THE AUSTRALIAN NATIONAL UNIVERSITY

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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
Parliament House
CANBERRA ACT 2600

<LegCon.Sen@aph.gov.au>

Dear Secretary,

Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984

Thank you for the opportunity to make a submission to the Committee's Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act* 1984, and for agreeing to extend the time for submission.

I am an academic at the Australian National University, with experience and expertise relevant to the Committee's inquiry. I have attached brief biographical information at the end of this submission. In addition, this submission is endorsed by some of our colleagues with an interest in women and the law, who are listed at the end of this letter.

For the reasons I have outlined below, I **submit** the SDA should be amended to

1. restate the purpose of the Act, placing the Act in a rights-framework and requiring interpretation that is consistent with Australia's obligations under relevant human rights instruments.
2. enable the promulgation of standards as recommended by the Australian Law Reform Commission.
3. replace a 'comparator' test for discrimination with a 'detriment' test as recommended by the NSW Law Reform Commission and enacted in the ACT.
4. shift the burden of proof, in terms similar to those in the UK SDA and s809 *Workplace Relations Act* (Cth).
5. proscribe indirect discrimination on the ground of family responsibilities.

6. extend coverage of the ‘family responsibilities’ provisions to all areas related to employment and not merely dismissal.
7. proscribe discrimination on the ground of family responsibilities in areas of activity such as such as education, accommodation, and provision of goods and services.
8. redefine the concept of ‘family responsibilities’ to extend to the carer responsibilities described, for example, in the Western Australia legislation.
9. repeal all exceptions and instead: provide instead for a proportionality test that recognises reasonable limits on the guarantee of non-discrimination, and specify that exemptions will be granted on the basis of the same test.
10. proscribe sex-based vilification in terms similar to those in Tasmania and, for race, under the *Racial Discrimination Act*.

Please let me know if I can assist the Committee further.

Yours sincerely,

By email

Associate Professor Simon Rice OAM

This submission is also endorsed by the following legal academics at the ANU College of Law:

Professor Simon Bronitt

Dr Tom Faunce

Ms Vivien Homes

Dr Matthew Rimmer

Ms Margie Rowe

Professor Kim Rubenstein

Dr Amelia Simpson

Professor Margaret Thornton

Mr Asmi Wood

Mr Matthew Zagor

Submission to the Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 – Associate Professor Simon Rice OAM

1. Need for a rights based approach

In the twenty years since the SDA was enacted, there has been a significant shift in thinking about how best to achieve equality through legislation, "from laws that prohibit discrimination to laws that provide for a positive duty to prevent discrimination" (*Time for Equality at Work*, International Labour Office, Geneva, 2003, p.xii).

A positive duty would reflects a rights-based approach to dealing with discrimination, where the starting position is that a person has a right to non-discrimination, and a person has a responsibility to not discriminate. If the SDA were to be a contemporary legislative statement, it would adopt a human rights framework, promoting human rights compliance rather than merely remedying individual occasions of discriminatory conduct.

A clear legislative statement of the SDA's purpose would. as well, provide a necessary aid to interpretation which is currently absent from the Act. A new 'purpose' or 'objects' clause would make clear that where there is any need to interpret the SDA, it is to be interpreted so far as possible so as to be consistent with Australia's obligations under relevant human rights instruments. The Long Title of Queensland's *Anti-Discrimination Act* 1991 is an admirable example, setting out clearly Parliament's reasons for enacting the Act, by reference to international human rights standards.

The human rights instruments to which Australia is a party, and that would inform a human rights approach to the SDA, go beyond the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and include the Convention on the Rights of the Child (CRoC); the International Covenant on Civil and Political Rights (ICCPR); the International Labour Organisation Conventions 156 Workers with Family Responsibilities, 111 Concerning Discrimination in respect of Employment and Occupation, and 110 Equal Remuneration.

I **submit** the SDA should be amended to restate the purpose of the Act, placing the Act in a rights-framework and requiring interpretation that is consistent with Australia's obligations under relevant human rights instruments.

2. Sex discrimination standards

The experience of standard-setting under the *Disability Discrimination Act* has been positive. It reflects a mature approach to addressing systemic issues in a rights-framework, and avoids over-reliance on individual complaints to achieve human rights compliance.

In its landmark report *Equality Before the Law* (ALRC 69, 1994), the Australian Law Reform Commission Report recommended that the Minister be empowered "to formulate standards to further the objectives of the SDA" (Recommendation 3.4). The setting and enforcement of standards is consistent with a rights-based approach to addressing discrimination on the ground of sex.

I **submit** the SDA should be amended to enable the promulgation of standards as recommended by the Australian Law Reform Commission.

3. Reliance on a comparator to prove direct discrimination

Twenty years of operation of not only the SDA, but also of provincial discrimination legislation throughout Australia, have made clear that it is both conceptually and practically difficult for a person to have to prove direct discrimination on the basis of a comparator. It is intellectually appealing to rely on 'comparison' to illustrate the occurrence of discrimination, but as a practical matter that is difficult. It is difficult when there is an actual comparator, and the complainant has to follow the High Court's approach to identifying the material circumstances (*Purvis v NSW* (2003) 217 CLR 92), and it is difficult when there is no actual comparator, and an aggrieved person has to hypothesise on what would have been the case had there been one (see eg J von Doussa and C Lenehan, 'Barbequed or Burned: Flexibility in Work Arrangements and the Sex Discrimination Act', (2004) *UNSW Law Journal* Vol 27(3) 892).

The approach to dealing with a comparator is slightly easier in the United Kingdom, where courts have been more generous in recognising the difficulties of proof faced by complainants (eg *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26), but that remains a matter of judicial interpretation. The narrow and demanding approach to the comparator that has developed in Australia cannot be remedied by any legislative tweaking of the 'comparator' provisions, and the only remedy is reform to the structure of the Act.

A readily available alternative is a 'detriment test', which has been recommended by the NSW Law Reform Commission in its *Review of the Anti-Discrimination Act 1997 (NSW*) (1999, paras 3.51-3.53), and has been implemented in s.8(1)(a) of the ACT *Discrimination* Act. "All that is required is whether the consequences of the dealing with the complainant are favourable to the complainant's interests or are adverse to the complainant's interests, and whether the dealing has occurred because of a relevant attribute of the complainant" (*Prezzi and Discrimination Commissioner* 1996 ACT AAT 132 para 24).

I **submit** the SDA should be amended to replace a 'comparator' test for discrimination with a 'detriment' test as recommended by the NSW Law Reform Commission and enacted in the ACT.

4. Onus of proof in direct discrimination

The SDA assumes the conventional approach in Australian anti-discrimination legislation, requiring a complainant to satisfy the court that their sex was the reason for the conduct complained of. The relevant question for the court is not 'what happened?', or even 'who did it?', but 'why did they do it?'. A complainant must therefore prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as fact, on balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.

It is widely recognised that this conventional approach to proof fails to promote the objects of anti-discrimination legislation. A 'shifting burden' would be a more constructive approach (see eg M Thornton, 'Revisiting Race' in *Racial Discrimination Act 1975: A Review*, Human Rights and Equal Opportunity Commission, 1995 at pp 93-

96; G Bindman, `Proof and Evidence of Discrimination' in Hepple B. and Szyszczak E., *Discrimination: the Limits of the Law*, Mansell, London, 1992 at pp 57-58).

A shifting burden in sex discrimination matters is usual in Canada and the USA, and was established in Europe by the European Council in Directive 97/80/EC, art. 4. That Directive has been implemented across Europe, and in the UK *Sex Discrimination Act* 1975 for employment and related fields (see generally K Monaghan *Equality Law*, Oxford 2007, Ch14.D).

Under a shifting burden "the burden of proof shifts when the claimant proves such facts from which the court could .. conclude in the absence of a adequate explanation from the alleged discriminator that discrimination … occurred" (per Monaghan at 14.21).

A shifting burden is well-known and well-established in areas of Australian law, most relevantly in anti-discrimination provisions in workplace relations law. Section 809 of the *Workplace Relations Act* (Cth) is only the latest enactment of a provision that can be traced back through s298V *Workplace Relations Act 1988* (Cth) and s 334 *Industrial Relations Act* (Cth) to s 5 of the *Conciliation and Arbitration Act 1904* (Cth). The history and rationale of the reverse onus is set out in *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257 at 266-271.

In light of the significant international recognition of a shifting burden as a preferable method of inquiring into alleged discrimination, and the century-long operation of such a provision in workplace discrimination legislation in Australia, I **submit** the SDA should be amended to shift the burden of proof in terms similar to those in the UK SDA and s809 *Workplace Relations Act* (Cth).

5. Family responsibilities

After ratifying ILO 156 the Commonwealth Government of the time took the shortest available route to legislate for 'family responsibilities' discrimination, amending the SDA to include family responsibilities as a further, but limited, ground.

I agree with HREOC that using the SDA in this way implies a nexus between a person's sex and their family responsibilities (HREOC, *It's about time: Women, men, work and family* 2007, at pp 54-55). This unwarranted implication would be avoided if there was separate legislation for discrimination on the ground of family responsibilities; in this regard, consideration could be given to HREOC's recommended *Family Responsibilities and Carers' Rights Act*.

But the SDA amendment to make provision for discrimination on the ground of family responsibilities is unfinished business. It is clear from the Second Reading Speech for the amending Act that it was Parliament's intention to legislate further for discrimination on the ground of family responsibilities: the amendment was said to be 'merely a 'first stage', and 'the second stage is to enter into wide ranging consultations with a view, at this point, to a further amendment to the SDA to prohibit more generally, discrimination in employment on the ground of family responsibilities'' (Senator R McMullan, Second Reading Speech, Senate, 24 November 1992). The second stage has not happened, with the result that the SDA is deficient in this area in three significant respects.

First, the SDA provides for only *direct* discrimination on that ground. Unable to claim indirect discrimination on the ground of family responsibilities, women, but not men, can argue indirect *sex* discrimination (see eg *Howe v Qantas Airways Ltd* [2004] FMCA 242).

But the argument is not available to men simply because, statistically, men are not likely to be disadvantaged by a requirement that is incompatible with carers' responsibility. I agree with HREOC that 'the result of women's reliance on indirect sex discrimination provisions may be that the law as it stands further entrenches the position of women as unpaid caregivers by linking only women to family responsibilities. This may in turn further discourage the more equal sharing of family/carer responsibilities and limit women's workplace participation' (*It's about time*, at p 55). Accordingly, I **submit** amendment to the SDA to proscribe indirect discrimination on the ground of family responsibilities.

Further, under the SDA, family responsibilities is ground for a discrimination complaint only for dismissal from employment, and not at all for the process of offering employment or for terms and conditions of employment. This gap in the legislation is part of the unfinished business of the original amendments. Accordingly, I **submit** amendment to the SDA to extend coverage of the family responsibilities provisions to all areas related to employment, and not merely dismissal. Relying on ILO 156, there is no constitutional barrier to the Commonwealth's doing so.

Finally, under the SDA, family responsibilities is ground for a discrimination complaint only in the area of employment and not in other areas of activity, such as education, accommodation, and provision of goods and services. ILO 156 would not provide a constitutional basis for legislating for other areas of activity, but Article 26 ICCPR would. In its *It's about time* report, HREOC makes no mention of extending family responsibilities discrimination to other areas. The NSW Law Reform Commission's *Review of the NSW Anti-Discrimination Act* recommended against extending family responsibilities discrimination to other areas, "[g]iven the difficulties in formulating an appropriate prohibition and relevant exceptions (at [5.219]). This difficulty is an insufficient reason to not address discrimination in society, and I **submit** the SDA should be amended to proscribe discrimination on the ground of family responsibilities in areas of activity such as such as education, accommodation, and provision of goods and services.

Quite apart from finishing the unfinished legislative business of providing for family responsibilities discrimination, the limited scope of the ground needs to be addressed. The SDA limits protection to those who have 'family' care responsibilities, as defined in s4A. But anti-discrimination legislation in States and Territories extend the care relationship to varying degrees. In Western Australia, for example, the care relationship extends to 'having [voluntary, ie unpaid] responsibility for the care of another person, whether or not that person is a dependant' (*Equal Opportunity Act* s4(1)), and in Victoria 'carer means a person on whom another person is wholly or substantially dependent for [voluntary, ie unpaid] ongoing care and attention' (*Equal Opportunity Act* s4(1)).

In its report *It's about time* (p58), HREOC agrees that the SDA ought be amended to extend to all forms of care, and to broaden its definition of family members, on the basis that to do so 'would provide protection to workers based on the nature of their responsibilities rather than the more arbitrary nature of their relationship to the person requiring care'. While HREOC suggests that CEDAW, ILO 156, and CRoC are sources of constitutional power for these extending the definition, so too is the 'any other status' dimension of Article 26 ICCPR.

I **submit** the SDA should be amended to redefine the concept of 'family responsibilities to extend to the carer responsibilities described, for example, in the Western Australia legislation.

6. Exceptions and exemptions

The SDA is subject to many and varied exceptions from its operation, and allows exemptions to be sought (Part II Div 4).

To an extent, an underlying rationale for the exceptions is a recognition of a public/private divide in the way legislation ought properly regulate conduct. But this rationale does not consistently explain the exception and exemptions, and is in any event a n excessively rigid rationale to apply as a rule, in advance of the particular circumstances that may arise.

There is an alternative approach to exceptions that avoids multiple and inconsistent provisions, and that conforms with a human rights-based approach to the SDA: permit discriminatory conduct within 'reasonable limits'. This test is the usual approach to exempting conduct from human rights guarantees: see eg s28 *Human Rights Act* (ACT); s7 *Charter of Rights and Responsibilities* (Vic); s1 *Canadian Charter of Rights and Freedoms*; s36 South African Constitution).

Relying on the extensive human right jurisprudence on 'reasonable limits', exceptions and exemptions for discriminatory conduct would be permitted after assessing (1) the importance of the objective to be achieved by the discriminatory conduct, (2) whether the conduct was necessary to achieve that objective, (3) whether there were available alternatives to the discriminatory conduct, and (4) he degree of proportionality between the effects of the discriminatory and its objective. This approach to excepted conduct is referred to as the proportionality test.

A proportionality test in the SDA would enable people to make an assessment of the discriminatory nature of their proposed conduct, and require them to turn their mind to important questions of possible effects, and alternatives. It would enable people to act defensively, in anticipation of conduct that could be discriminatory. This is consistent with an approach to anti-discrimination laws that operates to promote compliance rather than focussing on punishing and remedying individual breaches.

A proportionality test in the SDA does not discriminate in making an exception available – no person or organisation is excluded or protected from the scope of the Act, and all have the opportunity to make a case for excepted conduct.

I **submit** the SDA should be amended to repeal all exceptions, to provide instead for a proportionality test that recognises that reasonable limits on the guarantee of non-discrimination, and to specify that exemptions will be granted on the same test.

7. Sex-based vilification

Women continue to be subjected to a wide range of offensive conduct, much of which offends, humiliates, intimidates, insults or ridicules them simply because of their sex, or a characteristic attributed to their sex. This conduct is commonly categorised as vilification. While vilifying conduct may also be discriminatory, it takes place in circumstances that are much more extensive than the areas of activity covered by anti-discrimination legislation, particularly in public places, social settings, popular

entertainment and the electronic media, and remains outside the scope of legal regulation (see eg S Bronitt 'Hate Speech Sedition and the War on Terror' in *Hate Speech and Freedom of Speech in Australia*, K Gelber and A Stone (eds), Federation Press, 2007).

Both discrimination *and* vilification are proscribed under the *Racial Discrimination Act*. Among States and Territories only Tasmania makes provision for sex-based vilification (s17(1) *Anti-Discrimination Act* 1998). An oversight in the Tasmanian legislation, which should be addressed in any similar provision in the SDA, is the failure to extend the ground of vilification to characteristics of sex; the characteristics extension under that Act is limited, in s14, to occasions of direct discrimination.

I **submit** the SDA should be amended to proscribe sex-based vilification in terms similar to those in Tasmania.

8. Summary

For the reasons I have outlined above, I **submit** the SDA should be amended to

1. restate the purpose of the Act, placing the Act in a rights-framework and requiring interpretation that is consistent with Australia's obligations under relevant human rights instruments.
2. enable the promulgation of standards as recommended by the Australian Law Reform Commission.
3. replace a 'comparator' test for discrimination with a 'detriment' test as recommended by the NSW Law Reform Commission and enacted in the ACT.
4. shift the burden of proof, in terms similar to those in the UK SDA and s809 *Workplace Relations Act* (Cth).
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6. extend coverage of the 'family responsibilities' provisions to all areas related to employment and not merely dismissal.
7. proscribe discrimination on the ground of family responsibilities in areas of activity such as such as education, accommodation, and provision of goods and services.
8. redefine the concept of 'family responsibilities' to extend to the carer responsibilities described, for example, in the Western Australia legislation.
9. repeal all exceptions and instead: provide instead for a proportionality test that recognises reasonable limits on the guarantee of non-discrimination, and specify that exemptions will be granted on the basis of the same test.
10. proscribe sex-based vilification in terms similar to those in Tasmania.

Associate Professor Simon Rice OAM
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Associate Professor Simon Rice OAM is Director of Law Reform and Social Justice at the ANU College of Law.

Since 1981Simon has worked as a volunteer, staff member, director, board member and consultant in many community legal centres in NSW, including Redfern, Kingsford and Macarthur legal centres. He has been Director of the NSW Law and Justice Foundation, and a Board member of the NSW Legal Aid Commission. He was a consultant to the NSW Law Reform Commission's Review of the NSW *Anti-Discrimination Act*.

Since 1996 Simon has been a part-time judicial member of the NSW Administrative Decisions Tribunal in the Equal Opportunity Division. From 2000-2004 he was President of Australian Lawyers for Human Rights. In 2002 he was awarded a Medal in the Order of Australia for legal services to the economically and socially disadvantaged.

Simon was a lecturer in the UNSW Law Faculty 1989-1995, and taught at Sydney University Law Faculty in 2000 and 2001. He was a senior lecturer in the Division of Law at Macquarie University from 2005-2007.

Recent publications include

- Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials*, The Federation Press, Sydney, 2008
- Simon Rice and Scott Calnan, *Sustainable Advocacy: capabilities and attitudes of Australian human rights NGOs*, Australian Human Rights Centre, Sydney, 2007
- Gordon Renouf, Simon Rice and Roger West, *Review of the NSW Community Legal Centres Funding Program: Final Report*, Legal Aid Commission of NSW, Sydney, 2006
- Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice; Human Rights Law in Australia*, The Federation Press, Sydney, 2004.