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

Dear Committee Secretary

LEGAL AID QUEENSLAND RESPONSE TO INQUIRY INTO COMMONWEALTH *SEX DISCRIMINATION ACT 1984*

Legal Aid Queensland
Legal Aid Queensland(LAQ) provides legal help to disadvantaged Queenslanders. This assistance is provided through legal information, advice and representation in family, civil and criminal law.

Our Civil Justice Service provides legal advice and representation in anti-discrimination matters in both the state and Commonwealth jurisdictions. In addition, our Women's Legal Aid Unit provides legal advice and representation for women experiencing discrimination in both jurisdictions.

We would like to include some of the experiences of our clients for consideration by the Legal and Constitutional Senate Committee in their consideration of the effectiveness of the *Commonwealth Sex Discrimination Act 1984* (the Act).

It is hard to assess the effectiveness of the Act when we are aware that the Human Rights and Equal Opportunity Commission(HREOC) has been chronically under-funded over the last ten years. This reduces the ability of any agency to function and this inevitably has had an impact on the effectiveness of the legislation as a mechanism for eliminating all forms of discrimination against women.

This issue was canvassed in the Productivity Commission Inquiry of the *Disability Discrimination Act 1992.* Many submissions to that Inquiry commented that the resource constraints faced by HREOC were among the main factors limiting the effectiveness of the *DDA.*[1]. The need to provide resources to the individual complaints process has imposed restrictions on the resources available to address systemic issues. In the absence of sustained attention to activities which have a systemic effect such as education and awareness activities, the conduct of public inquiries, developing standards and reviewing legislation for consistency with the *DDA*, the potential of the *DDA* to achieve its objectives is limited.

[1] Productivity Commission, 2004 Review of the Disability Discrimination Act 1992 Inquiry Report.439

Similar comments can be made in relation to HREOC's resource constraints in the area of sex discrimination. While it is generally regarded as a sound example of a comprehensive national human rights institution, concern has been expressed about whether its sufficiency and security of funding impedes its independence and hence prevents it complying with the Paris Principles for national human rights institutions.[2]

Inadequate funding for legal assistance for people making individual complaints has also been identified as a resource constraint impeding the effectiveness of the DDA.[3] These concerns apply equally to the *Sex Discrimination Act 1984*.

Response to terms of reference of Inquiry
We provide below comments in relation to some of the terms of reference.

c) The powers and capacity of HREOC and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality.

The capacity of the HREOC and Sex Discrimination Commissioner to identify systemic problems is an extremely important aspect and function created by the Act. One weakness of the Act is that it is complaints driven and that many of the cases are conducted in a confidential environment. The ability to identify and raise systemic issues for Australians in relation to discrimination allows the legislation to be more useful to everyday Australians.

The current Sex Discrimination Commissioner's consultation tour and subsequent report was impressive and identified some of the most important issues facing women today.

It is important that the Commonwealth Government take responsibility for the discrimination experienced by women in Australia today in accordance with their obligations under the Convention of the Elimination of All forms of Discrimination against Women. One way that this can be achieved is through the Sex Discrimination Commissioner identifying and raising issues with the Commonwealth Government and in the public arena. Reference is made also to the under-funding issue mentioned above in relation to the ability of the Commissioner to fulfil these functions.

The public inquiry process has been regarded as successful, particularly the way in which it has been used to engage the community informally in dealing with systemic disability discrimination.[4] Public inquiries provide the scope to identify and examine barriers and provide wide ranging recommendations which address entire systems.

g) Preventing discrimination, including by educative means

One of the biggest problems experienced in our legal practice is the lack of knowledge by employers both big and small about sexual discrimination and sexual harassment and how to deal complaints. The existence of the Act has not assisted in raising that knowledge of employers, particularly in the private sector, until they are forced to deal with a complaint. The Commonwealth Government publications on the Act are an excellent resource. The Commonwealth Government and HEROC are positioned well to publish and distribute more resources in the future. There could also be a role in providing more training for employers as it is often the way that the matter is handled internally that prompts the complaint.

[2] O'Neill, N., Rice, S. and Douglas, R. (2004) *Retreat from injustice: Human rights law in Australia* 2nd edition, The Federation Press, Australia
[3] Productivity Commission, op cit, p. 435
[4] Ibid

i) Addressing discrimination on the ground of family responsibilities

The Act has not been successful in addressing or reducing discrimination on the basis of family responsibilities. The majority of the advice and representation currently provided to our clients relates to discrimination on the grounds of pregnancy, family responsibilities or returning to work from maternity leave. We provide advice to women who have been discriminated against on this basis every week.

It is often the case that the person who replaced the client whilst she was on maternity leave worked out well and the employer wants to retain that person and the certainty of their (often full time) employment. It is apparent that organisations are not geared around part-time workers. Clients fear the ramifications by the employer if they make a complaint as they want to be retained by that organisation. For the same reason, women as managers are fearful of recrimination by the employer(loss of promotion) for assisting another female worker to complain about their discrimination.

Case example: Client and friend worked together. Friend told employer she was pregnant and was made redundant. Client was also pregnant and decided to also tell employer to see if it was because of pregnancy. She was made redundant as well.

Case example: Client was terminated from casual cleaning job (5 days per week) due to her pregnancy. She got a doctor's certificate that said she could continue on current duties and that lighter duties might be appropriate at a later stage. The employer was given a copy. The Employer told her she could only retain her job if she was available Mon-Fri once the child was born.

Case example: Client was pregnant and was diagnosed by boss who is a medical doctor - he told client that she is being dropped back from full time hours to casual and client believes she no longer has a job at all.

One weakness of the legislation is that it is complaints driven and that people cannot get on the spot assistance to negotiate an outcome before it escalates to the complaints stage. They have to go through a laborious complaints process which places them in a conflictual position with their employer, when they may wish to remain employed at that organisation. In other areas of law in Queensland, government entities actively assist claimants with their complaints early in a process. For example, conciliators from the Residential Tenancies Authority will attempt to assist parties to settle a claim before an application is filed. As well, consumers can contact the Office of Fair Trading which will sometimes provide information and investigate consumer concerns. These authorities assist vulnerable people to resolve their problems without forcing them through formal processes which are often foreign to them. The limitations of the complaint process are discussed further at (m).

k) Sexual harassment

A second significant ground of discrimination regularly experienced by our clients is sexual harassment. This is particularly the case in private sector organisations and small businesses. We note that the Sex Discrimination Commissioner also identified this as a significant issue facing Australian women in her report "the Listening Tour Community Report".

Case example 1: client was employed by café as a waitress and experienced sexual harassment from the chef and owner. They made lewd suggestions about her appearance, asked her about her love life, left pornography lying around, and threw a bucket of water at the top of her torso whilst at a work function.

Case example 2: young female client worked for butcher and was regularly slapped on the bottom by the butcher. Butcher could not see that this behaviour was inappropriate or sexist.

Sexual harassment is such a common complaint for our clients that is worthy of some systemic attention by HREOC or the Commonwealth Government such as a public advertising campaign like the recent Commonwealth Government advertisements about domestic violence.

m) Any procedural or technical issues

It is common for LAQ legal practitioners to use the State legislation when acting on behalf of litigants seeking re-dress for sex discrimination. This is related to several factors:

- HREOC has only one office in Sydney for the whole of Australia. It previously had an office co-located with the Anti-Discrimination Commission in Queensland and this worked well. It is now harder for litigants to use the Commonwealth jurisdiction.
- It takes too long to process a complaint as a result of one office in Australia dealing with all of the complaints. It is quicker and easier to use the state system.
- The fact that there is no office in Queensland means that there is no practical support for litigants to lodge and continue with complaints. This discourages people from making complaints.
- It is slightly harder to use the Commonwealth scheme as it involves a court as opposed to a Tribunal which is a more relaxed environment for litigants. As well, the rules of evidence are more relaxed in the Tribunal.
- The forms associated with the Commonwealth scheme are slightly harder than the state scheme which is a barrier for litigants. However, HREOC does take complaints over the telephone which is an excellent service for many people who have difficulty with the forms and this function is not offered by the state commission.

As well, there are concerns about the conciliation process. There may be a significant power imbalance between a person making the complaint and the respondent who may be a large corporation or government entity.[5] The imbalance in the legal resources available to the complainant and the respondent can lead to settlement at the conciliation stage on less favourable terms than the complainant might otherwise accept.[6]. As well the outcomes of the conciliation process are usually confidential which 'individualises solutions' and can mean that energies are spent running and rerunning similar cases.[7] Even if, as commonly occurs, the complaint is settled on the basis that the respondent takes remedial action which will have a systemic effect, this is difficult to monitor or enforce.

The limitation inherent in the individual complaints process is that it relies on a person who may be 'disempowered and vulnerable'[8] to make a complaint. It has been argued that it is 'inappropriate and ineffective to place responsibility for instigating change upon those members of the community who have been affected by discrimination'.[9] There are also specific barriers to bringing an individual complaint.

The first of these is cost; either the costs of engaging a lawyer to assist a complainant or the risk of costs to be paid to the other party in the event that a complaint is unsuccessful in the courts. Legal aid is available in some cases, subject to a means and merit test.[10] This covers the costs of preparation of the complainant's case but does not guard against an adverse costs order if the litigation is unsuccessful While costs are not ordered in all unsuccessful cases, the proportion of

[5] For example, see Jones, M. and Basser Marks, L.A., 'Disability, Rights and Law in Australia' in Jones, M. and Basser Marks, L.A. (eds) 1999 *Disability, Divers-Ability and Legal Change*,: Martinus Nijhoff Publishers London, p.199
[6] Productivity Commission, op cit. p.372
[7] Jones & Basser Marks, 1999 op cit
[8] Jones & Basser Marks, 1998 op cit at p.73
[9] Equal Opportunity Commission Victoria, 2003, Submission in Response to the Productivity Commission Inquiry into the Disability Discrimination Act 1992 at para 4.1.1
[10] See, for example, Legal Aid Queensland, *Grants Handbook* at www.legalaid.qld.gov.au

cases in which a costs order is made is high.[11]

If a lawyer cannot be engaged because of cost, then there may be physical or cognitive barriers which prevent self representation.[12] For example, successful litigation requires the gathering of evidence of a range of complex issues, particularly for indirect discrimination where the complainant has the onus of proving a condition is unreasonable. In these cases, expensive expert evidence may be required about the impact of the condition on the complainant and the costs to the respondent.[13] Gathering evidence to prepare a case is a difficult task for a person with no legal training.

Once a case gets to hearing, the jurisprudence may not assist the complainant. It has been argued that judicial neutrality is 'often not what occurs when courts construe anti-discrimination legislation'[14] due to lack of judicial understanding of the context and aims of anti-discrimination law. It is also argued that the Australian legal culture and context is often antithetical to international law[15] and that the receptiveness of courts, tribunals and individual judges to human rights norms and principals is highly variable.[16]

Formal rules of court procedure also create barriers as do process issues which arise in the conduct of the case. For example in adversarial proceedings success is often dependent upon the complainant being considered a credible witness. If a court lacks understanding of psychiatric impairment, (psychiatric injury often occurs as a result of discrimination), there is a risk that it could draw adverse inferences about credibility on the basis of manifestations of impairment.[17] Courts have often imposed a higher standard of proof in respect of anti-discrimination complaints than the ordinary civil standard leading to uncertainty and creating the impression that the jurisdiction is not user friendly.[18]

Once all barriers are overcome and a case is successful in court, then the outcome is generally a relatively modest monetary award for the complainant. The case may result in the respondent changing its processes, sometimes with systemic effect.[19]

Changes to the individual complaints regime are necessary to ensure that there are real and accessible remedies for people who are subject to discrimination. Remedies for discrimination should not be solely on the basis of individual complaint. Regulatory regimes in other areas, such as competition policy or financial regulation[20], include a role for a regulator to bring prosecutions against those who commit serious breaches and where prosecution will have a broader public benefit. It is noted this role for HREOC was rejected by the Productivity Commission[21], however the benefits of this approach have been identified by a range of stakeholders.[22]

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[11] 64% in Federal Magistrates Court and 50% in Federal Court of Australia as reported in Human Rights and Equal Opportunity Commission, 2002, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000 – September 2002*,

[12] Banks, op cit, p. 354

[13] PIAC, op cit, para 11

[14] Gaze, B., 2002, 'Context and Interpretation in Anti-Discrimination Law', [2002] *Melbourne University Law Review* 18

[15] Charlesworth, H., Chiam, M., Hovell, D., Williams, G., 'Deep Anxieties: Australia and the International Legal Order', [2003] *Sydney Law Review* 21

[16] Lynch, P., 'Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre' [2006] *Melbourne Journal of International Law*, 10

[17] PIAC op cit para 11

[18] De Plevitz, L., 'The *Briginshaw* 'Standard of Proof' in Anti-Discrimination law: 'Pointing with a wavering finger' [2003] *Melbourne University Law Review* 13

[19] observations based on conduct of anti-discrimination practice at Legal Aid Queensland

[20] for example the role of the Australian Consumer and Competition Commission and the Australian Investment and Securities Commission which each take action which has consumer protection outcomes

[21] Finding 13.8

[22] see for example, PIAC, op cit, para 18

In relation to individual complaints, further government funded legal assistance should be provided to overcome the significant barriers identified[23] to individuals who bring complaints. Additionally, costs should not be awarded against unsuccessful complainants except in matters which are clearly frivolous, vexatious or brought in bad faith.

Representative complaints and proceedings should be permitted[24], to ensure that remedies are available to individuals who are not able to bring their own complaints. The same arrangements for funding for legal assistance and limitations on awarding of costs against unsuccessful complaints should apply to representative actions.

As previously identified, once cases proceed for judicial determination, it is important that lawyers acting in the case and the judicial officer have a sound understanding of the context and aims of anti-discrimination law[25] The need appears to go beyond disability awareness training, and has been named as a need for the development of a new 'equality jurisprudence'[26] which takes account of international human rights norms and principles.[27]

Conclusion

Thank you for the opportunity to make this submission. If you require anything further from us please do not hesitate to contact us. LAQ is happy for this submission to the LACA Inquiry being made public.

Legal Aid Queensland
August 2008

[23] Productivity Commission finding 13.2
[24] Productivity Commission op cit recommendation 13.5
[25] Gaze, op cit
[26] MacKinnon, C., "Towards a New Theory of Equality" in MacKinnon, C, *Women's Lives – Men's Laws* Harvard University Press/ Belknap, 2005 p.57
[27] Lynch, op cit