

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

1 August 2008

Re: Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984

UNIFEM Australia is pleased to have the opportunity to comment on the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination. Twenty-four years after the enactment of the Sex Discrimination Act (SDA), we consider the Inquiry both appropriate and timely. We wish to register our concern, however, that the amount of time granted to NGOs to make a submission to the Inquiry is inadequate – two weeks provides insufficient time for organisations like ours to access the expertise within our membership which we would otherwise wish to bring to this commentary.

UNIFEM Australia is particularly interested in the extent to which the Act implements the obligations of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW). We believe that the review of the SDA, which was enacted in 1984 to give effect to Australia's ratification of CEDAW in July 1980, should analyse whether in practice, the SDA has been comprehensive in addressing the scope and intention of the Convention.

Australia's implementation of CEDAW is limited in two major ways. Firstly, Australia has made formal reservations to significant aspects of the treaty, which have seemingly excused the absence of some key protective measures from the SDA. Second, the SDA contains a number of exemptions that are inconsistent with the international obligation to eliminate discrimination against women in all areas of life.

In reviewing the SDA we have focused on the Act's capacity to implement the articles of CEDAW; a priority issue for UNIFEM Australia. Our concerns have been divided according to the relevant terms of reference that were outlined by the Committee.

Scope of the Act (term of reference A)

UNIFEM Australia would like to draw to attention a number of key issues that are currently missing from the SDA, and which should play a vital role in protecting the rights of women as they are defined in CEDAW.

Sexual Discrimination in the Workplace

The federal equality laws – the Sex Discrimination Act 1984 (Cth) and also the Equal Opportunity for Women in the Workplace Act 1999 (Cth) – have proven to be of some use in prompting greater family-friendliness in Australian workplaces. However, three cases of sex-based discrimination in the workplace remain unresolved:

1. The absence of universal paid maternity leave

The preamble to CEDAW states that:

... the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole ...

The preamble recognises:

... the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children ...

CEDAW article 11(2)(b) states that States Parties should also take appropriate measures to introduce paid maternity leave. It provides:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures... To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances ...

Paid maternity leave is thus clearly identified as a measure that would fulfil states' obligation to provide women with equal rights in employment CEDAW sees paid maternity leave as a crucial measure to enable women to combine family and maternal obligations with activity in the labour force.¹

Australia is one of the only two OECD Countries that does not have a requirement for paid maternity leave: Maternity leave is not mandated by the SDA, but is left to the discretion of the employer.

All permanent public sector workers have access to paid maternity leave, but this privilege is not available to casual workers. In the private sector some provision for such leave has been introduced into a limited number of workplaces, in single employer collective agreements as a result of enterprise bargaining, through registered individual agreements or through

¹ Charlesworth, H. & Charlesworth, S. 'The Sex Discrimination Act and International Law', *UNSW Law Journal*, vol. 27, no. 3, p 858

voluntary management initiatives. Estimates of the spread of paid maternity leave vary but it is clear that the majority of women in paid work do not have access to paid maternity leave.²

The CEDAW Committee has expressed concern that Australia has not introduced a system of paid maternity leave and retains its reservation to article 11(2) (b) of the Convention. The CEDAW Committee has also urged Australia to 'take further appropriate measures to introduce maternity leave with pay or with comparable social benefits.'³

Under CEDAW, the provision of paid maternity leave is seen as a distinct international obligation, separate to the general provision of assistance to parents combining work and family responsibilities. A welfare payment does not constitute paid maternity leave as envisaged under CEDAW. It is not intended to encourage women's ongoing attachment to the paid workforce, nor is it linked to preventing discrimination against women in employment.⁴

UNIFEM Australia recommends that the SDA shall include a system of paid maternity leave for all Australian women which is at least equal to that in the ILO Maternity Protection Convention, and encourages the adoption of HREOC's proposed two-stage National Paid Leave Scheme.⁵ A national Australian paid maternity leave scheme for working women similar to the one in the United Kingdom would meet the objective of both the SDA and CEDAW of ensuring equality for women by providing structural recognition of women's roles as employees and mothers, and offset the disadvantage that stems from women's caring responsibilities.⁶ Such a system would ensure payment to women who are unemployed, and/or engaged on a casual and contract basis and those who do not meet traditional service requirements.

We call the Australian Government to remove its reservation to the CEDAW article 11(2)(b) as it is internationally agreed that universal paid maternity leave is a necessary measure to ensure equal opportunity for women in the workplace.

2. Equal pay

CEDAW article 11(d) states that women have:

The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work

As a State Party to this Convention, and in the absence of any reservation to this article, Australia is legally required to ensure pay equity for women. However, while the SDA

² HREOC, *Valuing Parenthood*, above n 19, 18-24; Marian Baird and Adam Litwin, 'Unpaid and Paid Maternity and Paternity Leave in Australia: Access, Use, and Options for Broader Coverage' in Michael Barry and Peter Brosnan (eds), *New Economies: New Industrial Relations - Proceedings of the J8th AIRANZ Conference* (2004) vol 2, 2-9.

³ CEDAW, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia*, 34th Session, 16 January - 3 February 2006.

⁴ HREOC, 'Commissioner Calls on Government to Remove Australia's Reservation to CEDAW' (Press Release, 30 June 2004), <http://www.humanrights.gov.au/media_releases/2004/45_04.htm>

⁵ HREOC, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002) 34-6, <http://www.hreoc.gov.au/sex_discriminationJpml21>

⁶ HREOC, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002) 34-6, <http://www.hreoc.gov.au/sex_discriminationJpml21>

mirrors the intentions of the CEDAW article, it does so in a vague manner, without explicit mention of equal salary.

We refer to SDA section 14(2)(a) which claims:

It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy in the terms or conditions of employment that the employer affords the employee

The ambiguity of the term “conditions of employment” renders this article open to interpretation, and hence less binding.

While the SDA does not include this equal pay provision, we acknowledge that the Workplace Relations Act 1996 (Cth) deals with the equal remuneration for men and women performing work of equal value in Part 12, Division 3. Problematically, it does not explicitly state a right to equal pay, and rather provides a mechanism to obtain equal pay on application to the Australian Industrial Relations Commission (AIRC). The failure of this particular legislation to expressly state an independent right to equal pay which can be breached, and the need to overtly bring a matter to the AIRC to make unequal pay an issue, is not sufficient to recognise the right to equal remuneration under article 11(d) of CEDAW and may be used to further the argument for recognition in the SDA.

Accordingly, a gender pay gap still exists in Australia, especially in Western Australia. Women's wages trail men's, reflecting direct discrimination and lower earnings for many female dominated occupations. This links back to the previous point on paid maternity leave, as a major cause of the pay gap is the lack of flexible working arrangements for women, which restricts their ability to combine quality employment and family care responsibilities. This applies to all employees, but impacts most on women with dependent children.

UNIFEM recommends that equal pay for equal work be a specific objective of the SDA and legally required by the SDA. We propose that the Committee examine the provisions which other countries have adopted to eliminate the salary gap which Australia still experiences,.

3. Disadvantage due to family responsibilities

CEDAW article 11(1) (e) protects women with a limited capacity to work against discrimination in the workplace by granting them:

The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave

And article 11(2) (c) protects women with family responsibilities in particular by stipulating that:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities

The SDA has translated these requirements into the following directives:

Section (7A):

... an employer discriminates against an employee on the ground of the employee's family responsibilities if the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and the less favourable treatment is by reason of:

(i) the family responsibilities of the employee; or

(ii) a characteristic that appertains generally to persons with family responsibilities; or

(iii) a characteristic that is generally imputed to persons with family responsibilities

And section 14(3A):

It is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee

A limitation of the SDA is that protection against discrimination on the grounds of family responsibility is limited to circumstances where the employee is dismissed. An employee who suffers other discrimination as a result of family responsibilities, such as denial of promotion, limited training or is refused part time work, cannot currently make a claim on the grounds of family responsibilities under the SDA. UNIFEM Australia would suggest the SDA could be amended to include a prohibition on discrimination on the grounds of family responsibility in instances where an individual is denied or refused a benefit in employment or subjected to a detriment. This would capture a denial of training or promotion and bring the protections for family responsibilities into line with the protections granted to other grounds of discrimination.

We note that this is difficult issue to enforce through legislation. An alternative approach may include a section in the SDA which requires the Australian Government to provide/delegate responsibility for these services to a particular department for policy action. Such a clause could mirror, for example, section 8 the Disability Services Act 1993 (NSW), which provides:

(1) The Minister has the function of facilitating the provision of designated services to persons in the target group (persons with a disability).

(2) The function may be exercised in one or more of the following ways:

(a) by the provision of designated services to persons in the target group, either directly to those persons or indirectly through other persons or bodies, or

(b) by the provision of financial assistance, either directly to persons in the target group or indirectly through other persons or bodies, or

(c) by the encouragement of the provision of services to persons in the target group by other persons and bodies.

However, we note that the target group would be much larger than people with disabilities and that the private sector is a substantially larger player in the area of women and work than it is with the provision of services to people with disabilities.

Another way in which these obligations could be recognised is when establishing appropriate rates of childcare benefits and tax deductibility issues for childcare. Greater rebates would be supported by pointing to Australia's obligations under CEDAW/

The absence of special measures to address this issue is apparent in women's inconsistent labour force participation and in women's concentration in casual, part-time, temporary, contract and low-paid work.

UNIFEM Australia recognises that women's incomes and their ability to save are less than men's as a result of their ongoing family responsibilities. Women in paid employment may have to work reduced hours due to their caring duties, and are therefore less considered for promotion, training and other work related opportunities. This in turn means that poverty, particularly at old age, primarily affects women.

UNIFEM Australia recommends that the SDA acknowledge women's disproportionate responsibility for unpaid caring and domestic labour and offer remedies to ensure an equal opportunity to support themselves financially, by means of paid maternity leave, paid leave for family-related responsibilities and equal access to promotion and training.

Women in Leadership Positions

CEDAW article 8 requires that:

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 7(b) also requires that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government

In conjunction with article 4 which allows the "...*adoption of temporary special measures aimed at accelerating de facto equality between men and women...*" these articles call for the introduction of an exemption to the SDA with the function of increasing political participation of women.

UNIFEM Australia is concerned by the under-representation of women in all public institutions. We are especially concerned that the SDA does not include any mechanism to increase the representation of women in both elected and appointed public offices until they are present in Australian public life in numbers proportionate to their representation in the community and their desire for involvement. UNIFEM Australia supports the Government's initiatives including Appoint Women and the National Strategy for the Increased Participation of Women on Boards, but argues that these measures are lacking in that the

programs, and the objectives underlying them, do not appear to be adequately protected in legislation (including the SDA). In practice, the resources invested in these measures are also arguably insufficient to meet their objectives.

On an international level, we believe that Australia should be a role model to other nations in the Pacific Region in terms of women's empowerment in general and women's political participation in particular. Australian efforts to raise the status of women in our region will not be perceived as sincere or credible unless we develop successful strategies to empower women at home.

Effectiveness in Addressing Intersecting Forms of Discrimination (term of reference L)

CEDAW article 3 claims that:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

And CEDAW article 5(a) states that States Parties shall take all appropriate measures to:

...modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes...

However, UNIFEM Australia believes that the SDA fails to acknowledge diversity among women, and the fact that gender combined with attributes like race, disability or sexuality can produce quite specific forms of disadvantage. In addition to the *Racial Discrimination Act* and the *Human Rights and Equal Opportunity Act*, UNIFEM Australia believes that the SDA should also cover these issues of diversity, acknowledging that women often suffer multiple forms of discrimination. These need to be addressed in their own terms to ensure the advancement of groups such as Indigenous women or women with disabilities and to 'modify the social and cultural patterns of conduct...' which cause these groups a dual disadvantage.

UNIFEM Australia is particularly concerned that the Act does not specifically address the needs of Indigenous women, as they have proven to be a distinctly vulnerable group.⁷ We recommend that the SDA include the specific mention of the vulnerability of Indigenous women and specific remedies to treat this disadvantage.

Any Procedural or Technical Issues (term of reference M)

UNIFEM Australia is concerned that some of the Act's substantive provisions are relatively weak.

CEDAW article 2(b) requires States Parties to:

⁷ Gaze, B. 'The Sex Discrimination Act after twenty years: Achievements, Disappointments, Disillusionment and Alternatives', *UNSW Law Journal*, vol. 27, no. 3, 2004, p 914

...adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women

While legislative measures have been put in place to prevent discrimination, UNIFEM Australia finds that the ‘reasonableness test’⁸ is too ambiguous and flexible to draw a clear line between desirable and non-desirable practices. The meaning of ‘reasonable’ is too vague and, it is asserted, that judges have not been able to clarify the test and how it should be applied so as to provide adequate guidance for subsequent courts and tribunals.⁹ The comparable countries on whose legislation this test is based have stronger laws: the United Kingdom requires a practice to be ‘justified’, and the American test is based on ‘business necessity’.

UNIFEM Australia believes this Section of the SDA should be re-worded to place the burden of “reasonableness” onto the alleged discriminator to demonstrate that their actions were not discriminatory on reasonable grounds. This would lift the burden from the individual claiming discrimination to establish the action is unreasonable.

Scope of Existing Exemptions (term of reference N)

UNIFEM Australia is concerned that the SDA provides for the granting of temporary exemptions which are incompatible with CEDAW.

CEDAW Article 5 requires the State Party to:

...take all appropriate measures' to eliminate 'customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women

Section 37(d) grants an extraordinarily broad ambit for discrimination on the basis of sex in relation to:

...any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion

Religious educational institutions are also free to discriminate on the basis of sex, marital status and pregnancy in employment of staff if the discrimination is:

...in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed

UNIFEM Australia believes that these exemptions undermine Australia’s commitment to sex equality. We recommend that this exemption be reviewed and changed to fulfil article 5 of CEDAW.

⁸ Sex Discrimination Act 1984 (Cth) section 7(b)

⁹ Gaze, B. ‘The Sex Discrimination Act after twenty years: Achievements, Disappointments, Disillusionment and Alternatives’, *UNSW Law journal*, vol. 27, no. 3, 2004, p 914

Further issues

We are advised that, since complaints under the SDA have moved to a Federal Court jurisdiction, if the matter is not conciliated, complaints are determined in a cost jurisdiction. This did not occur previously, where the Human Rights and Equal Opportunity Commission would determine the matter after conciliation. We are further advised that this has led to a number of complainants not pushing their complaints due to fear of costs. There are a number of organisations which will act pro bono for women in discrimination matters, however, this cannot protect them from these costs. While the Federal Court provisions could be used to limit costs, these provisions have also provided little certainty.

In our view, a provision in the SDA or other appropriate legislation that provides as a general rule that costs should be borne by each party will remedy the current situation. The Native Title Act 1993 (Cth) can be used as an example of how this section can prove successful in relieving the cost burden.

UNIFEM Australia thanks the Committee for the opportunity to submit these comments. Any questions on this submission may be directed to me on 02 9181 2796 or to Julie McKay, UNIFEM Australia Executive Officer on 02 6285 8254.

Yours sincerely,

Rosalind Strong
President
UNIFEM Australia

Submission authorised by the National Board of UNIFEM Australia