due to report in February 2009.

Representation of women in leadership positions

5.47 The submission from HREOC pointed to the representation of women in leadership positions as another area in which inequality persists:

In Australia, women continue to be significantly under-represented in senior leadership positions across business, government and the community, despite Australia leading the world [in] levels of educational attainment for women. For the top 200 companies listed on the Australian Stock Exchange at 1 February 2006, women held only 8.7 per cent of board directorships. Women make up 25 per cent of the House of Representatives in the Parliament of Australia. The statistics of women's representation in

48 *Submission, 19*, p. 3.

49 *Committee Hansard*, 9 September 2008, pp 39-40.

50 *Submission 5*, pp 3-4.

51 *Submission 58*, p. 8.

52 Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children*, Draft inquiry report, Canberra, September 2008 at: <http://www.pc.gov.au/projects/inquiry/parentalsupport/draft> (accessed 20 October 2008), p. 2.1.

53 Productivity Commission, p. 2.1

leadership positions are indicative of the barriers faced by women to equal participation and progression in the workplace.⁵⁴

5.48 The Business and Professional Women Australia also raised this issue and argued that:

[S]tructural change is needed to ensure that women fill a greater number of senior positions in both government and private enterprise. Women continue to lag behind in both remuneration and in corporate leadership...⁵⁵

5.49 UNIFEM Australia noted that the Act does not include any “mechanism to increase the representation of women in both elected and appointed public offices until they are present in Australian public life in numbers proportionate to their representation in the community and their desire for involvement”.⁵⁶ Mrs Strong of UNIFEM Australia told the committee:

Currently the Sex Discrimination Act is silent on this issue, although it is an element of CEDAW. We seek a clause that recognises the role of women in leadership in political, community and business life. We recognise that this is likely to be a symbolic clause but, by having a reference in the Act, we think it would be a strengthening of the situation in Australia which, at the moment, relies mostly on goodwill and the good faith of government or organisations...⁵⁷

Sexual Harassment

5.50 Evidence to the committee suggested that sexual harassment is an area of continuing discrimination. The committee was also told that the sexual harassment provisions in the Act are deficient in several respects.

Incidence of sexual harassment

5.51 Several witnesses and submissions provided evidence that sexual harassment remains a significant problem in Australian workplaces even in its most blatant forms. The Sex Discrimination Commissioner noted that sexual harassment was a key theme emerging from her listening tour.⁵⁸ The submission from HREOC expanded on this:

The Commissioner also heard many experiences of sexual harassment, ranging across industries and professions. One woman commented on her experience of repeated unwelcome sexual advances where she lives in close quarters to her male colleagues:

54 *Submission 69*, p. 31.

55 *Submission 11*, p. 3. See also Professor Marian Sawer, *Committee Hansard*, 11 September 2008, p. 41.

56 *Submission 19*, p. 6.

57 *Committee Hansard*, 9 September 2008, p. 40. See also p. 44.

58 *Committee Hansard*, 9 September 2008, p. 18.

I've been living [in these work quarters] for three years and I've had knocks on my door at night with guys saying, "Guess you're feeling a bit lonely, love?" It shouldn't happen. I've been sitting with a group of males and one will ask, "Don't you think it's my turn [for sex] tonight?"⁵⁹

5.52 Legal Aid Queensland stated that sexual harassment is a common complaint from clients, particularly in private sector organisations and small businesses, and provided the following examples of sexual harassment cases:

Case example 1: client was employed by café as a waitress and experienced sexual harassment from the chef and owner. They made lewd suggestions about her appearance, asked her about her love life, left pornography lying around, and threw a bucket of water at the top of her torso whilst at a work function.

Case example 2: young female client worked for butcher and was regularly slapped on the bottom by the butcher. Butcher could not see that this behaviour was inappropriate or sexist.⁶⁰

5.53 Similarly, the Public Interest Law Clearing House (PILCH) considered that "sexual harassment remains prevalent in Australia and there is little awareness of the incidence, nature and consequences of sexual harassment."⁶¹

5.54 A national telephone survey commissioned by HREOC in 2003 found that 28 per cent of women and seven per cent of men had experienced sexual harassment in the workplace.⁶² The HREOC survey also indicated the prevalence of particular types of sexual harassment:

Victims of sexual harassment report experiencing a broad range of behaviours including serious criminal offences such as sexual or physical assault. The 2003 HREOC telephone survey found that of those who experienced sexual harassment in the workplace in the last five years 94 per cent experienced crude or offensive behaviour; 85 per cent experienced unwanted sexual attention; 43 per cent experienced sexist behaviours; 20 per cent experienced sexual assault; 19 per cent experienced sexual coercion; and 62 per cent experienced physical harassment.⁶³

5.55 The Association of Professional Engineers, Scientists and Managers, Australia submitted that sexual harassment continues to be an issue for many women working in the technical professions and pointed to a recent Engineers Australia survey in which

59 *Submission 69*, p. 35. See also p. 191.

60 *Submission 26*, pp 3-4.

61 *Submission 31*, p. 3. See also pp 11-14; HREOC, *Committee Hansard*, 9 September 2008, p. 4; Women's Forum Australia, *Submission 64*, pp 12-13.

62 *Submission 69*, p. 132.

63 *Submission 69*, pp 132-133.

22% of women engineer respondents answered that they had experienced sexual harassment, and 28% bullying, whilst working as an engineer.⁶⁴

5.56 In addition, some submissions suggested that there is significant under-reporting of sexual harassment. For example, the ACTU noted:

A recent survey conducted by the Shop Assistant's Union (SDAEA) found that over one third of respondents who had experienced sexual harassment in the workplace did not report it, largely because they thought it would be ignored by management.⁶⁵

5.57 On the basis of the experience of the Working Women's Centres, the Collaborative submission supported the view that the number of complaints of sexual harassment may only be the "tip of the iceberg". The submission explained why there is such significant underreporting of sexual harassment:

Many women contacting the [Working Women's Centres], in particular young, lower skilled and precariously employed women, report to the centres that they feel that they have no alternative than to resign or take periods of leave after experiencing sexual harassment, especially when it is ongoing. The [Working Women's Centres] have also documented numerous cases where the woman has complained internally and the ultimate result is that she is compensated or paid out to terminate her employment but the harasser has remained employed in the organisation and in some cases promoted or moved sideways.⁶⁶

5.58 NACLCL also pointed to the difficulties women who do pursue sexual harassment complaints face:

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.⁶⁷

5.59 As the 2003 HREOC survey demonstrates, sexual harassment is not exclusively directed at women.⁶⁸ Furthermore, the Equal Opportunity Commission and the Office of Women (SA) advised that the commission is receiving increasing

64 *Submission 48*, p. 7.

65 *Submission 55*, p. 11. See also PILCH, *Submission 31*, supplementary submission, p. 1; Shop, Distributive and Allied Employees' Association, *Submission 42*, p. 6; HREOC, *Submission 69*, p. 133.

66 *Submission 60*, p. 33. See also Emily's List, *Submission 61*, pp 2-3.

67 *Submission 52*, p. 19. See also PILCH, *Submission 31*, supplementary submission, p. 2; HREOC, *Submission 69*, p. 132.

68 See also HREOC, *Submission 69*, p. 132.

numbers of sexual harassment complaints from men who have been harassed by other men.⁶⁹

Deficiencies in the sexual harassment provisions of the Act

5.60 The Sex Discrimination Commissioner pointed to deficiencies in the existing legislative protection from sexual harassment and recommended extending coverage in two areas: firstly in relation to workers who are harassed by customers or clients and secondly in relation to educational institutions. With respect to workers, the Commissioner told the committee:

At the minute, if I am a customer and I am harassed by a worker, I have protection; but if I am a worker and the client or customer harasses me, there is no protection for me as a worker.⁷⁰

5.61 The submission from HREOC noted that:

[M]any workers are just as vulnerable to sexual harassment by customers as by fellow employees or supervisors. In response to sexual harassment (or conduct escalating towards sexual harassment) by an important customer or client, many workers may feel reluctant to take assertive action out of fear of the repercussions from the employer. The customer may be in a position to exploit a significant[t] imbalance of power between him or her and the worker, particularly if the client is important to the business or directly impacts on the worker's salary.⁷¹

5.62 HREOC recommended that 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.”⁷²

5.63 With respect to educational institutions, the Sex Discrimination Commissioner explained that:

[U]nder the Act, the harasser needs to be an adult student, which is 16 years or over. But if I harass two students, one who is 16 and one who is 15 years and 9 months, the 16-year-old victim has protection whereas the 15 years and 9 months year old student does not have protection. We are saying we should remove the age limit for the victim. We are not exactly sure why the victim has an age limit.⁷³

5.64 Finally, the Commissioner explained that under section 28F of the Act:

69 *Submission 45*, p. 3. See also Victorian Automobile Chamber of Commerce, *Submission 32*, p. 7.

70 *Committee Hansard*, 9 September 2008, p.18.

71 *Submission 69*, p. 139.

72 *Submission 69*, p. 140.

73 *Committee Hansard*, 9 September 2008, p.19. See also *Submission 69*, pp 140-141.

[T]here is currently a requirement that the harasser must be at the same educational institution as the victim. If I go to the school sports carnival and a lot of neighbouring schools are there and I am harassed by a student or a teacher from another school, then I do not have any protection. We are saying that we should remove the requirement that the harasser must be at the same educational institution as the victim.⁷⁴

5.65 However, the Association of Independent Schools of South Australia expressed some reservations about expanding the coverage of the sexual harassment provisions with respect to education institutions. The Association noted that schools have existing procedures for handling allegations of student to student sexual harassment and suggested that HREOC handling such cases may not be in the best interests of either student.⁷⁵

5.66 The Law Council submitted that the Act does not provide comprehensive protection against sexual harassment. In relation to the legal profession, the Law Council noted that the Act may not apply to harassment that occurs between:

- witnesses and lawyers;
- lawyers and judicial officers or court staff;
- solicitors and barristers; or
- barristers.⁷⁶

5.67 Rather than seeking to plug these gaps, the Law Council proposed that the Act be amended by replacing the existing provisions, which prohibit sexual harassment in particular areas of public life, with a provision making sexual harassment unlawful per se. The Law Council recommended that this provision be similar to section 118 of the *Anti-Discrimination Act 1991 (Qld)* which simply provides: A person must not sexually harass another person.⁷⁷

5.68 The Anti-Discrimination Commissioner of Tasmania recommended that the definition of sexual harassment in section 28A of the Act be broadened. In particular, the Commissioner suggested that the definition should include the displaying of material related to a prescribed attribute (such as sex) so that the definition encompasses the displaying of offensive pornographic material.⁷⁸

5.69 Professor Thornton submitted that subsection 28A(1) of the Act should be amended to remove the requirement that the person harassed would be ‘offended,

74 *Committee Hansard*, 9 September 2008, p.19. See also *Submission 69*, pp 141-142.

75 *Submission 75*, p. 2.

76 *Submission 59*, pp 27-28.

77 *Submission 59*, p. 29. See also HREOC, *Submission 69*, pp 142-143.

78 *Submission 13*, p. 4. See also Working Women’s Centres, *Submission 56*, p. 6.

humiliated or intimidated’ and replace it with a requirement ‘that the person harassed would find the conduct unwelcome’.⁷⁹ She argued that:

[T]he requirement that the person harassed would be ‘offended, humiliated or intimidated’ contains questionable moralistic overtones. While sexual harassment undoubtedly contributes to the inequality of women at work, the phrasing of the SDA requires the person harassed to present themselves as exceptionally fragile and vulnerable. One of the descriptors may be appropriate in some cases, but not in others. Most significantly, it plays down the discriminatory effect of the conduct.⁸⁰

5.70 The Working Women’s Centres were also critical of the definition of sexual harassment in section 28A. They argued that:

For a complaint of sexual harassment to be upheld, the Act requires that a reasonable person would have anticipated that offence, humiliation or intimidation would have occurred. The nature of this requirement is limiting in that the reasonable person is required to anticipate that the person actually would be offended. This is a much stricter test than some state legislation.⁸¹

5.71 In particular, the Working Women’s Centres preferred the definition under section 119 of the *Anti-Discrimination Act 1991 (Qld)* which provides that “the person engaging in the conduct ...does so in circumstances where a reasonable person would have anticipated the *possibility* that the other person would be offended, humiliated or intimidated by the conduct” (emphasis added).⁸²

5.72 The Law Council and HREOC articulated similar concerns and also supported broadening the definition of sexual harassment in this way.⁸³ In addition, they argued that the Act should include a provision equivalent to section 120 of the *Anti-Discrimination Act 1991 (Qld)*. Section 120 provides that the circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated 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.⁸⁴

79 *Submission 22*, p. 6.

80 *Submission 22*, p. 5. See also Collaborative submission, *Submission 60*, pp 33-34.

81 *Submission 56*, p. 5.

82 *Submission 56*, p. 5.

83 *Submission 59*, pp 28-29; *Submission 69*, pp 137-138.

84 *Submission 59*, p. 29; *Submission 69*, pp137-138.

5.73 HREOC submitted that the advantage of incorporating a statutory guide to assessing reasonableness is that it:

...clearly directs the court to assess the reasonableness of the impugned conduct by reference to the individual circumstances and characteristics of the victim. This takes into account any gender, race, cultural, age or other relevant circumstances or factors that might help to explain why the individual victim regarded the conduct as unwelcome and inappropriate. By contrast, the SDA contains only a vague reference to 'having regard to all the circumstances'.⁸⁵

5.74 Finally, Ms Michele Panayi of PILCH argued that the identity of the victim in sexual harassment cases should be protected as a matter of course:

[U]nder the Federal Magistrates Court Act, an application can be made to a federal magistrate seeking that the identity of a witness or a party to the litigation be suppressed. However, from the information I have received from experts in the field, that is not easy to obtain. From the very beginning, a person who is going through this is extremely traumatised and extremely anxious. They need legal advice at the beginning to the effect that, 'If you go through this process, it will be okay; you will be de-identified.'⁸⁶

Violence

5.75 The committee did not receive extensive evidence in relation to the incidence and consequences of violence against women. However, HREOC submitted that violence against women remains a major human rights issue facing Australia:

Research has found that nearly one in five women has experienced sexual violence since the age of fifteen. An international study found that around one in three Australian women have experienced violence from an intimate partner in their lifetime.⁸⁷

5.76 Women's Forum Australia argued that prostitution and pornography contribute to violence against women:

[T]he activities of the sex industry, which have become normalised and entrenched in society, along with other forms of objectification of women and girls, are major contributors to shaping the attitudes of men and boys, distorting their views of women and girls, contributing to calloused attitudes, harassment and violence.⁸⁸

5.77 The Australian Women's Health Network pointed to the health consequences of violence against women:

85 *Submission 69*, pp 137-138. See also Law Council, *Submission 59*, p. 29.

86 *Committee Hansard*, 10 September 2008, p. 26.

87 *Submission 69*, p. 34.

88 *Submission 64*, p. 3.

[A] study in Victoria in 2004 found that intimate partner violence, based as it is in gender inequality, contributed 9 per cent to the total disease burden for Victorian women aged between 15 and 44 years and 3 per cent for all Victorian women. Astonishingly, perhaps, partner violence was the leading contributor to death, disability and illness for women aged between 15 and 44 years, ahead of well recognised risk factors, such as high blood pressure, smoking and obesity.⁸⁹

5.78 The Working Women's Centres also raised the issue of violence against women and suggested that the Act should ensure that women are not discriminated against in the workplace as a consequence of domestic violence against them:

[H]einous crimes are regularly committed against women by their partners (and at times other family members) resulting in them being injured (physically, emotionally and/or psychologically), causing lateness to work, interfering in their work by constant phoning, following them to their workplace and entering the site, preventing them from attending work or impacting on their work in other ways to such an extent that their employers institute performance reviews. The Act should encompass provisions for making it illegal to dismiss or disadvantage an employee on the grounds of being a victim of domestic violence.⁹⁰

Addressing discrimination against men

5.79 Some submissions argued that the Act has been more successful in addressing discrimination against women than against men. These submissions pointed to areas such as poorer educational outcomes for boys and higher rates of male suicide as evidence of discrimination against men.⁹¹ For example, the Lone Fathers Association of Australia argued that:

Australia's schools and universities are to a significant extent failing boys and young men. National policy for the education of girls (1987) made a point of neglecting boys' needs. 15 years after the first examination of boys' education issues, the situation continues to worsen, with only 75% of boys completing year 12 in Australia, compared with 81% for girls...⁹²

5.80 While Dads on the Air submitted that:

Males have much higher illness, injury, accident and death rates and die 5 years earlier than females, yet research funding for male health is less than one-third of that for female health.

Males suicide at almost four times the rate of females. More males kill themselves each year than the entire Australian road toll.

89 *Submission 30*, p. 3. See also Women's Forum Australia, *Submission 64*, p. 1.

90 *Submission 56*, pp 6-7.

91 Mr Richard A Greenwood, *Submission 3*, p. 2; Dads on the Air, *Submission 6*; Lone Fathers Association Australia, *Submission 54*; Families without Women, *Submission 67*, pp 6 and 9.

92 *Submission 54*, p. 6.

More than twice as many males as females experience work-related injuries and illnesses, and over ninety percent of work-related deaths are males.⁹³

5.81 Several submissions argued that there is particular discrimination against men in their role as fathers.⁹⁴ Dads on the Air submitted that this discrimination is evident in parental leave arrangements which are inequitable to men and thus reinforce the notion of fathers as breadwinners not ‘hands-on dads’.⁹⁵

5.82 Similarly, the Equal Opportunity Commission and the Office of Women (SA) noted that many fathers face discriminatory views when they seek to have their parental responsibilities taken into account such as when they request extended leave to care for a child.⁹⁶

5.83 The Human Rights Law Centre pointed out that to effectively address discrimination against women the Act must also address discrimination against men. Ms Rachel Ball of the Centre explained that to achieve equality for women:

...you need to also address inequality that men experience. The example that is often given is of the stereotype that women are mainly responsible for the care and responsibilities of children and that men are responsible for going to work, and if that stereotype is perpetuated to the detriment of both men and women the result is that women generally will be the ones who end up needing to give up the opportunity to participate more fully in public and economic life.⁹⁷

5.84 HREOC explained that the Act currently does not provide the same protection from sex discrimination for men:

Section 9 of the SDA draws on all the available heads of Commonwealth legislative power to give the SDA its broadest possible effect as far as it is constitutionally possible to do so. All of those heads of power are expressed in gender neutral terms, so they apply equally to men and women. If a claim is against a corporation, a man has protection equal to that of a woman. The only exception to that is section 9 (10), and essentially that gives effect to the external affairs power. In relying on the external affairs power, the government has given effect only to CEDAW.

Because CEDAW is expressed for the protection of women only, if you are in an area where no other head of constitutional legislative power applies, such as in an unincorporated body or a state government, a woman will

93 *Submission 6*, p. 2. See also Mr Ross Mitchell, *Submission 81*, p. 2.

94 Dads on the Air, *Submission 6*; Non-Custodial Parents Party, *Submission 21*; Lone Fathers Association Australia *Submission 54*; Families without Women, *Submission 67*.

95 *Submission 6*, p. 2.

96 *Submission 45*, p. 3. See also Australian Women Lawyers, *Submission 29*, pp 4-5.

97 *Committee Hansard*, 10 September 2008, p. 3.

have protection because CEDAW will give her protection, whereas a man will not.⁹⁸

5.85 An officer of the Attorney-General's Department provided an example of the more limited operation of the Act in relation to discrimination against men:

[A] university was found to be a trading corporation, so a man was able to take a sex discrimination complaint against that university. But a group of men who took a complaint against an unincorporated golf club, for example, found that the Sex Discrimination Act did not provide them with a remedy ...because the constitutional power of the Commonwealth did not extend to unincorporated associations. That does not mean to say that, under Australian law, they do not have any remedy at all. It is very likely ... that, if they took an action under the state or territory law ...they would be able to get a remedy or have their complaint heard.⁹⁹

5.86 Dads on the Air submitted that the Act should be gender neutral and be aimed at gender equality not just equality for women.¹⁰⁰ The Sex Discrimination Commissioner made a similar recommendation to the committee:

At the moment there are a number of ways in which the Sex Discrimination Act does not provide equal protection for both men and women. This is understandable, recognising that in 1984 the Sex Discrimination Act was enacted primarily to implement our international obligations under CEDAW. However, in 2008, we consider that to promote substantive gender equality in this country it is essential that the SDA applies equally for the benefit of both women and men...¹⁰¹

5.87 To ensure that the Act provides equal protection to men, HREOC proposed amending subsection 9(10) so that, instead of relying on the external affairs power just to give effect to CEDAW, it would give effect to other international obligations Australia has in relation to sex discrimination under ICCPR, ICESCR and the relevant ILO conventions.¹⁰²

98 *Committee Hansard*, 9 September 2008, p. 8. See also Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 11 September 2008, p. 9; Attorney-General's Department, *Answers to question on notice*, 22 October 2008, p. 2.

99 *Committee Hansard*, 11 September 2008, p. 6.

100 *Submission 6*, p. 3. See also Non-Custodial Parents Party, *Submission 21*, pp 2-4; Adrian Smyth, *Submission 28*; Neville Edwards, *Submission 34*; Lone Fathers Association Australia *Submission 54* pp 4-8; Helmut Roth, *Submission 66*; Families without Women, *Submission 67*.

101 *Committee Hansard*, 9 September 2008, p. 4.

102 *Committee Hansard*, 9 September 2008, p. 8. See also Ms Kate Eastman, Law Council, *Committee Hansard*, 10 September 2008, p. 58.