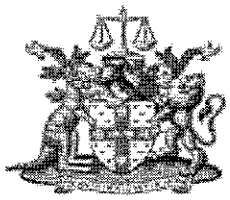


New South Wales Bar Association

Law Council
OF AUSTRALIA

Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality

Senate Standing Committee on Legal and Constitutional Affairs

15 August 2008

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Introduction

1. This joint submission made on behalf of both the Law Council of Australia (the **Law Council**) and the NSW Bar Association addresses each of the terms of references set out at (a) to (o) (excluding (j) and (m)) in the Committee's letter dated 2 July 2008.

2. In 1993, the now late Justice Lockhart made the following observation in the context of the *Sex Discrimination Act 1984 (Cth)* ('the *SD Act*'):

> *Anti- discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.*[1]

3. The effectiveness of the *SD Act* is impaired by complex concepts and technical language. The Law Council and Bar Association submit that the *SD Act* and discrimination law generally should not only be clear and readily understood by those who bear the obligation not to discriminate, employers, service providers, educators and like, but also by the beneficiaries of the right to be free from discrimination.

4. Moreover, the SD Act has historically been criticised for its limited scope and effect for the following reasons:[2]

   (a) It defines discrimination in terms of direct and indirect discrimination rather than in terms of equality, which would more closely reflect the text and purpose of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) on which it is based;

   (b) Its definitions of direct and indirect discrimination are complex;

   (c) It is not able to appropriately address systemic discrimination;

   (d) It is confined to limited areas of public life rather than all fields of activity;

   (e) Its operation and effect are not properly understood.

5. This submission, and the legislative amendments suggested herein, attempts to address each of these matters.

---

[1] *Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited and Ors* (1993) 46 FCR 301 at 326.

[2] See for instance *Equality Before the Law, Justice for Women* ALRC Report 69, 1994 ('*Equality Before the Law* Parts I and II')

Introduction

1. This joint submission made on behalf of both the Law Council of Australia (the **Law Council**) and the NSW Bar Association addresses each of the terms of references set out at (a) to (o) (excluding (j) and (m)) in the Committee's letter dated 2 July 2008.

2. In 1993, the now late Justice Lockhart made the following observation in the context of the *Sex Discrimination Act 1984 (Cth)* ('the *SD Act*'):

> *Anti- discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.*[1]

3. The effectiveness of the *SD Act* is impaired by complex concepts and technical language. The Law Council and Bar Association submit that the *SD Act* and discrimination law generally should not only be clear and readily understood by those who bear the obligation not to discriminate, employers, service providers, educators and like, but also by the beneficiaries of the right to be free from discrimination.

4. Moreover, the SD Act has historically been criticised for its limited scope and effect for the following reasons:[2]

   (a) It defines discrimination in terms of direct and indirect discrimination rather than in terms of equality, which would more closely reflect the text and purpose of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) on which it is based;

   (b) Its definitions of direct and indirect discrimination are complex;

   (c) It is not able to appropriately address systemic discrimination;

   (d) It is confined to limited areas of public life rather than all fields of activity;

   (e) Its operation and effect are not properly understood.

5. These submissions, and the legislative amendments suggested herein, attempt to address each of these matters.

---

[1] *Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited and Ors* (1993) 46 FCR 301 at 326.

[2] See for instance *Equality Before the Law, Justice for Women* ALRC Report 69, 1994 ('*Equality Before the Law* Parts I and II')

A. SCOPE OF THE ACT, AND THE MANNER IN WHICH KEY TERMS AND CONCEPTS ARE DEFINED

Scope of the SD Act

6. The *SD Act* gives effect to Australia's obligations under *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**).[3] Accordingly where expressions and terms used in the SD Act come from CEDAW, those terms must be construed consistently with the way in which the terms are construed in CEDAW. [4]

7. Central to the operation of CEDAW is the concept of equality. The idea of equality is notoriously difficult.[5] The expression 'equality' takes into account the ideas of formal equality, where people are treated the same regardless of the relevant characteristic. It also takes into account substantive equality, which recognises that sometimes differential treatment is necessary to ensure an equal outcome and thereby differential treatment is not necessarily unfair or unfavourable discrimination.

8. In CEDAW article 1 describes 'discrimination against women' in the following terms:

   Article 1

   For the purpose of the present Convention, the term "discrimination against Women" shall mean any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economical, social, cultural, civil or other fields.

9. The *SD Act* does not incorporate this definition of discrimination. Rather the *SD Act* describes discrimination in terms of "direct discrimination" and "indirect discrimination". The descriptions of direct and indirect discrimination do not come to terms with the central obligation in CEDAW, namely the promotion of equality of opportunity. Because the operation of the SD Act is all premised on the notion of formal equality, this means that at times the Act is inadequate in actually achieving equality for women in areas where there may need different treatment

---

[3] See Schedule to the *Sex Discrimination Act.* CEDAW opened for signature on 18 December 1979. Entry into force generally: 3 September 1981. Entry into force for Australia: 27 August 1983. Note that Australia has a reservation entered in July 1983 to article 11(2)(b). The reservation relevantly provides '[t]he Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' ATS 1983 No. 9

[4] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-31 (Brennan CJ)

[5] See *Equality Before the Law* op cit.

to achieve equal outcomes in relation to opportunities as between men and women.[6]

10. The concept of sex discrimination under section 5 of the SD Act could be amended so that it accords with the definition of 'discrimination against women' in Article 1 of CEDAW.[7]

11. Broadening the definition of 'sex discrimination' under the SD Act so that it is in accordance with the term 'discrimination against women' in Article 1 of CEDAW will enable the removal of the current definition of 'direct discrimination', defined in section 5(1) in terms of less favourable treatment, and the simplification of the concept in section 5(2) of the SD Act of 'indirect discrimination', thus more readily allowing for systemic discrimination to be addressed.[8]

12. Further, the SD Act ought to be amended to include recognition of the principle of equality in line with Article 2(a) of CEDAW.

13. Each of these matters is addressed more fully in response to the term of reference at (B) immediately below. The scope of specific concepts such as discrimination on the ground of family responsibilities and sexual harassment are addressed in the responses to terms of reference (I) and (K) respectively in this submission.

B. THE EXTENT TO WHICH THE ACT IMPLEMENTS THE NON - DISCRIMINATION OBLIGATIONS OF CEDAW, ILO CONVENTIONS, ICCPR, ICESCR ETC

14. In response to this term of reference (B), this submission deals in particular with:

    (a) the definition of 'discrimination' under the SD Act by comparison to the definition of 'discrimination against women' in Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the need to simplify the notion of indirect discrimination under the SD Act;

    (b) the limited areas of public life in which discrimination is unlawful under the SD Act by comparison to the general prohibition against *all* discrimination under Article 2(b) of CEDAW;

    (c) the absence of a legal recognition of the principle of equality in the SD Act by comparison to that in Article 2(a) of CEDAW;[9]

    (d) Australia's continuation of its reservations to the ratification of CEDAW; and

---

[6] The Hon. Justice Mary Gaudron, The Mitchell Oration 1990, *"In The Eye Of The Law: The Jurisprudence of Equality"*, 24 August 1990.

[7] Compare section 9 (1) of the *Racial Discrimination Act* 1975 (Cth).

[8] See for instance Recommendation 3.2 of *Equality Before the Law*, Part I op cit.

[9] See for instance the criticisms in this respect in Evatt, E *Falling Short on Women's Rights: Mis-Matches between SDA and the International Regime, Proceedings to the Human Rights 2004: The Year in Review Conference,* Castan Centre for Human Rights Law, Monash University December 2004.

(e) Australia's failure to become a party to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc A/Res/54/4 (the **Optional Protocol**).

Definition of discrimination, areas of discrimination and Principle of Equality

15. In line with the Recommendations of the Australian Law Reform Commission in 1994[10] and the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1992,[11] the definition of direct sex discrimination in section 5(1) of the SD Act ought to be replaced with the definition of 'discrimination against women' in CEDAW as described above.

16. While the current definition of direct sex discrimination in section 5(1) of the SD Act ought to be replaced with the general prohibition against discrimination contained in Article 1 of CEDAW, the definition of indirect sex discrimination in section 5(2) should be simplified with the simpler notion of indirect discrimination being based for instance on the notion in subsections 8(1)(b), (2) and (3) of the *Discrimination Act 1991* (ACT).

17. Section 8(1)(b) and (2) of the *Discrimination Act 1991* (ACT) provides:

> *(1) For this Act, a person discriminates against another person if:*
>
> ...
>
> *(b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.*
>
> *(2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.*
>
> *(3) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—*
>
> *(a) the nature and extent of the resultant disadvantage; and*
>
> *(b) the feasibility of overcoming or mitigating the disadvantage; and*
>
> *(c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.*

18. Amending the definition of direct and indirect discrimination under the SD Act to reflect the definition in Article 1 of CEDAW will more appropriately establish the substantive and positive right of women to equality and the enjoyment of human rights and fundamental freedoms, in line with the objectives of CEDAW.[12] It is

---

[10] *Equality Before the Law*, Part I, op cit.

[11] House of Representatives Standing Committee on Legal and Constitutional Affairs *Halfway to Equal, Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* 1992, AGPS.

[12] See for instance *Equality Before the Law*, Part I, op cit, pp41-42.

suggested that such an outcomes-focused approach to the prohibition of discrimination against women will assist in addressing systemic discrimination.[13]

19. It is further submitted that the definition of 'discrimination against women' in Article 1 of CEDAW captures all forms of discrimination and will enable the removal of the limitation currently in the SD Act of prohibition of discrimination only in the proscribed areas of public life in Divisions 1 and 2 of Part II. This is in line with the obligation under Article 2(b) of CEDAW to adopt appropriate legislative and other measures prohibiting discrimination against women.

20. Similarly to section 9(1) of the *Racial Discrimination Act 1975* (Cth), the SD Act will on this basis be structured to apply to discrimination against women in all fields of activity, rather than only limited areas of public life. This will also broaden the types of conduct captured by the SD Act.

21. In this respect the recent observations of Justice French in the Federal Court decision of *Victorian Women Lawyers Association Inc v Commissioner of Taxation*[14] highlight that the aim of the SD Act, in accordance with the objects of CEDAW, is to eradicate discrimination in all fields of human endeavour:

> *121 The Convention, which is scheduled to the Act and to which Australia is a party, includes, in Art 11, a commitment by States Parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women the same rights and, in particular:*
>
> > *(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*
>
> *122 Similar legislation exists in the various States. The legislation and the Convention to which Australia is a party can be taken as indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life.*

22. Finally, it is submitted that the SD Act should be amended to include a legislative recognition of the principle of equality of men and women in terms not dissimilar to that contained in the *Human Rights Act 2004* (ACT), section 8.

23. While section 8 of the ACT *Human Rights Act 2004* is drafted in general terms to give legislative recognition to the principle of equality of 'everyone' before the law and to enjoy human rights, it is submitted that amendment of the SD Act to recognise the principle of equality of men and women might appropriately provide as follows:

> *Recognition of the principle of the equality of women and men*

---

[13] See for instance, Evatt, op cit, at [9]-[14].

[14] [2008] FCA 983 at [122].

(1) Women and men are entitled to equality in law, where equality in law includes equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms.

"Laws" is taken to include all Commonwealth, State, Territory and/or local Acts, Rules and Regulations.

(2) In particular, everyone has the right to equal and effective protection against discrimination on any ground.

(3) Any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of sex is inoperative to the extent of the inconsistency

(4) Women and men have the right to enjoy their human rights without distinction or discrimination of any kind.

24. This reflects Recommendations 4.1 to 4.5 of *Equality Before the Law*, Part II. While it is recognised that these Recommendations were made in the context of a proposed *Equality Act*, it is submitted such a provision ought to appropriately be included in the SD Act for the purpose of ensuring consistency with the obligations under Article 2(a) of CEDAW.

25. Article 2(a) provides that States Parties agree to pursue by all appropriate means a policy of eliminating discrimination against women and, to this end, to undertake:

To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.

26. The constitutional validity of a provision recognising the equality of women and men (based on the external affairs power under section 51(xxix), *Commonwealth of Australia Constitution Act*) could be underpinned not only by Article 2(a) of CEDAW but also by Articles 2, 3 and 26 of the ICCPR[15] and Articles 2(2), 3, 7(a)(i), 7(c), 10(2), 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights.*

27. The inclusion of a legislative protection reflecting Australia's obligation under Article 2(a) of CEDAW will assist in addressing the historical insufficiency and unreliability of the common law to protect women's rights.[16] This is particularly necessary in the absence of a Constitutional right in Australia of the recognition of the principle of equality of women and men, and in the absence of a federal bill of rights.

28. As Justice Evatt has observed, the inclusion of such a provision "would give rise to a legal obligation to take positive measures to achieve substantive equality and

---

[15] See for instance the views expressed in *Equality Before the Law,* Part II, op cit p63.

[16] See for instance *Equality Before the Law*, Part II, op cit p57-58.

to overcome the disadvantages which obstruct women from enjoying rights on an equal basis".[17]

Removal of Australia's reservations to CEDAW and becoming a party to the Optional Protocol

29. The Law Council and the NSW Bar Association recommend that steps be taken to remove the two reservations placed by the Australian Government on the ratification in 1983 of CEDAW, and in addition to ensure that Australia becomes a State Party to the Optional Protocol.

30. The two reservations accompanying Australia's ratification in 1983 of CEDAW provided:

    (a) The Government of Australia advises that it is not at present in a position to take the measures required by article 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

    (b) The Government of Australia advises that it does not accept the application of CEDAW in so far as it would require alteration of Defence Force policy which excludes women for combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'.

31. While the reservation in relation to the application of CEDAW in so far as it would require alteration of Australia's Defence Force policy was amended in August 2000 to limit the reservation to the exclusion of women from combat duties, the reservation in relation to article 11(2) remains in force.

32. Article 11(2) of CEDAW relevantly provides:

    In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: ...

    (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

    ....

33. Steps should be taken to remove the reservation in relation to article 11(2) of CEDAW to enable legislative amendments to either the SD Act or the *Workplace Relations Act 1996* (Cth) to facilitate a national scheme of paid maternity leave. It is submitted that this will assist the SD Act in meeting the objective of CEDAW of eliminating all forms of discrimination against women, and ensuring equality of women and men, by recognising the value of women's participation in the labour force and encouraging through structural means that participation.

34. The Law Council supported this position in its submission dated 30 June 2008 to the Attorney-General's Department, in response to the consultation on the

---

[17] Evatt, op cit, [18].

possible accession of Australia to the Optional Protocol. In this submission, the Law Council observed that while accession to the Optional Protocol would not technically require Australia to remove the reservation to Article 11(2), such a step would appear to be in line with enhancing the rights protected under CEDAW. The Law Council in that submission noted that accession to the Optional Protocol would be a timely opportunity to revisit Australia's reservations to CEDAW.

35. The Law Council in addition intends to further advance this position in the submission it is currently preparing to the House of Representatives Standing Committee on Employment and Workplace Relations *Inquiry into pay equity and associated issues related to increasing female participation in the workforce.*

36. Removing the reservation to Article 11(2) will in addition assist the SD Act in meeting the objectives of ILO Convention *C183 Maternity Protection Convention, 2000* (article 6), adopted on 15 June 2000 (revising Convention *C103 Maternity Protection Convention 1952*), but not ratified by Australia.

37. In addition, it is noted that the Australian Government has to date refused to become a party to the Optional Protocol adopted by the United Nations General Assembly in 1999, which provides individuals "under the jurisdiction of a State Party" with a mechanism of making a written complaint to the Committee on the Elimination of Discrimination Against Women in respect of alleged violations of a right under CEDAW.[18]

38. The former Federal Government has been criticised for its failure to remove the reservation to article 11(2) of CEDAW, and for its refusal to sign the Optional Protocol, in light of the identification in article 11(2) of paid maternity leave as a measure that would fulfil the obligations of State Parties to provide women with equal rights in employment.[19]

39. It is noted that since 1999 each of the appointed federal Sex Discrimination Commissioners have recommended paid national maternity leave schemes,[20] with the current federal Sex Discrimination Commissioner most recently recommending to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave a staged national scheme consisting in part of an entitlement to 14 weeks paid maternity leave.[21]

40. The failure of the Australian Government to fully adopt article 11(2) has had significant consequences for women seeking to combine family obligations with participation in the labour force, given the low level of paid parental leave entitlements available to Australian employees. Of the 8.3 million Australian

---

[18] Although the Law Council and the NSW Bar Association acknowledge that the Federal Government is in the process of consulting with Federal Ministers, the States and Territories and the broader community in relation to becoming a party to the Optional Protocol to CEDAW: Media Release dated 23 May 2008, Australia Moves to Protect Women's Rights, Attorney-General's Department.

[19] See for instance Charlesworth, H and Charlesworth, S, "The *Sex Discrimination Act* and international law" (2004) University of New South Wales Law Journal 10(2).

[20] See the *Report of the National Pregnancy and Work Inquiry, Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999); *A Time to Value: Proposal for National Maternity Leave Scheme* (2002); *It's About Time: Women, men, work and family* (2007).

[21] At the rate of the federal minimum wage, or the average of the woman's previous weekly earnings from all jobs, whichever is the lesser amount.

employees as at August 2007 (which excludes employees who were owner managers of incorporated enterprises), Australian Bureau of Statistics data indicates that only 40% these claimed to have access to paid maternity/paternity leave.[22]

41. Access to paid leave entitlements of any kind is strongly tied to occupation and being employed on a full time basis, with the occupation group having the highest proportion of employees with access to paid leave entitlements being managers (92%) followed by professionals (87%).[23] Ironically, of the 6.5 million Australian employees with access to one or more types of paid leave entitlements, more than half (55%) are men, while 56% of the 2.1 million Australian employees with no leave entitlements at all are women.[24]

42. The introduction by the former Federal Government in July 2004 of a lump sum maternity payment (or 'baby bonus') in connection with the birth of a child has been criticised as not meeting the objectives of CEDAW given it does not constitute paid maternity leave or the provision of maternity leave with comparable social benefits. In particular:

> *...it is not intended to encourage women's ongoing attachment to the paid workforce, nor is it intended to compensate working women for income forgone as a result of childbirth, nor is it linked to preventing discrimination against women in employment.*[25]

43. Removal of Australia's reservation to article 11(2) can facilitate the introduction of both a national legislative scheme of paid maternity along with the provision of benefits and allowances for women not in paid work who do not qualify for paid maternity leave.[26]

44. The objective of CEDAW is the elimination of *all forms* of discrimination against women and achieving equality between women and men in the enjoyment or exercise by women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

45. In order for the SD Act to more appropriately and comprehensively meet the non-discrimination obligations of CEDAW and relevant ILO Conventions, the reservations in respect of article 11(2) of CEDAW and the exclusion of women from combat duties ought to be removed, in addition to which Australia ought to become a party to the Optional Protocol.

46. On 30 June 2008 the Law Council provided a submission to the Commonwealth Attorney-General's Department outlining its reasons for supporting Australia's accession to the Optional Protocol (referred to above). That submission is available at http://www.lawcouncil.asn.au/.

---

[22] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2007 Cat No 6310.0.

[23] Ibid.

[24] Ibid.

[25] Charlesworth, H and Charlesworth, S, op cit at 23.

[26] See for instance the proposal put forward by Charlesworth, H and Charlesworth, S, op cit at 23, which they based on the United Kingdom scheme.

C. THE POWERS AND CAPACITY OF HREOC AND THE SD COMMISSIONER, PARTICULARLY IN INITIATING INQUIRIES INTO SYSTEMIC DISCRIMINATION AND TO MONITOR PROGRESS TOWARD EQUALITY

47. The Law Council and Bar Association of NSW note that recommendations to assist the Sex Discrimination Commissioner to initiate inquiries particularly to address systemic change were made by the ALRC in *Equality Before the Law* Part I.[27]

48. In particular, in making these recommendations the ALRC observed the difficulties in addressing systemic discrimination relying only on a complaints based statutory framework such as is currently available under the SD Act.[28]

49. The pervasive nature of systemic discrimination is such that redressing individual complaints, while perhaps providing a remedy of some utility to the complainant, does little or nothing to address the widespread underlying problem, particularly when that problem exists outside the one organisation, or across whole industries, occupations or area of the community.

50. In addition, the financial and emotional burden is borne singularly by each complainant in making an individual complaint, whereas the community at large ought to bear the responsibility for addressing systemic discrimination, which is very often the product of out-dated yet once commonly accepted social and cultural practices.

51. An appropriate approach to addressing systemic sex discrimination would be to enact legislative changes that would:

    (a) empower the Sex Discrimination Commissioner to investigate systemic and/or pervasive discriminatory practices at her own initiative and without needing to rely upon a formal individual complaint and without requiring the consent of HREOC;

    (b) enable the Sex Discrimination Commissioner to report to the Attorney-General on any organisation that fails to implement the recommendations of the Sex Discrimination Commissioner made pursuant to an investigation of that organisation.

52. Any legislative measures should facilitate the Sex Discrimination Commissioner developing partnerships with key industry bodies to develop guidelines and protocols to identify barriers to equality and develop industry specific guidelines to address those barriers.[29] In this respect, we think it is important that there is not a 'one size fits all' approach to addressing systemic discriminatory practices. We think that the partnership will enable a top down approach to addressing biases which may work with the current bottom up approach, which is constituted

---

[27] *Equality Before the Law* Part I, op cit, p50-57.

[28] *Equality Before the Law* Part I, ibid, p50.

[29] See for instance Canadian Bar Association Taskforce on Gender Equality in the Legal System, *Touchstones for Change: Equality, Diversity and Accountability*, Ottowa, Canadian Bar Association 1993 and Judicial Council of California Advisory Committee on Gender Bias in the Courts, *"Achieving Equal Justice for Women and Men in the California Courts"* (July 1996)

by complaints being made by individual complainants about specific type of treatment.

53. The Law Council and Bar Association of NSW adopt Recommendations 3.3 to 3.5 made by the ALRC in *Equality Before the Law* Part I[30].

D. CONSISTENCY OF THE ACT WITH OTHER STATE AND TERRITORY DISCRIMINATION LEGISLATION and (F) IMPACT ON STATE AND TERRITORY LAWS

54. From the perspective of employers and service providers there is merit in consistency between the *SD Act* and State/Territory laws.

55. The SD Act is inconsistent in a number of important ways with State and Territory laws, as addressed elsewhere in this submission in particular in relation to the family responsibilities discrimination and sexual harassment provisions.

56. It is submitted that the SD Act ought to be amended to:

(a) make provision for a special need on the basis of an attribute to be accommodated in a similar manner to section 24 of the *Anti-Discrimination Act 1992* (NT) and in addition include a provision for the making of temporary special measures in line with article 4(1) of CEDAW.[31]

(b) In the event that the submission made at (B) above is not adopted in respect of replacing the definition of direct discrimination with Article 1 of CEDAW, in the alternative include a definition of unlawful direct discrimination based on unfavourable or unequal treatment rather than less favourable treatment, as in the *Discrimination Act 1991* (ACT).

(c) Repeal section 13 of the SD Act, which exempts State and Territory[32] government instrumentalities from the prohibition against discrimination in the area of employment, and sexual harassment, provisions.

(d) Incorporate a legislative recognition of the principle of equality of men and women in terms not dissimilar to that contained in section 8 of the *Human Rights Act 2004* (ACT) (dealt with in section (B) of this submission).

(e) Replace sections 4A and 7A of the SD Act with a definition of and prohibition against carers' responsibilities discrimination which reflects that contained in sections 49S and 49T of the *Anti-Discrimination Act 1977* (NSW), and repeal section 14(3A) of the SD Act (dealt with in section (J) of this submission).

---

[30] *Equality Before the Law*, op cit

[31] See also similar provisions in sections 25-26 of the *Anti-Discrimination Act 1998* (TAS).

[32] By virtue of the definition of State in section 4 of the SD Act to include Territories.

(f) Replace Part II, Div 3 of the SD Act with a definition of and prohibition against sexual harassment which reflects that in sections 118 to 120 of the *Anti-Discrimination Act 1991* (Qld) (dealt with in section (K) of this submission);

Special needs and special measures provisions

57. The SD Act should make it unlawful for a person to refuse or fail to accommodate persons with a special need that a person has because of an attribute, with the attribute being defined to include the sex, marital status, pregnancy or potential pregnancy of a person.

58. Such a provision would assist in overcoming the historical disadvantage and discrimination suffered by women and would properly assist in addressing systemic discrimination.[33]

59. The SD Act could incorporate a provision which makes it unlawful for a person to fail or refuse to accommodate such a special need, in terms similar to section 24 of the *Anti-Discrimination Act 1992* (NT), which provides:

> *(1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.*
>
> *(2) For the purposes of subsection (1) –*
>
> *(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and*
>
> *(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.*

60. Further, a new provision reflecting the wording of Article 4(1) of CEDAW could be incorporated into the SD Act, with such a provision co-existing with the current section 7D of the SD Act. The provision could read:

> *Temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined by Division 1 or 2, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*
>
> *The Sex Discrimination Commissioner should have power to make a declaration that a measure is a special measure for the purposes of the SD Act. Where such a declaration has been made, a person challenging the declaration shall bear the onus of proving the measure is not a special measure.*

---

[33] See CEDAW Committee, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures Thirtieth session, 2004.

61. A special measures provision in this form would accord with the objects of CEDAW and the obligations of State Parties to take measures aimed at accelerating de facto equality. In addition it avoids the problems associated with defining 'special measures' as constituting 'discrimination' while making that discrimination lawful, an approach not supported by CEDAW.[34]

62. It is noted that a provision (in former section 33 of the SD Act) providing that special measures aimed at assisting women to achieve de facto equality did not constitute unlawful discrimination was repealed and replaced with section 7D[35] partly on the basis that it did not accord with Article 4 of CEDAW.

63. The current section 32 in addition ought to be amended to provide that the provision of services the nature of which is such that they can only be provided to members of one sex shall not be considered discrimination, in line with Article 4(2) of CEDAW. It is contrary to Article 4(2) to define services that can only be provided to women (such as services directed at pregnancy or breast cancer) as constituting discrimination but exempting that discrimination from the provisions of the legislation making it unlawful.

Definition of direct discrimination

64. In the event that the recommendation at (B) herein is not adopted and the definition of direct discrimination within the SD Act is not replaced with a definition in line with Article 1 of CEDAW, it is recommended that the definition of direct discrimination be amended to reflect the definition of direct discrimination found within section 8 of the *Discrimination Act 1991* (ACT).

65. Section 8 of the *Discrimination Act 1991* (ACT) defines direct discrimination in terms of unfavourable rather than less favourable treatment as follows:

> *(1) For this Act, a person discriminates against another person if—*
>
> *(a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; ...*

66. Incorporating a definition of direct discrimination that relies on unfavourable rather than less favourable treatment removes the need for the identification of a real or hypothetical comparator, which is required for the purposes of determining whether a complainant has been treated less favourably under the SD Act.[36]

67. Under the definition of direct discrimination as it is currently formulated under the SD Act, a complainant must prove, in addition to a causal link between the attribute and the conduct, that the conduct constituted less favourable treatment when objectively assessed by comparison with an identified real or hypothetical comparator.

68. Determining the characteristics of a hypothetical comparator have proved troublesome for courts in making this assessment, with the High Court majority in

---

[34] See Article 4(1).

[35] By way of the *Sex Discrimination Amendment Act 1995*, No 165.

[36] See for instance *Purvis v State of New South Wales* (2003) 217 CLR 92 at [223]-[225].

Purvis v State of New South Wales (2003) 217 CLR 92 concluding that all manifestations of the complaint are to be attributed to the comparator (at [223]-[225]), thus making it inherently difficult for complainants to demonstrate that they have been treated less favourably when assessed against such a hypothetical comparator in the same or similar circumstances.

Section 13 of the SD Act

69. This provision ought to be repealed so that women in all States and Territories, and women employed by any government or non-government employer across the States and Territories, are afforded the same protections from discrimination and sexual harassment.

E. SIGNIFICANT JUDICIAL RULINGS ON THE INTERPRETATION OF THE ACT AND THEIR CONSEQUENCES

70. Apart from the *McBain*[37] litigation, the High Court has not had occasion to consider the operation of the SD Act. The High Court has considered the issues of indirect sex discrimination under the *Anti-Discrimination Act* 1977 (NSW) on two occasions in *Australian Iron & Steel v Banovic* (1989) 168 CLR 165 and *New South Wales v Amery* (2006) 230 CLR 174. Both cases were important in elaborating the meaning of indirect discrimination but of little relevance to the SD Act because the language of section 5(2) of the SD Act differs significantly from the way indirect discrimination is described in the *Anti-Discrimination Act* 1977 (NSW).

71. Consequently, the significant judicial rulings on the interpretation of the SD Act have been by the Federal Court or the Full Court of the Federal Court.

72. Prior to 2000, the Federal Court's consideration of the SD Act generally arose in the context of judicial review proceedings under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Prior to 2000, HREOC had jurisdiction to hear and determine complaints of sex discrimination, so the appeal to the Federal Court was concerned with review of the legality of HREOC's decision rather than a review of the merits. Since 2000, the Court has had jurisdiction to hear and determine claims of sex discrimination once a complaint is terminated by the President of HREOC.[38] It also hears appeals from the Federal Magistrates Court.

73. The Federal Court decisions prior to 2000 include:

- *McBain v State of Victoria* (2000) 99 FCR 116
- *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (Muller) (1998) 52 ALD 507
- *Commonwealth of Australia v Sex Discrimination Commissioner* (1998) 90 FCR 179

---

[37] *Re McBain;* ; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372

[38] Section 46PO(4) of the HREOC Act.

- *Australian Education Union v Human Rights & Equal Opportunity Commission* (1997) 80 FCR 46
- *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 80 FCR 78 (Full Court)
- *Commonwealth v Human Rights & Equal Opportunity Commission* (Hagar) (1997) 77 FCR 371
- *Commonwealth v Human Rights & Equal Opportunity Commission* (Dopking No.2) (1995) 63 FCR 74 (Full Court)
- *Harris v Bryce* (1993) 41 FCR 388
- *Human Rights & Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 (Full Court)
- *Commonwealth v Human Rights & Equal Opportunity Commission* (Dopking) (1993) 46 FCR 191 (Full Court)
- *Hough v Council of the Shire of Caboolture* (1992) 39 FCR 514
- *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251

74. The Full Court's decision in *Human Rights & Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 remains the most important decision on the question of 'direct' discrimination and the manner in which direct discrimination is established.

75. *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 80 FCR 78, *Commonwealth v Human Rights & Equal Opportunity Commission* (Dopking No.2) (1995) 63 FCR 74 and *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 were all significant decisions concerning indirect sex and marital status discrimination. The definition of indirect discrimination has since been amended in the SD Act but these decisions remain relevant to the operation of indirect discrimination in other Commonwealth and State/Territory enactments.

76. The Federal Court decisions since 2000 include:

- *Victorian Women Lawyers Association Inc v Commissioner of Taxation* [2008] FCA 983.
- *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978
- *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140
- *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903
- *Thomson v Orica* [2002] FCA 939
- *Ferneley v The Boxing Authority of New South Wales* [2001] FCA 1740

77. There have been surprisingly few decisions concerning the operation of the SD Act in the Federal Court. The majority of sex discrimination claims have been commenced in the Federal Magistrates Court. The Federal Court's decision in *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903 and *Thomson v Orica* [2002] FCA 939 demonstrate the scope of the Federal Court's jurisdiction to hear and determined claims based on the SD Act with an accrued or associated claim based on contract or trade practices claims.

78. In the area of sexual harassment, the significant decisions have been:

- *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 (15 July 2005)
- *Leslie v Graham* (2002) EOC 93-196 [2002] FCA 32
- *Elliott v Nanda & Commonwealth* (2001) 111 FCR 240
- *Gilroy v Angelov* (2000) 181 ALR 57
- *Aldridge v Booth* (1988) 80 ALR 1
- *Hall v A & A Sheiban Pty Ltd* (1988) 20 FCR 217 (Full Court)

79. The Full Court's decision in *Hall v A & A Sheiban Pty Ltd* (1988) 20 FCR 217 remains the seminal decision on the assessment of damages in sex discrimination/sexual harassment cases.

G. PREVENTING DISCRIMINATION, INCLUDING BY EDUCATIVE MEANS

Barriers to Women's Participation in the Legal Profession

80. Of particular concern to the Law Council and Bar Association is the effectiveness of the SD Act in removing barriers to women's sustained participation and progress in the legal profession.

81. In its 1994 inquiry on the discriminatory effect of Australian laws on women's full equality the ALRC considered the role played by discrimination, sexual harassment and barriers of a structural and cultural nature to this state of affairs. Observing that anti discrimination and affirmative legislation alone were unlikely to address the deep seated causes of discrimination, the ALRC called for professional associations to institute a range of measures including assuming an educative role on the obligations for legal firms under the federal SDA. [39]

82. The ALRC recommended that material on feminist legal theory and on women's experiences be integrated into the curricula materials of both undergraduate law students and graduates undertaking pre-admission requirements.[40] Similar recommendations were made for the addition of gender bias content into continuing professional development[41] and specialist accreditation coursework materials.

83. The Law Council and the NSW Bar Association submit that legal education could play a pivotal role in developing lawyers that are sensitive to and intolerant of gender bias, thereby assisting in removing the barriers to women's sustained participation in the legal industry.

---

[39] ALRC 69 Part 1 Chapter 3 at 3.2

[40] ALRC Report 69 Part 1 Chapter 8.

[41] Australian legal practitioners are required to undertake continuing professional development in most jurisdictions.

84. The Law Council and the NSW Bar Association also support a range of other measures to address barriers to women's participation and progress in the legal profession as detailed below.

Feminisation of the Legal Profession and Career Progression

85. Women in Australia have been involved in the legal profession for over a century.[42] This comparatively recent ingress into the ancient profession of law is sometimes cited to explain the slow career progress experienced by women lawyers today.[43]

86. It has been said that it is merely a question of time and the presence of women in sufficient numbers that will remedy the inequitable status of women within the legal profession. However, comparative research demonstrates that, without more, this is not the case.[44]

87. Authors such as Margaret Thornton have remarked that 'neither an increase in the number of women nor the passing of time'[45] would ameliorate the status of women in the jurisprudential community.

88. In 1995 it was observed that women lawyers were like 'fringe dwellers of the jurisprudential community' and that 'neither an increase in the number of women nor the passing of time'[46] would automatically remedy this situation.

89. In many countries including Australia, the feminisation of the legal profession began in earnest when the proportion of women studying law began to tip. By 1994, the ALRC Report noted that women already made up 50 per cent of law school graduates and 25 percent of the legal profession as a whole. Yet even then it was also observed, that women exited the profession at a much higher rate than men and of those that remained women did not progress to senior roles in proportion to their numbers. In 2007, 56% of Australian law graduates were women[47] who tended to also feature disproportionately among top graduates.[48]

---

[42] L Kirk Portia's Place Australia First Women Lawyers 1995 1 (1) *Australian Journal of Legal History* 75-91, 75.

[43] See for example the statistics in Hunter R Women in the Legal Profession: The Australian Profile in Schultz U and Shaw G (eds) *Women in the World's Legal Professions: A Challenge to Law and Lawyers* (Oxford Hart 2002)

[44] See for instance Keys Young Consultants, *Research on Gender Bias and Women Working in the Legal Profession* (1995), Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996), Hunter and McKelvie, *Equality of Opportunity for Women at the Victoria Bar: A Report to the Victorian Bar Council* (1998).

[45] M Thornton 'Women as fringe dwellers of the jurisprudential community' (Chapter 12 in D Kirby (ed) *Sex Power and Justice: Historical Perspectives of Law In Australia* Melbourne OUP 1995 at page 291.

[46] M Thornton 'Women as fringe dwellers of the jurisprudential community' (Chapter 12 in D Kirby (ed) Sex Power and Justice: Historical Perspectives of Law In Australia Melbourne OUP 1995 p 291.

[47] ABC (Australian Broadcasting Corporation) Radio National *Women in Corporate Law Firms* Law Report, 3 June 2008 transcript downloaded 3 June 2008 from

http://www.abc.net.au/rn/lawreport/stories/2008/2262012.htm

[48] M Thornton and J Bagust, The Gender Trap; Flexible Work in Corporate Legal Practice *Osgoode Hall Law Journal* Vol 45 No 4 2007 773 at page 774.

In terms of the practising profession[49] women now constitute about 38% overall of Australian legal practitioners[50] and in one of Australia's most populous jurisdictions, they comprise 56% of all lawyers under the age of 40.[51]

90. In the twelve years from 1988 to 2000 the profession grew at an annual average growth rate of 3.8% representing an increase of almost 57%. Within this general growth pattern, the number of female solicitors grew by 169% (male solicitors 28.5%) at an average growth rate of 8.6% (male solicitors 2.1%). From October 2006 to October 2007, 2,696 solicitors were issued with a practising certificate for the first time in New South Wales. This represents an overall growth rate of 4.5 %, the number of female solicitors rising by 7.7% (male solicitors by 2.2%).[52]

91. While the number of women entering the profession has increased there has not been a corresponding rise in the numbers of women attaining law firm partnership. A 2006 survey[53] of partnership appointment found that at 24 of Australia's leading law firms, women make up on average just 18.1% or 429 of 2364 partners.[54] When ranked, the survey found that it was possible to identify a handful of firms at which women tended to have a much higher chance of realising their aspirations of becoming partners of the firm. However, ranking also highlighted the worst individual performance on this measure. Notably one firm's female partnership comprised 10.8 %.[55] Fewer women tend to select to practice law in the manner of a barrister. Nevertheless the position is similar in that a small percentage compared to male barristers progress to senior ranks as 3.3 % of 'seniors' at the bar.[56]

Income disparity

92. Comparing the remuneration of male and female solicitors is complicated by the fact that men and women are not equally distributed across the main employment sectors. The preponderance of female practitioners tend to be younger and more recently admitted to practice than male practitioners. Further, relatively more female practitioners than male practitioners work part time or under a flexible workplace arrangement. Men on the other hand continue to hold a greater proportion of the more senior roles for which they are accordingly better

---

[49] Pursuant to Legal Profession legislation (or its counterparts) all candidates are eligible to be admitted as Australian legal practitioners. However once admitted practitioners may select to practice in the manner of a solicitor or barrister.

[50] ABC Radio National *Women in Corporate Law Firms* Law Report, 3 June 2008 transcript downloaded 3 June 2008 from

http://www.abc.net.au/rn/lawreport/stories/2008/2262012.htm

[51] A Patterson *Bendable or Expendable: Practices and Attitudes Towards Work Flexibility in Victoria's Biggest Legal Employers* Melbourne Law Institute of Victoria 2006 at 2.

[52] The Law Society of New South Wales, *2007 Profile of the Solicitors of New South Wales* December 2007

[53] Mahlab Recruitment *Private Practice Australia & International* Survey 2006

[54] Mahlab Recruitment *Private Practice Australia & International* Survey 2006 page 2.

[55] Mahlab Recruitment *Private Practice Australia & International* Survey 2006 page 2.

[56] Statistics mentioned in Moyle S and Sandler M *Effective Law Effecting Change: The Sex Discrimination Act and Women In The Legal Profession* ALRC Reform Issue 83 Spring 2003 downloaded 24 July 2008 from:

http://www.austlii.edu.au/au/other/alrc/publications/reform/reform83/3.html

remunerated. Because of these factors it is perhaps more meaningful to consider income parity between the genders based on the incomes of full time private practitioners by reference to years since admission.

93. From the very beginning of their careers within the legal profession, men are paid more than women. For example, in New South Wales when the incomes of solicitors with less than one year's experience were compared in 2002, men on average earned $8,200 more than their female counterparts.[57] In 2007 little has changed, the estimated mean income of male solicitors admitted between one and five years was calculated to be $70,300 while that of female practitioners was $63,500.[58]

Disadvantage

94. Through the SDA mechanism a body of jurisprudence has developed. Two decisions are worthy of particular note. However this submission does not aim to comprehensively state the legal position concerning claims made in reliance of the SDA involving members of the legal profession.

95. The earlier of the cases was decided prior to the 1995 amendments to the SDA.[59] The case in *Hickie v Hunt and Hunt* [60] nevertheless typifies the discrimination that many women lawyers face as they attempt to balance work life and family responsibilities.

96. It was held in *Hickie* that the requirement for a 'contract' partner (salaried rather than equity) in a law firm to have to work fulltime upon her return from maternity leave amounted to indirect discrimination. The fact that Hickie was pregnant when she was appointed was known to the firm. She returned from leave to work part time, however her practice had run down. Hickie claimed to have been the victim of discrimination based on the firm's failure to properly support her practice during her absence and her later period of part time work. She claimed the decision not to renew her contract in the circumstances, amounted to unlawful discrimination based on her being treated less favourably on grounds of sex, marital status, pregnancy, potential pregnancy and family responsibilities.

97. Presiding over the hearing, the [then] Human Rights and Equal Opportunity Commissioner Elizabeth Evatt held that the requirement to work full time would inevitably disadvantage women practitioners who, like all women, carry the majority of family carer responsibility.

98. As recently as June of this year, in a decision of the Federal Court the ongoing and historical 'disadvantage of women in the legal industry' was recognised. In *Victorian Women Lawyers Association Inc v Commissioner of Taxation*,[61] the

---

[57] The Law Society of New South Wales *After Ada: A New Precedent for Women in the Law* October 2002 page 6.

[58] The Law Society of New South Wales *2007 Profile of the Solicitors of New South Wales* December 2007 page 35.

[59] The 1995 amendments to the SDA included the introduction of SS7B and 7C which displaced from the complainant to the respondent the onus of (dis)proving reasonableness as a defence to indirect discrimination.

[60] *Hickie v Hunt and Hunt* [1998] EOC 92-910.

[61] [2008] FCA 983 (27 June 2008). This decision involved an application by the Victorian Women Lawyers Association Inc (VWL) to the Commissioner of Taxation for a private ruling that VWL was exempt from any

Federal Court was invited to take judicial notice of the 'disadvantage' of women practitioners in the legal profession.

99. In accepting this as a matter of "common knowledge...generally" and taking it on judicial notice, Justice French observed (at [116]):

... VWL, in its written submissions, identified the social fact for which it contended. ... The social fact propounded was the historical and persisting disadvantage of women in relation to their participation and career advancement within the legal profession. At that level of generality there was no dispute. I am prepared to take judicial notice of it.

100. His Honour further observed that the SD Act and CEDAW can be taken as:

...indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life.[62]

Other Preventative Measures

101. The legislative framework created by the SDA has over the past twenty four years significantly reduced overt unlawful sexual discrimination in Australia.

102. The reduction of the gap in disparity of incomes, education and labour market participation suggests that gender bias has in Australia been substantially reduced relative to the position in the 1960's and 1970's.[63]

103. In addition, labour market reforms in Australia (and overseas) have fostered women's greater participation in the workforce, including the formerly male dominated legal profession.

104. The Organisation for Economic Cooperation and Development's [64] annual Employment Outlook 2008 [65]reports that structural reforms per se are likely to improve the employment prospects of underrepresented groups by reducing the scope of discriminatory behaviours.

105. However, there are ongoing concerns for the status of women involved in the law. The gender income disparity and female under representation within the senior ranks of the practising profession and judiciary suggest that due to their carer responsibilities, women lawyers continue to experience discrimination and sexual harassment. The less favourable treatment they receive not only hinders

---

obligation to pay income tax on the basis that it is a charitable institution or an association established for community service purposes. The Commissioner of Taxation refused to make such a ruling and the VWL successfully appealed to the Federal Court.

[62] At [122].

[63] F Argy Equality of Opportunity in Australia Myth or Reality; the Australia Institute Discussion Paper Number 85 April 2006 p15

[64] Australia is a member of the OECD, an international organisation of thirty seven member countries that accept the principles of representative democracy and free market economy. http://www.oecd.org/dataoecd/54/57/40846335.pdf

[65] OECD *Employment Outlook* 2008 downloaded 25 July 2008 from: http://www.oecd.org/document/46/0,3343,en_2649_33927_40401454_1_1_1_1,00.html

women's progression in the law, it is also believed to contribute to the high attrition rates of female practitioners.

106. For these reasons, the Law Council and the NSW Bar submits that the SDA will be more effective if it supported by others measures that address labour discrimination including:

    (a) Long term investment in education campaigns and training to better inform people of their rights and employers of their obligations;

    (b) Structural reforms to promote more sustainable economic growth that will increase demand for employees, creating a more competitive environment that forces managers to drop discriminatory hiring and promotion of practices;

    (c) The development of industry standards, in consultation with the Law Council and State and Territory professional associations in relation to the education of the profession on gender bias and discrimination.

H. PROVIDING EFFECTIVE REMEDIES

107. All of the relevant human rights instruments stress the right to an effective remedy. An effective remedy is one which redresses the loss and damage suffered by the particular complainant but also addresses the reasons for the discriminatory conduct to prevent continuing or future breaches.

108. For the most part, remedies have focused on compensation. The historically low levels of compensation generally awarded under the SD Act have been criticised as being reflective of a view that discrimination against women, and sexual harassment in particular, is unimportant.[66] It has been observed that low levels of monetary compensation trivialise the serious nature of the conduct involved in complaints of sex discrimination and the often devastating impact on the complainant.[67]

109. One of the difficulties with compensation in the discrimination area is that claims for compensation might arise in a numbers of different circumstances. In the area of employment the question of compensation needs to take into account the relevant contract between the employee and the employer and much closer regard should be had to relevant contract principles in relation to the assessment of damage arising for breach of contract by way of discrimination. In that regard where the claim is concerned with the termination of employment it would be appropriate that the Court had regard to relevant principles concerning compensation for termination of employment.

110. Section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) could be amended to include legislative guidance to the Court to this effect, that is, that common law principles relevant to determining awards of compensation in termination of employment cases (such as wrongful dismissal)

---

[66] See for instance the submissions recorded in *Equality Before the Law* Part I, p86, fn 357-358.

[67] Id.

are to be applied in cases in which the unlawful discrimination results in termination of employment.

111. We do not support a general approach to assessing damages in discrimination law along the lines of a personal injuries type claim for all cases, particularly in the employment area. As the Federal Court noted in *Hall v Sheiban,* the measure of damages has to be appropriate to discrimination claims.

I. ADDRESSING DISCRIMINATION ON THE GROUND OF FAMILY RESPONSIBILITIES

112. The meaning of discrimination on the basis of family responsibilities is dealt with in the *SD Act* under section 7A, which provides:

> *For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:*
>
> *(a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and*
>
> *(b) the less favourable treatment is by reason of:*
>
> *(i) the family responsibilities of the employee; or*
>
> *(ii) a characteristic that appertains generally to persons with family responsibilities; or*
>
> *(iii) a characteristic that is generally imputed to persons with family responsibilities.*

113. Section 14(3A) limits the circumstances in which family responsibilities discrimination in the area of employment will be unlawful to a situation where the employee is dismissed.

114. Neither section 7A nor section 14 of the SD Act makes reference to indirect sex discrimination, and these provisions do not on their face extend the operation of section 7A to indirect discrimination as the term is contemplated for instance in section 5(2) of the SD Act.

115. The limited operation of the family responsibilities ground of discrimination in the SD Act is one of the most significant deficiencies of the legislation. One of the immediate problems which results from the fact that indirect family responsibilities discrimination is not a ground of discrimination under the SD Act, is that applicants making such claims are forced to formulate them as a species of indirect sex discrimination under section 5(2) of the SD Act. This is problematic for a number of legal and policy reasons.

116. Primarily, as a matter of policy it is particularly problematic because claims of indirect sex discrimination by reason of family responsibilities discrimination made under section 5(2) of the SD Act necessarily require the court to make a

finding, or accept on the basis of 'judicial notice', that women are the primary carers of infants and children.[68]

117. While this may historically have been accurate, and may remain the case for a large number of women, it perpetuates the stereotype that only or primarily women have or ought to have the care and responsibility for infants and children.

118. As a result, the courts are prepared to find that it is a characteristic that appertains to women that women are the carers of children.[69] This interpretation reinforces a stereotype which we do not think is appropriate or fair for women. Moreover, this interpretation may result in the SD Act being a vehicle for perpetuating adverse discrimination against women by allowing a view that it is only women who have the responsibility of children and it is only women who require part time work. As a matter of policy, such an interpretation of the SD Act or other human rights legislation ought to be avoided by appropriate use of legislative amendment.

119. At present if a male employee complains that he is being denied access to part time work, his claim will automatically be defeated because his claim is not a species of discrimination on the grounds of sex because it is not a characteristic appertaining to men that men are the primary carers of infants or children.

120. Both men and women are capable of being subject to discrimination on the grounds of responsibility to care for infant or dependent children, given that the modern role of caring (for not only infants and dependent children but other dependent members of the community) arises as the equal responsibility of both men and women. This is appropriately becoming the reality and ought to be recognised and encouraged by the operation of the SD Act. However, because the SD Act does not make indirect discrimination on the grounds of family responsibility unlawful, such claims are currently run as species of indirect sex discrimination claims which inherently means that a view has to be formed that only women have the care and responsibility for infant children.

121. It is critical that women are not viewed as being the only parent with responsibility for infants and children and that parents, both men and women, are seen to have equal responsibility and hence equal rights in relation to being free from discrimination on those grounds. It is more over important that the caring responsibilities of both men and women for all dependents, not only infants and children, are recognised under human rights legislation. Accordingly the definition and title of 'family responsibilities' ought to be amended to reflect the definition of carers' responsibilities under section 49S of the *Anti-Discrimination Act 1977* (NSW). In these respects the SD Act is sadly deficient compared to relevant state and territory legislation, which defines carers responsibility or family responsibility in a much more inclusive and appropriate manner.

122. The Committee ought to consider amending the SD Act to:

---

[68] See for instance *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122 at [37]; *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1 at [106].

[69] See for instance the findings of Driver FM in *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1.

(a) Extend the meaning of family responsibilities under section 7A of the SD Act to include indirect carers' responsibilities discrimination, formulating the definition of carers' responsibilities and section 7A in terms similar to sections 49S and 49T of the *Anti-Discrimination Act 1977* (NSW); and

(b) Repeal section 14(3A) of the Act, thereby extending the operation of the family responsibilities discrimination provisions to all circumstances of discrimination.

123. It is noted that the limitations on the operation of the family responsibilities discrimination provisions currently in the SD Act are reflected in the limitations of Article 8 of the *Workers with Family Responsibilities Convention 1981 (No 156)* (ILO 156) (discussed below). To overcome these limitations it is submitted that alternative articles of ILO Convention 156 ought to be relied upon under the external affairs power (further discussed below).

Family responsibilities discrimination and indirect discrimination: the current position

124. The mixed interpretations of section 5(2) of the SD Act that have arisen in the course of judicial examination as to whether this provision is capable of sustaining claims of indirect family responsibilities discrimination are problematic as a matter of law, for the reasons discussed below.

125. In a number of decisions the Federal Magistrates Court of Australia in particular has considered, with mixed results, whether the SD Act operates to make indirect family responsibilities discrimination unlawful by use of the prohibition against indirect sex discrimination under section 5(2): see for instance *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122 at [37]; *Kelly v TPG Internet* [2003] FMCA 584 at [71]-[72]; *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1 at [106].

126. This has resulted in differing lines of interpretation of section 5(2) of the SD Act. Moreover, an interpretation of the SD Act which allows for indirect discrimination on the basis of family responsibilities is not supported by the explanatory memoranda or second reading speeches relating to the *Sex Discrimination Amendment Bill 1995* or the *Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992*, and nor is it supported by relevant international instruments, including ILO Convention 156.

127. For example, the House of Representatives Explanatory Memorandum to the *Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992* provides, in relation to section 7A, as follows:

> *This provision defines what is meant by direct discrimination against an employee on the grounds of the employee's family responsibilities. Direct discrimination occurs when an employee is treated less favourably on the basis of his or her family responsibilities in circumstances that are the same or not materially different, than an employee without family responsibilities.*

128. The second reading speech in relation to the *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* in the House (3 November 1992), read by the Honourable MJ Duffy (Holt, A-G) was relevantly as follows:

I turn now to a more detailed description of the amendments. This amendment is intended to be narrow in its scope in that it provides protection only against discrimination on the grounds of family responsibilities which takes the form of dismissal. `...

... `Discrimination' is defined to include less favourable treatment—that is, direct discrimination. .... It is not intended to cover, for example, the dismissal of an employee because the employee is unwilling to change a shift, or has a period of unauthorised leave, even though both may be due to family responsibilities.

129. To resolve the uncertainty and inconsistency currently surrounding section 5(2) of the SD Act, it is submitted that legislative amendment of section 7A which extends to indirect discrimination and reflects section 49T of the *Anti-Discrimination Act 1977* (NSW) is appropriate, while the definition of family responsibilities ought to be broadened to reflect that contained in section 49S of the *Anti-Discrimination Act 1977* (NSW). Additionally, section 14(3A) of the SD Act ought to be repealed. Each of these changes can be supported using ILO Convention 156 in addition to Article 8 of that convention.

K. SEXUAL HARASSMENT

130. The amendments to the definition of sexual harassment in 1993[70] were a necessary step in lowering the evidentiary bar to complaints of sexual harassment, and these amendments appropriately shifted the focus from the victim's behaviour to the perpetrator's behaviour with the use of the objective/subjective 'reasonableness test'.

131. Nevertheless, the 'reasonableness test' as it is currently worded continues to face criticisms that the objective element of the test is drawn on male experiences and continues to place an unnecessarily high bar to complaints.[71] So, for instance, a reasonable person would not consider a woman who was 31 years of age, married with a child and who had a 'strong personality' to be offended by comments of a sexual nature, and nor would a reasonable person consider being grabbed, hugged and subjected to comments of a sexual nature to be offensive where no complaint was made at the time.[72]

132. While the inclusion of 'workplace participants' was intended to expand the protection against sexual harassment in the workplace, the coverage of the SD Act is not comprehensive. In the legal profession, if an incident of sexual harassment occurred in the relationship between:

- Witnesses and solicitors/barristers;
- Solicitors and barristers;

---

[70] Under the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).

[71] See for instance, Pace, F, "Concepts of 'Reasonableness' in Sexual Harassment Legislation: Did Queensland Get It Right?" (2003) 3(1) *QUT Law and Justice Journal.*

[72] See for instance *Davidson v Murphy* [1997] HREOCA 62 and *Wu v Cohen* [2000] HREOC No H99/43 respectively, each cited in Pace, op cit, at 14-15.

- Barristers and barristers
- Solicitors/barristers and judicial officers;
- Solicitors/barristers and court staff;

the SD Act may not apply.

133. In 2003, the Victorian Bar's Rules of Conduct were amended to include provisions making it possible for sexual harassment or vilification in any professional context to be held to be professional misconduct or unsatisfactory conduct. A person, including barristers, secretarial staff, Clerk's staff and Bar Council staff, allegedly harassed or vilified may lodge a complaint with a conciliator who will provide advice or, if requested, conciliate the matter.[73]

134. In 2004, the Bar Council of the New South Bar Association recognised the 'gaps' in the SD Act and the *Anti-Discrimination Act* 1977 (NSW) and approved a model sexual harassment and discrimination policy for adoption by individual chambers. The policy provides chambers with a structure to resolve matters of sexual harassment or discrimination that may arise.[74]

135. The Law Council and the Bar Association of NSW submit that the definition of sexual harassment in section 28A of the SD Act ought to be repealed and replaced with a definition of sexual harassment in line with the definition in section 119 of the *Anti-Discrimination Act 1991* (Qld).[75]

136. The sexual harassment definition contained in section 28A of the SD Act includes a 'reasonableness test' not dissimilar to that in *Anti-Discrimination Act 1991* (Qld), although with several important differences. Significantly, the 'reasonableness test' under section 119 of the Queensland legislation includes the circumstance of a reasonable person anticipating *the possibility* that the other person would be offended, humiliated or intimidated.

137. Section 119 of the *Anti-Discrimination Act 1991* (Qld) provides:

Sexual harassment happens if a person--

(a) subjects another person to an unsolicited act of physical intimacy; or
(b) makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
(c) makes a remark with sexual connotations relating to the other person; or
(d) engages in any other unwelcome conduct of a sexual nature in relation to the other person;
and the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so--
(e) with the intention of offending, humiliating or intimidating the other person; or
(f) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

---

[73] Part IX – Code of Conduct in the Victorian Bar's Practice Rules.

[74] Model Sexual Harassment and Discrimination Policy http://www.nswbar.asn.au/docs/professional/eo/harassment.php

[75] Section 22(2) of the *Anti-Discrimination Act* 1992 (NT) is in the same terms as section 119 of the Queensland legislation.

Examples of subsection (1)(a)--

physical contact such as patting, pinching or touching in a sexual way unnecessary familiarity such as deliberately brushing against a person

Example of subsection (1)(b)--

sexual propositions

Examples of subsection (1)(c)--

unwelcome and uncalled for remarks or insinuations about a person's sex or private life

suggestive comments about a person's appearance or body

Examples of subsection (1)(d)--

offensive telephone calls

indecent exposure

138. Provided the conduct complained of is found to have occurred, and a finding is made that it was unwelcome, satisfying the court that a reasonable person would have anticipated there was a 'possibility' that the victim would be offended, humiliated or intimidated is a far lower bar than that currently adopted under section 28A of the SD Act.

139. In addition section 120 of the *Anti-Discrimination Act 1991* (Qld) sets out a non exhaustive list of subjective matters to be taken into account when assessing 'reasonableness'. It is submitted that a similar statutory guide requiring attention to be given to subjective matters in assessing 'reasonableness' ought to be incorporated into the SD Act.

140. Similarly, in place of the prohibition of sexual harassment in the public areas of life set out in Division 3 of Part II of the SD Act, a provision making sexual harassment unlawful per se ought to be adopted, similar to the prohibition in section 118 of the *Anti-Discrimination Act 1991* (Qld).

141. Section 118 of the *Anti-Discrimination Act 1991* (Qld) provides simply that a person must not sexually harass another person, thus prohibiting sexual harassment in all fields of activity rather than limiting the prohibition to proscribed areas of public life only. This is in line with the obligation under CEDAW to eliminate *all forms* of discrimination, which is not limited to eliminating discrimination only in certain areas of public life.[76]

142. The Law Council and Bar Association of NSW submit that replacing Division 3 of Part II of the SD Act with provisions similar to those at sections 118-120 of the *Anti-Discrimination Act 1991* (Qld) is an appropriate measure to be adopted to prohibit discrimination against women consistently with Article 2(b) of CEDAW and the objective of eliminating sexual harassment in line with section 3(c) of the SD Act.

---

[76] See generally the response above to term of reference (A).

L. EFFECTIVENESS IN ADDRESSING INTERSECTING FORMS OF DISCRIMINATION

143. It is recognised that women of different ethnic, national and racial backgrounds, and/or women who have disabilities, have different experiences of discrimination and are often subject to multiple 'layers' of discrimination.[77]

144. Because federal anti-discrimination legislation addresses discrimination by way of four different separate pieces of legislation, plus the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), each law is designed to address discrimination on the basis of only one type of 'difference' or characteristic (or attribute appertaining to that characteristic).

145. The SD Act is for example formulated to address only discrimination on the basis of sex, marital status, pregnancy, potential pregnancy, family responsibilities and sexual harassment. It is not capable of taking into account any variation of the experience of only sex discrimination, such as discrimination on the grounds of both sex and race or sex and disability.

146. It is submitted that legislative amendment of either the SD Act or section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) is required so that, in cases where complainants allege discrimination on multiple grounds, such as on the grounds of both race and sex, or on the grounds of both disability and sex, the 'multiple discriminations' can be appropriately addressed. Such legislative amendment ought to include guidance to the court to take into account the experience of multiple differences in awarding remedies.[78]

147. By way of example, the decision of *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 17 involved complaints of sexual harassment, sex discrimination and race discrimination made under the SD Act and the *Racial Discrimination Act 1975* (Cth) by a woman who was subject to sexist and racist comments, bullying and other discriminatory behaviour by her colleagues, union representatives and management where she was employed in a meatworks.

148. Sir Ronald Wilson awarded damages under both the SD Act and the *Racial Discrimination Act 1975* (Cth) observing:

> *I note that my reasons for finding the complaints substantiated apply both to the complaints under the Racial Discrimination Act and the Sex Discrimination Act. I consider it appropriate to apportion the damages equally under both Acts.*

149. This and similar decisions illustrate the indivisible nature of simultaneous, multiple 'layers' of discrimination which needs to be recognised in anti-discrimination legislation and in particular in the remedies awarded in respect of such complaints.

150. It is noted that on 3 May 2008 the United Nations Convention on the Rights of Persons with Disabilities and the Optional Protocol entered into force, having been adopted by the General Assembly on 13 December 2006. While Australia has not yet ratified this Convention, it is nonetheless illustrative of the recognition

---

[77] See for instance *Equality Before the Law*, Part I,op cit p63-69; *Halfway to Equal*, op cit pp191-210.

[78] See for instance ibid, p65.

at an international level of the 'multiple discriminations' that women and girls face. Article 6 of the Convention provides:

Article 6 – Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discriminations, and in this regard shall take measures to ensure the full and equal enjoyment by them of all their human rights and fundamental freedoms.
2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

151. Legislative amendment ought to be made to either section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) or alternatively each of the SD Act, the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth), to ensure that multiple complaints of discrimination are joined and where substantiated are each taken into account when awarding compensation.

N. SCOPE OF EXISTING EXEMPTIONS

152. The current exemptions can be characterised into a number of different classes the first is where the exemption relates to capacity to perform the job see section 30.

153. The second category of exemptions relate to the particular respondents (see section 36, 37, 38, 39). The next relates to particular employment issues (see section 34, 35). And then there is the broader exemption in relation to acts done under statutory authority. These exemptions need to be considerably clearer.

154. In relation to other subject matter areas there are the insurance and superannuation exemptions, sport, combat duties and the provisions to grant exemptions.

155. In relation to the provision to grant exemptions we think it is appropriate for the Commission to have the power to grant exemptions in certain circumstances and for those exemptions to be reviewable by the AAT. However with the repeal of section 33 of the SD Act (which was the old 'special measures provision') there is now no provision that allows exemption to be granted in circumstances where the advancement of women or protections of women's rights is an issue and in this respect the exemption power should make it clear that it can deal with all types of special measures. This is a significant difficulty.

156. Attached to this submission at **Attachment B** is a recent submission made by the Law Institute of Victoria to the Victorian Justice Department's review of the exemptions from the Equal Opportunity Act 1995(Vic) conducted in February

2008. The observations and recommendations contained therein provide a valuable insight into the Victorian experience in this area.[79]

O. OTHER MATTERS RELATING AND INCIDENTAL TO THE ACT

Victimisation provisions

157. The issue of victimisation requires further attention. At the present time section 94 of the SD Act makes it an offence to subject a person to a detriment because the person has made an allegation or complaint of discrimination or harassment.

158. The offence of victimisation may be treated as an act of unlawful discrimination but it does not follow that the Federal Court should impose criminal penalties where unlawful discrimination is claimed. Each of the SD Act and the HREOC Act should provide a clear distinction between the civil and criminal treatment of victimisation.

Industry initiatives

159. The Law Council and the Bar Association also wish to highlight the importance of dealing with systemic discrimination by the development of industry standards and partnerships. In this respect we refer to the equitable briefing policy which was adopted by the Law Council[80] and is now in place in relation to a briefing of women counsel.[81] The objective of the equitable briefing policy is to maximise choices for legal practitioners and their clients, promote the full use of the Independent Bar, and optimise opportunities for practice development of all counsel or solicitor advocates. The Law Council views the adoption of equitable briefing practices as playing an important role in the progression of women in the law, the judiciary and the wider community.[82]

160. The equitable briefing policy provides that when counsel are selected all reasonable endeavours should be made to:

(a) identify female counsel in the relevant practice area; and

(b) genuinely consider engaging such counsel; and

(c) regularly monitor and review the engagement of female counsel; and

(d) periodically report on the nature and rate of engagement of female counsel.

---

[79] The Victorian Department of Justice's final report is available at http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+Review+Final+Report:+An+Equality+Act+for+a+Fairer+Victoria.

[80] For a copy of the Model Policy see **Attachment C.**

[81] Victorian Bar Equitable Briefing Policy http://www.vicbar.com.au/c.8.asp

[82] Hutchinson, Terry C M (2005) Women in the Legal Profession in Australia.

Australian Law Librarian 12(2):pp. 23-35

161. The Equitable Briefing policy has been adopted by governments and private law firms.[83] The development of industry standards which involves the relevant industry stakeholders is an effective way of addressing specific industry issues. Industry standards allow for monitoring to be done at an appropriate level within the relevant industry.

162. Much of the problem in discrimination is really identifying how and when discrimination occurs. Each industry would have its own particular circumstances as to why there are historical barriers or reasons why women are not seen at more senior levels in higher numbers or with greater visibility. In this respect we commend the equitable briefing policy as one measure that assists in dealing with the way in which industry (in this case the legal profession) can deal with the inherent biases against women receiving briefs and appearing as counsel in matters in court.

SUMMARY AND CONCLUSION

163. In summary, the Law Council and New South Wales Bar Association welcome the review of the SD Act. The SD Act has been an important legislative initiative to eliminate sex discrimination and sexual harassment. The SD Act has shifted perceptions about the role of women in the workplace and public life.[84] The focus of the SD Act is providing a remedy to individual complainants. The SD Act has had little impact on addressing systemic sex discrimination and this review provides an opportunity to examine how the SD Act may better achieve equality between women and men in Australia.

[83] http://www.agd.nsw.gov.au/lawlink/lms/ll_lms.nsf/vwFiles/EBPolicy.pdf/$file/EBPolicy.pdf

[84] See University of New South Wales Law Journal, Forum Volume 10 No 2 - The *Sex Discrimination Act*: A Twenty Year Review 2004.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

Attachment B

The Law Institute of Victoria Advocacy & Practice

Law Institute Victoria

Submission

Administrative Law & Human Rights and Workplace Relations Sections

The Exceptions Review

To: The Exceptions Review, Department of Justice

A submission from the Law Institute of Victoria (LIV)

Date 24 April 2008

Queries regarding this submission should be directed to:

Contact person	*Laura Helm*	*Elizabeth Hayes*
Ph	*(03) 9607 9381*	*(03) 96079389*
Email	*lhelm@liv.asn.au*	*ehayes@liv.asn.au*

Contents

1 Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the review of the exceptions to and exemptions from the *Equal Opportunity Act* 1995 (Vic) (the Exceptions Review).

This submission responds to the questions posed in the Department of Justice *Exceptions Review Consultation Paper* (February 2008) (the Consultation Paper).

If you have any questions in relation to this submission, please contact Laura Helm, Administrative Law and Human Rights Section Adviser, Law Institute of Victoria on lhelm@liv.asn.au or (03) 9607 9381 or Elizabeth Hayes, Workplace Relations Section Lawyer, on ehayes@liv.asn.au or (03) 9607 9389.

2 General questions

2.1 Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?

Anti-discrimination legislation was first introduced in Victoria in 1977 and has since been progressively reformed to enhance equal opportunity on the basis of a number of protected attributes. Until recently, Victorian equal opportunity law has been governed by the *Equal Opportunity Act* 1995 (Vic) (the EO Act).[1]

The fundamental human right to equality and freedom from discrimination is now further protected in Victoria by the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter).

The purpose of exceptions and exemptions under the EO Act is to balance the competing rights and interests of persons affected by equal opportunity laws. The Charter also sets out a balancing test in s7(2), which assists in weighing up competing rights and policy considerations to determine a human rights compliant outcome. Section 7(2) provides that "a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society", taking into account a list of relevant factors.

The LIV submits that reform of the exceptions according to the Charter will enhance equality of opportunity and the elimination of discrimination in Victoria by

[1] Equal opportunity is also promoted in federal legislation, including the *Race Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth), *Age Discrimination Act* 2004 (Cth) the *Disability Discrimination Act* 1992 (Cth).

providing a new framework to balance competing interests and ensuring they are based on sound human rights principles.

2.2 What are the social and economic costs and benefits involved in reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent?

The LIV considers that reform of the exceptions according to human rights principles will assist in reducing disadvantage in Victoria. Currently, disadvantage still exists within our community, often characterised as systemic discrimination. The LIV notes the findings of the report "More than Tolerance: Embracing Diversity for Health – Discrimination affecting migrant and refugee communities in Victoria, its heath consequences, community attitudes and solutions" (VicHealth 2007), which highlights the costs of discrimination including higher rates of depression and other forms of mental illness. The LIV notes that these costs are both direct, to the individuals affected and to the health system, and indirect, by reducing educational achievement and reducing productivity at work, leading to reduced economic output overall.

The LIV acknowledges the importance of some exceptions which seek to address historical disadvantage. However, as noted above, exceptions that aim to balance competing policy considerations may have the effect of perpetuating disadvantage and discrimination in the community. The LIV welcomes review of the exceptions in light of the Charter, which allows government to reassess the proportionality of exceptions using a human rights approach.

3 Exceptions and exemptions

3.1 Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?

The purpose of the Exceptions Review is to assess whether each of the exceptions and exemptions in the EO Act are compatible with the human rights protected under the Charter, including the human right to equality in s8. The LIV submits that following s7(2) of the Charter, this assessment will require consideration of whether each exception is a reasonable and demonstrably justified limit on the right to equality, having regard to:

(a) the fundamental importance of the right to equality; and

(b) the importance of the purpose of the exception; and

(c) the effect of the exception; and

(d) the relationship between the exception and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the exception seeks to achieve.

Many exceptions and exemptions allow for positive discrimination, to assist with overcoming systemic discrimination and the effects of historical disadvantage. The LIV submits that such exceptions are compatible with the Charter because the purpose of the limitation is to improve substantive equality. Section 8(4) of the Charter specifically provides that "measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination." International law recognises such positive discrimination as "special measures".[2]

In the LIV's view there are some exceptions and exemptions to the EO Act which neither seek to overcome systemic discrimination nor constitute a reasonable limitation within the meaning of the Charter. Where appropriate, this submission recommends whether an exception should be removed or amended, in accordance with human rights principles.

Further, the LIV submits that in some circumstances, "defence" provisions may be more appropriate than certain blanket exceptions. This would allow consideration of the facts of a particular case and shifts the burden to respondents in a similar way to the "unjustifiable hardship" test under federal anti-discrimination legislation (see further below).

3.2 Should any exceptions be repealed? If so, which exceptions and why?

3.2.1 Section 27B – Employers are able to discriminate on basis of gender identity

Section 27B provides that an employer may discriminate against job applicants and employees on the basis of gender identity if the person does not give the employer adequate notice of the person's gender identity or the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

In its submission to the Scrutiny of Acts Committee *Discrimination in the Law Inquiry under s.207 of the Equal Opportunity Act 1995 (Vic)*, the LIV made the following comments:

> [Section 27B] was inserted into the Equal Opportunity (Gender Identity and Sexual
>
> Orientation) Bill ("the Bill") on 29 August 2000. The purpose of the Bill was to protect people from discrimination on the basis of gender identity and sexual orientation. It is our understanding that it was not originally the Victorian Government's intention to exclude employers from these protections for transgender people, but that due to opposition from at least one Independent MP and the prospect of the Bill not being passed, the government had little choice but to introduce s27B.

---

[2] For example, *International Convention for the Elimination of All Forms of Racial Discrimination*, adopted 21 Dec 1965, entered into force 4 Jan 1969, 660 UNTS 195, Article 1(4).

Section 27B was defended by one independent MP with the use of the example of a "country hardware store".[3] He referred to the drop-off in business that could result from employing a transgender person.

There is no equivalent of s27B in NSW or Queensland and yet there is no evidence in either of those states of any economic problems for businesses as a result of employing a transgender person. Furthermore, s27B endorses discriminatory attitudes in society and is contrary to Australia's international obligations under Article 2 of the International Covenant on Civil and Political Rights.

Since its enactment, s27B has not been referred to in any case law. An employer has never used it as a defence since its introduction. This section unnecessarily discriminates against transgender people and should not exist for the purpose of protecting businesses from the discriminatory attitudes of customers. Therefore it is submitted that s27B should be repealed in its entirety.

In addition to these comments, the LIV considers that s27B is not a reasonable limitation to the right to equality, according to s7(2) of the Charter. We do not consider there to be a legitimate purpose to justify discrimination on the basis of gender identity and submit that the effect of the provision does not create any demonstrable benefit. Rather, it merely reinforces existing prejudices.

The LIV recommends that the s27B exception be repealed.

3.2.2 Section 21 - small business exception to discrimination in employment and employment related areas

Section 21 provides that an employer may discriminate in determining who should be offered employment if the employer has no more than the equivalent of five people employed on a full-time basis. This operates as a blanket exception, so that all small business employers are able to discriminate on the basis of **any** attribute.

The LIV considers this exception to be an unreasonable limitation on the right to equality and the right to be free from discrimination.

The LIV recognises the policy consideration that small business should not be over-burdened by excessive regulation and compliance costs. We submit however that this policy tension can be addressed by an "unjustifiable hardship" defence, similar to that used in the *Disability Discrimination Act* 1992 (Cth).[4]

---

[3] Victoria, Parliamentary Hansard, Legislative Assembly, Tuesday 29 August 2000, p. 251.

[4] Section 11 of the *Disability Discrimination Act* 1992 (Cth) provides:

For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and

Alternatively, the LIV would support a framework that requires businesses to make "reasonable adjustments", similar to provisions in the recently enacted *Equal Opportunity Amendment (Family Responsibilities) Act* 2008[5] and discussed in the *Equal Opportunity Review Options Paper.*[6]

The LIV submits that amendments relating to "unjustifiable hardship" or a requirement to make "reasonable adjustments" would provide a less restrictive means to achieve the purpose of the small business exception. Further, such amendments would ensure that all businesses would be required to comply with equal opportunity laws, to the extent possible given their resources. In particular, we note that many attributes may not require any particular accommodation or incur any financial cost and that as a result, a blanket exception may serve only to permit discriminatory attitudes to continue.

In light of these less restrictive alternatives, the LIV recommends that the small business exception be repealed and that consideration be given to alternative means to alleviate the burden on small business.

3.2.3 Sections 66 - competitive sporting activities

Section 66 permits the exclusion of a person of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

The LIV considers that the words "or with a gender identity" do not constitute a reasonable limitation and we recommend they be omitted.

One of the ways that discrimination on the basis of gender identity is manifested is a refusal to accept and respect the transition of a person to their affirmed sex from the sex in which they were brought up. In light of this, the LIV recommends that competitive sporting activities in Victoria should recognise the affirmed sex of a person of transgender background.

We note that the International Olympic Committee's "Stockholm Consensus" of 2004[7] took a more restrictive view, requiring surgical as well as hormonal and legal reassignment to have taken place, for at least two years. While this position is more restrictive than that proposed by the LIV, the Stockholm Consensus highlights a less restrictive alternative to the current wording of s66.

(b) the effect of the disability of a person concerned; and
(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
(d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.

[5] In particular, see *Equal Opportunity Amendment (Family Responsibilities) Act* 2008, s7.

[6] Equal Opportunity Review Options Paper, March 2008, p 29 – 31.

[7] See http://www.olympic.org/uk/organisation/commissions/medical/full_story_uk.asp?id=841

We submit that where a less restrictive alternative exists, the current exception cannot be compatible with the Charter test of reasonableness and proportionality and therefore warrants amendment.

3.2.4 Section 82 – welfare measures and special needs

The LIV highlights that the Equal Opportunity Review is considering whether to amend the EO Act to incorporate a general exception for "special measures" taken for the purposes of assisting or advancing people disadvantaged because of discrimination.

In this context, the LIV queries whether s82 will become superfluous should such an amendment be made. We submit that it would be appropriate for an amended exception to provide objectively reasonable restrictions to eligibility for services designed to meet the special needs of particular groups so that only those for whom the special measures are designed receive them. The risk that it can be read as permitting other discrimination in the provision of welfare services must be removed.

3.2.5 Section 77 – Religious beliefs or principles

Section 77 provides that discrimination is not prohibited where it is necessary for a person to comply with their genuine beliefs or principles.

The LIV considers that s77 is too broad and too subjective, going far beyond the right to religious freedom as protected in s14 of the Charter. The LIV notes that other exceptions adequately protect the home and private sphere, including:

- ss16 (domestic and personal services) and 54 (shared accommodation);
- s38 (educational institutions for particular groups) and as proposed to be modified, s76 and s75(2)(3)).

The LIV recommends that s77 be repealed.

3.3 Should any exceptions be amended? If so, which exceptions and why?

3.3.1 Section 25 – care of children

Section 25 provides that an employer may discriminate against prospective and existing employees where an employment position involves the care, instruction or supervision of children and the employer believes that the discrimination is necessary to protect the physical, psychological or emotional wellbeing of the children.

The LIV notes that the Working with Children Check (WCC) now creates a mandatory minimum checking standard across Victoria, designed to protect children under 18 years of age from physical or sexual harm. The Consultation Paper notes that the key difference between the exception and the WCC is that the exception for the care of children also covers protection of the psychological and emotional well-being of children.

The LIV recognises the paramount importance of the safety of children. We are concerned however that this exception is too broad and may reinforce discriminatory stereotypes relating to particular attributes and the emotional well-being of children. This concern may be particularly relevant for discrimination on the basis of sexual orientation, gender identity, physical features, sex and impairment, though is not limited to these attributes.

We note that s25 provides there must be a "rational basis" for the employer's genuine belief that discrimination is necessary to protect the physical, psychological or emotional well-being of children. The LIV submits that this is not clearly defined and may be used to justify a particular prejudice.

The LIV submits that s25 should be amended to state that where an employment position involves the care, instruction or supervision of children, it is not discrimination to refuse employment where the applicant has no WCC or on the basis of a negative WCC.

3.3.2 Section 40 – Standards of dress and behaviour (education)

Section 40 allows education authorities to set and enforce reasonable standards of dress, appearance and behaviour for students. Notably, a standard for appearance must be taken to be reasonable if the educational authority has taken into account the views of the school community in setting the standard.

The LIV submits that this exception does not adequately account for the obligation of an educational authority not to indirectly discriminate against students when setting standards of dress and behaviour.[8]

The LIV also notes that most education authorities now have additional responsibilities under the Charter (where they are defined as a public authority under s4 of the Charter). Section 38 of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

---

[8] *EO Act*, s9.

In light of this new obligation on education authorities, the LIV submits that s40 should be amended to recognise human rights obligations under the Charter. This would require recognition that in setting and enforcing reasonable standards of dress and behaviour, an educational authority must have regard to relevant human rights.

Many of the international trends on dress standards in schools have concerned the right to freedom of religion. In particular, the LIV notes a growing body of case law in the United Kingdom discussing the issue of school uniforms and the right of people to manifest their religion under the UK *Human Rights Act* 1998.

In the case of *Begum, R (on the application of) v Denbigh High School*,[9] the House of Lords found that the school did not interfere with a pupil's right to manifest her religion by refusing to let her wear a jilbab (a full length, loose cloak) to school because "Article 9 [of the European Convention on Human Rights on the right to freedom of thought, conscience and religion] does not require that one should be allowed to manifest one's religion at any time and place of one's choosing".[10] The Lords' majority judgment turned on the fact that the claimant chose to attend a school that did not allow the jilbab to be worn, when in fact three other schools in the area did allow for the jilbab in their dress code.

The Lords also held that even if there had been an interference with the claimant's rights, the interference was objectively justified following the reasoning of the European Court of Human Rights (the European Court) in *Sahin v Turkey*.[11] In that case, the European Court held that there is a need for compromise and balance, recognising "the value of religious harmony and tolerance between competing groups and of pluralism and broadmindedness."[12] The Lords found that the school uniform policy at Denbigh High was developed following extensive consultation with Muslim students, parents and local mosques and that it served the wider educational purposes of promoting harmony. This aim was deemed important given the complex make-up of the school, with students from 21 different ethnic backgrounds and 79 per cent of students who were practising Muslims.

This case has been followed in the recent case of *R (on the application of X) v Head teachers of Y School and Governors of Y School*,[13] in which the High Court of England and Wales upheld a school uniform policy that prohibited the

---

[9] *Begum, R (on the application of) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (the *Begum* case).

[10] As per Lord Hoffman, [2006] UKHL 15 at para 50.

[11] *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported).

[12] As per Lord Bingham, [2006] UKHL 15 at para 32.

[13] *R (on the application of X (by her father and litigation friend)) v Head teachers of Y School and Governors of Y School* [2006] EWHC 298.

niqab (a veil that covers the face, also known as a burqa). The LIV also notes recent media reports about a teenage girl in the UK banned from wearing a Christian chastity ring at school who is taking her case to the High Court.[14]

The position taken in the UK and in the European Court can be contrasted with developments in Canada. In the case of *Multani v Commission scolaire Marguerite-Bourgeoys*,[15] an orthodox Sikh student had been banned from wearing a kirpan (a knife-like religious object). The Supreme Court of Canada found for the student, concluding that the ban on wearing a kirpan violated the student's freedom of religion under s2(a) of the *Canadian Charter of Rights and Freedoms* (Canadian Charter) and could not be justified under the reasonable limits permitted under s1 of the Canadian Charter. The Court rejected the school's claim that the kirpan might be used to commit violent acts and held that "the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified". This relies on a test of proportionality, so that where two or more rights conflict, the least restrictive measure should be implemented to balance these rights.

In a submission to the Education and Training Committee *Inquiry into Dress Codes and School Uniforms in Victorian Schools*, the LIV proposed that the Department of Education should develop a more formal policy to guide Victorian schools that elect to have a student dress code on how best to develop and implement the code.[16]

The LIV submits that government policy and individual school dress codes on standards of dress and behaviour must strike an appropriate balance between allowing students to exercise their rights – such as the right to practise their religion – and the limits to be placed on that right having regard to the overriding purposes of the EO Act as well as the considerations set out in s7(2) of the Charter.

In light of the above discussion, the LIV recommends that s40 be amended to recognise that where an educational authority is a public authority under the Charter, the "reasonableness" of any prescribed standards of dress, appearance and behaviour for students should be assessed by reference to compliance with obligations under the Charter.

---

[14] Daily Telegraph, 29 April 2007 available at:

http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/04/28/nring28.xml

[15] *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256, available at

http://scc.lexum.umontreal.ca/en/2006/2006scc6/2006scc6.html

[16] *Inquiry into Dress Codes and School Uniforms in Victorian Schools*, Law Institute of Victoria, 5 June 2007, available at https://www.liv.asn.au/members/sections/submissions/20070605_44/index.html

3.3.3 Sections 75 and 76 - religious bodies and schools

Section 75 provides that religious bodies can legally discriminate where the action conforms to the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of the people of the religion. Section 76 provides a general exception for religious schools.

(i) Conduct excused by the exception

The LIV acknowledges that the exceptions provided for religious schools or schools run by religious bodies provided for in subss75(2)&(3) and s76 of the EO Act have a legitimate purpose, protected by s14 of the Charter. However, the LIV considers that subss75(2)&(3) and s76 are too subjective to pass the reasonable limitations test of s7(2) of the Charter.

The LIV submits that to satisfy the reasonable limitations test, any exception should provide that a school's discriminatory actions must be *reasonably necessary* to conform to the religious doctrines and sensitivities of the school. This objective test means that it is not enough to show merely that discrimination conforms to the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion. Section 7(2) requires that the limitation on rights be only as much as can be reasonably justified, and no more.

The LIV considers that ordinarily, it will only be reasonable for religious bodies and schools to discriminate against employees and contract workers who have a direct role in worship, observance, practice or teaching. This will necessarily include teachers, chaplains, and related support staff with pastoral responsibilities.

(ii) Bodies to whom the exception applies

The Charter requires limitations on rights to be "demonstrably justified in a free and democratic society based on human dignity, equality and freedom". The LIV notes that Australian society is also based on egalitarian, representative and pluralistic principles. The LIV recognises the importance of the right to freedom of thought, conscience, religion and belief to an egalitarian and representative society, set out in s14 of the Charter.

The LIV notes that only persons have human rights. The right to freedom of religion does not extent to an organisation, although we recognise that individuals have the right to demonstrate their religion in worship, observance, practice and teaching "in community". In this context, we suggest that the current framing of the religious schools exceptions is too broad in its definition of "religious body".

The LIV notes that the current Victorian exceptions for religious education providers broaden the previous "religious body" exception in the 1977 EO Act.

We understand that the scope of the exception was broadened to reflect a trend for religious schools to incorporate separately from the religious institutions with which they may have been originally associated, for taxation or other reasons. These new corporations delivered "religious-style" education programs to students.

The public policy justification for the wider exception for "religious education providers" was clearly linked to the need to respect religious faith and observance. Interpretation and application of the principles of faith, religious observance and codes of conduct in schools were subject to the overriding governance of religious bodies.

Given that many schools no longer have any links to a formal religious body, the LIV queries whether it is still appropriate to exempt schools run on "religious grounds".

The LIV recommends an amendment to the exception so that religious schools (that is, those who are subject to the discipline of a religious body), may discriminate against employees and contract workers where they have role in worship, observance, practice or teaching, insofar as such discrimination is reasonably necessary to avoid conflict with the tenets of that religion.

3.3.4 Section 78 - private clubs

The LIV recognises the policy tension arising in equal opportunity and human rights law relating to regulation of the public versus the private sphere. As noted above (under 3.2.5), many exceptions protect the home and the private sphere from regulation.

The Charter also recognises that limitations should be placed on government interference in the affairs of private citizens, in ss13 (privacy and reputation) and 16 (peaceful assembly and freedom of association).

The LIV submits that many private clubs today do not constitute a projection of the private sphere of individuals. Rather, they enter the public sphere by activities such as advertising and offering a range of membership services, activities and benefits in much the same way as other profit-making service providers. Many clubs are large-scale enterprises with hundreds, sometimes thousands of members, sharing common interests and pursuits.

Given the diversity of size and activities of many private clubs, the LIV does not consider a blanket exception for private clubs to be a reasonable limitation on the right to be free from discrimination.

The LIV notes that many private clubs discriminate in an attempt to address historical disadvantage experienced by particular groups of people. We recognise the importance of these private clubs in assisting members to

overcome systemic discrimination. The LIV submits that such clubs are adequately protected by exceptions in ss61-63 of the EO Act. Further, the LIV notes that charities are protected under s74, where the discrimination is in accordance with the provisions of a charitable deed or will.

The LIV recommends amendment to s78 to recognise that unless a private club is established to promote the interests of a group entitled to protection under the EO Act, (a "special measure"), the restriction of membership of a club to a particular attribute should not be subject to exception from the EO Act.

3.3.5 Section 63 – separate access to benefits for men and women

The LIV notes that the EO Act currently permits private clubs to discriminate on the basis of sex on the grounds of the "practicability" of providing services to a particular sex (s63). We understand that this exception was originally intended to allow clubs a reasonable opportunity to provide facilities and benefits, such as changing rooms and hygiene facilities suitable for the other sex, than a club's current dominant membership.

The LIV submits that s63 should be amended, so that private clubs are required to make reasonable adjustments to accommodate for the opposite sex, except where they can show unjustifiable hardship or protection by another exception.

3.4 Is the VCAT exemption process appropriate? How could it be improved?

3.4.1 Interpretation of s83 in light of the Charter

Section 83 of the EO Act provides a mechanism for the Victorian Civil and Administrative Tribunal (VCAT) to grant an exemption from any of the provisions of the EO Act in relation to a person or a class of people or an activity or class of activities. This mechanism effectively enables VCAT to create exceptions to the EO Act on the basis of particular facts and competing interests.

The LIV recognises the importance of s83 in ensuring flexibility in Victoria's equal opportunity regime. We note that many exemptions are sought to ensure that positive discrimination, or special measures, do not constitute discrimination under the EO Act.

When exercising its discretion under s.83, VCAT considers criteria as developed in *Stevens v Fernwood Fitness Centre.*[17] This test requires VCAT to consider whether the proposed exemption is appropriate and reasonable in the light of the objectives and scheme of the EO Act and anticipates that

[17] (1996) EOC 92-782.

exemptions will only rarely be granted. This test has been refined in the recent case of *Boeing*,[18] in which President Morris held that the test to be considered is "whether the proposed exemption is necessary or desirable to avoid an unreasonable outcome."

The LIV submits that the EO Act should be amended to set out the circumstances in which VCAT may grant an exemption and the criteria for granting that exemption. The LIV considers the test propounded by Justice Morris in *Boeing* to be vague and open-ended and we are concerned that it would allow an exemption whenever the costs outweigh the benefits. The LIV reiterates that the right to equality is a fundamental human right and should not be subject to a costs/benefit analysis.

We note that following the commencement of the Charter, s83 must be interpreted in a way that is compatible with human rights.[19] Given that exemptions effectively represent a limitation on human rights, (specifically the right to equality), the LIV supports the submission of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in *Boeing* that when exercising its discretion under s83 of the EO Act, VCAT should apply a reasonable limitations test, as set out in s7(2) of the Charter.[20]

3.4.2 Transparency and efficiency of the process

The LIV submits that the exemption process should be more transparent and accessible.

Under federal legislation, the Human Rights and Equal Opportunity Commission (HREOC) is able to grant temporary exemptions from some parts of the *Sex Discrimination Act* 1984 (Cth), the *Disability Discrimination Act* 1992 (Cth) and the *Age Discrimination Act* 2004 (Cth). HREOC has sought to make accountable decisions by publishing criteria and procedures and seeking public comment on exemption applications before making a decision.

The LIV submits that Victorian exemption applications should be similarly published to enable interested parties to make submissions during the exemption process. Further, we suggest that the current practice of notifying VEOHRC of exemption applications should be formalised as a requirement under the EO Act.

We note that currently many "routine" exemptions are granted on paper without a hearing, where they are special measures designed to achieve substantive

---

[18] *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 (*Boeing*).

[19] *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s32.

[20] *Boeing*, at [34].

equality or correct historical disadvantage. The LIV suggests that these applications could be dealt with more easily by incorporating s8(4) of the Charter into the EO Act, providing that "measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination". Criteria for such special measures could be further set out in guidelines or regulations.

4 Statutory authority exception

4.1 Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed? If not, why not?

The LIV supports recommendation 27 of the Scrutiny of Acts Committee (SARC) in 2005[21] and thus recommends that the statutory authority exception (s69 of the EO Act 1995) be repealed.

4.2 Are there any examples of Acts and enactments that cannot be reconciled with the Act?

The LIV refers to the recommendations made in the Final Report of SARC in 2005 and its submission to that inquiry, attached for your reference.

4.3 Is a mechanism to prescribe certain Acts under the *Equal Opportunity Act 1995* necessary?

Where Acts cannot be reconciled with the EO Act (and/or the Charter), the LIV proposes that an express override declaration should be included in the schedule to the Act. We further recommend that such an override declaration should be subject to a (renewable) sunset clause, as provided for in s31 of the Charter.

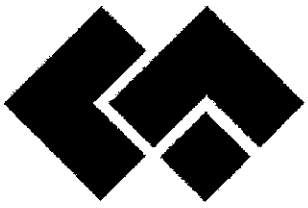
4.4 Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?

The LIV notes that in 2005, SARC proposed a three year transition period to allow government departments and statutory entities to audit their Acts and enactments for compliance with the EO Act. Given that government departments have been auditing Acts and enactments for compatibility with the rights set out in the Charter, we do not consider a further three year transition period necessary. In light of this, we propose a sunset period of at most one year from the date of Royal Assent to the amending legislation.

---

[21] Scrutiny of Acts and Regulations Committee (2005), 'Final Report, Chapter *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995*, [Victoria] 2005, 46.

Attachment C



Law Council
OF AUSTRALIA

Equal Opportunity

Law Council of Australia

Model Equal Opportunity Briefing Policy for Female Barristers and Advocates

20 March 2004

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra
Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639
19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

Objectives of the Policy

Equitable briefing practices maximise choices for legal practitioners and their clients, promote the full use of the Independent Bar, and optimise opportunities for practice development of all counsel or solicitor advocates.

The adoption of equitable briefing practices can play an important role in the progression of women in the law, the judiciary and the wider community.

Application of the Policy

This policy is formulated for voluntary adoption by both clients and legal practitioners (including in-house counsel) throughout Australia.

Whilst acknowledging that the selection of counsel or solicitor advocates is ultimately the decision of the client, referring legal practitioners exercise significant influence in making that selection.

Consistent with that acknowledgement, this policy is also formulated to take into account the role relevantly played by barristers' clerks and counsel in its effective operation. When they are consulted by clients, briefing firms and briefing agencies with a view to engaging counsel, all barristers' clerks and counsel adopting this policy will include female counsel among the names of counsel they identify in the relevant practice area under inquiry.

Equitable Briefing Policy

In selecting counsel, all reasonable endeavours should be made to:

(a) identify female counsel in the relevant practice area; (1) and
(b) genuinely consider engaging such counsel; (2) and
(c) regularly monitor and review the engagement of female counsel; (3) and
(d) periodically report on the nature and rate of engagement of female counsel. (4)

Notes to Assist in Implementing the Policy

1. Female counsel may be identified through searches of the relevant bar or women lawyer association websites; and/or by maintaining internal referral lists that are regularly updated; and/or through eliciting expressions of interest.

2. A genuine consideration would have regard to the skills and competency of counsel, regardless of gender and should avoid inappropriate assumptions about the capacities and aptitude of female and male counsel. Where there are equally capable male and female counsel available, arbitrary and prejudicial factors should not operate to exclude the engagement of female counsel.

3. Briefing firms, agencies and where applicable[1] barristers' clerks should develop the capacity to collect data and report upon that data so as to identify the nature of such engagement. The data should show the number, practice area, type (including hearing type) and gross value of such services. In-house counsel should consider requiring firms engaged by their organisation to ensure capacity exists to collect such data. Firms, agencies and where applicable[2] barristers' clerks should take care to ensure that the data collected or retained is not used for any other purpose than that referred to in this policy. In particular, they should take care the data is not used improperly, or released or published in a way which identifies clients, matters or counsel or particulars relating to any of them which would reasonably be regarded as confidential information.

4. The objective of reviewing, monitoring and then reporting to clients and to Bar Associations or Law Societies on the nature and rate of engagement is that female counsel be briefed at no less than the prevailing percentage of female counsel in the relevant practice area. Applicable statistics are available from the Bar Association or Law Society in each jurisdiction. The review and periodic report should have regard to the success or otherwise of the implementation of an equitable briefing policy, and should initiate steps to redress inequity where it is identified. In-house counsel should consider requiring firms engaged by their organisation to periodically conduct such reviews and report on their outcome to the organisation.

5. Having regard to the diversity in legal practice which exists in different states and territories throughout Australia, it is envisaged that relevant legal bodies and interested parties in each jurisdiction will draft more detailed guidelines for the implementation of this policy.

20 March 2004
(EOBP 01604)

[1] In some jurisdictions barristers clerks do not have access to such data.
[2] ibid