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Mr Peter Hallahan
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Standing Committee on Legal and Constitutional Affairs
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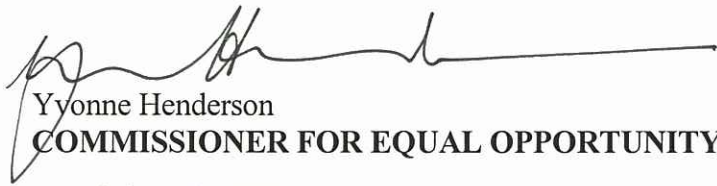
Dear Mr Hallahan

INQUIRY INTO THE EFFECTIVENESS OF THE *SEX DISCRIMINATION ACT 1984*

Thank you for your letter dated 2 July 2008 inviting me to make a submission to the Committee's inquiry into the effectiveness of the *Sex Discrimination Act 1984* (SDA).

Please find attached the Commission's submission.

Yours sincerely



Yvonne Henderson
COMMISSIONER FOR EQUAL OPPORTUNITY

13 AUG 2008

SUBMISSION OF THE WA EQUAL OPPORTUNITY COMMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE EFFECTIVENESS OF THE *SEX DISCRIMINATION ACT 1984*

Last month marked the 25th anniversary of Australia's ratification of the UN *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The Committee's inquiry is therefore timely and appropriate. The SDA was, and remains, a significant step towards the creation of a solid and enduring human rights legal framework in Australia. Since its enactment, all States and Territories have either enacted or expanded their own anti-discrimination laws. Like the SDA, the Western Australian *Equal Opportunity Act* (EOA) was passed in 1984, and came into force the following year. The provisions in the EOA dealing with unlawful sex discrimination were modelled on those in the SDA.

In 2006, the WA Equal Opportunity Commission ("the Commission") undertook a review of the EOA, the first in the Act's 20-year history.¹ Whilst the review made recommendations on a range of issues, including the grounds of discrimination, areas, remedies, and complaint investigation, some new concepts were considered. One of these was the creation of 'gender duty' that would apply to all public authorities when carrying out their functions. Such duties exist already in the UK, the most recent being the 'gender equality duty' under the *Sex Discrimination Act 1975*, which has been in force since April 2007.² This follows the creation of disability duty under the UK *Disability Discrimination Act 1995*, and a race duty under the *Race Relations Act 1976*, in 2006 and 2001 respectively. Gender equality policy initiatives have also been formalised in Canada³ and a number of countries in the European Union, where it is known as 'gender mainstreaming'.

The concept of a positive duty on public authorities to eliminate discrimination is not new to Australia. Since 2005, the Commission has been responsible for overseeing the implementation of the Substantive Equality Framework, a policy which requires state government agencies to identify and remedy deficiencies in the delivery of services to Aboriginal people and people from ethnically and linguistically diverse backgrounds.⁴ The guiding principle behind the Framework is the recognition that formal equality – where everyone is treated equally – does not necessarily result in substantive equality and, in fact, keeps systemic discrimination hidden from view.

In order to provide the same level of services to persons of different ethnic and racial backgrounds, an agency must first recognise their different needs, and the systemic practices that stand in the way of getting those services. Under the Framework program, each agency must go through five levels of implementation, starting with a commitment to implement, through to setting objectives and strategies, and concluding with review and evaluation.

¹ 'Review of the Equal Opportunity Act 1984', Equal Opportunity Commission, May 2007

² *Sex Discrimination Act 1975*, as amended by the *Equality Act 2006*. A similar duty commenced under the *Disability Discrimination Act 1995* in December 2006 and under the *Race Relations Act 1976* in 2001.

³ 'Federal Plan for Gender Equality', administered by Status of Women Canada.

⁴ 'The Policy Framework for Substantive Equality: responding to the different needs and priorities of individuals and communities', Department of Premier & Cabinet, Equal Opportunity Commission, www.eoc.wa.gov.au.

Although the Substantive Equality Framework addresses race discrimination, the model is applicable to different grounds of discrimination, as is the case in the UK.

The Commission believes that it is time for this type of approach to be recognised and applied, not just at policy level, but under Australian law. The existing rights-based approach to addressing discrimination, as formalised in the SDA and the other Australian discrimination statutes, relies too heavily on the capacity and willingness of individuals to assert those rights and commence legal proceedings. As a start to shifting the burden off individuals and on to institutions, the SDA should be amended to incorporate a gender equality duty, to apply to all Australian public authorities when carrying out their functions. Such an approach is consistent with, and advances the objective of, Article 2 of CEDAW.

The Commission also believes the SDA should be amended so that the existing function of the the Human Rights & Equal Opportunity Commission (HREOC) to initiate inquiries into matters relating to the grounds of discrimination covered by the SDA is broadened. This is discussed in more detail below.

THE GENDER EQUALITY DUTY

Under the UK statutory model, the gender equality duty requires public authorities to have ‘due regard’⁵ to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women.⁶ The duty recognises that *identical* treatment of men and women in employment and in the delivery of services does not automatically result in *equal* treatment. Once it is accepted that many existing policies and practices may actually entrench systemic sex discrimination, public authorities can set about replacing or modifying them. The duty aims to address sex discrimination experienced by both men and women in their dealings with public authorities. The stated objectives of the duty include improved policy development, better quality services which meet varied needs, and more effective use of talent in the workforce.⁷

The duty is a positive one, supported by a set of specific duties. These specific duties are designed to address the most important gender equality issues in an authority’s internal and external operations. Each authority is required to publish a ‘gender equality scheme’, explaining how it will meet the objective of complying with its general and specific duties. The duty complements the existing statutory right of an individual not to be discriminated against on the ground of sex.

The duty applies to all functions of all public authorities, with some exceptions.⁸ A ‘public authority’ is a body whose functions are of a public nature.⁹ This includes private entities or

⁵ ‘Due regard’ means that authorities should give due weight to the need to promote gender equality in proportion to its relevance – ‘Overview of the gender equality duty’, Equality & Human Rights Commission (UK) www.equalityhumanrights.com

⁶ *Sex Discrimination Act* s 76A (1)

⁷ ‘Gender Equality Duty Code of Practice-England & Wales’, Equality & Human Rights Commission (Code of Practice), at 7

⁸ For example, the duty does not apply Houses of Parliament, General Synod of the Church of England, Security Service, Secret Intelligence Service, and judicial functions – *Sex Discrimination Act* ss 76A(3), 76A(4)

voluntary organisations carrying out public functions on behalf of the government or a public authority. Those functions include policy-making, the provision of services, employment, and any decision or discretion exercised under statute.

Specific Duties

The specific duties are made and applied by order of the Secretary of State in consultation with the Equality and Human Rights Commission (EHRC).¹⁰ The EHRC commenced operation in October 2007, replacing the Equal Opportunities Commission. The duties and the authorities to which they apply are set out in the statutory 'Code of Practice for England & Wales' and the 'Code of Practice for Scotland.'¹¹

The specific duties¹² are:

- to prepare and publish a gender equality scheme;
- to consider the need to include objectives to address the causes of any gender pay gap;
- to gather and use information on how the public authority's policies and practices affect gender equality in the workforce and in the delivery of services;
- to consult stakeholders in order to determine gender equality objectives
- to assess the impact of the authority's current and proposed policies and practices
- to implement the actions set out in the authority's scheme within 3 years, unless it is unreasonable or impracticable to do so; and
- to report against the scheme every year and review every three years.

The Code of Practice provides authorities with detailed instructions on how to prepare a gender equality scheme, including choosing and prioritising objectives, who to consult, getting and using information, implementation, and analysis and monitoring. The EHRC can assist and advise authorities on how to develop and monitor their schemes.

Proportionality and Relevance

Under the duty, authorities are expected to prioritise action to address the most significant gender inequalities within their spheres of responsibility, and take action which is likely to bring about the best outcomes. The duty requires the authority to have due regard to both existing and future policies and functions when doing this.

Although the duty applies to authorities of all sizes, the way in which it is implemented should be appropriate to the size of the authority and its functions. When assessing the degree of relevance the duty has to the authority's different functions, the impact and extent of the discrimination as well as the number of people affected should be taken into account. If an authority forms the view that changing a policy or practice would lead to improved gender equality, then greater weight should be given to the case for change than the case for no change.

⁹ *Sex Discrimination Act* s 76A(2)

¹⁰ Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006

¹¹ *Sex Discrimination Act 1975* s 76E

¹² Code of Practice, at 6-7

Enforcement

The Code of Practice itself does not impose a legal obligation on authorities; it is more of a practical guide. However, if an authority fails to follow the Code, it may be called upon to explain how it has otherwise met its legal obligations under the general and specific duties.¹³ The EHRC has formal powers of enforcement in the event an authority fails to meet the gender equality duty, and informal measures are not acted upon. An authority may be served with a compliance notice, which requires the authority to meet its duty and provide information to the EHRC explaining what it has done to comply. If the EHRC believes that the authority has failed to comply or to provide information, it may apply to a court for an order.¹⁴ An authority can also be made to comply with the duty by way of judicial review, on application of EHRC or a party with an interest in the matter.

The Private Sector

In its current form, the gender equality duty does not apply to the private sector, except when a public authority contracts or partners with a private body to deliver its services. In its recent review of the *Victorian Equal Opportunity Act 1995*, the Department of Justice makes a range of recommendations for reform of equal opportunity law in Victoria.¹⁵ One of these is that the Victorian Act, to be re-named the *Equality Act*, contains a positive duty along the lines of the UK statutory duties.¹⁶ However, the Department observes that as the Victorian Act already applies to the private sector, so should the duty.¹⁷ As in the UK, enforcement would be initiated by the state equivalent to the EHRC, the Victorian Equal Opportunity & Human Rights Commission, without the need for a complaint to be lodged by an individual.

The Commission agrees in principle with the Victorian recommendation. Although, from an administrative and best practice point of view, it may be preferable that the public sector be the first to adopt the duty, ultimately there is no reason why a gender equality duty should not apply 'equally' to the private and public sectors.

ENLARGING THE HREOC INVESTIGATION FUNCTION

Under the SDA, the HREOC may at its own initiative, or when requested by the Minister, report to the Minister as to the laws that should be made by Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination on the ground of sex, marital status, pregnancy or potential pregnancy, or sexual harassment.¹⁸ The function does not specify that the HREOC is able to first carry out an investigation into such matters, although it may do anything incidental or conducive to the performance of the function.¹⁹

¹³ Code of Practice, at 5

¹⁴ *Sex Discrimination Act 1975* s 76D

¹⁵ 'An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report', Department of Justice, June 2008 (Victorian Report)

¹⁶ Victorian Report, at 41

¹⁷ Victorian Report, at 40

¹⁸ SDA, s 48(1)(g)

¹⁹ SDA, s 48(1)(h)

This function has been in the SDA since its enactment. Whilst there is little doubt the objects²⁰ of the SDA are advanced by such a function, it is still expressed in such a way that HREOC can only make recommendations about proposed laws or action the Commonwealth should consider in relation to the subject matter of the inquiry. By contrast, the equivalent function in a number of state and territory anti-discrimination statutes is considerably broader. For example, under the EOA, the Commission may at its own initiative carry out investigations, research, and inquiries relating to discrimination or sexual or racial harassment of the kinds rendered unlawful by that Act.²¹ Findings and recommendations made pursuant to an investigation carried out by the Commission may be directed towards public and private bodies, a particular industry, or a particular practice.

The Commission is currently conducting one such investigation, into whether or not there are practices in the private rental market that discriminate against persons of different racial or ethnic background who are renting accommodation, or seeking to. Unlike the HREOC, the Commission is not restricted to making recommendations as to what laws should be made, or action the government should take. Whilst changes to legislation may be relevant, the Commission is also able to make recommendations directly to private organisations and industry peak bodies about taking action to address discriminatory practices, if such practices are found to be occurring. Such a function is consistent with the objects of the EOA and within the Commission's remit. The Commission believes the HREOC should be given this same broad function under the SDA, and be permitted to initiate investigations and make recommendations beyond those currently provided for.

²⁰ SDA, s 3

²¹ EOA, s 80(a). See also NSW *Anti-Discrimination Act 1977*, s 119; QLD *Anti-Discrimination Act 1991*, s 235(b); TAS *Anti-Discrimination Act 1998*, s 6(c); NT *Anti-Discrimination Act 1992*, s 13(1)(f)