

INDEPENDENT EDUCATION UNION OF AUSTRALIA

**SUBMISSION TO INQUIRY INTO THE EFFECTIVENESS OF
THE COMMONWEALTH *SEX DISCRIMINATION ACT 1984* IN
ELIMINATING DISCRIMINATION AND PROMOTING
GENDER EQUITY**

August 2008

Introduction

The Independent Education Union of Australia (IEUA) is the federally registered union representing over 65,000 education professionals (teachers and other education staff) in the non-government education sector, many of whom work in community kindergartens, early childhood education centres and community preschools

Currently there are 2728 non government schools in which 83 567 teaching staff are employed. 66.16% of total staff in non-government schools are female.

In relation to gender ratio of teaching staff in non-government schools, the proportion of FTE(Full Time Equivalent) teaching staff who are female continues to rise.

In 2007, 66.16% of all FTE teachers in non-government schools were female, 79.9% of all FTE teachers in primary schools were female and 55.8% in secondary schools. The comparable figures in 1997 were 64.0%, 76.6% and 52.6% respectively. (ABS Schools Australia 2007)

The IEUA recognises the importance of strong sex discrimination legislation as a mechanism of protecting human rights. We welcome the opportunity to contribute to this inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equity.

In particular, this submission will focus on elements within the *Sex Discrimination Act 1984* which require further strengthening if the aim of eliminating discrimination and promoting gender equity is to be achieved.

It is also emphasised that when considering amendments to the Sex Discrimination Act 1984, that the overall result should not provide a reduction in legal protections and compliant mechanisms currently afforded under state law. Commonwealth legislation should ensure the same robustness offered by various State legislation.

Background

Sex discrimination law represents a legislative attempt to ensure that women's equality is substantively realised.

Yet, despite the fact that few pieces of legislation (*prima facie*) discriminate against women, real equality does not exist for many women in their daily lives. Nowhere is this inequality more obvious than in the workplace.

Academic research indicates that women are still responsible for the majority of family responsibilities, with increasing numbers also working full-time or part-time as well.

The struggle to balance work and family responsibilities remains ever present and still inadequately acknowledged.

The United Nations' *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) reflects a model of "substantive" equality. Australia was a major player in the working group that developed the final draft of CEDAW and was influential in ensuring its international adoption.

Yet, despite Australia's involvement in CEDAW's development and the fact that CEDAW was a key catalyst in the development of Australian sex discrimination laws, Australia has not translated the "substantive" equality model into legislation in any comprehensive sense.¹

Australia's *Sex Discrimination Act 1984* provides a limited framework focused on a right of *individual complaint* in *specific* circumstances of discrimination. The grounds covered by the *Sex Discrimination Act 1984* include sex, marital status, pregnancy and potential pregnancy, family responsibilities and sexual harassment. Areas in which discrimination is prohibited include employment, education, accommodation, provision of goods and services, disposition of land, membership of clubs and the administration of Commonwealth laws and programs.

The IEUA concurs with the Australian Law Reform Commission that an important aspect of continuing legal reform in this area is the development of proposals that aim to remedy systemic and hidden structures of sex discrimination.

Terms of Reference : The scope of the Act and the manner in which key terms and concepts are defined.

The *Sex Discrimination Act 1984* contains two concepts of discrimination: direct discrimination, which draws on an equal treatment model of gender equality; and indirect discrimination, which gestures towards a more substantive conception of equality or equality of outcomes. Unlike the CEDAW's definition, the *Sex Discrimination Act 1984* narrower concepts of discrimination use a comparator model. In this model direct discrimination only exists where women are similarly situated, as but treated differently from, men. Indirect discrimination is limited to situations where disparate or adverse impacts on women compared to a comparator group, can be demonstrated.

Direct discrimination and Maternity Leave

There is limited protection offered by the direct discrimination provisions of *Sex Discrimination Act 1984* to women on maternity leave.

¹ Australian Law Reform Commission Report No 69 Parts I and Parts II" *Equality before the Law: Women's Equality*" October 1994

Due to the application of the comparator test and causation elements of the direct discrimination test, an employer's dismissal of a woman on maternity leave because it preferred her replacement would not necessarily constitute direct discrimination.²

Currently, in such situations, women may need to frame the claim as a breach of contract or seek the limited protections of the WorkChoices Act, or seek to formulate a claim of indirect discrimination under the *Sex Discrimination Act 1984*

The *Sex Discrimination Act 1984* prohibits direct discrimination on the grounds of pregnancy, described in Section 7(1). It includes treating a woman less favourably because of a characteristic that appertains to women who are pregnant, “*than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant*”. It is accepted that taking maternity leave is a characteristic that appertains generally to pregnant women.

To prove direct discrimination on the ground of pregnancy, a woman must show that the act complained of was because of the taking of maternity leave (the causation test) and that she was treated less favourably(in circumstances that are the same or not materially different) from how the discriminator treats or would treat someone who is not pregnant.(the comparator test)³

The comparator test needs to be reconsidered as it requires the comparison with another employee on leave. No distinction is made between maternity leave and any other sort of leave. It fails to recognise that maternity leave should not be treated in same way as other forms of leave and should be given special protection.

The direct pregnancy discrimination provisions of the *Sex Discrimination Act 1984* only go a limited way to addressing the workplace disadvantage that women experience as a result of pregnancy.

This is concerning, especially as the Productivity Commission is seeking a review into paid maternity leave and have received many submissions calling for its wider implementation in the workforce. Should this result, more working women will be able to access paid maternity leave and will require strong, legislative protections against direct discrimination.

Recommendation

IEUA calls for the *Sex Discrimination Act 1984* to recognise maternity leave as a separate form of leave and provide specific protection.

² Barbaro M, “*Limited SDA Protection for Women on Maternity Leave*” Law Society Journal. July 2008

³ Barbaro M, “*Limited SDA Protection for Women on Maternity Leave*” Law Society Journal. July 2008

Direct Discrimination and family responsibilities

Discrimination because of family responsibilities is one of the major issues facing women in the workforce and there must be clear and direct protection from it in all its forms.

Many women with family and carer responsibilities have found themselves disadvantaged in the workplace when compared to workers without these responsibilities.

The experiences of many IEUA female members in the non-government education sector demonstrate that they struggle on a daily basis to balance work and family commitments. Increasing non-core duties and greater pressure on teachers to attend after hour activities and on weekends disproportionately affects women who bear the greatest burden for family responsibilities.

Further, IEUA membership patterns highlight that there are comparatively fewer women in decision making and/or leadership roles than men

It is recognised that the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) sought for governments to “take all appropriate measures to eliminate discrimination against women in employment” and that provisions of the *Sex Discrimination Act 1984* were introduced in 1992 to proscribe discrimination on the grounds of family responsibilities.⁴

However, the *Sex Discrimination Act 1984* currently only contains limited protection from discrimination because of family responsibilities.

“Family Responsibilities” is defined by the *Sex Discrimination Act 1984* as a separate ground of discrimination, not a general ground of sex discrimination. Importantly the *Sex Discrimination Act 1984* only protects against dismissal.

This means that many other forms of discrimination falling short of termination are not classed as direct discrimination under the Act and thereby protection is not provided for under the Act.

It is recognised that employees who suffer discrimination on the ground of family responsibilities which does not amount to dismissal may be able to lodge a complaint of indirect sex discrimination. This is because courts have found that because women still undertake the majority of caring duties, being discriminated against because of family responsibilities is a characteristic that relates mostly to women and so can constitute sex discrimination.

However, these provisions must be strengthened. Discrimination because of family responsibilities is one of the major issues facing women in the workforce and there must be clear and direct protection from it in all its forms.

⁴ Guest Krysti. *The Elusive Promise of Equality: Analyzing the limits of the Sex Discrimination Act 1984*. Law and Bills Digest Group, 30 March 1999.

In defining family responsibilities, it must be recognised that family responsibilities now extend beyond parenting to caring across the lifespan. Men and women within families also care for elderly family members or people with disabilities. This caring work shares many of the characteristics of parenting work but has its own stresses and difficulties. It too has a strong gender component, with many more women than men taking on unpaid caring responsibilities.

Recommendation

IEUA calls for the strengthening of provisions under the *Sex Discrimination Act 1984* to provide for protection against direct discriminative actions, other than termination, due to family responsibilities.

Terms of Reference : The powers and capacity for the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality

Legislative power to Human Rights and Equal Opportunity Commission to respond to systemic discrimination

The current sex discrimination legislation is primarily structured to respond to individualised harms that occur within a specific area of public life.

Whilst these mechanisms are very important, this framework by itself is unable to respond to the fundamental dynamic of systemic discrimination.

Individuals have to bear the burden of enforcing a remedy for discrimination, including the emotional and financial costs and the time which must be invested.

For these reasons, the vast majority of complaints settle with confidentiality agreements, which means that industry wide outcomes or systemic change is not possible.

The *Sex Discrimination Act 1984* needs to empower HREOC to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality.

The *Sex Discrimination Act 1984* currently only provides for adoption of discretionary guidelines '*for the avoidance of discrimination*'.

HREOC has no legislative power to mandate application of positive duties, nor to enforce compliance.

There is limited capacity to address systemic discrimination beyond an inquiry and reporting function, which is limited due to lack of resources. Even when recommendations are made there is no enforcement power.

The *Sex Discrimination Act 1984* must empower the Commissioner 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.

Recommendation

IEUA calls for the strengthening of provisions within the *Sex Discrimination Act 1984* to empower HREOC to enquire into regulate, monitor and enforce legislative responsibilities to prevent systemic discrimination and promote equality

Legislative power for the enforcement of decisions in accordance with the Sex Discrimination Act

It is recognised that the *Sex Discrimination Act 1984* provides a procedural right of complaint to persons who consider they have been discriminated against on specific grounds in specified circumstances, subject to a considerable range of exceptions and exemptions.

It is further recognised that the Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission are empowered to administer the Act, and as with all other anti –discrimination legislation, the *Sex Discrimination Act 1984* provides for machinery for a complaint to be conciliated, and potentially arbitrated before the Human Rights and Equal Opportunity Commission.

However, problematically the decisions are not enforceable, and currently if a complainant wishes to enforce a decision they must initiate an action in the Federal Court. Such recourse is prohibitive due to the costly and legalist nature of proceedings.

While the separation of administrative and judicial functions required at the federal level is recognised, there still remains a need for a specific jurisdictional entity which is well resourced, easily accessible and provides recourse and enforceability to decisions regarding complaints of discrimination. Such a entity could be based on the model similar to the industrial court which operated for a short time in the early 1990's.

Recommendation

IEUA calls for the strengthening of the *Sex Discrimination Act 1984* to empower the Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission to refer matters and complaints of discrimination to another jurisdictional entity which is well resourced, easily accessible and can ensure the enforceability of these decisions.

Another key feature of the *Sex Discrimination Act 1984* is the focus of dispute resolution on conciliation. Whilst the IEUA acknowledges the value of conciliation as a dispute resolution mechanism, the work by Professor Margaret Thornton is also recognised. In particular where she notes that “*as a strategy, alternative dispute resolution is a double edge sword. The neutrality and non-advocacy ideal of conciliation often fails to equalise power imbalances between complainants and respondents, resulting in conciliated outcomes disproportionately favouring*

respondents, or which provide relatively minimal remedies for complainants when compared to Court orders.”⁵

We support the concept of embedding guidelines as the meaning of conciliation into the legislation to ensure that the object of anti-discrimination legislation is central to a conciliated agreement.

Terms of reference: Scope of existing exemptions

The fundamental purpose of anti-discrimination legislation is that it be beneficial to the human rights of the citizens of the Australian community and that it prohibits discrimination on a range of grounds of attribute and areas of activities.

Yet, a wide range of exemptions are attached to the operation of the *Sex Discrimination Act 1984* generally in relation to religious, charity and voluntary bodies, religious education institutions, competitive sport, insurance and superannuation and court or tribunal decisions.

These exemptions have been persistently criticised as being too lenient and legitimising discriminatory behaviour which is contrary to recognised international human rights norms.

In majority of cases, these exemptions are inconsistent with existing State Legislations, having broader application and less protection to employees . *It is not an acceptable situation to have in existence a Commonwealth Sex Discrimination Act which provides for reduced legal protections and complaint mechanisms compared to State legislation.*

The existence of these exemptions undermines the validity of the protections of the *Sex Discrimination Act 1984*.

The IEUA has long argued that both federal and state anti-discrimination legislation should provide the same level of protection for its members as for all in the Australian community. People should not be required to forgo their ordinary human rights when they commence employment in religious schools.

In particular, the Queensland, NSW, and Tasmanian IEUA branches have made submissions and interventions during the 1990's into State based anti-discrimination legislation. More recently, in April 2008, the Victorian branch had made submission to the Department of Justice Review of the exceptions and exemptions in the Equal Opportunity Act 1995.

These documents are available on file.

In relation to IEUA members, the application of the exemption contained in section 38 of the *Sex Discrimination Act 1984* (Educational Institutions Established for Religious Purposes) is often the most concerning, as over 90% of non-government schools have a religious affiliation.

⁵ Thorton M “ Auditing the Sex Discrimination Act” Keynote address Human Rights 2004: The Year in Review. Castan Centre Annual Conference. December 2004.

Section 38 of the *Sex Discrimination Act 1984* specifically states “ *if the first mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed*”.

The concept of “good faith” is subjective, too wide ranging, is a major exception to the application of the prohibitions otherwise imposed by the legislation.

The IEUA believe that it is imperative that, if there must be exemptions relating to the area of employment, they be clearly and narrowly articulated, they incorporate concepts of “reasonableness” (not merely “good faith”) and they relate only to the employee’s conduct during a selection process, in the course of their work and/or in doing something connected with their employment. Employees’ private lives should remain private.

That where exemptions do exist in legislation, they should not be open to interpretation which is so broad that they undermine the human rights which the legislation is intending to protect.

Further that the onus should be on the private educational authority to demonstrate the necessity of the proposed discrimination in terms of the ethos and operation of a particular school and its community and the relationship to the genuine occupational requirement.

The federal Act must strike the appropriate balance between an employee’s right to privacy and choice of lifestyle and the employer’s genuine interests to provide an environment consistent with their moral, ethical and religious views.

An employee should be allowed to hold and express views different to those of the employer, as long as he/she does not, in the course of his/her employment, deliberately act in a manner which subverts the fundamental ethos of the school.

The legislation must strike a reasonable balance between protecting *the genuine religious interests* of Educational Institutions Established for Religious Purposes and protecting the rights of those working in such institutions.

The IEUA believes that it is also incumbent on employing authorities to develop and implement fair and just employment practices.

However, in the debate regarding exemptions, it is essential to register that matters such as carers leave, sexual harassment and pregnancy should not be subjected to any exemption from the legislation which seeks to protect them.

Recommendation

The IEUA believes that the wide range of exemptions undermines the anti discriminatory functions of the *Sex Discrimination Act 1984* and the working powers of the HREOC.

The IEUA believes that the provisions of Section 38 of the *Sex Discrimination Act 1984* in relation to “Educational Institutions Established for Religious Purposes”

is broad, subjective and wide ranging and notes with concerns the notion of “good faith” as a major exception to the application of the prohibitions otherwise imposed by the legislation.

The IEUA believes that if exemptions are considered necessary in the legislation, they should be clearly and narrowly applicable and not be open to interpretation which is so broad as to defeat the fundamental purpose of the legislation which contains them.

If such exemptions must exist, then they should be carefully formulated to ensure reasonableness in all circumstances of a particular case and that the onus should be on the private educational authority to demonstrate the necessity of the proposed discrimination in terms of ethos and operation of the school and the relationship to the employee’s course of employment.

Legislation must protect matters such as pregnancy, carers leave and sexual harassment as an absolute without any access to exemption.

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