Submission Sex Discrimination Act 1984 (Cth) Review
Senate Standing Committee on Legal and Constitutional Affairs
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Submission by:
Dr Belinda Smith
Faculty of Law
University of Sydney

To: Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Introduction

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the *Sex Discrimination Act* 1984 (Cth) (SDA). I hope that the review prompts wide ranging discussion about the successes and limitations of this Act and provides impetus for reform to enable the Act to better achieve its objects of eliminating discrimination and promoting gender equality. This review is particularly timely in light of a number of things, including:

- the 25th anniversary of Australia's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the Federal Sex Discrimination Commissioner's Listening Tour findings of the persistence of gender of inequality and sexual harassment;
- the recent launch by the International Labour Organisation (ILO) of its one-year global campaign to promote gender equality at work; and
- equality law reviews in other jurisdictions, including Victoria and the UK and innovative legal reforms in many other jurisdictions.

My submission focuses on the following terms of reference of the Senate Review of the effectiveness of the SDA:

a. the scope of the Act, and the manner in which key terms and concepts are defined;
…
c. the powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality;
…
e. significant judicial rulings on the interpretation of the Act and their consequences;
…

g. preventing discrimination, including by educative means;
h. providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;
i. addressing discrimination on the ground of family responsibilities;
j. impact on the economy, productivity and employment (including recruitment processes).

In responding to these terms of reference I draw on my academic research into Australian anti-discrimination laws and regulatory frameworks, equality (specifically gender equality and equality for workers with family responsibilities), and regulatory theory. In my research I have focused on the SDA. Relevant publications by me on these topics include:

- Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) *Federal Law Review* (forthcoming) (draft 25 June 2008, **attached**);

- Belinda Smith 'From *Wardley* to *Purvis*: How far has Australian anti-discrimination law come in 30 years?' (2008) 21 *Australian Journal of Labour Law* 3-29;

- Belinda Smith, "Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict", (2006) 28(4) *Sydney Law Review* 689-732;

- 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), 105-124; and

- Belinda Smith & Joellen Riley, "Family-friendly Work Practices and the Law" (2004) 26 *Sydney Law Review* 395-426.

I would be happy to provide any of these in electronic or hard-copy form.

I will not try to summarise all of the points in these articles, but wish to draw out a few key features and then make some specific recommendations for reform to the SDA.

Approach and outline

Since Australia introduced the SDA over two decades ago, there have been significant international developments in equality laws in other, comparable jurisdictions such as the UK and Canada. The first is an acknowledgement that the goal of anti-discrimination and equality laws needs to be substantive equality, not merely formal equality. Canada explicitly acknowledged this two decades ago. Opening doors, removing procedural barriers and treating all people the same are important steps, but reflect a formal conception of equality that may in fact entrench existing norms and disparities rather than enable the full and fair participation and dignity of all citizens to which we should aspire.

A second important development in anti-discrimination laws in many comparable jurisdictions is a recognition that to achieve substantive equality, the original individual fault-based anti-discrimination laws need to be supplemented by laws that promoted institutional change. Victims of discrimination warrant individual redress, but this alone will not guarantee wider, systemic or institutional change. Generally legal changes

acknowledging this have entailed some shifting of responsibility for change from the victims of discrimination to those in positions of power in society, such as employers, education providers and public authorities. A related development has been the utilisation of a growing body of regulatory scholarship in designing equality laws to make them more effective, as discussed further below.

These trends can be seen in the emergence, as noted by leading Oxford discrimination law scholar Sandra Fredman, of two different regulatory models for achieving equality: 'an individual complaints-led model based on a traditional view of human rights; and a proactive model, aiming at institutional change.'[1] The SDA clearly reflects the first model described by Fredman relying upon change to be brought about by individual victims pursuing private rights against individual perpetrators of discrimination.

A pattern around the world has seen the adoption of the individual complaints-led model and then its supplementation with the more proactive measures. This has meant addressing inequality not merely as a problem of individual acts of discrimination requiring a rights based response but also as a social, structural and cultural problem that requires institutional change. In respect of these trends, Australia has certainly lagged behind. In an international review of equality laws in 2004 it was noted:

> Within a global historical perspective, between 1950 and 1990, more sophisticated legal concepts and mechanisms developed to tackle indirect discrimination, promote equal pay between men and women, and facilitate affirmative action in the pursuit of greater equality. Such developments took place across Europe, Scandinavia, India, Canada and the USA. The measures introduced during the period were generally more complex than the pre-existing anti-discrimination laws. The latter were generally limited to retrospectively redressing an immediate wrong, rather than removing discriminatory practice across an organisation. … *Amongst industrialised nations, Australia and New Zealand have been the countries with the least developed labour market equality measures.*[2]

The government has a wide range of tools it can use to regulate individual and corporate behaviour in order to address issues of public concern such as discrimination and equality. There is a vast and growing body of regulatory scholarship which explores the way in which law can be used to regulate behaviour. Insights of this scholarship have been applied in many fields, such as occupational health and safety, environmental protection, trade practices and taxation. In other jurisdictions, such as the United Kingdom, such insights are also being applied to the issues of discrimination and equality. (see eg McCrudden 2007; Hepple et al 2000) However, to date, there has been very little consideration of how regulatory scholarship could inform the debates and thinking about equality in Australia.

In respect of organisational behaviour, to be effective regulation needs to acknowledge and respond to the fact that organisations will vary widely in respect of three key elements: commitment to addressing the problem; skills for addressing the problem; and institutionalisation of self-regulation and problem solving. (Parker 2002) What this means is that effective regulation should prompt organisations to identify or acknowledge

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[1] Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 369.

[2] Paul Chaney and Teresa Rees, 'The Northern Ireland Section 75 Equality Duty: An International Perspective' in Eithne McLaughlin and Neil Faris, *The Section 75 Equality Duty – An Operational Review*, 2004, 8-9 (emphasis added).

a problem and commit to addressing it, prompt and enable the development and application of necessary skills for addressing the problem, and institutionalize self-regulation and development in respect of the objectives. (Parker 2002; Smith 2006b) Our anti-discrimination laws have some limited capacity to prompt an organisational response to the problem of discrimination and equality, but they are very poor at equipping organisations with the information and skills required to address the problem or effectively self-regulate, and provide virtually no capacity to monitor or evaluate such organisational responses. (Smith 2006b)

To make the SDA more effective at eliminating discrimination and promoting equality, I believe we need to improve the rights mechanisms AND explore the options for more proactive measures.

I have set out below (a) limitations and recommendations in respect of the existing rights based model of the SDA, and (b) comments and recommendations in respect of developing additional mechanisms to better promote systemic and institutional change.

(a) Rights based model – limitations and recommendations

Limitations

I have explored extensively why the existing individual rights based model adopted in the SDA and other Australian anti-discrimination laws is limited in its effectiveness. (see Smith 2006a, Smith 2006b, Smith 2008a, Smith 2008b) While anti-discrimination laws have the potential to promote equality, there are features of the SDA that severely limit the effectiveness of the Act in achieving this goal. The key limitations I highlight are:

- **The Rule** – The first limitation of the SDA in establishing a standard of behaviour is that the duty it imposes is only a negative one, a *pro*scription of discriminatory behaviour. This means that organisations are required to 'not discriminate', but are not required to do anything positive in order to promote equality. The trigger for organisational response is the finding of fault for breach of the proscription, and this finding is dependent upon an individual victim having a sufficient understanding of discrimination laws, and sufficient interest, resources and capacity to pursue litigation for redress.

  A second limiting factor in the effectiveness of the discrimination prohibition is its general nature. While discrimination is defined, many key terms – such as reasonableness - are very open-textured and the only official mechanism for providing guidance on their meaning is through court pronunciations. The compulsory conciliation model adopted under the SDA results in most complaints not proceeding all the way through to a final hearing and court determination. The lack of jurisprudence or alternative mechanism for clarifying what is and is not legal – such as codes of practice or evidentiary guidelines – results in uncertainty for all.

  Finally, a significant limitation of the SDA is the distinction between direct and indirect discrimination. This distinction, largely replicated across all Australian anti-discrimination laws, is artificial, chimerical, difficult to understand and thus difficult to comply with and enforce. The strict separation in our legislation between direct and indirect discrimination was made clear by the High Court in the case of *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92. By this case, the High Court established that the prohibition on direct discrimination – the

most common form of complaint - is now limited to complaints of blatant category based exclusions or procedural inequality (Smith 2008a). This reflects a very limited, formal conception of equality. Importantly, the ruling of the Court was not confined to the field of disability discrimination or the particular facts, the approach having been adopted across Acts and fields. In essence the case makes clear that direct discrimination provisions do not prevent employers (education providers, etc) from using criteria that very closely connect or overlap with traits that are supposedly protected by the SDA. For example, while an employer may be prohibited from applying a blanket exclusion of women, direct discrimination provisions allow the employer to choose the candidate who can work 24/7, can do overtime on short notice, will not take extended leave, will not take their entitlement to carer's leave or any other criteria that may have a gendered element but is not expressly 'sex'. Further, under direct discrimination actions, such criteria are not subjected to any evaluation of legitimacy or connectedness to the job (as inherent requirements are in the DDA), and there is no obligation to accommodate at all (even up to undue hardship, as is required under the DDA). The *Purvis* decision removes the criteria from judicial scrutiny and makes clear that reasonable adjustments are not required. The indirect discrimination provisions are still available to challenge such criteria, but with all the uncertainty and litigation difficulties that indirect discrimination provisions entail.

The artificiality and complexity of the distinction between direct and indirect discrimination is particularly problematic given that it is victims alone who must prove breaches of the SDA, as noted below.

- **Enforcement** – Under the SDA the right to prosecute for breaches is limited to victims. 'Establishing a prohibition that relies for enforcement on initiatives taken by disempowered victims, rather than proactive enforcement by a public agency, is arguably one of the weakest forms of achieving behavioural change, barely one step above free-market self-regulation.' (Smith 2006a, 115)

  Looking around the world to other jurisdictions, it is clear that the Australian approach of *not* establishing agency advocacy and enforcement is unusual.

  This is also unusual in Australia in respect of fields other than discrimination, such as occupational health and safety (which is public prosecution), working conditions established under the *Workplace Relations Act* (which allows for public, victim and third pary enforcement) and anti-competitive practices and consumer rights. I would argue that this is one of the key weaknesses in the Australian regulatory model for equality and must go some way to explaining why our laws have not been more effective at promoting equality.

  The absence of an enforcement agency also limits the capacity of the state to regulate 'responsively'. (Ayres and Braithwaite; Smith 2006b)

- **Sanction** – The sanctions under the SDA, or orders that can be made for discriminating, are only *compensatory*, with no exemplary or punitive component, and, more importantly, no capacity to make corrective or preventative orders that extend beyond the individual victim. 'This has a number of implications. Firstly, it serves to reinforce the characterisation that discrimination is merely an interpersonal dispute in which only the complainant is harmed, not colleagues, family or the wider

society. Further, in a victim-driven compensatory system, discrimination that is systemic is likely to go unaddressed because no individual victim has been so specifically harmed as to prompt litigation. Secondly, by focussing only upon redressing harm done to the victim, Australian anti-discrimination laws do not require or even necessarily prompt structural and preventative change. 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, 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.' (Smith 2008b, 18-19)

The absence of a hierarchy of sanctions further limits the capacity of the state to regulate responsively. (Smith 2006a; Smith 2006b, Smith 2008b)

- **Process** - the dispute resolution process is an informal one that mostly keeps breaches out of public view, thus limiting the publicity threat of actions and the useful public elaboration of the general legislative prohibition, as noted above.

The regulatory model of SDA is a fault-based, individual rights model which is not adequately equipped to achieve its goals of eliminating discrimination and promoting equality. It is outdated and could be developed to better reflect regulatory insights that have been applied to a vast array of other fields. The SDA may work to resolve disputes over discrimination and promote formal equality – raising awareness and encouraging decision-making based upon merit rather than assumptions and stereotyping – but the model offers little to ensure systemic discrimination is addressed and substantive equality achieved. The victims of discrimination may be well placed to see the disadvantage but not sufficiently well-resourced to be the drivers of change through litigation. Organisations that are committed to doing the right thing, are provided with insufficient guidance on compliance (due to the lack of legal codes or jurisprudence). Finally, a system that only requires employer action if wrong-doing is found frames individual discriminatory acts as interpersonal disputes, rather than looking at inequality as a public problem that harms us all.

<u>Recommendations</u>
Based on this analysis, I submit that the following reforms should be considered to enhance the effectiveness of the SDA.

1. **Amend the definition of discrimination** – the Canadian model should be reviewed to consider the abolition of a distinction between direct and indirect discrimination. This would involve a consequential shift in focus away from treatment versus impact, to whether the distinction or requirement is reasonable.

   Prior to 1999, Canadian anti-discrimination laws reflected the current bifurcation in Australia between direct and indirect discrimination, with at least two important distinctions. Firstly, under the Canadian system, once the complainant established a prima facie case of discrimination, it was up to the respondent to establish a defence, which could include bona fide occupational requirement or qualification. In Australia, since *Purvis*, direct discrimination complainants face great difficulty proving even different treatment because *Purvis* essentially allows the respondent to

choose the appropriate comparator by deciding the criterion of comparison. In respect of the employer's criterion, the complainant may have been treated the same as all other applicants who took carer's leave or said they couldn't work full time or overtime at short notice or was restricted in work travel or had taken 12 months leave. Secondly, unlike the bona fide occupational requirement defence in Canada,[3] the criteria used by employers in such a scenario is not subjected to any examination by the court. The Canadian criteria

> To be a *bona fide* occupational qualification and requirement a limitation . . . must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved [the subjective element] . . . In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public [the objective element].[4]

Developing our direct discrimination test in this way would improve its effectiveness. But in 1999 the Canadian Supreme Court went even further by, in essence erased the distinction between direct and indirect discrimination arguing that the distinction was artificial and too malleable. Instead the Court developed a new three-step test. Once the applicant has proven a prima facie case of discrimination, the respondent employer is required to prove:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[5]

We need to consider whether – by legislative reform – this formulation of discrimination would serve us better in the eradication of discrimination and achievement of substantive equality. The test ensures that victims of discrimination are unduly burdened by the challenge of trying to figure out whether their experience fits into the artificially distinct categories of direct or indirect discrimination under the SDA. This is a difficult task and one that matters a lot as the choice of action determines what needs to be proven and, as we saw in *Purvis*, whether the respondent's criteria or practice can be scrutinized for anything other than its consistent application and whether any accommodation is required of the respondent.

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[3] Colleen Sheppard 'Of Forest Fires and Systemic Discrimination: A review of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [(2001) 46 *McGill Law Journal* 533

[4] *Ontario (Human Rights Commission)* v. *Etobicoke (Borough of)*, [1982] 1 S.C.R. 202 at 208, 132 D.L.R. (3d) 14 as cited in Sheppard, above n 3.

[5] *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)* [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 at para 54.

This test ensures that criterion used to select (and exclude) employees or applicants is subjected to some assessment of legitimacy in light of the goals of our equality laws. And, importantly, it builds into the single definition a limited obligation on respondents to accommodate difference or make reasonable adjustments to the extent of undue hardship, regardless of whether it is direct or indirect discrimination.

If such a significant revision of the SDA definitions of discrimination are only possible in the longer term, I suggest that in the meantime we need to:

a. Address the formal equality limitations imposed by *Purvis* by at least making clear that characteristics that generally appertain to a protected trait (as family responsibilities currently do to women) are not to be treated merely as a circumstance attributable to the comparator thereby erasing the difference of treatment.

b. Further, given the difficulties of proving discrimination, the burden in respect of proving causation should be shifted to the respondent as is the case in the *Workplace Relations Act* 1996. This is particularly important if the current system is to be retained of only providing victim prosecution, without agency advocacy.

2. **Expand Family Responsibilities ground** – In order to challenge work-family conflict and disadvantage faced by those with caring responsibilities, and to implement Australia's international obligations under ILO Convention 156, the SDA should be amended to expand anti-discrimination protections for workers with caring responsibilities. Protection under the SDA in respect of family responsibilities is currently limited to direct discrimination and only in respect of employment dismissal. It should be expanded in a way comparable to the other grounds, to cover both direct and indirect discrimination, in respect of employment and other forms of work, and all stages of work, not merely termination. Further, drawing on the findings and recommendation of HREOC in its 2007 report *It's About Time: Women, Men, Work and Family*, the SDA should be amended to require employers to reasonably accommodate the needs of workers with caring responsibilities, a provision which could complement the new National Employment Standard (NES) of a right to request a change in working arrangements. (Smith 2008b) The NES, as currently drafted, is limited to workers with caring responsibilities for pre-school children and in this way will do nothing to address the difficulties faced by workers with responsibilities to care for older children, or disabled or elderly dependents.

3. **Amending discriminatory definitions** – The SDA definition 'family responsibilities' and 'marital status' are both discriminatory toward same sex relationships and need to be amended. (Chapman 2005, 2006).

4. **Codes of practice.** The Human Rights and Equal Opportunity Commission should be empowered to develop statutory codes to provide compliance guidance, akin to those provided for in the UK. If employers and other organizations are expected to comply with anti-discrimination legislation, they should be provided with clearer guidance as to what constitutes discrimination and harassment, rather than having to rely only upon guidance of courts in judgments that are generally inaccessible other than to lawyers. HREOC has done an impressive job of providing educational

materials, but it should be further resourced and empowered to provide evidentiary guidelines rather than merely information that has no legal authority.

5. **Provide for public advocacy and enforcement of discrimination breaches** - Expand HREOC's, or preferably a separate body's, power to further support complainants or even initiate inquiries into indirect and systemic discrimination in order to more proactively promote equality rather than rely upon reaction driven by disempowered victims. (Smith 2006b)

6. **Expand the range of sanctions to better address systemic and repeat discrimination** – The array of sanctions available for breach should be expanded to include corrective or preventative orders for indirect and systemic discrimination (as in NSW) and punitive damages or public penalties (for repeat offenders or particularly egregious and intentional acts of prejudice or harassment). (Smith 2006b)

(b) Proactive model

The above recommendations are designed to improve the effectiveness of an individual rights based model, drawing on regulatory insights that have been applied to this field in other jurisdictions and other fields in this jurisdiction. However, jurisdictions such as Canada and the UK have gone further than simply amending the rights based systems. Drawing on the Canadian and Northern Ireland models, the UK has added positive duties to the regulatory armory for Great Britain for addressing inequality, thereby altering its model to make it more proactive and designed to bring about institutional change. Sandra Fredman contrasts the positive duties approach to the complaints based model:

> At the root of the positive duty … is a recognition that societal discrimination extends well beyond individual acts of [racist] prejudice. Equality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility. Positive duties are therefore proactive rather than reactive, aiming to introduce equality measures rather than to respond to complaints by individual victim.
>
> This has important implications for both the content of the duty and the identification of the duty bearer. In order to trigger the duty, there is no need to prove individual prejudice, or to link disparate impact to an unjustifiable practice or condition. Instead, it is sufficient to show a pattern of under-representation or other evidence of structural discrimination. Correspondingly, the duty-bearer is identified as the body in the best position to perform this duty. Even though not responsible for creating the problem in the first place, such duty bearers become responsible for participating in its eradication. A key aspect of positive duties, therefore, is that they harness the energies of employers and public bodies. Nor is the duty limited to providing compensation for an individual victim. Instead, positive action is required to achieve change, whether by encouragement, accommodation, or structural change. (Fredman 2001, 164)

The UK duties go further than the federal affirmative action duty under the *Equal Opportunity for Women in Employment Act* 1999 (Cth) in that they apply in respect of race, disability and gender in respect of all functions of all public authorities, including policy making, the provision of services, and employment. Currently the UK parliament is reviewing a proposal to expand these duties.

Further detail about these duties and lessons we might learn from them is provided in Part V of the attached article, Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) *Federal Law Review* (forthcoming).

Neither Canada nor the UK has 'solved' the problem of discrimination and inequality. But it is clear they have progressed significantly further in their research, public discussion, judicial understandings, and legal mechanisms for addressing the problems. Their efforts remind us of how complex the problem is and how addressing the problems in Australia is going to be a long, ongoing process that requires progressive leadership, political commitment, public engagement, a great deal of research about the issues and options, and resources to implement recommendations. Hopefully this inquiry is merely a first step in getting Australia back on the path to being an international leader rather than laggard on gender equality.

I would be happy to clarify or respond to any queries in respect of this submission.

Dr Belinda Smith
31 July 2008

Attachment: Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) *Federal Law Review* (forthcoming)

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