United Nations Development Fund for Women

UNIFEM Australia

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

26 September 2008

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

UNIFEM Australia is pleased to provide this supplementary submission on the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination, further to our appearance before the Senate Committee on 9 September 2008.

1 Exemptions

UNIFEM Australia notes that the issue of exemptions and exceptions to the *Sex Discrimination Act 1984* (**SDA**) was raised at the Senate hearing and wish to comment further on this issue.

As noted in our submissions dated 1 August 2008, under Part 2, Division 4 of the SDA, there are several circumstances identified where practices that might otherwise be discriminatory are exempt from claims under the SDA. We recognise that some of these circumstances can be described as "positive discrimination" or affirmative action measures, rather than exemptions that act in opposition to the goal of gender equality. UNIFEM Australia supports these affirmative action measures.

However, several of the exemptions under Part 2, Division 4 are inconsistent with Australia's international human rights obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) and with the SDA's broad objectives of equality and non-discrimination, as explicitly stated in s 3 of the SDA. In particular, UNIFEM Australia is concerned with the operation of the exemptions to the provisions of the SDA for religious bodies, educational institutions established for religious purposes and voluntary organisations.

1.1 Religious bodies

In addition to our submissions on the operation of ss 37 and 38 of the SDA, UNIFEM notes its support for the submissions of the Australian Human Rights Commission (**AHRC**). We acknowledge AHRC's view that broad consultation is required before deciding what action should be taken on these exemptions. However, UNIFEM Australia is of the strong opinion that this exemption should not remain in its current form.

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UNIFEM Australia recognises the importance of the right to religious freedom, but in its current form, ss 37 and 38 prioritise this right over the equally important right to gender equality. Section 38, for example, effectively grants educational institutions established for religious purposes a broad power to discriminate based on sex in relation to employment of *any* of its employees. This cancels the right not to be discriminated against in favour of the right of religion, rather than performing an appropriate balancing act between two equally important human rights.

The need for a balance between these rights was specifically recognised by the UN Human Rights Committee, which stated that, where limitations or restrictions are made on a human right, states must demonstrate the necessity of these restrictions and only take such measures that are proportionate to the pursuance and legitimate aims of the relevant international human rights covenant. In no case may restrictions be applied or invoked in a manner that would impair the essence of a covenant right. The UN Human Rights Committee approach was noted by the Human Rights Law Resource Centre in its submissions.

In its submission, the AHRC has suggested that s 37 does not support women of religion promoting gender equality within their religion, and does not encourage religious bodies to properly examine the role and representation of women within their faith in areas that do not conflict with their doctrines, tenets and beliefs of the religion. UNIFEM Australia supports this position.

Submissions made to this inquiry by the Office of the Anti-Discrimination Commissioner, Queensland Anti-Discrimination Commission and Human Rights Law Resource Centre are also critical of these exemptions, and UNIFEM Australia supports their positions

1.2 Voluntary bodies

As we noted in our original submissions and at the Senate hearing on 9 September 2008, UNIFEM Australia is critical of the exemption in s 39 of the SDA for voluntary bodies. In its submissions, the AHRC have recommended that this section be removed, or at the very least, interpreted narrowly and we support this recommendation.

The drafting of s 39 allows a voluntary body to exercise broad discretion to discriminate based on sex, marital status and pregnancy, without being compelled to provide a foundation for such discrimination in, for example, the organisation's stated objectives or practices. This is in contrast to the drafting of s 38, which requires religious educational institutions to, at least, demonstrate that a decision is based on avoiding injury to the religious susceptibilities of adherents of that particular religion or creed. The exemption for voluntary bodies does not require any such explanation to be given, enabling them to discriminate under the SDA at their own discretion, without any justification apart from the sex, marital status or pregnancy of that person. Drafted in this manner, this exemption directly conflicts with the objectives of eliminating discrimination, fulfilling Australia's obligations under CEDAW and achieving gender equality, expressly stated in the SDA under s 3.

UNIFEM Australia recommends this section be reconsidered, at the very least, to limit the breadth of voluntary bodies' ability to discriminate based on sex by requiring them to show that their discriminatory act was reasonable or appropriate in light of their organisation's established objectives.

2 Costs jurisdiction

We reiterate our comments at page 9 of our original submissions on the issue of costs in the Federal Court. As argued by UNIFEM Australia, a Federal Court jurisdiction for sex

discrimination results in high costs risk for a complainant, both in running their own case and in the risk of an adverse costs order if the claim is unsuccessful. This discourages many complainants from pursuing their claims.

2.1 Federal Court procedures

The Federal Court has the power to order costs against the unsuccessful party, and frequently does so. There are currently no provisions for an applicant to seek a Court order that no, or limited, costs will be ordered against the respondent if their claim fails. There is no means of ensuring that adverse costs will not be incurred before litigation commences.

We note, however, that s 85A of the *Native Title Act 1993* (Cth) provides that, except in the case of unreasonable conduct, each party to a proceeding in the Federal Court must bear his or her own costs (in relation to native title claims). UNIFEM Australia recommends a similar approach be taken in relation to discrimination claims. For example, Queensland Legal Aid, in its submission to this inquiry, has recommended that costs should not be awarded against unsuccessful complainants except in matters which are clearly frivolous, vexatious or brought in bad faith. UNIFEM Australia supports this view.

2.2 Legal Aid

In response to a question posed at the Senate hearing by Senator Feeney, UNIFEM Australia would like to comment on the assistance Legal Aid can provide on this issue. Obtaining legal aid funding is dependent on extremely stringent means and merit tests. A large proportion of complainants earning any income or owning their home may not qualify.

Furthermore, there are restrictions on the availability of legal aid in Commonwealth discrimination matters (which include complaints under the SDA). As well as fulfilling the means and merit tests, the applicant must show that there is a strong prospect of substantial benefit being gained by the applicant *and* by the public or a section of the public. The applicant is also required to demonstrate that:

(a) if an award of damages or property is available, that the applicant is likely to receive damages or property if successful;

(b) the applicant could not reasonably be expected to obtain a conditional costs agreement with a private lawyer; and

(c) the applicant cannot obtain appropriate legal assistance from another source.

Considering the rigorous criteria for the obtainment of legal aid in a sexual discrimination claim, it is likely that many complainants are unable to rely on legal aid.

There is also an issue of inconsistency between the policies of state legal aid commissions. Though claims made under the SDA are matters of federal jurisdiction, legal aid for federal matters is provided by state legal aid commissions. Hence, a person with an SDA complaint in Queensland may have a very different experience in obtaining legal aid (and the extent of aid available) than a person with a similar SDA complaint in NSW. The inconsistency between state legal aid policies is particularly relevant when considering the risk of an adverse costs order.

Even if an applicant manages to fulfil the criteria to obtain legal aid, he or she is not exempt from adverse costs orders in federal courts and tribunals. The NSW Legal Aid Commission will only protect an applicant from an adverse costs order up to a specified maximum (currently $15,000); however, any costs above that maximum will be borne by the applicant.

As discussed by Queensland Legal Aid in its submission to this inquiry on pages 4-5, Queensland Legal Aid does not guard against an adverse costs order if litigation is unsuccessful. A complainant represented by legal aid (who has already met stringent requirements in relation to the merits of his or her case and has already demonstrated limited financial means) may be discouraged from bringing a claim under the SDA because of the risk of being liable for the legal costs of the (frequently better-resourced) respondent.

UNIFEM Australia also notes that, if an unsuccessful complainant is unable to obtain formal legal aid, but is represented by a community legal centre or pro bono legal practitioner, the complainant would also be at risk for the entire amount of the respondent's costs if unsuccessful in their claim. We understand from some pro bono practitioners that applicants who have very strong discrimination claims are often deterred from pursuing those claims because of the risk, even if it is slight, of an adverse costs order as it could be financially devastating for them.

3 The test of reasonableness

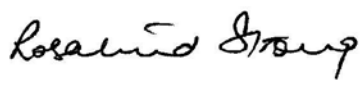
UNIFEM Australia retracts its comment on page 8 of its original submissions, recommending the removal of the reasonableness test under s 7(b) of the SDA. We believe that the term reasonable allows for broader considerations than the term 'justified', which is used in the UK. For example, an act can be justified without recognition of reasonableness: an act of discrimination could be justified on economic grounds rather than on grounds of reasonableness. Furthermore, the test of 'reasonableness' also allows the Court to consider broader community views on discrimination. Although this may allow for ambiguity, flexibility is required to address different circumstances of discrimination.

This opinion does not necessarily contradict the test of proportionality that the AHRC appears to propose in its submissions to this inquiry. We do prefer the reasonableness test to a justified test. However, if, as the AHRC suggests, an alternative test of proportionality allows for better consideration of community views on discrimination and better places the right to equality against, for example, more business-oriented priorities, then UNIFEM Australia would support this approach.

While UNIFEM Australia retracts its comment on the "reasonableness" test, we maintain our recommendation on page 8 of our original submissions, relating to the burden placed on complainants. UNIFEM Australia argues that this test should be changed to shift the burden to the alleged discriminator to show that their actions were not discriminatory on reasonable grounds.

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
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Submission authorised by the National Board of UNIFEM Australia