



Australian Government
Attorney-General's Department

**Classification, Human Rights and
Copyright Division**

08/9711

22 October 2008

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

**Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in
Eliminating Discrimination and Promoting Gender Equality**

I refer to the public hearing held on 11 September 2008 in relation to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the effectiveness of the *Sex Discrimination Act 1984* (the SDA). During this hearing the Attorney-General's Department undertook to provide responses to several questions taken on notice. The Department's responses to these questions are set out below.

Standing Committee of Attorneys-General Anti-Discrimination Law Harmonisation Working Group

2. The Senators asked for details as to the number of representatives on the Standing Committee of Attorneys-General (SCAG) Anti-Discrimination Law Harmonisation Working Group.

3. The SCAG Anti-Discrimination Law Harmonisation Working Group (the Group) has been established with representation on, or interest in, the Group by all jurisdictions. The Group is chaired jointly by the Australian Government Attorney-General's Department and NSW Attorney-General's Department. There is a total of 16 members comprising:

- Australian Government Attorney-General's Department (Chair) - 1 member
- NSW Attorney-General's Department (Co-Chair) - 1 member
- Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) - 2 members
- Victorian Justice Department - 2 members
- Victorian Equal Opportunity and Human Rights Commission - 2 members
- Western Australian Department of the Premier and Cabinet - 1 member
- Western Australian Equal Opportunity Commission - 1 member

- Queensland Justice Department and the Attorney-General - 1 member
 - Queensland Anti-Discrimination Commission - 1 member
 - Tasmanian Department of Justice - 1 member
 - Northern Territory Anti-Discrimination Commission - 1 member
 - Australian Capital Territory Department of Justice and Community Safety - 1 member
 - Australian Capital Territory Human Rights Commission - 1 member
4. The South Australian Attorney-General's Department is not formally represented on the Group, but receives all of the Group's papers and communications.

Coverage of men under the Sex Discrimination Act 1984

5. Senator Fisher asked the Department to comment on any existing gaps in the protection of men under the SDA.
6. The SDA applies throughout Australia in the circumstances set out in section 9 of the SDA. Section 9 draws on a number of the legislative powers of the Commonwealth. Broadly, it gives the SDA an application in relation both to men and women in the following areas: the territories (other than the Australian Capital Territory and the Northern Territory); Commonwealth activities (including employment); the activities of 'constitutional' corporations; the conduct of interstate (including with territories) and overseas trade and commerce; banking and insurance; and discrimination or other acts involving persons, things or matters outside Australia. It also gives the SDA an application in relation to discrimination against women in so far as the SDA gives effect to the *Convention on the Elimination of All Forms of Discrimination against Women*.
7. An application based on the Convention may conceivably give the SDA a differential operation as between men and women, but only in cases having no relevant connection with the areas identified above. The question whether, in fact, any such relevant connection exists would need to be considered on a case by case basis.

Differences between State and Territory Anti-discrimination laws

8. Senator Barnett asked whether there were any examples of specific State and Territory anti-discrimination laws which are substantially different to the approach generally adopted in other States and Territories.
9. There are differences in both substantive law and procedure between State and Territory and Commonwealth anti-discrimination laws. For example, at the procedural level complaints are made to different bodies under two levels of regulation (Commonwealth and the relevant State or Territory), and proceedings conducted in different jurisdictions have different fees and cost structures.

10. In terms of substantive law, there are differences in the grounds available for making discrimination complaints, the available remedies, and there is differential treatment of particular types of discrimination across jurisdictions as either criminal or civil offences. Examples of this include:

- discrimination on the grounds of sexuality and gender identity: this is available in all State and Territory jurisdictions, but not under Commonwealth law
- discrimination on the grounds of physical features: this is available only in Victoria and not other States and Territories. In the Victorian *Equal Opportunity Act 1995* physical features are defined as a person's height, weight, size or other bodily characteristics
- South Australian anti-discrimination legislation: the South Australian *Equal Opportunity Act 1984* does not include some grounds of discrimination which are generally included in most other State and Territory anti-discrimination legislation. Examples of grounds not included in the South Australian legislation are:
 - caring responsibilities,
 - religion
 - political belief, and
 - industrial activity
- racial vilification: this is a criminal offence of serious racial vilification in New South Wales, Queensland, the Australian Capital Territory and Victoria (under the Victorian *Racial and Religious Tolerance Act 2001*) but this offence does not exist in other jurisdictions (for example, under Commonwealth anti-discrimination legislation racial vilification is treated as a civil wrong), and
- compensation: which in some jurisdictions where it is available is unlimited and in others it is capped, for example:
 - in relation to a complaint made under the Victorian *Equal Opportunity Act 1995*, the Victoria Civil and Administrative Tribunal may an order that the payment of compensation of an amount that the Tribunal thinks fit to compensate the complainant, and
 - in respect of a complaint made under the New South Wales *Anti-Discrimination Act 1977*, the Administrative Decisions Tribunal may order payment of damages not exceeding \$40,000.

Workplace Relations

11. The Department took on notice to review the submission of the Australian Chamber of Commerce and Industry (ACCI) and to provide comment in relation to the case studies contained in that submission. In addition, Senator Barnett also asked whether there was any protection in workplace relations law which would prevent 'double-dipping'.

12. This raises two separate issues, namely the potential legal consequences of an employer's attempt to comply with discrimination laws and an employee's options for redress where an employer has terminated employment on discriminatory grounds.

13. The Department of Education, Employment and Workplace Relations (DEEWR) has reviewed the cases referred by ACCI in its submission to the Committee and have advised me to the following effect.

14. The cases outlined in the submission from the ACCI relate to circumstances in which an employer's attempt to comply with relevant anti-discrimination legislation, eg providing a workplace free of harassment and discrimination, has led to the dismissal of an offending employee resulting in the employer being exposed to breaches of other laws such as unfair dismissal provisions of workplace relations laws.

15. In the three cases discussed by ACCI at paragraph 49 of its submission the employer has dismissed an employee for breaching company policy intended to comply with anti-discrimination legislation. The dismissed employee has then made an unfair dismissal claim against the employer in the New South Wales Industrial Relations Commission (NSW IRC). The NSW IRC is required to consider a range of factors, including any matters it considers relevant, when determining whether a dismissal is unfair. Presumably, the NSW IRC would have taken into account the employer's defence when making a determination in these cases. Also in two of the cases, *Attorney General's Department v Miller* [2007] NSWIRComm 33 and *Budlong v NCR Australia Pty Limited* [2006] NSWIRComm 288, the NSW IRC showed great reluctance to make the finding that the employees had been unfairly dismissed.

16. At paragraph 106 of the submission ACCI uses two further examples that concern unfair dismissal provisions in the *Workplace Relations Act 1996* (WR Act). ACCI's submission only records the initial decision by a member of the Australian Industrial Relations Commission to reinstate the employees that had been dismissed in circumstances involving sexual harassment in the workplace. Both these cases went to appeal and in both cases the initial decision was overturned and the employer's decision to dismiss the offending employee upheld (see *Graincorp Ltd v Markham* PR924103 [2002] AIRCFB (29 October 2002) and *Telstra Corporation Limited v Streeter* PR980356 [2008] AIRCFB 15 (24 January 2008).

17. Generally in all the cases outlined in ACCI's submission, the applicable Commission considered a range of factors, beyond the anti-discrimination issues, in reaching its decision including longevity of service, behavioural record of the employee and the gravity of the misconduct. The law attempts to balance the right of employees to be protected from discrimination and harassment in the workplace with the right of employees to be protected from being dismissed unfairly.

18. The second issue concerns "double-dipping provisions" that limit the capacity of an employee to make a claim across different jurisdictions or different statutes where employment has been terminated on discriminatory grounds.

19. I am advised by DEEWR that the WR Act does include provisions that prevent employees from seeking remedies under different laws for the same action. Sections 672 to 674 of the WR Act ensure that if an employee has commenced a proceeding for either unlawful termination or unfair dismissal they must not commence other termination proceedings under:

- another provision of the WR Act,
- another law of the Commonwealth (such as the SDA), and

- a provision of a law of a State or Territory that deals with the prevention of discrimination, the promotion of equal employment opportunity or both, and is neither a State or Territory industrial law or contained in such a law.

20. If the employee discontinues the initial proceedings or if the proceedings fail for want of jurisdiction they may commence other termination proceedings.

21. It is also worth noting that for employees not covered by federal workplace relations laws, relevant state workplace relations laws, for example the *Industrial Relations Act 1996* (NSW), may contain similar limitations on employee actions following the termination of employment.

22. I trust this information is of assistance to the Committee. The action officer for this matter is Peter Thomson who can be contacted on (02) 6250 6039.

Yours sincerely



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