

Australian Education Union



Submission

to the

Senate Legal and Constitutional Affairs Committee

**Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act
1984 in eliminating discrimination and promoting gender equality**

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1. Introduction

- 1.1 The Australian Education Union has a membership of over 170,000 educators who work in public schools, colleges, early childhood and vocational settings in all states and territories of Australia. Members include teachers and allied educational staff, principals and administrators mainly in government school and TAFE systems.
- 1.2 The AEU represents its members industrially and professionally in diverse forums. This includes the maintenance of comprehensive industrial protection and representation through industrial awards and agreements in all industrial tribunals in Australia. This involves industrial research, negotiation and advocacy over a wide range of matters including salaries and teaching and learning conditions.
- 1.3 The Australian Education Union makes the following submission to the Senate Inquiry into the Sex Discrimination Act (SDA), fully supportive of the Act and its fundamental importance to Australian women and in upholding our international obligations of basic human rights.
- 1.4 There are a number of observations the AEU wishes to make about the operation and effectiveness of the Sex Discrimination Act but our submission will not address every issue in the Terms of Reference.
- 1.5 Broadly, the AEU considers the SDA a crucial and landmark piece of legislation and its ability to create an avenue for complaints of sex discrimination to be heard and resolved is a great achievement. It is our view that under this review, any changes to the act should only be improvements to provide for greater gender equality and not to remove any current rights. We believe it is important to retain the ability for individuals to lodge complaints and for current remedies to remain. However, the AEU is aware that much sex discrimination is of a systemic rather than individualist nature and the SDA hasn't had as much of an impact in rectifying fundamental inequities amongst men and women in this country.
- 1.6 As a union representing a feminised industry, we have much concern for the systemic and structural disadvantage many women face in Australia and the impact this has on their economic and social wellbeing. Our submission therefore comments more on suggestions to strengthen the SDA's ability to address structural disadvantage and effect greater cultural change, as well as some specific references to the operation of the Act, rulings by HREOC and their impact particularly on the education sector.

2. Ability to address structural disadvantage and effect greater cultural change

The scope of the Act, and the manner in which key terms and concepts are defined;

- 2.1 Acknowledging the limitation of legislation to effect lasting and widespread cultural change, there is an ongoing need for Government to address systemic disadvantage women face. Such issues include the continuing gap between women's and men's weekly and indeed lifetime earnings, the undervaluing of paid and unpaid work women undertake, the prevalence of violence towards women by men, the sexualisation/exploitation of women (and increasingly children) and women's restricted career prospects (due to caring responsibilities).
- 2.2 These issues are less about the individual experiences of women against their employer, spouse or other community member, they are the result of collective judgement upon and experience of groups of women - generations of women - which is formed by inherently patriarchal societal norms.
- 2.3 In the past, and in considering improvements to legislative avenues to outlaw discriminatory treatment of women, it has been suggested that a general statement of the prohibition of discrimination against women in the SDA would be of symbolic importance. The AEU would support such a statement that holds discrimination against women as not being condoned by the Australian society and that is built upon the provisions of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which defines discrimination against women in a purposive sense and establishes the substantive and positive right of women to equality and the enjoyment of human rights.

e.g. " 'discrimination against women' shall mean 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."

Recommendation 1

That the Sex Discrimination Act be amended to include a general statement of the prohibition of discrimination against women, following the definition used by CEDAW.

- 2.4 In line with the sentiments above, it is also opportune for the Government in reviewing the SDA (and the timing of its intentions to ratify the CEDAW Optional Protocol) to ensure that the SDA is well aligned with international instruments.

The extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organisation or under other international instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

- 2.5 Australia has been a party to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1983. Under CEDAW, Australia is obliged to ensure equality between men and women to eliminate discrimination in all areas, including the law; attitudes, prejudices and stereotypes; family matters; politics and public life; economic life; work conditions; access to welfare, health care and education. In its reports on the implementation of CEDAW, Australia has described how it implements its obligations through a range of Commonwealth and State and Territory laws and programs. However, many women's organisations in the past have regarded the reports provided to the UN as masking a deeper analysis of ongoing gender inequities in Australia.
- 2.6 The Australian Government is now considering whether to become a party to the Optional Protocol to CEDAW. If the Government is serious about ratifying the CEDAW Optional Protocol which would allow Australian women an international avenue to seek a resolution to claims of discrimination, then the Government must take greater responsibility through domestic legislation to reduce systemic disadvantage and reduce the grounds on which women may experience discrimination.
- 2.7 As well as alignment, there should be a greater capacity for monitoring and reporting, against key indicators, Australia's progress towards gender equality. For too long gender has been an invisible policy concern for the Federal Government. Data collections by the Office for Women, the Australian Bureau of Statistics and more recently the Office of the Employment Advocate and the Department of Employment and Workplace Relations have reduced or included minimal references to gender specific breakdowns. (Preston et al, 2006).
- 2.8 Curtin University of Technology (Preston et al, 2006) research reports the need to reinstate previous or extend current data collections to account for the specific indicators of women's disadvantage and expose them. Preston says in particular:
- the ABS *Average Weekly Earnings (Catalogue 6302.0)* needs to provide details about earnings within different wage setting jurisdictions, employment contract and occupational categories.
 - The ABS *Employee Earnings and Hours (6306.0)* could be more useful if run more regularly and to be constructed on a time series basis which would make comparing the occupational and industry levels easier and could assist gender pay equity inquiry.

- The Office for the Employment Advocate report, Agreement Making in Australia under the Workplace Relations Act, was not disaggregated by gender in any meaningful way at all.
- 2.9 Over the last ten years, we have seen that if targeted policy supported by rich gender specific data is not facilitated by Government and instead a flawed notion of mainstreaming is relied upon, complex issues do not get resolved. Rather they quickly become invisible with stakeholders rendered voiceless and disempowered.
- 2.10 Without regular monitoring and reporting against key indicators, Australian governments are not held accountable to their obligations to achieve substantive gender equality in key areas of public and private life e.g. workforce participation and promotion, pay equity, leadership, sexual harassment and other forms of gender-based violence. Annual independent reporting would be a key public education and awareness-raising process, as well as ensuring the richest possible information is drawn upon when reporting to and complying with international obligations and conventions.

Recommendation 2

That the Sex Discrimination Act should be amended to provide the Sex Discrimination Commissioner and HREOC with a statutory responsibility to independently monitor and report to parliament on gender equality.

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;

- 2.11 Further to the points made above, it is clear that the independence of the Sex Discrimination Commissioner and of the Human Rights and Equal Opportunity Commission as a whole is critical to ensure reporting on discrimination continues when the policy will is weak.
- 2.12 Again, for any cultural change to occur towards greater gender equality in areas of historic and structural/systemic disadvantage, education, leadership and advocacy amongst the broader community is essential. We therefore believe it is time to extend the powers of the Sex Discrimination Commissioner to investigate gender issues without formal complaint and that the educative role of HREOC and resources to conduct test cases should be a priority outcome of this inquiry.

Recommendation 3

That the Sex Discrimination Commissioner should have the power and resources to investigate systemic/structural discrimination on her own initiative (without a need for a formal complaint) and report to Parliament with recommendations for policy change to improve gender equality.

Recommendation 4

That the Sex Discrimination Act should be amended to strengthen HREOC's education role and ability to conduct test cases.

- 2.13 The SDA currently only provides for adoption of discretionary guidelines 'for the avoidance of discrimination'. HREOC has no power to mandate the application of positive duties, nor to enforce compliance. However the operation of the Disability Discrimination Act includes standards which require a 'positive compliance' approach. This creates the environment that anti-discrimination measures are a rule rather than being viewed as a special measure. Standards in the DDA have been said to reduce litigation/complaints and may well be a positive inclusion into the SDA. These standards could include recruitment and promotion in employment, staff training in discrimination awareness, procedures for complaints or strategies for workplace culture change.

Recommendation 5

That the Sex Discrimination Act should be amended to include standards, along the lines of the Disability Discrimination Act, to encourage positive compliance and greater enforceability of measures to reduce inequality particularly in the workplace.

Providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;

- 2.14 In 1998 (Clifford) and 2005 HREOC reported on issues with the anti-discrimination complaints process. Some of the issues included long delays (conciliation taking from 6-9 months), unsatisfactory conciliation and arbitrary outcomes due to the level of inquiry by the Commissioner varying on a case by case basis.
- 2.15 Since 2000 complaints that could not be resolved via conciliation only have the option of a court-based determination process, either through the Federal Court or the Federal Magistrates Court, where costs can be awarded.
- 2.16 HREOC reported (2005) that there was a rise in legal representation in all action under federal anti-discrimination legislation (Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act) from 11% in 1998 to 23% by the end of 2004 which again incur costs. Complainants under the SDA had utilised legal representation from 22% of cases in 1998, to 33% by the end of 2004, which is consistently higher than those for other discrimination matters.
- 2.17 The involvement of court-based determination and the rise in legal representation being used caused concern that potential complainants would be discouraged by financial implications and decline to report discrimination.

- 2.18 Further, in 2005 when the Federal industrial relations law (*WorkChoices*) changed and removed unfair dismissal there was concern that unlawful dismissals and indeed unlawful discrimination would go unchecked because this left anti-discrimination law as the only avenue, though costly, for justice. Previously, dismissal and discriminatory treatment at work could also be challenged via the Industrial Relations Commission, with the representation of unions and though unlawful discrimination may have occurred, often the remedy was via unfair dismissal laws. The choice for employees became the possibility of having costs awarded against them should they be unsuccessful in proving unlawful discrimination, and with the added reality of the cost of legal representation, the move to court-based determination did prove a barrier to justice.

Recommendation 6

That the Government should consider whether court-based determination is the most suitable form for discrimination complaints and either make changes to this avenue or increase the ability for individuals to receive Legal Aid when accessing anti-discrimination law.

3. Specific references to the operation of the Act

Significant judicial rulings on the interpretation of the Act and their consequences;

- 3.1 In 2002 the Catholic Education Office applied for an exemption under the SDA to allow them to offer male only primary teaching scholarships. This became a very public and complex debate regarding the purpose of the SDA, the effect of short-term exemptions or the need for legislative amendment.
- 3.2 The debate exposed a basic lack of understanding the nature of discrimination (direct and indirect), the purpose and proper operation of exemptions to the SDA and what ought be the resilience of such anti-discrimination legislation against change. It also exemplified the public acceptance of stereotypes when regarding feminised professions and their status, being the type of systemic discrimination which HREOC or the SDC should have the power to challenge in a more meaningful way through the SDA.
- 3.3 The AEU argued there was no need to amend the Sex Discrimination Act to allow for “positive discrimination” in the case of male teachers and that short term exemptions weakened the purpose of the legislation, creating confusing and oft misapplied justifications for the very discrimination the legislation is set up to outlaw.
- 3.4 The issue of male teacher numbers and of the teacher shortage in general can be remedied much more significantly and on a longer term by industrial and other promotional means, rather than a small number of scholarships and watering down important legislation.

- 3.5 The Human Rights and Equal Opportunity Commission, when assessing the Catholic Education Office's bid for an exemption to the Sex Discrimination Act to offer scholarships to male would-be teachers, said, 'neither the means of offering scholarships, nor the ends of producing better boys' literacy performance' could be proven to justify granting the exemption.
- 3.6 The AEU supports the extensive arguments put by the then Sex Discrimination Commissioner (12/04/04). Importantly, the discrimination inherent in the SDA amendment proposal, was greater than the original concern that the scholarships would be only open to men. Because, as Ms Goward explains, "the simple fact is that young men are not attracted to teaching because they can earn better money elsewhere. As 'women's work' it has never been remunerated properly....Front loading the pay of male teacher students through a scholarship, effectively relieving them of the HECS burden their female counterparts will carry into their professional careers, entrenches this inequity and has not been demonstrated to address the disparity in numbers of male and female teachers long term."
- 3.7 As a legislative process, the proposed amendment to the Sex Discrimination Act, even though the opportunity is created for initiatives for either gender to redress imbalance where it exists, is still a flawed concept and the ruling given by the Human Rights and Equal Opportunity Commission in February 2003 exposed these flaws.
- 3.8 It is clear that without strong education around the notion of discrimination and how the systemic undervaluing of so-called feminised work can perpetuate stereotypes in the public mind inequalities will remain unchallenged. The example of the debates surrounding the Catholic Education Office's application for an exemption to the SDA, (and resultant move to legislative amendment to the SDA) highlights the ongoing need for HREOC to have a strong educative role and resources.

4. The SDA and implications for the education sector

- 4.1 As seen in the example of the Catholic Education Office, misunderstandings around the purpose of the SDA and the nature of discrimination, (which lead parties to seek exemptions), highlight how the existence of exemptions can limit the effectiveness of the SDA.
- 4.2 Currently, it is lawful to discriminate under the SDA in certain cases regarding voluntary bodies, educational institutions established for religious purposes, sporting clubs etc. Private and religious schools are able to discriminate on the basis of sex, marital status or pregnancy, either regarding its teaching workforce or indeed student intake, and the AEU believes they have not been reticent to make use of these indulgences.

- 4.3 The exemption has been used by the Catholic Education Office to dismiss teachers who live in de-facto relationships; to dismiss teachers who are gay or lesbian; and by private schools to decline the enrolment of disabled students, or to target the employment of teachers of particular genders.
- 4.4 Discrimination in this fashion goes against the spirit of legislation in this country and if exemptions are viewed necessary following the inquiry into the SDA then there must be consideration given to the scope of bodies allowed exemption and the grounds applicable. Particularly considering the employment rights of educators, the SDA should significantly narrow the criteria for exemptions to employment practices.

Recommendation 7

That the SDA be amended to exclude educational institutions established for religious purposes from exemptions allowable under the act, for employment purposes.

Preventing discrimination, including by educative means;

- 4.5 The AEU understands that schools must provide human rights education and develop students' celebration of diversity if as a society we are serious about preventing discrimination.
- 4.6 The Human Rights and Equal Opportunity Commission conducts training and produces education resources to help teachers introduce human rights concepts to students and build an awareness of the law and avenues for discrimination redress. However, this role can always be expanded and better supported by Government by way of funding.
- 4.7 Schools are being asked to respond to more and more social problems which are difficult for teachers to manage with limited time. This is not to say human rights is neglected in the curriculum, but that organisational support and communication is required to get the best result in terms of student engagement.

Recommendation 8

That the Federal Government increase the educative role of HREOC with appropriate resourcing and to better manage the interaction between HREOC and education departments, school leadership and the union.

Sexual harassment;

- 4.8 Part of the importance of community awareness around human rights and anti-discrimination is about changing cultures that still support gender stereotypes and in turn act as barriers to gender equality. Women's experiences of the legal system, in connection with sexual harassment or sexual assault, often expose outdated and offensive attitudes.

- 4.9 Sexual harassment is deemed illegal by the SDA, yet community attitudes vary in terms of the gravity of the offense and the understanding not just of what constitutes sexual harassment but the impact it has on a victim.
- 4.10 Women's access to justice in response to breaches of the SDA is mitigated by the attitudes and awareness of those working within the legal system and even those reporting cases.
- 4.11 The Project for Legal Action Against Sexual Assault (ALRC, 1994) tells the unacceptable treatment of one woman who had been raped by two work colleagues and of her experience in the court room at the committal proceedings.

“In the court room, I gave evidence for four hours. They asked me why I did not fight back, why I had so many drinks, why I had asked them to help me find a taxi and not someone else. Apart from the (sexual assault) counsellor . . . I was the only woman in the room. ...The DPP said my evidence didn't stand up, that my story didn't hold, that I was a bad witness. What finally got me, was I never got to tell my story. It was as if what happened to me did not matter, they were so preoccupied with the words I chose to express it. I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way.”

- 4.12 Whilst this example relates to sexual assault it tells of the victimization experienced at the hands of ignorance.

Any procedural or technical issues;

- 4.13 The AEU wants to make it clear that we wholly support (section 7D) the provision in the Act for ‘special measures’ to address inequality. This provision ‘recognises that certain special measures may have to be taken to overcome discrimination and achieve equality and it is one aspect of the law we have often needed to use. As a union which understands the need for affirmative action in the form of women’s officers, rules to ensure women’s equal representation on decision making bodies and exclusive committees we are heartened that a recent challenge to this part of the SDA was rejected and that special measures do indeed continue to be valid.
- 4.14 Specifically, section 7D was considered for the first time by the Federal Court in *Jacomb v Australian Municipal Administrative Clerical & Services Union* (‘*Jacomb*’). In this case, the rules of a union provided that certain elected positions on the branch executive and at the state conference were available only to women. The male applicant alleged that the rules discriminated against men and were unlawful under the SDA.

- 4.15 The essence of the applicant's objection to the rules was that the union policy of ensuring 50 per cent representation of women in the governance of the union (which was the basis of the quotas within the rules) exceeded the proportional representation of women in certain of the union branches. Consequently, women were guaranteed representation in particular branches of the union in excess of their membership to the disadvantage of men. The union successfully defended the proceedings on the basis that the rules complained of were special measures within the meaning of s 7D of the SDA.
- 4.16 Crennan was satisfied that the union believed substantive equality between its male and female members had not been achieved and that addressing this problem required women being represented in the governance and high echelons of the union so as to achieve genuine power sharing. Crennan commented that it 'was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under s 7D (subs 7D(3)).
- 4.17 Being a union which represents a majority of women who still encounter sex discrimination within the workplace and policies, it is important that we continue to raise issues and make representations exclusive to women. The ongoing operation of the special measures provision allows the union to do so with confidence that we are not discriminating.

5. Conclusion

- 5.1 The review of the Sex Discrimination Act offers the Government and Australian women to be sure that sex discrimination is eradicated in the most thorough way possible. To bring Australian processes and policy objective into line with International standards and protocols should be a priority as should the strengthening of investigative and educative powers of the Sex Discrimination Commissioner and her complaints unit.
- 5.2 The AEU supports the fundamental objective of the Act and believes that any change must be by way of strengthening the ability for the law to disallow any weakening of the notion of anti-discrimination. Special measures to achieve gender equality must remain and any exemptions to the Act must only be allowed in the most rigorously tested of circumstances.
- 5.3 Above all, gender should not be a barrier to participation, wellbeing, economic or physical security and any reform to the SDA must be about empowering individuals and institutions to move towards gender equality not to undermine it.

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Chapter 2. Gender inequality

Chapter 3. Strengthening the Sex Discrimination Act 1984

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Chapter 3. Understanding equality

Chapter 4. An Equality Act

Chapter 5. The impact of an: Equality Act on government

Chapter 6. The impact of an Equality Act on courts

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