INQUIRY INTO THE EFFECTIVENESS OF THE *SEX DISCRIMINATION ACT 1984* (Cth) (SDA)

SUBMISSION

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Introduction

Discrimination on the ground of sex was never recognised by the common law, but outright exclusion and egregious manifestations of unequal treatment offended liberalism's commitment to formal equality (also known as procedural equality or equality before the law). Substantive equality, which focuses on outcome or end result, is much more problematic and the SDA makes only desultory gestures in that regard.

Neo-liberalism, or the new incarnation of liberalism, is not concerned with equality at all. Instead, it is obsessed with the notion of freedom, particularly the 'free' market, and the freedom of individuals and corporations to pursue entrepreneurialism and accumulate wealth. Productivity and the maximisation of wealth, not just nationally, but globally, are the primary aims of the neoliberal state. It has therefore been busy in removing obstacles to the untrammelled operation of the market – such as centralised wage-fixing and a range of worker protections. Work intensification, casualisation and flexibility are the new norms. Egalitarianism, social justice and equity are treated as though they were passé.

Contingent workers cannot complain; they are expected to be docile. They may have no voice in the workplace and, if they speak out, they face being dismissed at will. Collective action through unions is now reviled. In the US, when workers try to form unions, at least half of the employers threaten to close their plants. We have not yet seen such action in Australia, but the reality is that Australian workers are now competing with workers in developing countries in order to attract or to retain the operation of transnational corporations. Inequality, not equality, I suggest, has become the norm within this market-driven political economy, which has frustrated the operation of the SDA.

There has been a decline in the lodgement of complaints, as is apparent from the attached graph (Appendix 1). Formal hearings have also dropped to a tiny proportion of complaints lodged and the number of appeals is minuscule, with almost no chance of success for complainants. The High Court picture is dramatic. After the initial trailblazing successes of *Wardley v Ansett, Najdovska v AIS, Waters v Public Transport Corporation*, etc, every discrimination decision over the last decade since *Wik* has favoured respondents, supported by a narrow legalism.

Against this background, I focus briefly on some of the issues identified for comment.

a. Scope of Act

(i) Objects of the SDA

The Objects clause of the SDA undermines the entire Act because almost every sub-section is equivocal. Section 3(a) states that it will give effect only to 'certain provisions' of CEDAW. The repeated use of the qualifier, 'so far as is possible', appearing in the first line of the Preamble, and repeated in s3 (b), (ba) and (c), conveys the impression that the Act is ambivalent about its aims and judges need not construe it in accordance with the spirit of CEDAW.

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

The injunction 'to eliminate' makes little sense in an instrument riddled with exceptions (Thornton 2005), as well as being a term unfamiliar within the legal lexicon. As the more familiar injunction 'to prohibit' is not only stronger and clearer, as well as already appearing in the preamble, its inclusion within the objects clause would require only minor amendment.

Recommendation: (1) That the phrase 'so far as is possible' be removed from the preamble;

(2) That the objects section of the SDA, to be renumbered s 3(1) be strengthened;

(3) That the qualifying phrase 'to eliminate, so far as possible' contained in ss (b), (ba) and (c) be removed and replaced with the words 'to prohibit'.

(ii) ***Definition of Discrimination***

Equal treatment has always been problematic. Aristotle recognised more than two and a half thousand years ago that treating in the same way those who are differently situated could give rise to inequality. A formalistic versus a substantive struggle over interpretation has long beset anti-discrimination legislation in the United States and, now, Australia. The High Court case of *Purvis*, accepted by all Australian courts as authoritative, is a startling example. The case determined that not only should the complainant be compared with another without the impugned characteristic, but the comparator should be one who has nevertheless acted in exactly the same way, thereby sloughing off the [disability] altogether. The effect of this strict approach has pulled the rug from beneath the feet of direct discrimination, rendering it more difficult than ever for a complainant to succeed. As respondents and their legal representatives are always going to argue for a formalistic interpretation because it is more favourable to them, the test for direct discrimination should be made less restrictive (see **m** below).

While the introduction of indirect discrimination represented a halting step towards recognition of systemic discrimination, the complexity of the provision has resulted in its significant under-utilisation. The sticking point has been the centrality of

reasonableness. Although a well established standard in law, its malleability renders it notoriously difficult for complainants to satisfy. It also allows judges to fall back on their own subjectivity and favour the practices of corporate respondents, especially in employment cases (Thornton 2008).

In the light of the judicial evisceration of direct discrimination, I suggest that a much broader definition of discrimination needs to be included in the SDA that expressly refers to substantive discrimination.

Recommendation: That the SDA include a broad definition of discrimination that adverts to substantive discrimination in a way that more accurately reflects the definition contained in CEDAW Article 1.

c. Powers of HREOC and Sex Discrimination Commissioner

(i) Systemic Discrimination Inquiries

As discrimination is woven into the historical fabric of society, it is frequently impossible to identify a single respondent who can be held responsible for a specific act of discrimination. Unless an unbroken causal thread connects the complainant and respondent with the act of discrimination, the complaint fails.

There are also significant limitations associated with individual complaints, including the financial and psychological costs of pursuing a complaint in the public interest against a corporate respondent. The latter is likely to have deep pockets and can either pass the costs onto consumers or, in the case of a government respondent, have recourse to the public purse. The individualisation of complaints may mean that a person who lodges a complaint of sex discrimination becomes very visible, not only within an organisation, but within an industry. This is particularly the case with those occupying high-profile and senior positions, whose careers may be ruined as a result, as happened in *Dunn-Dyer v ANZ* [1997] EOC ¶92-897.

These problems would be met to some extent if the SDA contained a power that enabled HREOC and/or the Sex Discrimination Commissioner (SDC) to initiate inquiries into systemic sex discrimination, such as within the legal profession, an industry or a workplace. The Director of the Equal Opportunity in the Workplace Agency, who has limited powers under the EOWA Act, is an ideal position to refer possible matters to the SDC for inquiry. The United States literature identifies such inquiries as ‘pattern and practice suits’. SDA s 48(1)(f) and (g) contain a power of initiation but it is limited to laws; it does not extend to the sites of discrimination.

In order to move beyond the limitations of the individualised complaint that lie close to the surface, it is necessary to empower the SDC to initiate inquiries into systemic, classwide or structural discrimination. I stress that the SDC be adequately funded in order to conduct inquiries; such a task cannot be undertaken on a shoestring. If the cost of such inquiries is to come from a one-line budget, priority will inevitably be given to routine complaint handling.

Recommendation: 1) That HREOC and the Sex Discrimination Commissioner be authorised to initiate inquiries into systemic discrimination.

2) That a special allocation be set aside in the annual HREOC budget to undertake inquiries into systemic discrimination.

(ii) Power to Intervene

Recommendation: That the Sex Discrimination Commissioner be empowered to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA.

e. Significant judicial rulings on the interpretation of the Act

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

As mentioned, *Purvis* (2003) was a decision dealing with disability in which a narrow definition of the comparator was developed. The majority judges held that the appropriate comparator was a person without a disability but who acted *in the same way* as the complainant (rather than simply a person without the disability). The effect is to raise the burden of proof higher than it already is for complainants. I shall return to this point under **m** below.

Amery (2006) is only the third sex discrimination case to be heard by the High Court in 30 years. Again, the approach was narrow and legalistic, displaying little understanding of how socially constructed choice regarding mobility contributes to systemic discrimination in employment for women with family responsibilities. The result entrenches employer prerogative and the status quo. Accordingly, more guidance for courts is exhorted at the outset in conjunction with a revised objects clause, as recommended in **a** above.

More interpretative guidance to courts also needs to be provided along the lines of that contained in the *Freedom of Information Act 1982* (Cth). (See Appendix 2 for revised objects clause).

Recommendation: That a new s3(2) be added as a guide to judicial interpretation:

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

h. Providing effective remedies

The limitations of the individualised complaint-based mechanism is nowhere so clearly manifest as in the case of remedies. At the conciliation level, beyond which few complaints progress, there are no limitations as to the terms of settlement, although the evidence suggests a favouring of an individualised settlement.

In proceedings before the Federal Court and the Federal Magistrates Court, a wide power is vested in the court to make such orders as it thinks fit (HREOC Act s46PO(4) but this is invariably read down. The complainant must show that s/he is affected by a class trait, such as sex, but the remedy ignores systemic discrimination and concentrates on restoring the individual to the position s/he would have been but for the discriminatory treatment, according to the established principles of tort law. The problem is that the common law analogy is restrictive and inappropriate in a legislative instrument with very specific proactive aims, that is, to implement the CEDAW agenda. The focus is *not* just on remedying past wrongs.

The individualised focus has meant that the respondent has continued discriminatory practices for years after an individual complaint has been settled. This is the phenomenon of the habitual respondent. The positive ripple effect intended to flow from the lodgement of individualised complaints has proven to be fanciful. The timidity of judges in taking cognisance of systemic discrimination (Thornton 1995) needs to be recognised so that there is more specific guidance in order to promote equality.

Recommendation: That the Human Rights and Equal Opportunity Act s46PO(4) include two new sub-sections as follows:

> a) An order requiring a respondent to discontinue a discriminatory practice, policy or course of conduct;
>
> b) An order requiring a respondent to perform any reasonable act or course of conduct with the aim of creating a non-discriminatory environment.

k. Sexual Harassment

Importuning another for sexual favours is the paradigmatic case of sexual harassment. While this conduct is appropriately proscribed within the SDA, its present conceptualisation raises two problems: one, the requirement that the complaint would be 'offended, humiliated or intimidated' and, two, that it does not adequately deal with sex-based harassment. My concern is about the way the sexual harassment is separated from sex discrimination (Thornton 2002).

First, the requirement that the person harassed would be 'offended, humiliated or intimidated' contains questionable moralistic overtones. While sexual harassment undoubtedly contributes to the inequality of women at work, the phrasing of the SDA requires the person harassed to present themselves as exceptionally fragile and vulnerable. One of the descriptors may be appropriate in some cases, but not in others. Most significantly, it plays down the *discriminatory effect* of the conduct.

Secondly, sex-based harassment tends to fall through the cracks of the SDA. This includes verbal abuse, bullying and gender. However, the biologistic focus of sexual harassment makes demeaning sex-based conduct difficult to succeed as sexual harassment, while the comparability requirement makes it difficult to succeed as sex discrimination. For example, in *Malone v Pike* [1996] EOC ¶92-868, HREOC held that the poking of a woman in the chest and telling her to do

what she was told was not sufficiently sexual to succeed as sexual harassment (despite the physical location of a woman's chest). In *Hosemans v Crea's Glenara Motel P/L* [2000] EOC ¶93-082, calling a complainant a 'stupid bitch' and telling her that she had a 'fat arse' was found by HREOC to be personal abuse rather than sexual harassment (despite the sexual and sex-based connotations). As such conduct detracts from the dignity and equality of women, it should be proscribed.

Recommendation: (1) That s 28A(1) be amended to remove the moralistic requirement that the person harassed would be 'offended, humiliated or intimidated' and replace it with a requirement 'that the person harassed would find the conduct unwelcome'.

(2) That sex-based harassment be expressly proscribed by the SDA. This should be defined to include verbal disparagement, threatening gestures, improper bodily contact and bullying.

m. Procedure

(i) Reverse Onus: Picking up on **a** above in relation to direct discrimination, the burden on a complainant could be mitigated by having him/her raise a prima facie case and then shifting the evidentiary onus to the respondent to adduce a justification for the decision that is not pretextual. This would preclude the invidious position in which complainants find themselves post-*Purvis*. For those wedded to a mode of adjudication in which complainants should prove every component of their case, it is notable that the concept of the shifting burden has been accepted in respect of indirect discrimination. There is no good reason, why it should not apply also in the case of direct discrimination, as under the Civil Rights Act in the United States.

(ii) The Comparator: The most common test of discrimination requires a complainant to show that s/he was treated less favourably than another in the same or similar circumstances. This notion of comparability has always been difficult for women in sex discrimination complaints and it makes no sense at all in sex-segregated workplaces. I have already referred to the debilitating effects of *Purvis*.

The test serves no useful purpose, other than to present the complainant with yet another hurdle to be overcome. It has been jettisoned in many overseas jurisdictions where the focus is solely on the *effect* of the discriminatory treatment. Even indirect discrimination in the SDA, for all its faults, focuses on the effect of the conduct. It is noteworthy that the ACT *Discrimination Act 1991* does not include a comparator test in respect of direct discrimination. This Act uses the concept of 'unfavourable' treatment which seems to work perfectly well.

Recommendation: (i) That the onus of proof be reversed in all discrimination complaints that proceed to formal hearing. That is, while the complainant has a duty to make out a prima facie case, the onus of proof should then shift to the respondent to show that the conduct complained of was not justifiable.

(ii) That the comparator requirement be removed and be replaced with a test of unfavourable treatment.

n Exemptions

The number and extent of exemptions under the SDA attest to the weak commitment on the part of the legislature to the non-discrimination principle and contrasts sharply with the RDA, which contains no exemptions.

(i) s. 38 Educational Institutions established for Religious Purposes

It is unacceptable for educational institutions conducted by religious organisations (as is the case with the majority of private schools) to discriminate on the ground of sex in respect of either employment or education when such institutions are the recipients of significant public funding. It is noted that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the spirit of the SDA and CEDAW about the position of women and girls in contemporary Australian society.

As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding be permitted to discriminate on any of the legislatively proscribed grounds. Furthermore, proof of the existence of non-discriminatory policies should be a precondition to the receipt of public funds. Since education is widely regarded as the key to the acceptance of the non-discrimination principle, educational institutions that are the recipients of substantial government funding should not be permitted to flout the general law of the land. The inclusion of s 38 is over-inclusive and unnecessary.

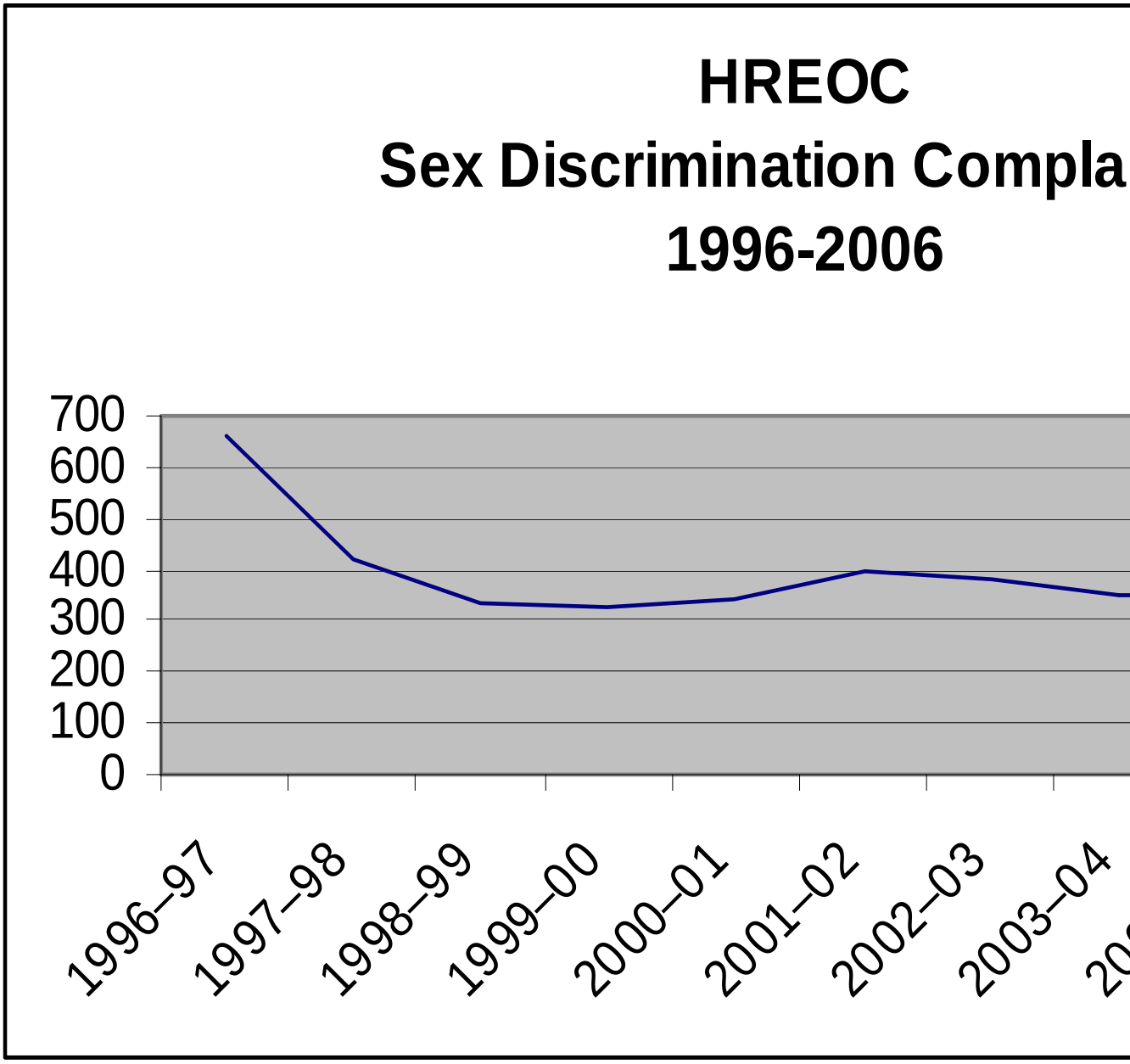
(ii) Section 44 Grant of Exemptions

Discretionary exemptions have recently been granted in every mainland State jurisdiction and the ACT on the ground of race (involving applications from ADI, Raytheon and Boeing). In all these applications, profits were privileged over racism. The absence of guidelines from the legislation or a statement that the grant of any discretion should be beneficial was significant. While such perverse examples do not seem to have occurred to date in relation to the SDA, it could happen in the future. I am particularly concerned about mooted free trade agreements. Accordingly, the beneficial effect of any discretionary exemption needs to be made clear.

Recommendations: (i) That s 38 be repealed.

(ii) That s 44 be amended to include the proviso that any exemption granted must promote the objects of the Act.

APPENDIX I



T Luker, ANU College of Law, 2008.

APPENDIX 2

SEX DISCRIMINATION ACT 1984

Preamble: Recognising the need to prohibit----------discrimination against…

S 3 Objects

The objects of this Act are:

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

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

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

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

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

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

Selected References

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