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

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As a legal academic at the University of Melbourne Law school (since 205) and previously at Monash Law Faculty, I have taught anti-discrimination law in Australia to LLB students for more than fifteen years. My comments on the effectiveness of the Sex Discrimination Act 1984 touch on areas that, although technical, are directly related to its success as an instrument for combating sex discrimination. These include the onus of proof of discrimination; access to legal advice and legal aid; funding for and strategic enforcement of the law; and improving the remedies for successful cases.

This submission centres on the following terms of reference:

l. effectiveness in addressing intersecting forms of discrimination;
m. any procedural or technical issues;
n. scope of existing exemptions; and
o. other matters relating and incidental to the Act. – in particular, I am concerned with what can be done to enforce of women's equality rights at a more systemic level.

I begin by commending the Parliament highly for undertaking its inquiry into the Act. Underlying my submission is the understanding that sex discrimination is not simply the result of the isolated acts of prejudiced individuals. That is not the process that has designed the workforce to suit men's lives, and many other aspects of society to consider men's interests somehow more real and legitimate than women's, so that women have to act like men if they want their interests to be noticed and taken seriously. Because the media and the higher levels of most social endeavours are dominated by men, their perspectives are automatically recognised and seen as legitimate. Where women's priorities or needs differ from those of men, they are often not noticed, or not regarded as legitimate or realistic. Unless the Sex Discrimination Act can challenge these assumptions, it cannot really assist women effectively.

*Women's lack of resources for enforcement*

As a result of these society wide assumptions, it can be very difficult for women to make out a case of sex discrimination. Women have fewer resources than men, and especially where they have lost a job, may have great difficulty in finding another, especially if they are pregnant or have young children needing attention. Most women in this position will have great difficulty finding and affording expert legal

advice and representation in a discrimination matter. Despite the power in the HREOC Act for the Attorney-General to provide legal aid in unlawful discrimination matters, it appears that virtually no such aid is provided, either by the Attorney or in the legal aid system, and that in many cases women must negotiate the complaints, conciliation and adjudication system unrepresented. Legal aid is very difficult to obtain in such cases because it is necessary to pass an extra merits test that is very difficult to satisfy, is not imposed in other areas of law, and suggests that there is no general public interest in the enforcement of human rights laws and respect for the human rights of all members of society. These features affect most adversely the women in the most vulnerable positions: indigenous women, migrant and ethnic minority women, women with disabilities, pregnant women and poor and low skilled women.

*Need to protect women in intersectional categories*
The case law indicates that claims by women in these categories (who could be regarded as affected by multiple discrimination grounds, or "intersectionality") are rarely litigated. It is very difficult to work out what these women would have to prove to establish their claims if the claim involves combined ground discrimination. The law must be amended to make it possible to bring such claims and make it clear what has to be established in order to protect these vulnerable groups. In addition women in these groups tend to have very few resources to enable them to effectively enforce the law that is ostensibly designed to protect them. The enforcement mechanism needs to be strengthened to ensure these women are adequately protected by it. Leaving all the effort of enforcement up to such individuals means that enforcement will be suboptimal. Emphasis therefore needs to be put on both improving the ability of an affected individual to enforce the act, and in creasing the level of systemic enforcement by actors other than the affected individuals, who may well be unable to act to protect themselves because of their very vulnerability.

**A Increasing Systemic Enforcement**

Many suggestions for systemic enforcement were made in the Victorian Equal Opportunity Act Review, and should also be considered in this review. Amendments to the SDA to set up effective enforcement by a government body at the level of systems as well as individual complaints would make clear the government's intention to enforce the Act to make human rights a reality. It would also set a national standard and provide a basis around which sex discrimination law, and indeed discrimination law generally, could be harmonised which is very desirable, especially for employers who operate through out the country. However, a more lengthy review of options would be needed to ensure that such measures are carefully chosen and designed to maximise impact.

Other models also exist. The province of Ontario in Canada, for example, has recently changed it enforcement process in discrimination matters under the Ontario Human Rights Act so that discrimination complaints are no longer lodged with and investigated by the Commission (see http://www.ohrc.on.ca/en). Instead there is direct access to the Tribunal (in Canada, commissions have always acted as gatekeepers how decided whether a claim could be taken to the tribunals). A publicly funded Human Rights Legal Support Centre has been created to provide expert legal advice and representation in cases selected for their strategic value or other

importance. This has the benefit of providing expert legal assistance in the most economical way, through salaried legal officers who work solely in this area and can accumulate expertise. The Commission's work will now focus more on systemic issues and education. The merit of this system is that it deals with the need to provide expert legal assistance in at least strategically important individual complaints, which does not happen here at present, and it provides a specific legal aid fund for discrimination matters so that expertise can be developed.

In addition and also very powerful is for the government to make much more extensive use of the tool of contract compliance, requiring those with whom it contracts for goods and services to demonstrate commitments to equity in their own suppliers and workforces. Consulting firms seeking government business, for example, could be required to provide workforce analyses demonstrating fair employment practices for women and pay equity audits demonstrating that they take their responsibilities as equal opportunity employers seriously.

Similarly the government should pursue equity in its own workforce through requiring all departments, authorities and public corporations to undertake and publish the results of pay equity audits.

The idea of publishing workforce data could be extended more broadly and would be very powerful. Rather than requiring private sector employers to change their workforce practices directly, the Sex Discrimination Act could require instead that companies of a certain size undertake workforce analyses of appointment levels and promotions by gender and the intersecting features (ethnicity, ability and sexuality if that data can be collected), as well as pay equity audits, and publish the results. In this way, women would be able to see which employers are really fair employers and would not have their choice of employers limited by lack of information in the employment marketplace. This could be very powerful as a tool. Proposed changes in the UK prohibit the use of clauses in employment contracts that make pay rates confidential, and this would be an effective tool.

It should not be necessary to rely solely on the SDA for protection against sex discrimination. In areas where many decision are made that may affect women, such as migration or taxation, there should be specific provision in the relevant applicable legalisation to provide guidance on acceptable policy and decision parameters so that it is not necessary to rely on the SDA, and so that gender impact is borne in mind in the relevant area. .

*Access to system data for research.*
As an academic, I am concerned about research access to human rights files. Similarly to epidemiological research, it is important for some work to be undertaken on discrimination complaints files in order to understand how and why the system operates and its effects on participants in it. Yet at present they are destroyed after a short period, and the Commission takes the view that the Privacy Act 1988 prevents the use of files for research purposes even if the data is used only anonymously. There should be a specific provision in the anti-discrimination laws that acknowledges the importance on external research into the operation of their discrimination system and that allows research proposals to be approved to access

such data on appropriate conditions, and that requires the keeping of files for a minimum number of years (say 7 years).

## B Improving enforcement in individual cases

Several areas need improvement here.

It is essential that a full ground of family and carer responsibilities be included in the Act.

*Proof of direct discrimination*
Dealing with the onus of proof of direct discrimination is very important. At present, all the evidence of the basis for a decision is held by the respondent who made it, and the complainant has no way of getting this information. As a result, it can be impossible to show what the ground of any decision that imposes less favourable treatment was, and in such circumstances, the direct discrimination claim will fail on the onus of proof. At a minimum, the respondent should be required to give evidence of the basis for its decision when it leads to less favourable treatment and the distinguishing factor between those affected involves sex, pregnancy or potential pregnancy, or marital status. These issues have been addressed by the European Community and the UK. In the UK, a "questionnaire procedure", introduced when the Sex Discrimination Act was first passed in 1975 allows complainants to ask questions of respondents about the basis of their actions, in a way that can facilitate early resolution of complaints.

*Remedies*
When a case of discrimination is proved, the opportunity should be taken to ensure that any remedy awarded deals with systemic issue that he case may have raised. If, for example, the facts suggest that it is possible that others may be affected in a similar way, then the court should be obliged to consider how a remedy could be designed to avoid any future discrimination even if this goes more broadly than a remedy in the individual case. In relation to damages, by comparison with defamation damages for intangibles such as reputational damage, in even successful discrimination cases, little compensation is awarded for such things as the career damage a woman suffers by losing the job she is in in circumstances where she may have great difficulty finding a new job and even if she does find one, she may not be in as good a position for promotion or advancement as in the original job, especially if the discrimination has occurred in connection with a pregnancy or the birth of a child. The research indicates that such events have a serious impact on women's careers, often involving the loss of the job with consequent slippage down the career ladder that is not adequately compensates by the courts, and intangible damages are assessed at a very low level given the possibly lifelong career damage suffered and impact on lifelong earnings (see eg Ann Crittenden *The Price of Motherhood*).

*Specific protection for vulnerable groups*
It is strongly arguable that some groups require special protection, and pregnant women are one of those groups because of their vulnerability. The Act could provide that where a pregnant woman is dismissed with knowledge of her pregnancy, the onus of proof shifts (as it does under s. 659 of the Workplace Relations Act) to the

employer to show that pregnancy was not an element of the basis for the decision. In addition legal obligations to return the women to her own job and how to deal with impact of restructuring while she is on maternity leave could be clarified. If it is not seen as appropriate to do this in the Act, then Guidelines could be developed by the Sex Discrimination commissioner or HREOC to assist employers on these points.

*Other proposals*
Generally a greater facility for the development of action plans by organisations and codes of practice by industries or guidelines by the Commission (although not standards as in s. 31 do the DDA) would be useful in allowing the law to be clarified.

The Sex Discrimination Act is expressed to bind only the Crown in right of the Commonwealth. By contrast, the Racial Disability and Age Discrimination Acts all bind the crown in right of the Commonwealth and the states. This should be corrected by extending the application of the SDA.

*Exceptions*
Regarding exceptions, generally the SDA contains too many exceptions, especially by comparison with the Racial Discrimination Act. The result is to dilute the commitment to gender quality the Act represents. CEDAW should be used as a guide to the acceptability of exceptions in the broad area of sex discrimination.

The Sex Discrimination Act allows discrimination in superannuation provided there is a reasonable actuarial basis for such differentiation. This would not be acceptable if the actuarial difference was on racial lines, nor should it be accepted where it is on gender lines. This merely operates to limits women's superannuation support even further. Given existing pay inequity and women's lower position in all employment positions, this reinforces their disadvantaged status in retirement and contributes to female poverty in old age. A financial practice that would not be acceptable on racial lines should also not be tolerated on gender lines.

Finally, regarding the substance of the Act, rules that differentiate on the ground of sex in clothing and grooming at work should be presumptively unlawful. Exploitation of women's appearance at work should not be permitted unless it is a genuine occupational qualification.

*Conclusion*
Thinking in discrimination law has advanced substantially since the Act was passed in 1984. Immediate reforms would be very desirable in many of the areas outlined above. However, ultimately a detailed review of policy and law in this area is likely to be necessary to provide a sure basis for reform. The process of review and reform in both Canada and UK has been ongoing for most of the last four to six years. We may hope to benefit from the lessons of that work, but it will require a substantial and detailed research and review effort to do this.