CHAPTER 11

SUMMARY OF THE VIEWS OF COMMITTEE MEMBERS

11.1 While the committee has received extensive evidence of areas in which the Act could be improved, it is notable that the submissions to this inquiry were overwhelmingly supportive of the Act and its objects. That represents a very dramatic shift in public attitudes since the controversial passage of the Act nearly 25 years ago. It is not possible to disentangle from other factors what contribution the Act has made to this widespread acceptance of the goal of gender equality, but it seems likely to have been a substantial one. As commentators including Dr Smith have pointed out, legislation plays a normative role: it acts as a powerful symbol of what behaviour society regards as unacceptable, what we value and what we aspire to.[1]

11.2 The committee shares the view expressed by the Sex Discrimination Commissioner that:

> [T]he Sex Discrimination Act matters. It matters as a tool for driving systemic and cultural change which is needed if we are to live in a country where men and women enjoy true gender equality in their daily lives. The Act has been in operation for nearly 25 years. Like most law, it is time to renew it to ensure that it continues to be an effective platform for progressing gender equality.[2]

11.3 Some submissions suggested that the time frame of this inquiry was too short and others argued that some changes to the Act require further consultation.[3] The committee believes that a review of the Act was timely and that there are clearly a number of immediate changes which could be made to improve the Act. However, the committee accepts that other changes are more complex and require further consultation and consideration. The committee has therefore grouped its recommendations according to whether they are:

- changes which ought to occur immediately;
- changes which require further consultation but should be considered over the next 12 months; or

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1 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.

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

3 See for example Women Lawyers Association of NSW and Australian Women Lawyers, *Submission 29*, p. 3; Collaborative submission, *Submission 60*, p. 1; Muslim Women's National Network of Australia, *Submission 65*, p. 3.

- longer term changes which require significant further consultation and consideration.

11.4 The committee has not made recommendations regarding implementation of a paid parental leave system. While the committee supports such a system, it considers that the draft report and recommendations of the Productivity Commission have more than adequately addressed this issue.

Suggested changes for immediate implementation

Objects

11.5 The committee believes that the Act should set out an unequivocal commitment to the elimination of sex discrimination and sexual harassment. The qualification of the commitment to eliminate discrimination in the preamble to the Act and the objects in section 3 by the phrase 'as far as is possible' is unhelpful at best. At worst, it suggests only a half-hearted conviction that eliminating discrimination is desirable and achievable.

11.6 The objects of the Act currently include giving effect to CEDAW which is directed primarily at the elimination of discrimination against women. The objects do not refer to ICCPR, ICESCR or the ILO conventions which create obligations in relation to eliminating sex discrimination and promoting gender equality.[4] In the committee's view, it is important that the Act represents a commitment to achieving gender equality rather than the narrower goal of eliminating discrimination against women. The objects of the Act should therefore explicitly refer to these other international conventions which create obligations in relation to gender equality.

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.

Interpretation and definitions

11.9 The committee is concerned by evidence it received suggesting that the courts have adopted a narrow approach to interpretation of the Act. A key purpose of the Act is to implement Australia's international obligations to eliminate sex discrimination. The committee agrees that the Act ought to be interpreted broadly given its beneficial

4 ILO Convention 100, ILO Convention 111 and ILO Convention 156.

purpose and, in particular, that interpretation of the Act should be consistent with Australia's international obligations. There is already a presumption at common law that domestic legislation should be interpreted consistently with Australia's obligations under international law. However, as HREOC pointed out, there are a plethora of competing interpretative principles. The committee therefore considers that there should be an express requirement under the Act for the courts to interpret the provisions of the Act consistently with the international conventions it seeks to implement.

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.

11.11 The committee considers that the definition of 'de facto spouse' in section 4 of the Act should be amended to include same-sex couples. This would protect same-sex couples from discrimination on the basis of their relationship status. In its inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008, the committee received submissions expressing concern that amendments to social security and tax legislation to remove discrimination against same-sex couples will require those couples to declare their relationship status. This includes many elderly couples who may not previously have declared their relationship to others. In this context, the committee is particularly concerned to ensure that the Act provides protection to same-sex couples from discrimination based upon their relationship status.

11.12 Evidence to the committee clearly demonstrated the difficulties in making out a complaint of discrimination under the Act caused by the current definitions of discrimination. In particular, the requirement for complainants to show that they were treated less favourably than a comparator seems to add unnecessary complexity to consideration of whether the treatment of the complainant was discriminatory. It appears both simpler and more in keeping with the purpose of the Act to use a definition of direct discrimination similar to that under paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)* which simply requires the applicant to show that he or she has been treated unfavourably because of a protected attribute (such as sex, marital status or pregnancy). The committee has accordingly recommended amendment of the definitions of direct discrimination in sections 5 to 7A of the Act to replace the comparator test with a test of unfavourable treatment.

11.13 The committee also supports replacing the reasonableness test in relation to indirect discrimination with a test requiring that the condition, requirement or practice be legitimate and proportionate. Comparable jurisdictions including the United States and the United Kingdom provide for a more stringent test than reasonableness. The committee considers that something more than reasonableness should be required where practices are likely to disadvantage one sex, people of a particular marital status

or pregnant women. Specifically, conditions, requirements or practices that disadvantage such groups should only be imposed in pursuit of a legitimate object and where they are proportionate, in the sense that they are the least restrictive means of achieving that object.

11.14 The committee notes concerns about the narrow interpretation of the phrase 'condition, requirement or practice' in the *Kelly* case but, with respect, considers that this case did not interpret that phrase correctly: a decision by an employer to refuse to provide part-time work is surely an employment practice and not merely the withholding of a benefit from an employee. Evidence to the committee also pointed to the High Court decision in *Amery* but that decision concerned an equivalent provision under the *Anti-Discrimination Act 1977 (NSW)* which is not worded in the same way as the indirect discrimination provisions in the Act and, in particular, refers only to 'a requirement or condition' and not to 'practices'.

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.

Scope of the Act

11.18 The committee strongly believes that the Act should provide equal protection to men from sex discrimination. This is important for both practical and symbolic reasons. On a practical level, removing discrimination against men in relation to their role as parents and carers is important in the process of recasting gender roles in a manner which is more equitable to both men and women. Furthermore, public support for the Act increasingly depends upon it being directed, not just at eliminating discrimination against women, but at the broader goal of gender equality. The

committee therefore recommends that subsection 9(10) of the Act be amended to refer not only to CEDAW but also to Australia's other international obligations with respect to gender equality. This will ensure that the Act provides equal coverage to men and women. The committee notes that a similar amendment to the Act was made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* to provide a constitutional basis for the provisions extending protection against discrimination on the basis of family responsibilities to same-sex couples.

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.

11.20 The committee is concerned by evidence it received of specific gaps in coverage under the Act. At present, it is doubtful whether the Act protects volunteers and independent contractors from sex discrimination and sexual harassment. In addition, the Act expressly excludes from coverage partnerships with fewer than six partners, and the Crown in right of the states and state instrumentalities.

11.21 While it is true that some complainants may be able to rely on state and territory legislation for a remedy, the committee does not consider that coverage under the federal Act should be so partial or depend upon such arbitrary distinctions. The committee has therefore recommended amendments to the Act to remove the most significant gaps in coverage identified by the inquiry.

11.22 Moreover, the existing patchwork approach to coverage under the Act appears both unnecessarily complex and undesirable. The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in all areas of public life equivalent to section 9 of the *Racial Discrimination Act 1975*. Similarly, the committee supports proposals that the Act be amended to include a general equality before the law provision equivalent to section 10 of the *Racial Discrimination Act 1975.*

11.23 While HREOC has suggested that these changes be the subject of further consultation, the committee is mindful that it is now 14 years since ALRC made similar recommendations. In addition, the operation of similar provisions under the *Racial Discrimination Act 1975* for over thirty years does not suggest that there are likely to be any unforeseen problems with the introduction of similar protection from sex discrimination and sexual harassment in public life. As a matter of principle, it is difficult to justify providing narrower protection from sex discrimination than the protection afforded from discrimination on the basis of race. Further, the absence of general protection provisions in the Act sends an unfortunate message that sex discrimination and sexual harassment are primarily private matters which should only be prohibited in narrowly specified public spheres.

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.

11.28 The committee acknowledges that the intent of the Act is to protect women from discrimination based upon them breastfeeding. This is achieved by providing in subsection 5(1A) that breastfeeding is a characteristic that appertains generally to women. This seems a somewhat circuitous path. It would be desirable for the Act to provide for specific protection against discrimination on the ground of breastfeeding in order to send a clear message that discrimination on this basis is prohibited.

Recommendation 12

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

11.30 Evidence to the committee overwhelmingly supported the view that the protection against discrimination on the basis of family responsibilities under the Act is too limited. The current protection is limited to direct discrimination resulting in termination. This excludes the most common types of discrimination on this ground such as employees being denied training or promotion, or being demoted or otherwise treated less favourably as a result of their family responsibilities.

11.31 The committee also notes the evidence it received demonstrating that a failure to strike an appropriate balance between work and caring responsibilities has negative consequences for the health of carers and for their workforce participation. Striking such a balance is also important to overcoming some entrenched aspects of gender discrimination which continue to lock women into the role of carer and men into the role of bread-winner to the detriment of both sexes. The committee recommends

broadening protection against discrimination on this ground. Specifically, both direct and indirect discrimination should be prohibited and protection should extend to all aspects of employment – not just termination.

11.32 In addition, the committee supports providing for a positive duty on employers not to unreasonably refuse requests for flexible working arrangements to accommodate family or carer responsibilities. The committee notes ACCI's submission that the NES will provide a similar right to employees and that this change should be bedded down before any expansion of the positive duty on employers. However, the NES will not apply to all employees and does not extend protection to parents and carers generally but only to those caring for children under school age. Furthermore, the committee accepts HREOC's view that the indirect discrimination provisions in the Act already prohibit the unreasonable imposition of work practices that disadvantage women with family responsibilities. As a result, the change proposed by the committee would simply recast this duty in positive terms and extend it to men with family responsibilities.

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)*.

11.35 The committee does not recommend narrowing the scope of the Act to allow states and territories to discriminate, on the basis of marital status, in relation to access to assisted reproductive technology, adoption and surrogacy. The committee acknowledges that such proposals are motivated by the sincere religious convictions of groups such as the Australian Christian Lobby and their belief that the welfare of children is best served by being raised by a mother and father. However, a bill to enact these changes was previously subject to extensive scrutiny by this committee and the Parliament.[5] Ultimately, that bill was not passed even after the previous government obtained a majority in the Senate. There are clearly a wide diversity of views in relation to this issue and evidence to the committee's previous inquiry shows that many within the community would view such an amendment as discriminatory. In addition, it is likely that such an amendment would be contrary to Australia's obligations under CEDAW – the very convention the Act was enacted to implement.

5 Sex Discrimination Amendment Bill (No.1) 2000.

Sexual harassment

11.36 The committee heard evidence that the existing definition of 'sexual harassment' is too narrow because it requires that a reasonable person would have anticipated that the person harassed *would be* offended, humiliated or intimidated by the conduct. Under this definition, the Act seems to permit, for example, unwelcome conduct of a sexual nature where a person realises that it is possible the other person will be humiliated by that conduct but thinks the odds are against it and decides to run the risk. The committee prefers the definition under section 119 of the *Anti-Discrimination Act 1991 (QLD)* which requires that a 'reasonable person would have anticipated the *possibility* that the other person would be offended, humiliated or intimidated by the conduct' (emphasis added).

11.37 The committee considers that it would be desirable for the Act to provide additional guidance on what factors are relevant circumstances to be considered in assessing whether a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated by the conduct. Specifically, the Act should include a provision equivalent to section 120 of the Anti-Discrimination Act 1991 (Qld). Section 120 provides that the relevant circumstances include the individual characteristics of the person harassed including factors such as the person's age, race and sex. Such a provision would ensure that the courts apply the sexual harassment provisions having particular regard to characteristics of the person harassed which have an impact upon how the person experiences the unwelcome conduct.

11.38 The inquiry received evidence of gaps in coverage under the sexual harassment provisions, particularly in relation to harassment occurring in educational institutions and workplaces. In relation to educational institutions, there is not currently protection under the Act if the student harassed is under 16 years of age, or if he or she is harassed by someone from a different educational institution.

11.39 The committee notes the evidence of the Association of Independent Schools of South Australia that schools have existing procedures for handling sexual harassment involving students and the Association's concerns that HREOC may not best placed to handle such cases in the best interests of both students. However, the committee is confident that HREOC's existing complaint handling procedures have sufficient flexibility to deal appropriately with such sensitive issues. Furthermore, the availability of protection under the Act does not preclude schools continuing to use their internal procedures for resolving such matters; it merely provides an additional option where a matter is not satisfactorily resolved under those procedures. Accordingly, the committee considers that the Act should protect all students regardless of age from sexual harassment. There should also be protection for students harassed by a teacher or student from another educational institution.

11.40 There are other gaps in the coverage of the sexual harassment provisions of the Act that relate to workplaces. The committee accepts that sexual harassment of workers by clients or customers is clearly possible and that harassment may also occur

in the context of professional relationships, such as between solicitors and barristers. The committee therefore recommends that the Act be amended to provide protection to workers who are harassed by clients, customers or other persons they have contact with through their employment, rather than being limited to harassment by workplace participants.

11.41 This amendment should place liability for the harassment upon the individual harasser. The committee is cognisant that the amendment would marginally broaden the potential liability of employers because of the operation of section 106 of the Act which imposes vicarious liability on employers for the actions of their employees. For example, an employer may be vicariously liable for an employee solicitor harassing a barrister. However, in practical terms, it seems unlikely that any additional steps would be required of employers beyond those needed to meet their existing obligation to take all reasonable steps to ensure their employees do not engage in harassment of other employees or workplace participants.[6]

11.42 The committee notes with concern the evidence it received from ACCI about employers dismissing employees in an effort to enforce their sexual harassment policies but subsequently being required to reinstate those employees as a result of unfair dismissal proceedings. The committee acknowledges that striking an appropriate balance between the rights of workers to be protected from sexual harassment and the right of workers not to be dismissed unfairly is a complex task both for employers and for industrial relations commissions. The committee also notes advice from the Attorney-General's Department that two of the case ACCI referred to were overturned on appeal. Given the introduction of the Fair Work Bill 2008 on 25 November 2008 and, thus the likelihood of significant changes to federal industrial relations legislation in the near future, the committee makes no recommendation on this issue.

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;**

6 See section 28B and subsection 106(2) of the Act.

- **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.

Complaints process

11.47 The committee is conscious that the complaints process for sex discrimination and sexual harassment claims is shared with other federal anti-discrimination legislation. It seems very likely that much of the evidence the committee received regarding the difficulties in pursuing complaints under the Act has equal application to complaints under the other federal anti-discrimination laws. The committee has therefore framed most of the recommendations in this section generally rather than limiting their application to claims under the Act. However, given the wider implications of proposed amendments related to the complaints process, the committee has taken a conservative approach to these recommendations.

11.48 The committee accepts the evidence it received that a clear deficiency of the existing Act and other federal anti-discrimination legislation is its inability to deal with claims of discrimination on intersecting grounds. The committee believes there is some merit in the proposal to address this difficulty by replacing the existing anti-discrimination acts with a single Equality Act. However, this is a change which clearly requires further consultation.

11.49 As an interim approach, the Act and other anti-discrimination laws should provide for the joining of complaints which allege discrimination on grounds prohibited by separate anti-discrimination acts. In essence, the committee adopts recommendation 3.9 of the ALRC *Equality Before the Law* report that the Act or the HREOC Act should be amended to provide that, where a complainant formulates his or her complaint on the basis of different grounds of discrimination covered by separate federal legislation, then HREOC or the court must consider joining the

complaints under the relevant pieces of legislation.[7] The committee notes that the *Age Discrimination Act 2004* was passed after ALRC made its recommendation and should be included within the scope of this proposed amendment.

11.50 Evidence to the committee clearly demonstrated that individuals seeking to enforce their rights under the Act confront a series of almost insuperable difficulties not the least of which is obtaining legal representation. The committee therefore makes two recommendations aimed at improving representation and support for complainants.

11.51 Firstly, the committee agrees that public interest organisations should have standing to pursue sex discrimination or sexual harassment complaints on behalf of complainants in the Federal Court or the Federal Magistrates Court. This would have the added benefit of making the standing provisions for lodging an application in the courts consistent with the standing requirements for lodging a complaint with HREOC.

11.52 Secondly, the committee supports increasing funding to legal aid commissions and organisations which providing free or low cost advice in relation to sex discrimination or sexual harassment matters. The committee envisages that this additional funding would significantly enhance the effectiveness of the Act as these organisations will often be able to resolve matters which might otherwise escalate into complaints simply through the provision of accurate advice about what the Act requires.

11.53 The committee notes the evidence it received in relation to the difficulties posed by the restrictive tests applicable to the funding of discrimination matters under existing legal aid guidelines. The committee draws this evidence to the attention of the Attorney-General's Department so that this issue can be addressed in the context of the current negotiations for new legal aid agreements with the legal aid commissions.

11.54 The committee accepts HREOC's advice that the existing time allowed, after termination of a complaint, for the complainant to lodge an application with the Federal Court or the Federal Magistrates Court is too short. This seems an unnecessary hurdle for complainants and the committee therefore recommends increasing the time allowed for complainants to lodge applications with the Federal Court or Federal Magistrates Court from 28 days to 60 days.

11.55 A further hurdle for complainants is demonstrating that the reason for the respondent's conduct was the complainant's sex, marital status, pregnancy or family responsibilities. Almost invariably, respondents will be in a better position to produce evidence in relation to the reason for their conduct than applicants. As a result, the committee considers that a shifting burden of proof would be more appropriate in sex discrimination cases. The committee therefore recommends that a provision be inserted in the Act in similar terms to section 63A of the *Sex Discrimination Act 1975*

7 ALRC, *Equality Before the Law: Justice for Women,* ALRC 69 Part I, recommendation 3.9.

(UK). This would mean 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.

11.56 At present, the remedies available for breaches of the Act focus upon redressing the harm caused to particular individuals by acts of discrimination or harassment by providing those individuals with damages or, in cases involving termination of employment, reinstatement. However, discrimination rarely affects a single individual in isolation. No doubt the hope when the Act was passed was that individual complaints would have a ripple effect producing broader compliance with obligations under the Act. The committee believes that a key means of ensuring that individual complaints do have such an effect would be to broaden the existing remedies available to include corrective and preventative orders. In particular, there should be the capacity for the courts to order the respondent to perform any reasonable act or course of conduct aimed at ensuring future compliance with the Act.

11.57 The committee is concerned by evidence it received that complainants are deterred from pursuing claims in the courts because of the risk that they will be liable for the costs of the respondent. It was suggested that either costs should routinely be capped or that parties should generally bear their own costs. However, the committee notes that there is existing provision for the Federal Court and the Federal Magistrates Court to make orders capping costs. Further, a rule that each party will generally bear its own costs would have both advantages and disadvantages for complainants in that those who are successful would generally be left to pay their own legal fees. More fundamentally, the committee considers that this issue would be better addressed through changes to allow for enforcement of the Act by a public body rather than changes to the general rules in relation to costs.

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.

Exemptions

11.64 The committee is attracted to the idea of a general limitations clause replacing the existing permanent exemptions. Such an approach is clearly more flexible and allows for a more nuanced approach to balancing of rights and interests where these are in conflict. While the committee acknowledges that this approach provides less certainty, Australia would have the experience of other jurisdictions to draw upon and HREOC would be able to play a role in educating the public about the practical application of the provision. Most importantly, it would allow the Act to evolve with prevailing community attitudes rather than freezing the exceptions at a particular point in time.

11.65 Nevertheless, the committee accepts that this would be a major change to the Act and it warrants more in depth consultation than has been possible in the course of this inquiry, particularly in light of the diverse range of groups likely to be affected. The committee has therefore recommended that further consideration be given to replacing the permanent exemptions under the Act with a general limitations clause and that there be additional consultation on this issue over the next 12 months (see recommendation 36).

11.66 If the exemptions are not replaced by a general limitations clause then the committee considers that the drafting of the exemption relating to religious educational organisations in section 38 should be reviewed. The purpose of the exemption in section 38 is to protect religious freedom. However, Christian Schools Australia noted that the exemption in section 38 is not used by its members to discriminate on the basis of sex and pregnancy but only on the basis of marital status. The Independent Education Union also suggested that, in addition to being in 'good faith', discrimination under section 38 should be 'reasonable'.

11.67 The committee has therefore recommended that there be further consultation regarding the drafting of section 38 with a view to ensuring that:

- protection of the right to freedom of religion is maintained; and
- the provision limits the rights of employees and students to be protected from sex discrimination as little as possible (see recommendation 35).

11.68 The committee considers that there are a number of changes to the exemptions which should be implemented immediately. The committee heard persuasive arguments for the removal of the exemption relating to voluntary organisations (section 39). Both ALRC and a previous Sex Discrimination Commissioner have recommended the removal of this exemption. The committee supports this view and notes that if this permanent exemption was removed it would still be possible for organisations to apply to HREOC for temporary exemptions if necessary. However, the committee is conscious that this approach may have particular impact on voluntary organisations with single-sex membership.[8] As a result the committee recommends that consideration should be given to broadening the definition of 'clubs' in section 4 so that the prohibitions on discrimination under section 25 apply to a broader range of organisations and those organisations will have the benefit of the exception in subsection 25(3) which permits single-sex clubs.

11.69 The committee acknowledges that strong arguments were made for the removal of other exemptions particularly the exemptions relating to sport (section 42) and combat duties (section 43). While the committee has not recommended the immediate removal of these exemptions, it considers that those arguments reinforce the case for replacing all of the permanent exemptions with a general limitations clause.

11.70 As a technical matter, the committee agrees that the incorporation of sections 31 and 32 in Division 4 of Part II which deals with exemptions to the operation of the Act is likely to add to confusion about when differential treatment is permitted, or even required, in the interests of equality.[9] The committee agrees that these provisions

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8 This would particularly be the case if the committee's recommendation that a general prohibition on discrimination is implemented.

9 Section 31 clarifies that it is not discriminatory to provide women with rights or privileges in connection with pregnancy or childbirth. Section 32 provides that the prohibitions on discrimination do not apply to services which by their nature can only be provided to one sex.

should more logically be placed alongside the provisions which define discrimination, in particular, section 7D which deals with temporary special measures.

11.71 Finally, the committee agrees that HREOC should exercise its power to grant temporary exemptions in accordance with the objects of the Act. This is simply codifying the existing approach HREOC takes under its guidelines. Nevertheless, it is important that this power should not be described so broadly as to permit the granting of exemptions which might undermine the fundamental purposes of the Act.

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.

Powers of HREOC and the Sex Discrimination Commissioner

11.76 The committee is persuaded by the evidence it received indicating that there are deficiencies in the existing powers of the HREOC and the Sex Discrimination Commissioner to enforce the obligations created by the Act. Some of these are technical matters related to the drafting of various provisions in the Act and the HREOC Act which can be quickly remedied. Others are more fundamental issues linked to the enforcement model adopted by the Act which require additional consultation to identify the best solution.

11.77 The committee accepts that the most fundamental limitation of the Act is its reliance on enforcement through individuals pursuing complaints. The committee considers that there is merit in the proposal that the Sex Discrimination Commissioner

be empowered to initiate an investigation of alleged breaches of the Act and have a range of powers aimed at resolving any breaches of the Act she identifies without the necessity for court action. The committee also supports HREOC being empowered to pursue enforcement of the Act in the Federal Court or the Federal Magistrates Court where resolution through these mechanisms is not possible.

11.78 Providing additional powers to the commissioner and HREOC, would not prevent the continued use of more cooperative approaches such as education programs and informal advice on the requirements of the Act. Furthermore, the committee envisages that the use of these powers to initiate investigation and enforcement of breaches of the Act would be limited to the most serious and persistent cases of sex discrimination. However, these changes would represent a fundamental change to the Act. The committee is particularly concerned about how these new functions would interact with HREOC's conciliation function. As a result, the committee suggests that these proposed changes be the subject of additional consultation to ensure that the most effective means of improving enforcement mechanisms under the Act is adopted.

11.79 HREOC's powers to conduct formal inquiries are limited to inquiries into Commonwealth laws or actions done by the Commonwealth or its territories. This limitation seems both unnecessary and artificial. More importantly, it hamstrings the capacity of HREOC to examine the more intractable or systemic areas of sex discrimination which generally cross the boundaries between the Commonwealth and the states. The committee believes that Australia's national human rights institution should have broad ranging formal inquiry powers that enable it to identify and suggest solutions to these remaining areas of gender inequality. Some evidence to the committee suggested vesting the Sex Discrimination Commissioner with an inquiry function but, in light of the existing function of HREOC to conduct inquiries, the committee believes that it would be more logical to expand HREOC's existing powers.

11.80 The committee also considers that HREOC should have the power to intervene and the Sex Discrimination Commissioner to act as amicus curiae as of right. It would seem appropriate to allow HREOC and the commissioner to determine whether a case is sufficiently important, in terms of the human rights issues it raises, to warrant their intervention. Furthermore, providing for a right to intervene or act as amicus acknowledges that there is a public interest in eliminating discrimination and that discrimination is not merely a private matter. In any case, HREOC and the commissioner are constrained by resources to use these powers sparingly.

11.81 In addition, these functions appear to be limited in two technical respects and the committee considers that these limitations should be removed. Firstly, HREOC should explicitly have the power to intervene in court proceedings relating to family responsibilities discrimination or victimisation. Secondly, the special purpose commissioners should be empowered to appear as amicus curiae in appeals from discrimination decisions made by the Federal Court and Federal Magistrates Court as well as the proceedings at first instance.

11.82 Finally, the committee considers that there should be a requirement for the Sex Discrimination Commissioner to report to Parliament every four years. These reports should precede Australia's reports to the UN committee by twelve months. This would demonstrate the Australian Government's commitment to independent monitoring and assessment of progress towards gender equality. In addition, it would ensure that reports are produced against a timeframe in which it is reasonable to expect measurable progress. Most importantly, it would allow for an assessment of whether existing legislation and programs are succeeding in eliminating discrimination and allow for adjustments if they are not. The committee believes it is important that these reports be mandatory to ensure that this function is not 'crowded out' by more immediate concerns such as complaint handling.

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.

Resources for HREOC

11.88 The committee is conscious that implementation of some of its recommendations involves a significant additional workload for HREOC both in

terms of initial public education regarding changes to the Act as well as ongoing work in relation to the broader powers to intervene in court proceedings and conduct inquiries, and the requirement for the Sex Discrimination Commissioner to prepare reports. Furthermore, the committee is concerned by evidence from HREOC that existing reductions in its funding will limit the work HREOC can undertake in educating the public about the Act.

11.89 The committee accepts the evidence from business groups that businesses are keen to comply with their obligations under the Act for financial, reputational and ethical reasons and that providing businesses, particularly small and medium sized businesses, with additional advice and support to meet their obligations is an effective way of promoting equality. As a result, ensuring HREOC efforts in relation to its public education functions are not compromised by a lack of funding ought to be a high priority. For all of these reasons, the committee recommends that HREOC should be provided with additional resources including additional ongoing funding.

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.**

Recommendations requiring further consultation

11.91 As already noted, there are several medium term changes which require further consultation. The committee has already discussed the need for additional consultation in relation to proposals:

- to remove the permanent exemptions from the Act and replace these provisions with a general limitations clause; and
- to empower the Sex Discrimination Commissioner and HREOC to pursue enforcement of the Act without the need for an individual complaint.

11.92 The evidence regarding empowering HREOC to promulgate legally binding standards indicated some of the complex considerations involved in adopting such an approach. In particular, there is a risk that such standards may be overly prescriptive or inflexible. On the other hand, the advantages of binding standards include providing greater certainty about what is required to ensure compliance with the obligations imposed by the Act. The committee considers that a power to issue binding standards, if used judiciously, would be a useful additional tool for HREOC to employ to encourage and facilitate compliance with the Act.

11.93 The committee also considers that there is a clear need to strengthen the positive obligations to eliminate discrimination imposed by the EOWW Act. Legislation aimed at promoting equal opportunity for women in the workplace should require something more than the development of a program and reporting on that program: it should require progress. In the committee's view, it would be worthwhile considering the creation of broad positive duties:

- to promote equality and remove discrimination
- to take reasonable steps to avoid sexual harassment.

11.94 In particular, the positive duties under the *Equality Act 2006 (UK)* may provide a useful model which could be adopted and applied either to public sector organisations or to both the public and private sector.

11.95 There is also a need to examine the relationship between the Act and the EOWW Act. There may well be advantages to incorporating the obligations under the EOWW Act within the Act and combining the functions of EOWA and HREOC.

11.96 While it is the committee's view that these changes require additional consultation, there are models available in other jurisdictions or under other federal anti-discrimination legislation for each of these proposals. It should therefore be possible to complete this consultation within 12 months. Given the largely technical nature of these proposed changes, the committee has recommended that the Attorney-General's Department conduct the consultation.

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.

Broader review of Commonwealth anti-discrimination law

11.105 Some evidence to the committee advocated changes which require much broader and more in depth consultation than has been possible during the course of this inquiry. Foremost among these is the proposal that the Act and other federal anti-discrimination laws be replaced by a single Equality Act.

11.106 The merits of introducing a single Equality Act may be one of options for harmonisation which will be examined through the SCAG process. However, the committee considers that such a significant change warrants a public inquiry and that HREOC is best placed to conduct that inquiry.

11.107 The committee received some evidence about both the benefits and disadvantages of a single omnibus act. That evidence highlighted the complexity of

the issues involved and the broad range of groups likely to be affected by such a change. The committee is also mindful that some of the existing anti-discrimination acts have an iconic status for some groups in the community. As a result, the mechanics of how anti-discrimination law operates are not the only consideration.

11.108 Such an inquiry should also consider whether federal anti-discrimination law should provide protection from discrimination on additional grounds including sexuality and gender identity.

11.109 Further the inquiry could more generally consider the enforcement model adopted under the Act and other anti-discrimination legislation and examine the merits of alternative approaches such as whether there should be provision for civil fines for egregious instances of sex discrimination or sexual harassment.

11.110 When the Act was passed, it placed Australia at the forefront of countries seeking to redress centuries of discrimination against women. However, two decades have seen the Act overtaken by more innovative approaches to addressing discrimination both overseas and in our own states and territories. A national inquiry will provide us with an opportunity to re-invigorate all of Australia's anti-discrimination laws and place them at the vanguard of legislative schemes that promote equality.

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.**

Senator Trish Crossin

Chair