Women's Electoral Lobby Australia Inc.

66 Albion St, Surry Hills 2010

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Submission to the Legal and Constitutional Affairs Committee Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality

1 August 2008

Background: The Women's Electoral Lobby Australia

The Women's Electoral Lobby Australia (WEL) is a feminist, not for profit, self-funded, non-party political, lobby group founded in 1972. Its original intention was to put issues of concern to women onto the political agenda in that year's Federal election and it continues to act as a research/advocacy group on the issues that disadvantage women.

WEL is dedicated to creating a society where women's participation and potential are unrestricted, acknowledged and respected; where women and men share equally in society's responsibilities and rewards. WEL aims to improve women's access to decision-making bodies in order to give women input into those decisions that affect their lives.

WEL makes the following submission to the Legal and Constitutional Affairs Committee's inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality. WEL welcomes the inquiry, notes the very short deadline for submissions but trusts that the tight turn-around will enable the government to respond to the substantial issues that need to be addressed in time for the 25th anniversary of the Act in March 2009.

We also draw the Committee's attention to overlapping issues addressed by the WEL submission to the House of Representatives Standing Committee on Employment and Workplace Relations' concurrent Inquiry into Pay Equity.

Summary and Recommendations

The Convention on the Elimination of All Forms of Discrimination against Women 1979, which in part provides the Constitutional basis for the Sex Discrimination Act, looks to promote substantive equality between women and men and their equal enjoyment of human rights. The Sex Discrimination Act, on the other hand, provides only a complaints-based model that limits the kinds of complaints that can be made and the kinds of discrimination that can be remedied. Moreover, the objects of the Act are drafted in a most unhelpful and equivocal way, with the repeated use of the phrase 'so far as possible'. As we point out, this is the equivalent of requiring people to drive on the left-hand side of the road 'so far as possible'.

What is more, the processes through which the Act operates—including its narrow interpretation, particularly on the part of the High Court, the need to establish a comparator and the increased proportion of complainants requiring legal representation—all further reduce the capacity of the legislation to redress individual instances of discrimination, let alone to address the impact of systemic discrimination or to educate the community about its nature.

WEL's view is that both the underlying assumptions of the SDA and the processes it puts in place need to be amended to bring the legislation into line with its original goal of promoting substantive equality and to establish an adequate monitoring mechanism for measuring progress towards this goal.

Recommendations

1. That the phrase 'so far as is possible' be removed from the preamble to the SDA.

2 That the objects provision of the SDA be strengthened:

(a) That the phrase 'to eliminate, so far as possible' be removed and replaced with the words 'to prohibit', as in the Preamble;

(b) That a new subsection be added as a guide to judicial interpretation:

It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.

[For the full redraft of the objects provision, see Attachment A.]

3. That the Sex Discrimination Commissioner be empowered to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA, including proceedings before Fair Work Australia.

4. That HREOC and the Sex Discrimination Commissioner be authorised to initiate inquiries into systemic discrimination.

5. That the Director of EOWA should be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry.

6. That the Sex Discrimination Commissioner be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality.

7. That such reports focus on key performance indicators (see Attachment B).

8. That government respond within 15 sitting days to such reports.

9. That a discrete unit be established within HREOC to undertake the research required for the monitoring and reporting role.

10 That the Sex Discrimination Commissioner be provided with sufficient resources to:

- **conduct substantive inquiries into direct, indirect and systemic discrimination issues, as in R4 and R5;**
- **intervene in legal cases of relevance to direct, indirect and systemic discrimination, including matters under consideration in the industrial jurisdiction as in R3. This should include the resources to provide well-researched evidence in test cases relating to matters such as pay equity and conditions affecting workers with family responsibilities;**
- **research, compile and promote an annual report to Parliament on progress towards gender equality, as in R6 and R7;**

- **provide well researched submissions to national inquiries conducted by the Parliament;**

- **use the expertise and evidence acquired in inquiries to develop public relations and advertising campaigns to address of direct, indirect and systemic discrimination.**

11 That de-identified data from complaint-handling be collected, published and used for educational and policy purposes.

12 That the criteria for legal aid be amended to include the funding of equality test cases.

13 That the Government legislate to extend the current prohibition on discrimination on the ground of family responsibilities consistent with the recommendations of the *It's About Time* report, and that other measures proposed to address systemic discrimination be replicated in relation to the new ground.

14 That responsibilities for age discrimination be assigned to a specialist Commissioner with statutory responsibility and adequate resources for this role.

15 The new Federal Government should give serious consideration to HREOC's 'right to request' model as a way of addressing the conflicts faced by those with work and family responsibilities.

The scope of the Act and the extent to which it implements non-discrimination obligations (TOR a, b)

The Commonwealth Sex Discrimination Act (SDA) has been in operation for 24 years. Its passage was the outcome of a number of factors, including pressure from the women's movement and changes in broader community attitudes towards women's role. International factors included the proclamation of the United Nations Decade for Women in 1976 and the subsequent drafting of the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), which in part provides the Constitutional basis for the SDA.

Article 1 of CEDAW defines discrimination against women as: '…any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. CEDAW emphasises that such discrimination violates the principles of equality of rights and respect for human dignity. There is an explicit recognition of women's disadvantage, with the CEDAW preamble noting that 'extensive discrimination against women continues to exist'.

CEDAW is thus generally drafted in accordance with a model of substantive equality. It recognises both the existence of systemic discrimination against women and the need to take action to remedy it. Australia was a key player in the working group that developed the final draft of CEDAW and was influential in ensuring its international adoption. However, despite Australia's involvement in CEDAW's development, and despite the fact that CEDAW was, legally and socially, critical to the development of Australian federal sex discrimination legislation, the translation of internationally accepted human rights norms into domestic legislation was both complex and partial.

The enactment of the SDA came after the failure of an earlier Private Member's Bill introduced by Senator Susan Ryan in 1981, while Labor was in Opposition. As well as anti-discrimination complaint machinery, the 1981 Bill included affirmative action provisions that required employers to establish active and systematic hiring, training and promotion policies for female employees. In effect it aimed at substantive equality in the area of employment and so introduced mechanisms for addressing systemic discrimination.

Re-introduced in 1983 after Labor gained office, the Sex Discrimination Bill was associated with a number of negative community campaigns and lengthy parliamentary debate, which led to numerous amendments and exemptions. The affirmative action provisions had not been included in the 1983 Bill and were later introduced as separate legislation in 1986 as the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*, later the Equal Opportunity for Women in the Workplace Act (EOWA). As a consequence of these changes, the SDA generally only implements a more limited model of formal equality based on an individual complaints mechanism, rather than implementing a model of substantive equality based on systemic measures. It is addressed to individual acts of discrimination in a limited number of contexts. It does not constitute the Constitutional or statutory guarantee of equality for women required by Article 2 of CEDAW.

Apart from CEDAW, there are a number of relevant ILO equality conventions in the area of employment. These include:

- the Discrimination (Employment and Occupation) Convention, 1958 (No. 111),
- Equal Remuneration Convention, 1951 (No. 100),
- Workers with Family Responsibilities Convention, 1981 (No. 156) and
- the Maternity Protection Convention, 2000 (No. 183).

Australia is signatory to the first three, yet the SDA fails to fully implement these conventions in a number of key areas. For example:

- *The SDA's definition of discrimination*. In ILO 111 for example, 'discrimination' is defined as 'any distinction, exclusion or preference made on the basis of … sex …, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.' This broader definition does not require a comparator, as does the SDA, and is focused squarely on substantive equality outcomes.

- *The SDA's focus on individual remedies*. The complex phenomenon of pay equity is not easily addressed by means of an anti-discrimination complaint mechanism that requires an individual aggrieved by an act and a comparison with a similarly situated man, and which focuses on formal rather than substantive equality. Moreover, individual remedies provided under the SDA cannot provide a remedy for women who are not party to the proceedings.

- *The lack of protection for workers with family responsibilities*, as required under ILO 156. In the SDA such protection is limited to protection against termination of employment.

The question of how to address the limits of complaints-based legislation in grappling with systemic discrimination is considered after the next section dealing with the objects of the Act.

The objects of the Act and their adequacy as a guide to judicial interpretation (TOR e)

WEL is concerned that a persistently narrow interpretation of the SDA, particularly on the part of the High Court, is undermining the efficacy of the Act. It is notable that, in the 12 years since Wik, not a single discrimination case has succeeded before the High Court. With the exception of Justice Kirby, High Court judges have ignored the beneficent purpose of the Act and the contents of CEDAW, which has frustrated the aims of the legislation.

For example, Purvis (2003) is a disability case that has reconceptualised the notion of the comparator in narrow and onerous terms that raises the burden of proof in direct discrimination complaints to insuperable heights. Amery (2006) is only the third sex discrimination case to be heard by the High Court in 30 years. Again, the approach was narrow and legalistic, displaying little understanding of how socially constructed choices regarding mobility in employment contributes to systemic discrimination for women with family responsibilities.

Accordingly, more guidance for courts is exhorted at the outset. The Objects clause of the SDA undermines the entire Act because almost every sub-section is equivocal. Section 3(a) states that it will give effect only to 'certain provisions' of CEDAW. The repeated use of the qualifier, 'so far as is possible', appearing in the first line of the Preamble, and repeated in ss3 (b), (ba) and (c), confirms the impression that the Act is ambivalent about its aims.

It is not a statutory convention within Australian law to proscribe wrongful behaviour and then qualify it with the words 'so far as is possible'. We would not tolerate an injunction 'to drive on the left-hand side of the road "so far as possible"'. Most significantly, no such qualification is used in CEDAW, which 'condemns discrimination against women in all its forms' (Art 2). As an example of legislation with a far less equivocal commitment to the non-discrimination principle, the Committee is referred to the Equality Act 2006 (UK).

As the injunction 'to eliminate' is unfamiliar in legal parlance and the stronger 'to prohibit' is already used in the preamble, its inclusion within the objects clause would require only minor

amendment. More interpretative guidance to courts also needs to be provided along the lines contained in modern Acts, such as the *Freedom of Information Act 1982* (Cth).

Recommendation:

1. **That the phrase 'so far as is possible' be removed from the preamble;**

2. **That the objects section of the SDA be strengthened:**

   (a) That the qualifying phrase 'to eliminate, so far as possible' be removed and replaced with the words 'to prohibit', which is already used in the Preamble;

   (b) That a new subsection be added as a guide to judicial interpretation:

   It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.

   [For the full redraft of the objects provision, see Attachment A.]

The powers and capacity of HREOC and the Sex Discrimination Commissioner in relation to systemic discrimination and monitoring progress towards equality (TOR c)

WEL believes that the expertise of the specialist Sex Discrimination Commissioner within Human Rights and Equal Opportunity Commission is crucial to the effectiveness of the SDA, and essential if complex areas of intersecting and systemic discrimination are adequately to be addressed. However, if she is to be effective, her capacity to address issues of systemic discrimination needs to be further strengthened, particularly through a broadened power of intervention and a power to initiate non-complaint-based inquiries.

WEL welcomed amendments to the SDA enabling the Commissioner to refer complaints relating to federal industrial instruments to the Australian Industrial Relations Commission. WEL also applauded the introduction of the amicus curiae (friend of the court) capacity for the specialist Commissioners and believes this has been an important adjunct to their role. However, the amicus curiae function contained in the HREOC Act is confined to intervention in the Federal Court and the Federal Magistrates Court. WEL believes that the Sex Discrimination Commissioner should not be so constrained. She should be able to apply to make representations before State courts and tribunals where there is provision to intervene, although this would require a change to the HREOC Act, s 46PV. She should also be able to refer discriminatory awards or agreements to the Australian Industrial Relations Commission and its successor body Fair Work Australia without the requirement to receive a written complaint and have a right of intervention in such cases.

WEL would also like to see SDA contain a power that enables the Human Rights and Equal Opportunity Commission (HREOC) and/or the Sex Discrimination Commissioner to initiate inquiries into systemic discrimination.

As discrimination is woven into the historic fabric of society, it is frequently impossible to identify a single respondent who can be held responsible for a specific act of discrimination. Unless an unbroken causal thread connects the complainant and respondent with the act of discrimination, the complaint fails. Moreover, the complaints-based model relies upon victims identifying and standing up for their rights and prompting social change through individual litigation and its subsequent ripple

effect. It assumes that victims have the time, security and resources to pursue such litigation, despite the financial and psychological costs of pursuing a complaint in the public interest against a corporate respondent. The latter is likely to have deep pockets and can either pass the costs onto consumers or, in the case of a government respondent, have recourse to the public purse. The individualisation of complaints may mean that a woman who lodges a complaint of sex discrimination becomes very visible, not only within an organisation, but within an industry. This is particularly the case with women occupying high-profile and senior positions, whose careers may be ruined as a result, as happened in *Dunn-Dyer v ANZ*.

Even if an employer is found to have discriminated, they will only be ordered to compensate the victim. The courts lack power to order systemic corrective orders—such as a change in policy, the introduction of a compliance program that might prevent further discrimination, or an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant—or to set reform standards. In this way, the laws are more focussed on redressing, not preventing harm or promoting equality. Having settled a complaint of discrimination, an employer may not even see a connection between the individual complaint and other equality issues in the workplace.

These problems would be met to some extent if the SDA contained a power that enabled HREOC and/or the Sex Discrimination Commissioner to initiate inquiries into systemic sex discrimination, such as within the legal profession, an industry or a workplace. The Act contains a power of initiation but it is limited to laws; it does not extend to the sites of discrimination.[1] This power of initiation should not be contingent on the lodgement of a complaint.

WEL also notes in this context that the Director of the Equal Opportunity for Women in the Workplace Agency receives reports from employers of more than 100 people across all occupations and industry sectors. There is little remedial action available to the Director when possible industry sector or occupation wide-systemic discrimination is identified through her agency's activities, which include employer consultations, worksite visits, and industry data analyses. However, if the Sex Discrimination Commissioner had a power to initiate an inquiry into systemic sex discrimination in an industry or occupational group, the Director of EOWA would be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry

In order to move beyond the limitations of the individualised complaint that is close to the surface, this power to initiate inquiries into systemic, class-wide and structural discrimination, is crucial. We stress that the Sex Discrimination Commissioner must be adequately funded in order to conduct these inquiries in addition to her other functions. Otherwise, in the context of efficiency dividends, the urgent will always drive out the important. As noted below (R14) we also believe that responsibilities for age discrimination would be more properly assigned to a specialist Commissioner with a statutory responsibility and adequate resources for this role, rather than being carried by the Sex Discrimination Commissioner in addition to her other very extensive responsibilities..

Recommendations

3. That the Sex Discrimination Commissioner be empowered to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA, including proceedings before Fair Work Australia.

4. That HREOC and the Sex Discrimination Commissioner be authorised to initiate inquiries into systemic discrimination.

[1] *Sex Discrimination Act 1984* ss 48(1)(f) and (g)

5. That the Director of EOWA should be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry.

Monitoring progress towards gender equality

A key element in achieving any kind of equity goal is the establishment of effective monitoring mechanisms. For the integrity of such mechanisms to be maintained they need to be at arms length from government and able to undertake independent analysis and evaluation of evidence.

The federal government currently lacks effective mechanisms for monitoring progress towards gender equality. In the past there were units within government with specific responsibilities for monitoring aspects of gender equality such as equal pay. These included the Women's Bureau within the employment portfolio (1963-97) and the Equal Pay Unit within the Department of Employment and Workplace Relations (1991-98). The fact that these units no longer exist suggests the vulnerability of such monitoring mechanisms when they are located within government and the need for independent scrutiny from outside, complementing work from inside.

In order to ensure renewed progress towards gender equality, new agendas are needed as well as new monitoring mechanisms to ensure that attention is paid to any shortfalls. The independence of HREOC as Australia's national human rights institution makes it the appropriate location for monitoring progress towards gender equality. The Sex Discrimination Commissioner should be given a new statutory responsibility to monitor and report annually to parliament on progress towards gender equality. This new statutory role must be accompanied by new resources. Past experience suggests that such monitoring and reporting functions must be allocated discrete resources so that they are not competing with the other functions of the Commission. A dedicated unit is required for the new monitoring function, with a minimum staffing level of five researchers—the equivalent of previous monitoring bodies such as the Women and Statistics Unit within government.

In order to measure progress in overcoming major sources of gender inequality the annual reports should focus on key performance indicators. An indicative set of data items is attached to this submission, but as a minimum these should include:

- de-identified sex discrimination data as set out under TOR h below;
- data that is indicative of the overall gender pay gap (average weekly earnings, earnings for ordinary hours full-time work, as well as total earnings for full time work), and data that is indicative of pay disparity across industries, occupations and types of work;
- key employment conditions data, including access to paid maternity and parental leave and superannuation;
- the impact of caring responsibilities on income security, as measured by the gender ratio of those living in poverty;
- access to quality childcare;
- key health indicators;
- the level of gender-based violence;
- representation of women in public decision-making, including parliaments and local government.

The information in such annual reports should be presented graphically where possible and in a highly visual, accessible and economic way, to assist in the goal of raising public awareness of persistent obstacles to gender equality. To ensure that such reports are not lost on being tabled in parliament, there should be a statutory responsibility for government to respond to them within 15 sitting days.

Recommendations

6. That the Sex Discrimination Commissioner be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality.

7. That such reports focus on key performance indicators (see Attachment B).

8. That government respond within 15 sitting days to such reports.

9. That a discrete unit be established within HREOC to undertake the research required for the monitoring and reporting role.

Adequate resourcing of functions including inquiries into systemic discrimination, monitoring progress towards equality and education (TOR c, g)

As we have noted, there are distinct limitations to a complaints-based model for addressing sex discrimination and the current complaints process. Those who do complain (a minority) get little support. Even where conciliation is successful, the outcome means money rather than vindication in many cases. Conciliation is generally confidential and often the terms of a settlement involve confidentiality. Since *Brandy*, complaints that have gone beyond conciliation have become increasingly costly. Many employers have also paid money to get out of the problems complained of, while not at the same time necessarily seeing that what they had done was wrong.

There is no educational benefit in this process. Many complainants have indicated that they would not put themselves through a complaints process again as it was bruising and not satisfactory. Nevertheless, education remains critical to broadening community understanding of direct, indirect and most especially systemic discrimination, and reducing its occurrence. WEL sees the effectiveness of education as often being directly proportional to its links to the operational activities of the office of the Sex Discrimination Commissioner. The actual case studies of pregnancy discrimination coming out of the Sex Discrimination Commissioner's national inquiry had more bite than a stand-alone poster or set of posters or pamphlets. Hence in our view it is critical to ensure that the Commissioner has sufficient resources to pursue more complex, institutional or systemic instances of discrimination, and bring the issues and examples raised by those matters to the attention of the community through education campaigns.

Recommendation

10 That the Sex Discrimination Commissioner be provided with sufficient resources to:

- **conduct substantive inquiries into direct, indirect and systemic discrimination issues, as in R4 and R5;**
- **intervene in legal cases of relevance to direct, indirect and systemic discrimination, including matters under consideration in the industrial jurisdiction as in R3. This should include the resources to provide well-researched evidence in test cases relating to matters such as pay equity and conditions affecting workers with family responsibilities;**
- **research, compile and promote an annual report to Parliament on progress towards gender equality, as in R6 and R7;**
- **provide well researched submissions to national inquiries conducted by the Parliament;**

- **use the expertise and evidence acquired in inquiries to develop public relations and advertising campaigns to address of direct, indirect and systemic discrimination.**

The complaints process (TOR h)

We have discussed the need to supplement the individual complaints-based model through a power for the Sex Discrimination Commissioner to initiate inquiries into systemic discrimination. But even within the limits of what it can achieve, the individual complaints process is not travelling very well. Not only are there problems dealing with the new forms of discrimination that have arisen in an increasingly deregulated economy, but there clearly remain significant difficulties dealing with the 'same old' discrimination. This is evident in the persistence of sexual harassment and direct pregnancy discrimination. The ailing state of the individual complaint system is reflected in a decline in the number of complaints in the discrimination jurisdiction in the past five years, and in the paucity of case law, at a time when labour market and employment deregulation has been resulting in increasing unfairness for women.

While in recent years HREOC has improved the responsiveness of the complaint handling process, including under the SDA, it remains a relatively slow and non-transparent process. The transparency of the complaints resolution process would be enhanced by the collection, publication and use of de-identified data on the process itself and its outcomes. Such data would support proactive steps to reduce sex discrimination and promote gender equality and to educate both potential complainants and respondents. Such data would include:

- the types of detriment alleged by complaints;
- socio-demographic data on complainants by each jurisdiction, instead of aggregated under all federal anti-discrimination legislation as is currently the case in HREOC's annual reports;
- legal and other representation of complainants and respondents;
- the industries or sectors in which complaints are made as the basis of taking action to address issues in particular industries or sectors;
- settlements reached, both monetary and other.

Recommendation

11 That de-identified data from complaint-handling be collected, published and used for educational and policy purposes.

The legislative amendments required as a result of the *Brandy* decision meant significant changes to the complaints process and the need to take unconciliated cases to the courts has been associated with increased costs for complainants and increased legalism. Parties to proceedings in the Federal Court or Federal Magistrates Court now have a right to legal representation where previously consent was required for legal representation at a hearing before HREOC. Awards of damages by HREOC were relatively low compared with Court awards of common law damages and this constitutes a further encouragement to enter into the additional expense of legal representation. The Court's power to award costs raises the stakes all around and acts as a further disincentive to making a discrimination claim. Individuals are likely to find themselves in a complex area of law dealing with well-resourced respondents.

The impact of the increased legalism of the conciliation process under the SDA is shown vividly in HREOC data which indicates that legal representation of complainants has increased and the number of complaints has decreased, at least initially. Legal representation of complainants rose from 22 per cent in 1998 to 33 per cent in 2004, and HREOC survey data suggests that parties to

complaints under the SDA have markedly higher levels of legal representation in conciliation than parties to complaints under other federal anti-discrimination legislation.[2]

A search of the relevant annual reports also shows that in all areas under the SDA the number of complainants lodging complaints fell from 399 in 2001/02 to 347 in 2005/06.[3] In 2006 only ten employment matters under the SDA were determined in the Federal Court or the Federal Magistrates Court, with three of these being procedural matters only.[4] These numbers began to turn around in 2006/07, when complaints under the SDA in the area of employment alone increased to around 382,[5] probably as a result of WorkChoices, although HREOC data on complaints finalised suggests that none of these reached the Federal Court. Nevertheless, on a per capita basis complaints under the SDA remain well below those in the UK where complaints under the Sex Discrimination Act 1986 (UK) and the Equal Pay Act 1970 (UK) are growing rapidly.[6]

Recommendation

12 That the criteria for legal aid be amended to include the funding of equality test cases.

Discrimination on the ground of family responsibilities (TOR i)

In March 1990, Australia ratified the International Labour Organisation Convention 156, Workers with Family Responsibilities. In 1992, it amended the SDA to include family responsibilities in the objects of the act and as a ground of direct discrimination.

Under the current provisions of the SDA, only complaints regarding dismissal can be brought on the ground of family responsibilities. Discrimination faced by this group extends well beyond dismissal—significant though that undoubtedly is. Many Australians struggle to combine work and family and workers with family responsibilities undoubtedly experience significant discrimination and inequality. Workers with caring responsibilities are unable to participate equally in paid work, often being relegated to jobs with poor reward and insecurity. Conversely, the longer hours and work intensification faced by traditional primary breadwinners has limited their opportunity to engage more fully in family caring.

In March 2007, following two years of consultation regarding the problems faced by men and women in respect of work and family responsibilities in Australia, HREOC released its final report, *It's About Time: Women, Men, Work and Family*. The key recommendation of the report was for legal change: the introduction of new federal legislation, the Family Responsibilities and Carers' Rights (FRCR) Act.

The proposed Act would expand protection against family responsibilities discrimination and establish an obligation on employers to reasonably consider requests for flexible work hours. Under

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[2] Sara Charlesworth, 2007, 'Understandings of Sex Discrimination in the Workplace: Limits and Possibilities', <www.uq.edu.au/equity/docs/burton_mem_lect_2007.pdf, p. 4>.

[3] Loc. cit.

[4] Ibid. p. 5.

[5] HREOC's latest annual report for 2006/2007 (Chapter 4, Table 8) provides data on the total number of complaints lodged under the SDA (472 complaints). Unlike previous years it does not provide data on the number of complaints in the area of employment. However data provided at Table 21 indicates that of the 995 separate grounds of complaints raised in the 472 individual complaints, 81% related to the area of employment. This is used to extrapolate the 'around 382' complaints in the area of employment. See <http://www.hreoc.gov.au/about/publications/annual_reports/2006_2007/pdf/hreoc_ar2006-07.pdf>.

[6] Charlesworth, 'Understandings of Sex Discrimination in the Workplace', p. 4.

the first part, the current federal prohibition on family responsibilities discrimination would be expanded to cover both direct discrimination (different treatment) and indirect discrimination (different impact), in all areas of employment. It would replicate the other federal anti-discrimination Acts in that the central regulatory mechanism would be this prohibition coupled with an associated right of victims of such discrimination to take legal action against perpetrators for compensation. HREOC's powers to promote equality, raise awareness of discrimination and alternatives, and intervene in legal proceedings to assist the courts would be extended to cover this new protected ground.

The current prohibition on family responsibilities discrimination in the SDA is very limited, in that it only covers direct discrimination and only in respect of employment dismissal.[7] WEL believes that by extending the prohibition to indirect discrimination, and to all stages of work, the federal laws would be expanded significantly and would provide greater national consistency. In making this recommendation WEL intends that other measures it is proposing to address systemic discrimination be replicated in relation to the new ground. In light of the expanded role of the Sex Discrimination Commissioner in relation to family responsibilities, we recommend that her role with regard to age discrimination be reallocated, preferably to a specialist commissioner with statutory responsibility and adequate resources for this role.

Recommendations

14. That the Government legislate to extend the current prohibition on discrimination on the ground of family responsibilities consistent with the recommendations of the *It's About Time* report, and that other measures being proposed to address systemic discrimination be replicated in relation to the new ground.

15 That responsibilities for age discrimination be assigned to a specialist Commissioner with statutory responsibility and adequate resources for this role.

The second part of the proposed FRCR Act, a duty in respect of flexible work arrangements, would require employers reasonably to consider requests by workers with family responsibilities for accommodation of their caring commitments. Currently in Australia such a right only exists in a limited form arising out of a number of different sources of law, all of which have significant limitations.

In particular the draft National Employment Standards issued on 16 June 2008 provide each employee who has 12 months' service and responsibility for the care of a pre-school child with the right to request a change in working arrangements to assist them to care for the child. The employer may only refuse the request on 'reasonable business grounds'.

It is worth noting the restrictive nature of the proposed standards. First, the right is only to be provided to parents or carers of young children, who are only a subset of all workers with caring responsibilities. The standards do not draw on the definition of 'family responsibilities' within the SDA which extends to all 'dependent' children and beyond children to 'any other immediate family member who is in need of care and support'. Second, under the National Employment Standards there is also a 12-month qualifying period before the right to request flexible work arrangements

[7] Moreover, the proposal would significantly expand the protection afforded to men who have caring responsibilities. Whilst the current protection against family responsibilities discrimination in the SDA is not technically limited to female workers, to date, men have not asserted their rights under these provisions. One possible reason for this is that it is more difficult for men to use the 'sex' discrimination provisions in litigation in the alternative to the 'family responsibilities' provisions.

applies. Third, it is unclear how disputes are going to be resolved surrounding the National Employment Standards, with the most obvious issue arising in relation to the right to request.

HREOC's recommendation to include in the FRCR Act a duty for employers to reasonably consider flexible hours requests would go some way towards addressing some of the current limitations of scope and enforcement of a right to request. The Victorian government has already introduced such a right for Victorian workers by amending its anti-discrimination legislation along the lines recommended by HREOC. By imposing an express duty on employers, it provides greater clarity and certainty than the current sex discrimination rights or the National Employment Standard and it would apply across Australia. It would also pertain to workers generally, not only women, which is significant in enabling both women and men to contribute both at home and at work.

Recommendation

15 The new Federal Government should give serious consideration to HREOC's 'right to request' model as a way of addressing the conflicts faced by those with work and family responsibilities.

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for WEL-Australia

Attachment A

The amended objects provision*

Sex Discrimination Act 1984 - s 3

Objects

The objects of this Act are:

(1) (a) to give effect to the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to **prohibit** discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

(ba) to **prohibit** discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to **prohibit** discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

(2) **It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.**

* Amendments in bold.

Attachment B

Women's Equality Indicators

Indicators	Data by sex	Source
Demographics	• Percentage of population • Percentage by age group • Number of children per woman • Age at birth of first child • Life expectancy • Gender ratio of those living in poverty	ABS
Discrimination	• HREOC data on complaints by type and resolution	Sex Discrimination Commissioner
Educational attainment	• Post-school qualifications • Trade qualifications • Bachelors or higher degree	ABS
Employment	• Average weekly earnings • Average weekly full-time ordinary earnings • Average weekly full-time total earnings • Hourly earnings • Access to paid maternity and parental leave • Proportion in casual/part time employment • Industry segregation • Occupational segregation	ABS
Superannuation	• Percentage of pre-retirement population with superannuation • Retired persons: percentage who received income from superannuation/ annuities	ABS
Family and community support	• Contact with family or friends living outside the household, • Able to ask for small favours from persons living outside the household • Able to access support in time of crisis from persons living outside the household • percentage undertaking voluntary work • shortfall in child care places	ABS Commonwealth gov't data
Health	• proportion reporting a core activity limitation disability • Self-assessed health status as fair/poor • Experience personal stressors	ABS

	uncluding serious illness, accidents, death in the family, separation, and witness to violence. • Had high levels of psychological distress • Identify as a current smoker • Risky/high risk alcohol use	
Participation in sport and recreation		ABS
Crime and safety	Percentage reporting that • they feel unsafe alone at home after dark • they were a victim of physical or threatened violence in the past year • they had been a victim of break-in in the past year	ABS
Recorded crime	• Number of female victims of assaults and sexual assaults • Victim offender relationships:percentage o Known to victim o Family member • Numbers of family violence incidents • Percentage of o Aggressors by sex o Victims by sex	ABS
Decision making	• Percentage of government board members • Percentage of remunerated gov't board members • EOWA data on women CEOs/on boards • Percentage of ministers • Percentage of state/federal parliamentarians • Percentage of elected local government officials • Percentage of APS executives by level • Women in the judiciary	Government data EOWA data Australian Public Service Employment Database