



6 August 2008

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

By Email: legcon.sen@aph.gov.au

Dear Committee Secretary

RE: Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equity

Please find attached the Queensland Council of Unions' submission to the above inquiry.

The QCU recommendations are aimed at creating an anti-discrimination regime better equipped to deal not only with the individual instances of discrimination but the entrenched discriminatory behaviours, practices and institutions that continue to reinforce and cultivate discrimination and inequality.

Should you require any further information regarding the QCU's submission, please do not hesitate to contact Industrial Officer Lorin Booth.

Yours sincerely

Amanda Richards
Acting General Secretary

Senate Legal and Constitutional Affairs Committee

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

Submission by the Queensland Council of Unions August 2008

1. Queensland Council of Unions

The Queensland Council of Unions (QCU) is the peak union council in Queensland. We represent over 40 affiliated unions and over 350 000 union members. The QCU has offices in Brisbane and regional centres throughout the state.

2. Harmonisation

The Queensland anti-discrimination regime is defined by the *Anti-Discrimination Act 1991* (the Queensland Act). Under the Queensland Act, a complainant has protection against a broader range of discriminatory behaviours and access to a more timely and accessible complaint mechanism. In addition, the Queensland Act covers all instances of discrimination providing a consistent approach to discrimination. This recognises that a complaint of discrimination may emulate from more than one source. Sexual discrimination may be accompanied by other forms of discrimination such as racial or age discrimination.

Federal harmonisation, if deemed desirable, should not result in a person experiencing a reduction in the legal protections and complaint mechanisms currently afforded them under state law. Accordingly any harmonisation exercise must begin with commonwealth legislation being no less robust than the Queensland Act.

3. Queensland anti-discrimination regime

3.1. *Anti-Discrimination Act 1991 (Qld)*

The principle object of the Queensland Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation¹. The Queensland Act deals with all forms of discrimination. The Queensland Act prohibits discrimination that is:

- a) on the basis of a specified attribute;
- b) is direct or indirect in nature; and
- c) occurs in specified areas of activity including work, education and provision of goods and services.

In respect to sex discrimination, the Queensland Act provides a number of grounds of discrimination (attributes) in addition to those found in the *Sex Discrimination Act 1984* (SDA). These additional attributes are:

- sexuality;

¹ s. 6 *Anti-Discrimination Act 1991* (Queensland)

- gender identity;
- lawful sexual activity as sex worker;
- parental and relationship status (as distinct from marital status);
and
- breastfeeding.

The Queensland Act prohibits both direct and indirect discrimination. Direct discrimination is determined to occur where a person with an attributes is treated less favourably than a person without that attribute in circumstances that are the same or not materially different. It is not necessary for discrimination to have been intentional.² Indirect discrimination is defined as occurring where a term is imposed or is proposed with which:

- a person with an attribute is unable to comply;
- a high proportion of people without the attribute are able to comply; and
- the term is not reasonable.³

Again it is not necessary that the discrimination be intentional.

Significantly the Queensland Act does not distinguish or limit any of the grounds of discrimination. The limitation on the application of discrimination on the basis of family responsibilities found in the SDA is not replicated in the Queensland Act.

Recommendation 1

SDA amended to include as grounds for discrimination:

- sexuality;
- gender identity;
- lawful sexual activity as sex worker;
- parental and relationship status (as distinct from marital status); and
- breastfeeding.

Recommendation 2

SDA amended to remove restriction on discrimination on basis of family responsibility to include all instances of direct or indirect discrimination.

3.2. Queensland complaint model

The Queensland Act provides for an Anti-Discrimination Commission (ADCQ) and Anti-Discrimination Tribunal (ADTQ) to hear complaints under the Queensland Act.

Consistent with the SDA, the Queensland Act is an individual complaint driven jurisdiction. QCU affiliates report a strong preference for the ADCQ as a mechanism for the resolution of complaints. The ADCQ is generally considered to be more accessible and timely than the complaint route offered by the Human Rights and Equal Opportunity Commission (HREOC) under the SDA.

² s. 10 SDA

³ s. 11 SDA

3.3. Anti-Discrimination Commission (ADCQ)

The accessibility of the ADCQ is enhanced by its physical location in Queensland. This advantage is most evidenced by the large usage of the regional offices of the ADCQ. The ADCQ has three regional offices (Rockhampton, Townsville and Cairns). These offices ensure accessibility beyond the south eastern corner of Queensland. In 2006/07, 43% of complaints lodged with the ADCQ were lodged outside of Brisbane.⁴

In comparison HREOC is entirely based in Sydney and does not operate offices elsewhere in Australia. This may go some way to explaining the comparatively low use of HREOC by complainants located outside of NSW. In the 2006/07 43% of HREOC complaints originated in NSW, while only 14% originated in Queensland and 20% in Victoria.⁵

QCU affiliates also report greater levels of satisfaction with the time taken by the ADCQ to consider and deal with complaints compared with HREOC. The Queensland Act prescribes a number of timeframes on the lodgment and handling of complaints including:

- a complaint must be lodged within one year of the alleged contravention of the Act⁶;
- the ADCQ has 28 days to notify a complainant that their complaint is to be accepted or rejected⁷; and
- either party to a complaint may seek a referral to the ADTQ if the complaint is not resolved by the ADCQ by conciliation within six months of the complaint being lodged⁸.

In addition the ADCQ seeks to provide a date for compulsory conference within six weeks of the notification that the complaint has been accepted.

In addition to increased accessibility and more transparent timeframes, QCU affiliates perceive a greater willingness on the part of the ADCQ to find jurisdiction and deal with complaints than is demonstrated by HREOC.

3.4. Anti-Discrimination Tribunal (ADTQ)

Under the Queensland Act if a complaint cannot be resolved through conciliation the ADCQ may refer the complaint to the ADTQ. The referral process provides an element of continuity to a complaint. The ADTQ is recognised by QCU affiliates as a preferable arrangement to the situation under the SDA. Recourse to the Federal Court is seen as prohibitive due to the costly and legalist nature of commencing such proceedings.

As a trade union peak body the QCU is most concerned with the operation of the SDA in the area of work and employment. There is a high incidence of work related complaints in both state and federal anti-discrimination jurisdictions. In 2006/07 60% of complaints to ADCQ related to the area of

⁴ Anti-Discrimination Commission Queensland Annual Report 2006/07

⁵ HREOC Annual Report, 2006/07

⁶ s. 138 *Anti-Discrimination Act 1991*

⁷ s. 141 *Anti-Discrimination Act 1991*

⁸ s. 167 *Anti-Discrimination Act 1991*

work.⁹ Although preferable to the Federal Court, the ADTQ has been criticised by QCU affiliates for:

- being too concerned with form than content (despite the absence of requirement to be bound by rules of evidence);
- allowing legal procedure to draw legal proceedings out over extended periods; and
- part time tribunal members lacking expertise in anti-discrimination and industrial matters.

In response to these criticisms, the report of the Queensland Industrial Relations Commission (QIRC) Pay Equity Inquiry¹⁰ (Pay Equity Report) recommended that the QIRC be accorded shared jurisdiction under the Queensland Act to hear and determine discrimination complaints in the area of work. The QIRC possess the necessary work related expertise. In addition the QIRC provides a timely, less legalist forum for the resolution of complaints.

These arguments are even more compelling in the context of the SDA. In 2006/07 81% of complaints lodged with HREOC related to the area of work.¹¹ The Australian Industrial Relations Commission (AIRC) and its anticipated successor Fair Work Australia offer a comparable alternative to burden of commencing proceedings in the Federal Court.

Recommendation 3

The SDA be amended to grant the Australian Industrial Relations Commission/Fair Work Australia jurisdiction to hear and determine complaints of discrimination made in the area of work. Jurisdiction to be shared with the Federal Magistrates' Court and Federal Court.

Recommendation 4

Steps to be taken to ensure all commissioners, judges, magistrates and tribunal members empowered to hear and determine complaints of discrimination receive training aimed at the development of cultural awareness skills so that all discrimination matters are handled with appropriate empathy and sensitivity.

3.5. Powers of the Commissioner

The Queensland Act grants to the Queensland Anti-Discrimination Commissioner (the Commissioner) powers to initiate an investigation into a possible offence under the Queensland Act against a class or group of people.¹² When performing this investigation, the Commissioner has all the powers to seek and obtaining information as available to them when investigation a complaint.¹³ The SDA does not include equivalent powers. This omission is the subject of further discussion at 4.4.1 below.

⁹ ADCQ Annual Report 2006/07

¹⁰ Pay Equity, Time to Act. QIRC, Sept 2007

¹¹ HREOC Annual Report 2006/07

¹² s.155 *Anti-Discrimination Act 1991*

¹³ s. 156 & s. 157 *Anti-Discrimination Act 1991*

The Commissioner is also granted complimentary powers under the *Queensland Industrial Relations Act 1999* (the IR Act). For example:

- the Commissioner has power under the IR Act to make an application to the QIRC for the making of an order providing equal pay for work of equal or comparable value.¹⁴ This power is a significant element in the advancement of pay equity; and
- the IR Act provides that where the ADCQ refer an industrial instrument to the QIRC on the grounds that it is discriminatory, the QIRC must review it. The Commissioner is party to these proceedings.¹⁵

Recommendation 5

The SDA and federal industrial relations legislation needs to facilitate a complimentary relationship between the AIRC/Fair Work Australia and HREOC/Sex Discrimination Commissioner consistent with Queensland legislation.

4. Effectiveness of SDA in eliminating discrimination and promoting gender equality

4.1. Australian Law Reform Commission

The SDA was included in a report by the Australian Law Reform Commission in 1994¹⁶ (the ALRC Report). The ALRC Report made a series of recommendation to strengthen the SDA as a tool to address discrimination and promote gender equality. It is the view of the QCU that many of the recommendations found in that report are still relevant today.

4.2. Prohibition on discrimination

At a big picture level, the absence of a general prohibition on discrimination consistent with the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is a significant omission in the SDA. Consistent with the ALRC Report¹⁷, the QCU recommends the inclusion of such a statement.

Recommendation 6

The SDA should contain a general prohibition of discrimination in accordance with the Convention on the Elimination of all Forms of Discrimination against Women, Article 1.

4.3. Individual Complaints

The QCU recognise that in the fight against discrimination there must be a mechanism to allow individuals to raise cases of discrimination. As noted by Susan Walpole, Sex Discrimination Commissioner from 1993-97:

¹⁴ s. 61 *Industrial Relations Act 1999 (Queensland)*

¹⁵ s. 131 *Industrial Relations Act 1999 (Queensland)*

¹⁶ *Equality before the law: justice for women*, Australian Law Reform Commission Report 69 1994

¹⁷ Recommendation, ALRC Report

“...discrimination legislation is the necessary “circuit breaker”, since until it is no longer legal to exclude people from employment on the basis of sex, other problems and issues are not even visible.”¹⁸

However the QCU believe the HREOC individual complaint model suffers from the following weaknesses:

- 4.3.1. Complaints of alleged contravention of the SDA are currently limited to complaints by individuals or a group with the same allegation. The SDA must provide HREOC or the Sex Discrimination Commissioner the capacity to deal with complaints from a class of complainants.

Recommendation 7

The SDA should be amended to allow complaints to be lodged by a class of persons.

- 4.3.2. HREOC is geographically removed from the majority of potential complainants. The ADCQ demonstrates the benefits of being a more geographically diverse and accessible organisation.
- 4.3.3. HREOC is unable to address and deal with complaints in a timely manner. Resources must be available to ensure timeframes are reduced.

Recommendation 8

HREOC should be properly funded to allow for the geographic dispersal of offices and the provision of sufficient staff to ensure the more timely resolution of complaints.

- 4.3.4. HREOC acts as investigator and conciliator. There is no support offered to complainants trying to formulate a complaint. This limits the capacity of potential complainants hindered by language, cultural expectations or geographic isolation to raise complaints.

Recommendation 9

The SDA should provide that HREOC give appropriate assistance to a person who wishes to make a complaint under the SDA in the formulation of the complaint and in reducing the complaint to writing.¹⁹

- 4.3.5. Settlements reached through the HREOC are made in secret. This reinforces the premise that discrimination is an individual and private matter. Outcomes can not be used as educational tools. Making examples of discriminatory behaviour widely available helps define the boundaries of discriminatory or non-discriminatory behaviour.

Recommendation 10

¹⁸ Susan Walpole, Peeling the onion: How Australia's industrial system deals with discrimination in employment and pay equity, speech to 6th Interdisciplinary Congress on Women, Adelaide, 25 April 1996

¹⁹ See *Disability Discrimination Act 1992 (Cth)* s. 69(2)

The SDA should be amended to require the SDC to publish, or otherwise make available, a public register of settlements reached in conciliation. This could be done through a public report or through HREOC's annual report to parliament. No names or identifying information concerning the parties should be included in the public record.

4.3.6. The individual treatment of each complaint does not sufficiently discourage repeat offenders. An offender does not suffer any additional penalty if they continue to behave in a discriminatory manner. There must be a capacity to deal with recalcitrant offenders.

Recommendation 11

The SDA should provide that the Sex Discrimination Commissioner may refer a matter directly to hearing where the respondent is a repeat discriminator. In considering whether to exercise this discretion to refer the matter to a hearing, the Commissioner must take into account:

- the wishes of the complainant, and
- the nature and frequency of the repeat violations of the SDA.

Assistance should be available to assist complainant in such cases to meet the additional cost of having the matter heard.

4.4. Addressing systemic discrimination

While offering recommendations to improve the complaint handling role of the HREOC, it is the view of the QCU that the exclusive adoption of the individual complaint model is the greatest limitation to the capacity of the SDA to advance gender equality. Gender equality will only be achieved through a united attack not only on individual cases of discrimination but also on the systemic discrimination that continues to limit women's engagement in the workforce and their achievement of equality.

Systematic discrimination in the area of work is evident in:

- ongoing gender pay inequity with women continuing to receive less than 85% of the annual male wage;
- lack of universal access to paid parental leave;
- lack of universal access to flexible working arrangements;
- lack of access to quality, affordable childcare; and
- insufficient superannuation accumulation.

As noted by former Sex Discrimination Commissioner Susan Walpole:

“Anti-discrimination legislation has been relatively successful... by providing individual redress for a specific form of sex-based harm but it also raises the issue of the effectiveness of specialist bodies such as HREOC in tackling these issues in a broad systemic way. There is little evidence that harassment levels have dropped despite the thousands of cases dealt with by human rights bodies.”

It is the view of the QCU that gender inequality can not be achieved by the SDA retaining a reactive complaint based focus. The SDA must empower

the Sex Discrimination Commissioner (the Commissioner) and HREOC to take active steps to address inequality.

The ALRC Report proposed three ways in which the SDA could be amended to give it an active role in promoting gender equality. The QCU support these recommendations.

- 4.4.1. Commissioner to be empowered to initiate investigations into instances of possible discrimination against a group or class of women without a complaint being lodged. In pursuing such an investigation, the Commissioner would require powers to obtain information and seek redress for any discrimination found to exist.

As noted at 3.5 above, the Queensland Act provides the Anti-Discrimination Commissioner power to initiate an investigation although the power can only be exercised with the permission of the Minister. The QCU recommend that this limitation not be reflected in amendments to the SDA.

Recommendation 12

The SDA should be amended to allow the Commissioner of her own motion and without the requirement to seek consent, to investigate conduct that appears to be unlawful under the SDA.

In exercising this power the Commission should have all the powers of discovery that are currently available under the SDA to deal with a complaint.

- 4.4.2. Any power of investigation must be supported by an enforcement capacity. The *Privacy Act 1988 (Cth)* includes an investigation and reporting mechanism that could be utilised in the context of anti-discrimination.

Recommendation 13

The SDA be amended to include investigation and reporting mechanisms similar to the *Privacy Act 1988 (Cth)*. These mechanisms to include:

- if an organisation investigated fails to implement any recommendations made by the Commissioner to improve the practices of the organisation to eliminate discrimination, the Commissioner may make a report to the Attorney-General;
- the report should detail the conduct of the investigation, the findings of the investigation and the recommendations made by the Commissioner as a result of the investigation. The report should also contain the organisation's reasons for failing to implement the recommendations if reasons have been given;
- the Attorney-General should be required to have a copy of the report laid before both Houses of Parliament within 15 sitting days; and
- the report may contain recommendations for the development of standards under the SDA.

- 4.4.3. The capacity for making of legally enforceable standards already exists in anti-discrimination law in Australia. The *Disability*

*Discrimination Act 1992 (Cth)*²⁰ includes an existing model that could be equally effective in the area of sex discrimination.

Recommendation 14

The SDA be amended to contain provisions modeled on the *Disability Discrimination Act 1992 (DDA)* to provide the Minister with power to formulate standards to further the objectives of the SDA. The provisions to include:

- proposed standards should be laid before both Houses of Parliament within 15 days of their formulation. The standards should be able to be amended or disallowed by each House of Parliament as is provided for in the DDA;
- it should be unlawful to contravene a standard under the SDA;
- in devising standards the Minister should be required to consult with the Commissioner and relevant persons, groups or organisations; and
- the Commissioner should make reports to the Minister on matters relating to the development of standards.

4.5. Positive rights

The QCU believe the SDA must assert positive rights that support gender equality by re-dressing identified systemic discrimination. Universal access to flexible working arrangements is one such example. Women continue to bear the responsibility of the majority of unpaid/domestic work. The ability of women to meet these demands is greatly affected by the availability of flexible working arrangements and leave. Accordingly, the availability of such arrangements has a disproportionately significant impact on the working lives of women.

In the report of the Pay Equity Report it was noted that anti-discrimination was the originating source of employer's obligation to reasonably consider a reasonable request for flexible working hours/practices. The report went on to recommend that positive obligations in regards to flexible working arrangements be included in the Queensland Act. The QCU supports this recommendation.

Recommendation 15

SDA be amended to extend the prohibition to include the right to request flexible working arrangements.

5. Conclusion

The QCU is of the view that the SDA is only one tool in the battle to achieve work free of discrimination and inequality. The QCU support the conclusion of former Sex Discrimination Commissioner Susan Walpole:

"The more we learn about the complexity of ... inequity, the more it becomes clear that integrated measures to overcome historical and structural barriers are

²⁰ s. 31 *Anti-Discrimination Act 1991*

needed to overcome the limitations of a model based on redress for individual complaints.”²¹

The QCU recommendations found in this submission are aimed at creating an anti-discrimination regime better equipped to deal not only with the individual instances of discrimination but the entrenched discriminatory behaviours, practices and institutions that continue to reinforce and cultivate discrimination and inequality.

²¹ Susan Walpole, Peeling the onion: How Australia’s industrial system deals with discrimination in employment and pay equity, speech to 6th Interdisciplinary Congress on Women, Adelaide, 25 April 1996