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 Australian Council of Trade Unions (ACTU)

August 2008

INTRODUCTION

The ACTU is the peak body representing 47 unions and almost 2 million working Australians.

We welcome this opportunity to make a submission to the Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality. Our submission focuses on discrimination in employment.

The introduction of the *Sex Discrimination Act* (SDA or the Act) almost 25 years ago, has played an important role in protecting women from discrimination and stating the social unacceptability of sex based discrimination and harassment. However, women still fare worse than men on a number of key measures of equality in employment:

- Women earn on average 18.4% less than men;[1]
- Women have $3 to the $10 men have in their superannuation accounts;[2]
- Women are almost twice as likely to be under-employed than men;[3]
- Over half of all working women experience sexual harassment;[4]
- Women are under-represented in senior positions in organizations;[5]
- Women are over-represented in industries characterised by casual, part-time and low paid employment;[6] and
- Inequality of opportunities for (primarily female) employees with caring responsibilities is emerging as a key form of systemic discrimination.

Discrimination in employment can impose severe personal costs on the individual employee, including stress, victimisation, loss of self esteem, career damage, job loss and financial hardship.

The costs to employers can include low staff morale, a negative work environment, low productivity, high staff turnover and inability to attract and retain skilled employees.[7]

More generally, disadvantaging a section of the community on a systemic basis also has broader social and economic costs.

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[1] ABS 6310.0 August 2007

[2] Clare, Ross.2007 *Are retirement savings on track?* Association of Superannuation Funds of Australia. Available at www.superannuation.asn.au

[3] ABS 6105.0 Australian labour Market Statistics, July 2008

[4] Human Rights and Equal Opportunity Commission (HREOC), 20 Years On: The Challenges Continue, 2004

[5] Women hold just 7% of Australia's top earner positions: EOWA Census on Women in Leadership January 2008.

[6] ABS 6310.0 August 2007

[7] For example, a survey of women engineers in 2007 found that 42.3% of respondents, over half of whom were recent graduates, had experienced gender based discrimination. This survey estimated that women are leaving the engineering profession 38.8% faster than men, with anecdotal evidence suggesting that difficulty in balancing work and family responsibilities is a key factor.APESMA 2007, APESMA Women in the Professions Survey Report.

The economic cost of under-utilisation of a highly educated and experienced section of the labour market such as women of child rearing age is well documented. [8]

The role of the Sex Discrimination Act in resolving individual complaints is critical and needs strengthening. However, in our submission, substantive equality between men and women workers will not be achieved if the primary mechanism continues to be remedial orders arising from individual complaints. A new framework to address systemic discrimination is required which contains three elements:

1. A positive approach including the restatement of the objective of the Act as achieving substantive equality between men and women and the introduction of a duty to eliminate sex discrimination;

2. New regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination and prevent its recurrence, and enforce non-compliance; and

3. Improvements in the way in which complaints are handled.

In our submission there are some shortfalls in the current regime which should also be addressed:

- The focus of the *Sex Discrimination Act* on individual complaints does not facilitate resolving systemic discrimination;

- There is inadequate advocacy support for complainants;

- The various regulatory agencies that deal with equal opportunity for women and the elimination of discrimination have limited rights to initiate investigations and claims of systemic discrimination;

- There are insufficient regulatory tools to encourage and assist organisations to prevent discrimination;

- The complaints process is time consuming, overly legalistic and costly; and

- The enforcement provisions in the Act are insufficient both in terms of regulation and the level of punitive damages, particularly when compared to similar jurisdictions such as occupational health and safety and consumer protection legislation.

We are hopeful that this Inquiry brings about changes that both address the current inadequacies in the Act as well as build its capacity to address a more modern understanding of systemic discrimination and encourage genuine progress towards gender equality in the workforce.

[8] The Government's Intergenerational Report noted the importance of maintaining workforce levels that can sustain a sufficient tax base for servicing an aging population. Treasury officials estimated that a 2.5% increase in labour participation rates would produce an additional 9% increase in economic output by 2022: Gruen, D & Garbutt, M., "The Output Implications of Tighter Labour Force Participation", Treasury Working paper, 2003-02, October 2003.

BRIEF SUMMARY OF RECOMMENDATIONS

1. A new framework for the Act which strengthens the individual complaints based model and better addresses class and systemic discrimination.

2. A new Object of the Act to achieve substantive equal opportunity.

3. Introduction into the Act of a positive duty to eliminate discrimination as far as is reasonably practicable.

4. A greater public agency role for the prevention of discrimination.

5. Greater synergy between the remedies against discriminatory behaviour and the promotion of positive measures to eliminate discrimination.

6. More regulatory tools to effectively eliminate discriminatory behaviour which provides preventative, enforceable regulations and punitive disincentives.

7. An improved complaint handling process that is free, efficient, and non-legalistic.

8. A role for Fair Work Australia in the resolution of discrimination complaints arising from the workplace.

1. A NEW FRAMEWORK TO ADDRESS SYSTEMIC DISCRIMINATION

1.1 The individual complaint model emphasized in the Act is limited in its ability to address systemic discrimination. It reinforces discrimination as an individual, 'once off' problem rather than systemic discrimination based on patterns and practices which consistently disadvantage certain groups.

1.2 In addition, the current remedies under the Act are designed to compensate the individual complainant rather than effect cultural change to address the underlying causes of discrimination.

1.3 Modern understanding of systemic discrimination recognises that while individual grievances need to be solved on an individual basis, this can be done within a framework that works towards addressing the cause of the inequality.

1.4 Therefore, to address systemic inequality, the anti-discrimination legislation needs to do more than prohibit discriminatory behaviour. It needs to encourage organisations to develop policies and practices that address the causes of inequality.

1.5 For example, substantive equality will not be achieved by prohibiting the requirement to attend training after normal work hours which discriminates against employees with family responsibilities, but rather by the obligation to consider how employees with family responsibilities may be able to attend training.

The Objective of the Act should include achieving substantive equality

1.6 Importantly, the current Act lacks an express objective to achieve substantive equality. The creation of a new objective of the Act to achieve substantive equality would provide a positive framework for cultural change to address systemic discrimination without giving rise to an enforceable cause of action.

1.7 The stating of this objective would have a positive effect in many areas of employment; for example, in promoting equal pay or in supporting employees with family responsibilities.

The Act should create a duty to eliminate discrimination as far as reasonably practicable

1.8 The Act currently does not require any positive duty to eliminate discrimination. The addition of a clear statement of the duty to eliminate discrimination as far as is reasonably practicable would help encourage the shift from a complaints driven model to a shared responsibility for the elimination of discrimination. This shared model applies in other areas where the law seeks to promote changed work practices and workplace behaviour, such as occupational health and safety.

1.9 Under this model, the onus would no longer solely be on the complainant to prove discrimination, but upon the employer to prove that steps were taken to address the alleged discrimination as far as was reasonably practicable.

1.10 A qualification that any positive duty on employers must be "reasonable" would protect employers from vexatious or spurious claims while being strong enough to enforce instances where reasonable steps where not taken to address and prevent discrimination. This concept is not new to employers who under the current legislation are exempt from vicarious liability if they 'take all reasonable steps' to prevent the discriminatory conduct of the employee.

1.11 The positive duty approach has been adopted by the UK Equality Bill 2008 which contains:

- a new public sector Equality Duty to address gender equity;
- extends the scope of affirmative action measures;
- allows for wider recommendations to deal with systemic workplace discrimination;
- specifically facilitates representative actions on behalf of individual and group complainants;
- includes equality as part of the governments ethical purchasing policies;
- facilitates investigations into sectors where systemic discrimination is an issue;
- provides for trade union based equality representatives in workplaces; and
- greater transparency of workplace practices including pay equity.

1.12 Recent reviews of Victorian and West Australian Equal Opportunity legislation have also recommended placing a positive duty on employers to eliminate sex discrimination and promote gender equality.

The Act requires an effective mechanism for group complaints in order to deal with systemic discrimination.

1.13 The current Act does not include an effective mechanism for group complaints to deal with systemic discrimination which are beyond the resources of an individual complainant.[9]

1.14 Systemic discrimination is most evident in the work environment through:

- Pay inequity and job segregation;
- Lack of family friendly policies such as flexible work arrangements;
- Lack of access to unpaid parental leave;
- Loss of employment opportunities associated with returning to work from parental leave; and
- Disparity in retirement incomes.

1.15 In the employment area, for example, an effective mechanism for group complaints would enable action to be taken on a company or industry-wide basis

[9] While the Act does permit complaints to be made on a representative basis, case law requires common questions of law and fact to all members of the class and similar allegations of discrimination across all members of the class. This can be problematic where the discrimination complaint of a representative group affects a larger group and should be addressed statutorily in the Act.

on gender equality issues such as equal pay in a comprehensive way which is currently beyond the scope of an individual applicant.

Definitions relating to direct and indirect discrimination should be reviewed

1.16 Current definitions relating to direct and indirect discrimination effectively preclude many claims of systemic discrimination.

1.17 The current definition of direct discrimination requiring unfair comparison with a male comparator is problematic where there is no evidence available of a male in the same or similar circumstances.[10]

1.18 The requirement for a direct male comparison particularly precludes pay inequity claims where male and female workers perform different types of work, or between different workplaces or on the basis of occupational segregation.

1.19 Similarly, the current definition of indirect discrimination based on the imposition of a condition or practice that disadvantages the claimant, has been interpreted too narrowly and should be clarified legislatively.[11]

1.20 The Act should clarify the elements of the test for determining the 'reasonableness' of a disadvantaging condition, requirement or practice. The test should require an employer to establish that they considered alternatives appropriate to the individual's circumstances and had a high degree of business necessity in deciding to impose the condition, requirement or practice. The circumstances in which judges can set aside findings on reasonableness should be set out in the Act.

Discrimination on the grounds of family responsibilities should not be restricted

1.21 Currently, claims of discrimination on the grounds of family responsibilities are limited to direct discrimination resulting in dismissal.[12] By its very nature, discrimination on the basis of family responsibilities is likely to be indirect through requirements to conform to policies that disadvantage workers with family responsibilities. The current restriction results in many such cases having to be brought under direct or indirect sex discrimination. This effectively precludes men with family responsibilities from a remedy for discrimination.

1.22 Indirect discrimination has also been a problematic head under which claims of discrimination on the grounds of family responsibilities may be brought because the courts have required that the discriminating condition imposed on the

[10] Commonwealth v Evans [2004] FCA 654, where a case failed on the basis that there was no evidence available of a male comparator who took similar amounts of leave to care for dependents.

[11] Kelly v TPG Internet Pty Ltd 2003 176 FLR 214, where it was held that the complainant was not discriminated against when her employer denied her part-time work upon return from parental leave because there was no evidence of other employees in managerial positions employed part-time by the respondent.

[12] In addition, under the Act, HREOC is *not* empowered to prepare guidelines on the avoidance of discrimination on the grounds of family responsibilities.

complainant needs to be a pre-existing condition.[13] This is particularly a problem in cases concerning return to work from parental leave where refusal of part-time work has been interpreted as merely a refusal of a benefit rather than an imposition of a discriminatory condition to work full-time.[14]

1.23 The protection afforded to those with family responsibilities should be broad enough to encompass caring responsibilities including care for dependents with a disability, chronically ill or the elderly. There is significant evidence that accommodation of employee's caring and paid work responsibilities will be a critical factor in the future supply of carers in our society.[15]

1.24 This lack of redress for discrimination on the grounds of caring responsibilities undermines the capacity to address a significant modern source of both direct and indirect discrimination and is inconsistent with the objects of the Act and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[16]

1.25 The CEDAW defines discrimination against women as *"…any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*[17]

1.26 The CEDAW definition of discrimination is broader than that contained in the current Sex Discrimination Act and its adoption in the Act would overcome many of the limitations discussed earlier.

1.27 Adopting the CEDAW terminology would broaden the capacity of the Act to deal with systemic discrimination and bring the Act more in line with State EO legislation which variously include as grounds for discrimination the additional attributes of marital, parental or carer status, sexuality, gender identity and lawful sexual activity. An additional ground should be created to protect employees seeking flexible working arrangements in order to balance work and caring responsibilities.

[13] Kelly v TPG Internet Pty Ltd 2003 176 FLR 214
[14] Kelly v TPG Internet Pty Ltd 2003 176 FLR 214
[15] See ACTU Submission to House of Representatives 'Better Support for Our Carers' Parliamentary Inquiry July 2008.
[16] Importantly, Australia's ratification of CEDAW is the basis of the SDA. Adopting the CEDAW definition of discrimination against women aligns the legislation more closely with the Convention.
[17] Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, www.un.org/womenwatch/daw/cedaw

2. A GREATER PUBLIC AGENCY ROLE FOR THE ELIMINATION OF DISCRIMINATION AND PROMOTION OF GENDER EQUITY

HREOC should be empowered to take representative actions on behalf of complainants

2.1 Society has legitimate expectations that anti-discrimination measures will be advanced by government and its agencies. Without a public role in prosecution and enforcement, sex discrimination will continue to be perceived as a private matter to be dealt with by an individual, when in reality sex discrimination is a matter of public interest.

2.2 Under the current system, HREOC has no right to initiate proceedings and is reliant on individuals making complaints.[18] Nor does HREOC have the capacity to support or assist complainants with their discrimination cases.

2.3 Complainants of sex discrimination are likely to be members of disempowered groups. Expecting them alone to identify discrimination, prosecute claims and enforce outcomes without any public assistance is a fundamental flaw in the current anti-discrimination legislative scheme.

2.4 HREOC should be able to take representative actions, including the capacity to stand in the shoes of a complainant or group of complainants where this is appropriate.

2.5 In addition, HREOC should provide a broad range of advocacy services including support for complainants in the form of preparation of materials and provision of advice to assist non-lawyer represented applicants in proceedings under the Act, including conciliation.

HREOC should have powers to investigate and initiate own motion proceedings

2.6 In particular, a more proactive public advocacy role is required to effectively deal with systemic discrimination. It is beyond the capacity of most individuals to identify systemic discrimination let alone find the resources to follow through a group complaint.

2.7 The Act should provide a capacity for regulatory agencies to initiate investigations or "own motion" proceedings where it is in the public interest and there is concern that discrimination is occurring or is likely to occur. The agency should be able to initiate an own motion proceeding on behalf of a group or class of complainants irrespective of whether a complaint has been lodged.[19]

2.8 The Act should empower the Sex Discrimination Commissioner to intervene in any proceeding in order to promote the objects of the Act.

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[18] The right to prosecute for breaches is limited to victims under the SDA.

[19] As is the case in Queensland for example where the Commissioner has the power to initiate an investigation into contravention of or possible offence against the Act- s.155

2.9 HREOC's existing amicus curiae powers should be extended to include proceedings dealing with the setting of minimum wage rates and before State courts and tribunals.

HREOC should have greater powers of investigation, research, awareness raising and education

2.10 These powers should include the issuing of best practice strategies, compliance guidelines, and capacity to monitor the effectiveness of the Act in eliminating discrimination.

2.11 Evidence suggests that HREOC's role in promoting an understanding of discrimination, articulating the merits of non-discrimination and disseminating best practice strategies and compliance guidelines have been successful tools in addressing discrimination.[20]

2.12 The SDA should be amended to require the Sex Discrimination Commissioner to publish, or otherwise make available, a public register of (de-identified) settlements reached in conciliation. This could be done through a public report or through HREOC's annual report to Parliament.

HREOC should have a greater enforcement role

2.13 There must be a stronger role for public agencies in enforcing compliance with the Act. The practice of relying on victims to enforce orders is essentially self regulation and is an unacceptable feature of the current anti-discrimination law.[21]

2.14 Restricting HREOC's rights to prosecute and enforce cases compares unfavourably with powers of other regulatory schemes in Australia such as occupational health and safety, and consumer and competition law.

2.15 It also compares unfavourably with similar anti-discrimination schemes in the UK and the US where regulatory agencies have the power to initiate claims and publicly prosecute them and to enforce judgments and settle them.[22]

There needs to be greater synergy between EEO and anti-discrimination legislative schemes.

2.16 The legislative history of the Equal Employment Opportunity for Women in the Workplace Act 1999 (EEOWA) Act and the Sex Discrimination Act resulted in separate passage and operation of the two Acts. The lack of cohesion between these two pieces of legislation has resulted in a significant lack of coordination between preventative measures and sanctions for breaches of the Sex Discrimination Act. This has severely undermined any capacity for linking affirmative action measures as a means of addressing sex discrimination.

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[20] See Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, pp.19-27

[21] HREOC does not have the power to enforce judgments or settlement agreements that have been made.

[22] Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005 P.14

2.17 It may be time to consider the integration of the Act, other anti-discrimination legislation including those dealing with age, race and disability discrimination and the EEO legislation as a general 'Equality Act'. This would facilitate a simple, comprehensive anti-discrimination and equal opportunity scheme which would be able to address intersecting forms of discrimination.

2.18 In any event, the EOWA has failed both as a source of public approbation of discrimination and as an advocate for the elimination of discrimination.[23] The terms of reference for this Inquiry should extend to the consideration of other appropriate regulatory tools to promote best practice and affirmative action measures.

3. THE ARMORY OF REGULATORY TOOLS AVAILABLE UNDER THE ACT NEEDS TO BE BROADENED.

3.1 For regulation to be most effective there needs to be a full range of powers including the 'pyramid' of self-regulation, enforceable regulations, and punitive sanctions.[24]

3.2 The current system provides a low guidance and self-regulation level and a high judicial punitive level, but lacks the middle tier of 'enforced self- regulation'. This middle tier of enforced self- regulation is necessary to encourage, educate and assist organisations to eradicate discrimination.

3.3 The 'soft regulation' mechanisms employed by HREOC and EOWA are likely to have more impact on employers who need to attract and retain highly skilled and marketable employees. Arguably, these employers already provide programmes to address discrimination and positive schemes such as Work and Family Awards are an effective affirmation of good workplace policy.

3.4 Stronger regulatory mechanisms however are required to support a discrimination-free workplace for employees who have less labour mobility and whose employers may be more resistant to implementing measures to address discrimination. A recent survey conducted by the Shop Assistant's Union (SDAEA) found that over one third of respondents who had experienced sexual harassment in the workplace did not report it, largely because they thought it would be ignored by management.[25]

3.5 Whilst the objects of the current Act include elimination of discrimination, the individual based remedy often results in the victim resigning from work and without a focus on organisational responsibility or assistance for organisations to change.

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[23] The Equal Opportunity for Women in the Workplace Act 1999(Cth) applies only to workplaces of more than 100 and has virtually no sanctions for non-compliance.

[24] Ayres and Braithwaite model of effective regulation requires three tiers of regulation low, medium and high. In Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, p.14

[25] The Shop, Distributive and Allied Employees Union Membership Survey 2005

There is ample precedent for a more proactive role and use of a greater range of regulatory tools to prevent discrimination.

3.6 The use of investigative powers, issuing of improvement notices, and the enforcement of the positive duty to provide a safe working environment under Occupational Health and Safety law contrast with the lack of similar regulatory tools under the SDA.

3.7 Similarly, the powers vested in the Australian Competition, and Consumer Commission (ACCC) to enforce compliance with the Trade Practices Act 1974 (TPA) include information gathering (including the right to issue statutory demands for information and requiring people to appear before the Commission, and the right to enter and inspect premises), information dissemination, assisting organisations to resolve low level or accidental contraventions, formal *public* settlements and enforceable undertakings, initiating litigation proceedings against organisations or individuals, intervening in private court proceedings where appropriate and monitoring and enforcing court orders.

3.8 There is no justification that sex discrimination be treated with less gravitas and afforded fewer powers of prevention and enforcement than occupational health and safety law or consumer protection law.

Preventative measures

3.9 Confidentiality of settlements also results in a lack of case law to provide guidance to both complainants and employers as to what constitutes sex discrimination and how to best manage the risks associated with contravention of the Act.

3.10 Most claims of discrimination are brought by employees in small businesses. To effectively eliminate discrimination *all* public and private organisations should be required to meet basic *minimum reporting* obligations irrespective of the size of the organisation.

3.11 Trade union based workplace equality representatives would provide employees and employers with greater support to address discrimination in the workplace.

3.12 In order to effectively address pay inequity, *mandatory equal pay audits* should be a feature of the regulatory regime and employers should be required to include the results in their reporting cycle.

3.13 Accounting standards should be amended to require auditors to consider the risk of non-compliance with the Act in *routine company audits*.

3.14 *Evaluation of all government regulation* should be prior to its introduction to assess its impact on achieving substantive gender equality.

3.15 *Ethical purchasing policies* should be adopted by government agencies to further promote the adoption of equality provisions in organisations.

3.16 The Act should enable the relevant anti-discrimination agency to require, in addition to any remedy achieved by the complainant, *recommendations for organisational change* to prevent further discrimination as a matter of course.

Enforceable regulations

3.17 *Enforceable codes or standards*, developed voluntarily after consultation with all affected groups, would be of great assistance to organisations wishing to ensure that they meet the requirements of the duty to promote equality and non-discrimination, as well as assisting tribunals and courts in applying the legislation.

3.18 The ACTU strongly supports an ability to issue *improvement or unlawful action notices* where it has evidence of discriminatory behaviour or practices. Like enforceable undertakings, improvement notices can help avoid costly legal proceedings and allow for direct engagement with the person or organisation breaching the Act.

3.19 *Enforceable of undertakings* and *mandatory action plans* in cases where discrimination has occurred, and to enforce them if broken, is an important and cost-effective alternative to litigation and is supported by the ACTU.

Punitive disincentives

3.20 Without adequate punitive mechanisms, the self-regulatory and enforceable regulatory levels of the legislation lack a crucial incentive for organisations to eliminate discrimination.

3.21 Exemplary and punitive damages are not available under the SDA which compares unfavourably to most comparable schemes including anti-discrimination schemes in the US and UK; and Occupational Health and Safety, consumer protection, and unfair dismissal jurisdictions in Australia.[26]

3.22 In addition, under the current system there is no punishment aspect for dealing effectively with particularly intransigent repeat defendants.

3.23 In any event, the level of damages for sex discrimination is very low and should be benchmarked equivalently to other common law amounts.[27]

3.24 The low level of punitive sanctions attached to breaches of anti-discrimination law is inconsistent with modern social expectations.

3.25 In the US, potential liability for higher damages has resulted in greater attention by organisations to implement anti-discrimination programs to minimise liability.

[26] For example, breaches of the TPA can attract penalties of up to $10m for organisations and up to $750,000 for individuals.

[27] Compared to for example the US the limit is set at $300,000 for punitive and $300,000 for compensatory damages. In Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, p.16

3.26 The larger sums of damages have generated greater publicity of sex discrimination cases and the concomitant threat of exposure of the identity of defendants, creating another incentive to address sexual discrimination.

3.27 Consideration could be given to *public exposure* of intransigent employers where this is deemed as an appropriate disincentive to further discriminatory behaviour.

Monitoring the effectiveness of the Act

3.28 Agencies' monitoring of discrimination inquiries and complaints must be extended to include de-identified details of confidential settlements, with capacity for further investigation into a particular employer, sector or group of people where it is deemed appropriate.[28]

3.29 Agencies tracking of defendants should include the capacity to identify repeat offenders problem employers. The agency should have the capacity to follow up such employers to enforce further recommendations for change.

3.30 Mechanisms need to be established that allow agencies to assess the *quality and standard* of programmes employed by organisations to address sex discrimination.

3.31 Indicators or benchmarks against which the extent of discrimination and the progress towards equality can be measured should be conducted by agencies on a regular basis and generate a review of the effectiveness of the anti-discrimination system.[29]

4. IMPROVED COMPLAINT HANDLING PROCESS

4.1 The Act must provide effective redress to victims of sex based discrimination. This is both as a matter of justice and as a symbol of the seriousness that breaches of the Act are afforded. The features of this process must be efficiency, affordability and informality.

Efficiency

4.2 The current complaint resolution process is excessively cumbersome. In its submission, the SDAEA points out that, *"The process of investigation, conciliation, mediation, then a directions hearing, then a hearing is cumbersome and too costly in terms of time and money… By this time, most complainants just want the case to be over and are likely to accept a lesser amount of compensation. This is especially so in cases where the individual is also responsible for legal fees."*

[28] For example, an analysis of 2004 complaints to VEOHRC found that the retail industry was an important source of sex discrimination complaints: Sara Charlesworth Submission to the Victorian Equal Opportunity Review, 2007

[29] For example, gender statistics provided by the United Nations Economic Commission for Europe on Work and the Economy and the Gender and Work database at York University in Canada. Also the WA Office of Women's policy keeps a modest score card against indicators such as representation of women in public life, labour force participation, health and well being of women in senior positions and so on.

Cost

4.3 Legal representation at a federal court is very costly and acts as a deterrent to complainants pursuing remedies following a failed conciliation.

4.4 The resources (including financial, emotional and time) required are beyond the means of most workers, especially if their situation has meant that they are no longer employed. Consideration must be given to the provision of free advocacy support and representation where this is considered appropriate.

Conciliation

4.5 Conciliation is a critical component in achieving justice for victims of sex discrimination. Due to lack of resources, the conciliation process conducted through HREOC is too lengthy.

4.9 The practice of well-resourced employers engaging legal representation undermines the process. Legal representation of complainants or defendants in conciliation should be restricted to special circumstances.

4.10 The conciliation process through should have the following features:

a. be free;
b. be adequately resourced;
c. normally contact the parties immediately on receipt of a complaint for initial informal "without prejudice" discussion, and be in a position to arrange a conciliation meeting within a fortnight, or within 48 hours if the matter is urgent;
d. conciliate or mediate flexibly and informally.

4.11 In addition, this review should not only ensure that the complaint process is made more efficient, but also consider where conciliation is best performed.

4.12 The current practice of HREOC to maintain impartially as a conciliator undermines its capacity to provide support to complainants of sex discrimination.

4.13 The ACTU supports the broad principles of independence of conciliation from advocacy and promotion of anti-discrimination measures.

4.14 The government may wish to consider a separation of the conciliation and complaint handling function from the investigation, advocacy, education, facilitation and awareness raising role such as the models adopted in the UK and

The Role of Fair Work Australia

4.15 Given the significant majority of discrimination complaints are employment related[30], and the proven capacity of the AIRC to resolve complaints effectively and efficiently, the ACTU would support the referral or shared jurisdiction of employment related complaints with Fair Work Australia (FWA).

[30] In 2006/7 81% of complaints were employment / work related- HREOC Annual report 2006/7.

4.16 Employees and their trade unions have conventionally seen the *Workplace Relations Act* and the Australian Industrial Relations Commission ("the AIRC") as preferable mechanisms for dealing with workplace disputes about discrimination.

4.17 The main reason for this is:

- Expeditious resolution of disputes;
- Low cost to parties;
- Flexible utilisation of personnel, particularly in the usual practice of the same AIRC member conducting both conciliation and arbitration of a matter;
- Accessible, informal and non-legalistic manner.

4.18 The ACTU supports the policy of the current government to provide a 'one-stop-shop' for the resolution of workplace relations disputes. We see merit in a similar one-stop-shop approach in dealing with all forms of discrimination at work.

4.19 Without knowing the legislative structure of the proposed Fair Work Australia, it does seem conceptually appropriate to consider that FWA could have responsibility for all work related grievances including discrimination.

4.20 At least functions of the Sex-Discrimination Commissioner, but functions performed more broadly by HREOC Commissioners, could be considered for dual appointment in the context of the development of Fair Work Australia.

4.21 Further, the performance of conciliation and judicial functions within the framework of Fair Work Australia would facilitate a more streamlined process of dispute resolution.

5. NATIONAL HARMONISATION

5.1 The ACTU is recognizes that the government and business are concerned to eliminate duplication of regulation. Given the limited time available for this inquiry the ACTU has not developed a policy approach to potential harmonisation of anti-discrimination laws.

5.2 Our approach to harmonisation of health and safety laws has been to argue that that harmonisation should not undermine existing rights enjoyed under relevant State or Federal Acts.

5.3 If consideration were given to harmonisation of anti-discrimination law, the process should be directed to an overall lifting of anti-discrimination standards – standards expected by the community – not a series of trade-offs or, worse, a lowest common denominator cost cutting approach.

5.4 The overriding concern, however, is that there is effective legislation, whether Federal and/or State, to ensure equality of opportunity is achieved; and that requirements for equal treatment are enforced as simply and expeditiously as possible.

RECOMMENDATIONS

1. **A new framework for the Act which strengthens the individual complaints based model and better addresses class and systemic discrimination** through:

   - Providing a mechanism for group complaints to deal with company and industry wide gender equality issues currently beyond the scope of an individual applicant;
   - Removing current barriers to addressing systemic discrimination as a result of the narrow definitions of discrimination;
   - Removing the restrictions on redress for discrimination on the grounds of family and responsibilities;
   - Affording all those with caring responsibilities protection under the Act; and
   - Adopting the broader CEDAW [31] definition of discrimination.

2. **A new Object of the Act to achieve substantive equal opportunity** which encourages organisations to develop policies and practices that address the causes of inequality.

3. **Introduction into the Act of a positive duty to eliminate discrimination as far as is reasonably practicable** which encourages the shift from individual responsibility to make a complaint to a shared responsibility to eliminate discrimination.

4. **A greater public agency role for the prevention of discrimination** including:

   - The capacity to take representative action on behalf of individual or group complaints;
   - Provision of general advocacy support to complainants during all stages of a proceeding;
   - Increased powers of investigation, own motion and representation of a class of complainants to deal with systemic discrimination in particular; and
   - A greater role in enforcement and compliance of orders.

5. **Greater synergy between the remedies against discriminatory behaviour and the promotion of positive measures to eliminate discrimination** including consideration of merging equal employment opportunity and anti discrimination legislation into one single 'equality act'.

6. **More regulatory tools to effectively eliminate discriminatory behaviour which provides preventative, enforceable regulations and punitive disincentives** including:

   Prevention

   - Compulsory minimum reporting for all public and private organisations;

[31] Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, www.un.org/womenwatch/daw/cedaw

- Provide for trade union based workplace equality officers;
- Mandatory equal pay audits;
- Compliance with Act to be considered in routine company audits;
- Evaluation of the impact of proposed government regulations on gender equality;
- Ethical purchasing policies by government agencies; and
- Recommendations for organisational change to accompany any settled complaints.

Enforceable regulations

- Voluntary (enforceable) codes or standards;
- Enforceable undertakings and mandatory action plans as part of settlement of complaints; and
- Unlawful action and improvement notices.

Increased level of punitive damages

- Benchmarked equivalently to other common law jurisdictions; and
- Public exposure of organisations in breach of the Act where warranted.

Monitoring the efficacy of the SDA

- Publication of details of de-identified settlements;
- Capacity to investigate certain employers or sectors where appropriate and identify repeat offenders;
- Capacity to assess the quality and standard of anti-discrimination programmes; and
- Indicators and benchmarks to measure progress towards equality.

7. **An improved complaint handling process that is free, efficient, and non-legalistic** and which has a:

- Streamlined process;
- Robust conciliation process independent of HREOC to allow the Commission to provide advocacy support or representation where appropriate;

8. **A role for Fair Work Australia in the resolution of discrimination complaints arising from the workplace** including:

- The referral or shared jurisdiction of employment related complaints with Fair Work Australia for a one-stop-shop resolution of all work-based disputes; and
- Consideration of dual appointments to Fair Work Australia of HREOC Commissioners where appropriate; and
- Consideration of a streamlined conciliation and judicial process in resolving workplace based discrimination complaints by Fair Work Australia.