

Inquiry into the effectiveness of the Sex Discrimination Act

Collaborative Submission from leading women's organisations and women's equality specialists

Introduction

The following submission has been prepared and endorsed by a range of leading women's organisations and women's equality specialists (see Appendix A). Many of these members have also prepared independent submissions. This document represents a collaborative vision for strengthening the equality framework in Australia, particularly through improvements to the *Sex Discrimination Act* (SDA).

We welcome the inquiry into the effectiveness of the SDA, in this the 25th anniversary year of Australia's ratification of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

In 2009 Australia will celebrate the 25th anniversary of the adoption of the SDA. Australia's implementation of CEDAW is also likely to be reviewed by the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee). In our view these two events provide a significant impetus for the Australian Government to strengthen the current gender equality framework in Australia. We look forward to the contribution your Committee will play in identifying the areas for improvement.

While we note that the 25th anniversary of the adoption of the SDA provides an excellent opportunity to announce a strengthening of the SDA, we are concerned by the short timeframe of this inquiry. We note that the period given for preparing complex submissions was very brief.

Preparation of this submission has been supported by the WomenSpeak Network and Security4Women and facilitated through leadership of the YWCA Australia.

We are pleased to be able to contribute this submission to the Senate Legal and Constitutional (SLAC) Committee's inquiry. Individual contributors to this submission look forward to appearing before the Committee to provide further insight into matters raised in this submission.

Recommendations contained in this submission

Recommendation 1

That the phrase 'so far as is possible' be removed from the preamble.

Recommendation 2

That the objects section of the SDA, to be renumbered s 3(1), be strengthened (see Appendix C).

Recommendation 3

That the qualifying phrase 'to eliminate, so far as possible' contained in ss (b), (ba) and (c) be removed and replaced with the words 'to prohibit', which is already used in the Preamble.

Recommendation 4

That a new ss 3(2) be added as a guide to judicial interpretation, as follows:

It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further

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the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.

Recommendation 5

That the SDA definitions of discrimination be reviewed to give full effect to CEDAW obligations pertaining to formal equality and substantive equality.

Recommendation 6

Review the SDA to establish the elements of the test for determining the reasonableness of a disadvantaging effect of a condition, requirement or practice. An employer should have to establish a high degree of business necessity, have at the very least considered other alternatives in light of the degree of disadvantage identified, and ensured that the measure was proportionate to the harm it caused.

Recommendation 7

The circumstances in which judges can set aside findings on reasonableness should be prescribed in the SDA.

Recommendation 8

Amend the SDA to address shortcomings pertaining to judicial rulings on motive and onus of proof in sex discrimination cases. In doing so we commend the approach of s 63A of the UK *Sex Discrimination Act 1975* (adopted in 2001) and the EU *Council Directive [97/80/EC](#) of 15 December 1997 on the burden of proof in cases of discrimination based on sex*.

Recommendation 9

Amend the SDA to re-establish the principle, held in the High Court judgment, *Waters v Public Transport Corporation* (1992), that the services provided, or employment involved in a case, should not be characterised in such a way as to preclude the possibility of a finding of discrimination.

Recommendation 10

Amend the SDA to provide full protection against discrimination against all people with family or caring responsibilities. In amending the SDA an inclusive definition of parental and caring responsibilities should be adopted, including ensuring the extension of rights to same sex couples and same sex attracted individuals.

Recommendation 11

Establish an obligation on employers to make adjustments to enable workers with family or caring responsibilities. In formulating such an obligation it should be clear that an employer can only refuse on the basis of a specific justification and must provide evidence for such a refusal. The obligation should also establish a regulatory timetable for this process. We commend to the attention of the SLAC Committee the model adopted in the UK *Employment Rights Act 2004*.

Recommendation 12

Amend the SDA to ensure that in a claim based on intersecting grounds of discrimination, the complainant need not identify which ground is the cause of the disadvantage, provided that they can

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establish that they were treated less favourably than a person who did not embody the same combination of characteristics.

Recommendation 13

Reconceptualise the category of 'special measures' as 'actions towards substantive equality' or 'substantive equality measures'.

Recommendation 14

That the *Human Rights and Equal Opportunity Commission Act 1986* be amended to extend the Sex Discrimination Commissioner's capacity to exercise her amicus curiae function beyond the Federal Court and the Federal Magistrates Court. In particular she should be able to intervene in Fair Pay hearings and to apply to make representations before State courts and tribunals.

Recommendation 15

That HREOC and the Sex Discrimination Commissioner be authorised to initiate inquiries into systemic discrimination.

Recommendation 16

That the Sex Discrimination Commissioner be empowered to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA.

Recommendation 17

Director of Equal Opportunity for Women in the Workplace Agency should be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry.

Recommendation 18

The Committee may wish to inquire how the budget measures will affect the work of the SDC and how any strengthening of the role can be assured sufficient resources to be successful.

Recommendation 19

That the Sex Discrimination Commissioner (SDC) be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality.

Recommendation 20

That such reports focus on key performance indicators (please see the WEL submission for further details).

Recommendation 21

That government respond within 15 sitting days to such reports.

Recommendation 22

That a discrete unit be established within HREOC to undertake the research required for the monitoring and reporting role.

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Recommendation 23

Amend the SDA to introduce an equality duty which places a legal responsibility on public and private bodies to promote gender equality and eliminate sex discrimination. Ensure that such a measure is accompanied by the publication and auditing of equality plans and a compliance regime which moves from a facilitative role to sanctions as a measure of last resort. Vest responsibility for monitoring of compliance with HREOC (and include reporting on compliance in the new reporting obligation to Parliament), with the prosecution of any breaches to be determined by the Federal Court or Federal Magistrates Court.

Recommendation 24

Amend the SDA and the *Equal Opportunity for Women in the Workplace Act* (EOWA) to strengthen the capacity of the government to 'buy' equality outcomes.

Recommendation 25

Review the SDA to ensure that the provision of compensation properly values the loss suffered in sex discrimination cases – including future loss of pay and career advancement, and also establishes the basis for punitive damages which will contribute to the systemic change required to avoid future discrimination.

Recommendation 26

Strengthen the funding available to support strategic public interest litigation in the field of discrimination and equality law.

Recommendation 27

Strengthen the individual complaints process. We commend to the SLAC Committee the model adopted by the NZ Human Rights Commission, noting also the recent review of the Victorian *Equal Opportunity Act* recommends the adoption of a similar model.

Recommendation 28

Review the capacity of the judicial system to make broader recommendations in discrimination cases, as per provisions in the UK *Equality Act*.

Recommendation 29

Increase resourcing to the SDC to enable the collection, publication and use of de-identified complaint data as an education mechanism for both potential complainants and respondents.

Recommendation 30

Amend the SDA to include similar provisions to the *Race Discrimination Act* s 10 on direct remedy for discriminatory state/territory legislation.

Recommendation 31

Amend the SDA to include similar provisions to the *Disability Discrimination Act* on the development of action plans and standards.

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Recommendation 32

That the SDA or a Carers Act ensure that men with caring responsibilities are afforded protection under the act.

Recommendation 33

That the SDC be properly resourced to develop materials demonstrating the business case for preventing and managing sex discrimination and achieving equality.

Recommendation 34

That s 28A (1) be amended to remove the moralistic requirement that the person harassed would be ‘offended, humiliated or intimidated’ and replace it with a requirement ‘that the person harassed would find the conduct unwelcome’.

Recommendation 35

Review s 28A (1b) & (2) to ensure that the use of modern technological tools such as multimedia SMS messages and the internet can also be the instrument of harassment and great offence.

Recommendation 36

That sex-based harassment be expressly proscribed by the SDA. This should be defined to include verbal disparagement, threatening gestures, improper bodily contact and bullying.

Recommendation 37

Repeal both s 37 and s 38 of the SDA.

Recommendation 38

Amend s 44 to include the proviso that any exemption granted must promote the objects of the SDA.

Recommendation 39

That the SLAC recommend the review of the entire anti-discrimination framework in Australia with a view to the adoption of an Equality Act.

Recommendation 40

That such a review look to the lessons of the UK in this matter, both in terms of substantive content (including lessons learnt subsequent to its introduction) and procedural mechanisms adopted for the review.

Efficacy of the SDA in implementing international legal obligations (terms of reference A & B)

Rights to equality and non-discrimination in the human rights treaty system

The individual’s right to be treated equally to others, without discrimination, is a central concept in the UN human rights treaty system (UN HRTS) and is incorporated in the majority of treaties in the

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UN HRTS. The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CROC) all establish obligations to prevent discrimination on the basis of sex and achieve equality.

The scope of obligations in CEDAW

The concepts of sex discrimination and gender equality are given their most explicit meaning in CEDAW. CEDAW defines discrimination against women as

any distinction, exclusion, or restriction or preference made on the basis of sex which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.**

The CEDAW definition establishes obligations for the state to prohibit behaviour which discriminates on the basis of sex and which results in the inequality of women. Thus, CEDAW requires not only that states parties adopt measures to preclude discrimination, but they are also required to adopt measures to achieve women's equality.

The definition of discrimination applies to a range of actions within the remit of states party responsibilities. At article 2, CEDAW establishes a range of areas for action, including embodying the principle of equality in national constitutions; the adoption of legislative measures to prohibit discrimination, including through the provision of sanctions; an obligation to ensure that state actors do not engage in discrimination against women; an obligation to ensure that non-state actors, defined as 'any person, organisation or enterprise' do not discriminate against women; an obligation to take measures to modify or abolish existing laws, regulations, customs and practices which discriminate against women; and to repeal any discriminatory penal provisions.

At article 3, CEDAW identifies an obligation to take all appropriate measures to realise the equality of women. At article 4, CEDAW authorises the adoption of 'temporary special measures' to accelerate the realisation of substantive equality. At article 5 CEDAW identifies obligations to modify social and cultural practices that imply the inferiority or superiority of either sex or that rely on stereotyped ideas of men and women's roles. In particular CEDAW recognises that caring labour in the family should be the domain of both women and men, and that the state has obligations to educate the community about the capacity of both women and men to nurture children.

CEDAW's agenda for gender equality

In the discussion which follows we explore the nature of sex discrimination and gender equality obligations established in CEDAW. Taken together these obligations establish a broad-based agenda for the elimination of discrimination against women and the realisation of substantive equality, in both the public and private sectors.

In relation to provisions on equality, it may be useful for the SLAC Committee to consider the CEDAW Committee's authoritative interpretation of formal and substantive equality, contained in

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their general recommendation on temporary special measures.¹ In particular we draw the SLAC Committee's attention to two factors the CEDAW Committee has highlighted as being important:

- that the treaty contains a broad concept of sex discrimination;
- that the treaty requires the realisation of both formal and substantive equality.

Broad concept of discrimination

The CEDAW Committee note that CEDAW has a broader concept of discrimination than those used in other human rights norms and legal standards both domestically and internationally. They note that CEDAW focuses on the discrimination women experience because they are women, whereas other laws simply prohibit discrimination on the basis of sex.

Realisation of formal and substantive equality

In the view of the CEDAW Committee, to fully realise CEDAW rights, states parties need to ensure that they are not simply achieving formal equality for women, but also substantive equality for women. The CEDAW Committee has elaborated their understanding of substantive equality in four key paragraphs of their general recommendation on temporary special measures, reproduced at Appendix B. In essence the CEDAW Committee articulate an obligation for states parties to ensure that legislative protections pursue a substantive equality agenda which takes into account a) biological differences between women and men, b) the ongoing impact of historical inequalities between women and men, c) the importance of non-identical treatment of women and men in certain circumstances as a mechanism to achieve substantive equality, and d) the transformation of harmful social, political, economic and cultural mores, based on stereotypical assumptions about women and men.

Elimination of sexual harassment

The issue of sexual harassment has been addressed by the CEDAW Committee in its general recommendation on violence against women.² In particular, the CEDAW Committee have identified work related components, arguing that 'equality in employment can be seriously impaired' by sexual harassment in the workplace. They have identified sexual harassment as discriminatory when 'the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'. The Human Rights Committee have also addressed this matter in their work, and it would be useful to consider how the obligations of other treaties, particularly the ICCPR and ICESCR could be integrated into the SDA.

¹ [www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)
² <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>

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Recognition that substantive equality cannot be realised without measures to enable families to reconcile work and caring responsibilities

A central component of CEDAW is the recognition accorded to the detrimental impact on securing substantive equality between women and men arising from biological imperatives of reproduction and the social construction of caring labour as a woman's responsibility. CEDAW establishes five clear obligations for states parties to achieve substantive equality between women and men through the transformation of economic, social and political responses to reproduction and reproductive labour:

- prohibition of pregnancy-based discrimination in preparing for work, entering into work, participating in work, and advancing at work;
- provision of paid maternity leave;
- terms and conditions which reflect the needs of workers with family responsibilities, including the prohibition of maternity-based discrimination;
- the promotion, development or provision of child and family care by public or private means;
- education to challenge social, economic and cultural values on family responsibilities and the function of maternity.

The importance of measures to achieve substantive equality, temporary special measures

CEDAW, at article 4, specifically authorises temporary special measures as a mechanism to accelerate the realisation of substantive equality. Again, it is useful to draw the SLAC Committee's attention to the recent interpretative statement on this issue for elucidation into the nature of the states party obligations in this area.

The CEDAW Committee recognises that CEDAW seeks to address 'the discriminatory dimensions of past and current societal and cultural contexts' which have denied women their human rights. In an Australian context we understand this to be measures to address systemic discrimination. The CEDAW Committee distinguishes between the two types of special measures envisaged in the treaty:

- those which seek to accelerate the achievement of substantive equality by addressing systemic discrimination;
- those which seek to provide for non-identical treatment of women and men on the basis of biological differences.

In both instances the CEDAW Committee recognises that temporary special measures are not 'an exception to the norm of non-discrimination' but rather that 'temporary special measures are part of a necessary strategy' to realise substantive equality. The CEDAW Committee also offers a useful commentary on the concept 'special'. They eschew an understanding of the term as casting women as weak, vulnerable and in need of 'special' measures. Rather, they argue that 'special' means those measures designed to serve a specific goal. The CEDAW Committee goes on to identify a broad range of actions that may be taken:

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22. The term ‘measures’ encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.

It is useful to note that at the last review of Australia’s implementation of CEDAW the Australian Government strongly resisted the view that temporary special measures were required in Australia. The CEDAW Committee raised this matter in their concluding comments, specifically in the context of the participation of Aboriginal and Torres Strait Islander women and women from non-English speaking backgrounds in decision making (See Appendix B for the full text of the comments). In our view, the adoption of a range of measures to achieve substantive equality is required in Australia.

The importance of measures to address ‘intersectional discrimination’

Women’s life experiences and identities, for example class, nationality, ethnicity or sexuality, can mean policies have differential impacts on them. While CEDAW focuses specifically on distinctions grounded in sex, recent debates have highlighted the limitation of a single factor analysis of discrimination. The term ‘intersectional discrimination’ recognises that some people experience discrimination on the basis of more than one aspect of their identity.³ Intersectional discrimination reveals ‘both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination’.⁴ The CEDAW Committee has recognised the importance of an intersectional analysis in a general recommendation on temporary special measures,

certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compound negative impact on them.

The Women’s Rights Action Network Australia use a baking analogy to demonstrate the limitations to discrimination models that require individuals to point to the component parts of their discriminatory experiences. In making chocolate cake, you take a variety of ingredients, eggs, flour, milk, cocoa powder, sugar, butter. At the start of the process you can distinguish each ingredient. However, by the end of the process each ingredient is indistinguishable, and instead of constituent items you now have chocolate cake. In this analogy, intersectional discrimination is the chocolate cake. The CEDAW Committee have grappled with the existence of intersectional discrimination, yet

³ For an insightful discussion into intersectional discrimination see Kimberle Crenshaw, “Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics,” in *Feminist Legal Theory: Foundations*, ed. D Kelly Weisberg (Philadelphia: Temple University Press, 1993).

⁴ UN Division for the Advancement of Women, *Gender and Racial Discrimination, Report of the Expert Group Meeting* No UN Document Number (New York: United Nations, 2000).

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because of the specific focus on sex discrimination in the treaty, have been unable to adequately address matters of intersectional discrimination in the Optional Protocol procedures.

Rights to equality and non-discrimination in the International Labour Organisation

In addition to the UN HRTS, the ILO has also addressed equality and sex discrimination in four key treaties:

- the Discrimination (Employment and Occupation) Convention, 1958 (No. 111),
- Equal Remuneration Convention, 1951 (No. 100),
- Workers with Family Responsibilities Convention, 1981 (No. 156) and
- the Maternity Protection Convention, 2000 (No. 183).

Australia is signatory to the first three. Taken collectively these treaties establish a similar range of obligations to those of CEDAW with respect to reconciling work and family responsibilities. It is important to note however that the Maternity Protection Convention provides for 14 weeks paid maternity leave, and that a 2000 recommendation on the matter extended this provision to 18 weeks paid maternity leave.

To what extent does the SDA implement these international legal obligations?

In our view, the current definitions of sex discrimination, the provisions on discrimination on the basis of family responsibilities contained in the SDA, and the remedy mechanisms available in the SDA do not meet the full scope of measures envisaged in CEDAW. This view is shared by the CEDAW Committee, who in their most recent review of Australia's implementation of CEDAW, expressed concern about the legislative framework for sex discrimination in Australia:

12. While noting the existence of national legislation to prohibit sex discrimination at federal, state and territory levels, the Committee expresses concern about the status of the Convention at these levels and the absence of an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men.

In the discussion to follow we will focus our greatest attention on the definitions of discrimination contained in the SDA. However, at the outset we will briefly focus our attention on limitations associated with the mechanisms for remedy. We will discuss these in greater detail at terms of reference H.

In our view, CEDAW creates a range of remedy obligations, which extend beyond the focus on individual remedies inherent in the SDA. While the SDA empowers the Commissioner to embark upon inquiries and to file *amicus curiae* briefs in a limited range of jurisdictions, the primary remedy for sex discrimination contained in the SDA necessitates an individual to put forward an individual claim of discrimination. This does not meet the full range of measure envisaged in CEDAW.

For example, the complex phenomenon of pay equity is not easily addressed by means of an anti-discrimination complaint mechanism that requires an individual aggrieved by an act and comparison

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with a similarly situated man, and which focuses on formal rather than substantive equality.⁵ Any individual remedies provided under the SDA cannot:

- provide a remedy for large groups of women who are not party to the proceedings;
- directly amend discriminatory arbitral awards for the future; or
- require a systemic audit of all inequitable remuneration systems

At this point we also note the disjuncture between the anti-discrimination framework and the industrial relations framework. While the area of employment is the most frequent ground of complaint under the SDA⁶ complaint-handling in the sex discrimination jurisdiction has remained separate from the mainstream forum of the Australian Industrial Relations Commission. Indeed the historical primacy of the industrial relations jurisdiction in employment matters has continued to underpin an effective demarcation between two very different legislative frameworks, which has worked to construct the sex discrimination jurisdiction one as a secondary and inferior one. The separation between the two jurisdictions has also created gaps. In the UK by contrast, the pursuit of complaints in the equal pay and sex discrimination jurisdictions through the use of industrial conciliation and arbitration mechanisms such as employment tribunals has arguably lent an 'industrial' status to the grievances of sex discrimination and unequal pay lodged with them.

Concepts of discrimination

In this section we turn our attention to the concepts of discrimination espoused in the SDA. In our view the SDA does not adequately reflect the definitions of formal and substantive equality set forward in CEDAW. The current definitions of discrimination were drafted fairly narrowly to begin with, and have been subjected to technical and restrictive interpretations, which means that they have not been able to ensure full formal or substantive equality for women. Improved definitions of both are necessary, but must be accompanied by revision of the objects clause to provide a guide to interpretation of the legislation. Both definitions must be broadened to make it clear that technical narrow judicial approaches are not within the intention of parliament. In an area like sex discrimination, that affects most women in employment or their other activities, incentives for technicalities and complexity in the law must be discouraged. Effectiveness of the law depends on making it clear what employers can and cannot do.

Limitations in the model of formal equality set forward in the SDA: a critique of the definition and application of direct discrimination

Formal equality requires that people in similar situations be treated the same way. This was a vital step forward when the SDA was adopted in 1984. Before the advent of sex discrimination laws, women could be treated less favourably than men without any legal sanction. Thus legally requiring formal equality was a very important achievement of the SDA. However, formal equality is not

⁵ Redman, Ronnit; O'Connell, Karen 2000, 'Achieving pay equity through human rights law in Australia' *Australian Journal of Human Rights*, vol 6, no. 1, p107.

⁶ In 2006/07 81% of complaints under the SDA were in the area of employment.

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concerned only with legal barriers. Full implementation of formal equality requires the removal of non-legal, social or cultural barriers to women’s equal treatment in situations where they are similarly situated.⁷ While some of this distance has been travelled, much more remains to be done in eliminating the role of social and cultural barriers to women’s participation. In the workforce, for example, social and cultural barriers include the prevalence of sexual harassment of women in non-traditional areas, and failure to adjust workplace practices that evaluate men more favourably than women, for example women’s relative lack of comfort in being ‘one of the boys’ in companies where business is done in informal social settings that are suited to men. It is argued below that the definition of direct discrimination is not adequate to ensure that all direct discrimination is prohibited and it should be revised.

Direct discrimination is structured to provide formal equality or same treatment. The test for direct discrimination is whether a person is treated the same as a person of a different sex, marital status etc in circumstances that are the same or not materially different. However, the scope of the guarantee of formal equality is limited by the difficulty of proving direct discrimination given the technical interpretations it has received from the courts. This is because courts have given technical and narrow interpretations of the definition to avoid finding liability, and there are numerous exceptions and exemptions in the SDA (discussed further below under point (n)).

Proving that the ground of any less favourable treatment was sex, marital status or pregnancy or potential pregnancy can be very difficult, as all evidence of the reason for the action lies with the employer. Unless an employer explicitly states that the reason for an action is the sex, marital status or pregnancy of the person affected (e.g. *Thomson v Orica*), it will often be hard to convince a court why the action was taken. The law provides no assistance to complainants to prove their case, and often they will have to rely on the court drawing inferences from circumstantial evidence, or even from the absence of any evidence at all. The SDA requires that the prohibited ground need only be a not insubstantial basis for the decision, so in theory, proof by the employer of another reason does not necessarily negate the presence of a discriminatory reason. However, courts have been reluctant to draw inferences about the ground of actions, and have paid little attention to the multiple motives provisions of the SDA.

This problem could be avoided if the legislation authorised courts to draw an inference of discrimination if circumstantial evidence suggests it could have been a motive and the respondent provides no evidence of a non-discriminatory reason for acting, similar to s. 63A of the UK *Sex Discrimination Act 1975* (adopted in 2001).⁸ This question of onus of proof was regarded as so important to the effectiveness of discrimination law within the EU that a specific Directive was

⁷ Refer to Robin West 2003 *Re-imagining justice: progressive interpretations of formal equality, rights, and the rule of law* Aldershot, Hants, England; Burlington, VT: Ashgate/Dartmouth.

⁸ S.63A provides: Burden of proof: employment tribunals

(1) This section applies to any complaint presented under section 63 to an employment tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or

(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

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adopted requiring EU states to ensure that their law assists with proof in the way that s. 63A does.⁹ Courts should also be required to consider whether even though a non-discriminatory reason has been proved, a discriminatory reason may still have been part of the decision.

Limitations in the model of substantive equality set forward in the SDA: a critique of the definition and application of indirect discrimination

As discussed, CEDAW clearly establishes the obligation to realise not only formal equality, but also substantive equality. In many areas of life, men and women are differently situated, so requiring same treatment will not ensure equality. For example women cannot always be treated like men in the workforce as they have specific needs as a result of their childbearing function. Substantive equality looks to situations where it is necessary to treat someone differently because they are differently situated, in order to ensure equality. Thus, women need to have maternity leave, preferably paid, with a guarantee of return to work in their job, in order to be put on a position of equality with men, who do not face a risk of losing their jobs because of their reproductive roles.

Indirect discrimination, by challenging apparently neutral practices that disadvantage women, or married people, or pregnant people, could provide a path towards substantive equality. However it has not operated in this way because of the barriers to success in proving an indirect discrimination claim. Technical interpretations by courts have blocked progress. This has occurred in relation to identifying the condition requirement or practice, and in applying the condition of 'not reasonable' to the disadvantaging condition.

In *NSW v Amery* (2006), the High Court held that permanent and casual (but long term) relief teachers' jobs were so different that they could not be treated as the same job for the purpose of identifying a condition or requirement. As the High Court held in *Waters v Public Transport Corporation* (1992), the services provided, or employment involved in a case, should not be characterised in such a way as to preclude the possibility of a finding of discrimination. Since this dictum was not followed in *Amery*, it should now be embodied in the SDA, to indicate that the High Court's approach in *Amery* was wrong.

When a disadvantaging effect of a condition, requirement or practice has been established, it is nevertheless acceptable if the employer proves that the condition, requirement or practice was reasonable. This is far too open textured a test, as it suggests no objective requirement. It is much lower than comparable tests in the USA (where proportionality and business necessity must be established) and the UK (where the test is 'justified'). At one stage Sheppard J suggested that the test was so low that provided an employer could state any recognisable reason for a practice, it would not be discriminatory. This is far too low a standard, and better statutory guidance is essential. It is suggested that the elements relevant to the test in s 7B of the SDA be restated as

⁹ See EU Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, which provides inter alia "Member States shall take such measures as are necessary in accordance with their national judicial systems to ensure that, where the plaintiff establishes, before a court or other competent authority, facts from which discrimination may be presumed to exist, it is for the defendant to prove that there has been no contravention of the principle of equality. Member States are not prevented from introducing evidential rules which are more favourable to the plaintiff. Measures taken by the Member States pursuant to the Directive, together with the provisions already in force, must be brought to the attention of all persons concerned."

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elements of the test. An employer should have to establish a high degree of business necessity, or at least having considered other alternatives in light of the degree of disadvantage identified, and that the measure is proportionate to the harm it causes.

It is also suggested that the basis for setting aside a finding that a practice is not reasonable on appeal should be specified. In several important cases, including the Commonwealth Bank case ([1997] FCA 1311 (Full court)), findings that a practice was not reasonable by courts or tribunals that have heard extensive evidence and argument have been overturned on appeal by judges who simply disagree with the assessment of reasonableness made at the lower level. Such a finding on something that has been stated to be a question of fact should only be able to be overturned if a specific identified error of law has been identified in the decision.

Limitations to the objects of the SDA in the context of our discussion of concepts of discrimination

The preceding discussion has addressed the impact of narrow judicial rulings on the efficacy of the SDA. This undermining of the SDA could be avoided by the provision of greater guidance for courts at the outset. The Objects clause of the SDA undermines the entire SDA because almost every subsection is equivocal. Section 3(a) states that it will give effect only to 'certain provisions' of CEDAW. The repeated use of the qualifier, 'so far as is possible', appearing in the first line of the Preamble, and repeated in ss3 (b), (ba) and (c), confirms the impression that the SDA is ambivalent about its aims.

It is not a statutory convention within Australian law to proscribe wrongful behaviour and then qualify it with the words 'so far as is possible'. We would not tolerate an injunction 'to drive on the left-hand side of the road *so far as is possible*'. Most significantly, no such qualification is used in CEDAW, which 'condemns discrimination against women in all its forms' (Art 2). As an example of legislation with a far less equivocal commitment to the non-discrimination principle, the Committee is referred to the *Equality Act 2006* (UK).

As the injunction 'to eliminate' is unfamiliar in legal parlance and the stronger 'to prohibit' is already used in the preamble, its inclusion within the objects clause would require only minor amendment. More interpretative guidance to courts also needs to be provided along the lines contained in modern Acts, such as the *Freedom of Information Act 1982* (Cth).

Limitations to the protection of rights for those with family, parental and carer responsibilities

The current protection for people who have caring roles for others in the SDA is completely inadequate, and does not meet the obligations set forward in CEDAW or the ILO treaties Australia has ratified. Many state laws have gone past the level of protection offered. The SDA should provide full protection against direct and indirect discrimination to all people with family or caring responsibilities, and this should apply to all situations where other discrimination prohibitions apply, not merely to termination of employment.

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Beyond this, however, it is necessary to adopt some formulation that requires employers to make adjustments needed to enable workers to discharge their responsibilities. Of the available models, the NSW carer's responsibilities provisions adopt concepts from disability discrimination law on inherent requirements of the job and unjustifiable hardship, while the 2008 amendments to the *EO Act* (Vic) prohibit unreasonable refusal of an adjustment by an employer. Neither approach is ideal; both are weak in formulation and difficult for individuals to use. Instead, a formulation that requires an employer to refuse only on the basis of specific justification and to provide evidence to support their refusal, and that lays down a regulatory timetable for the process would be much more useful and simpler to follow for both employers and employees. This is the model adopted by the UK *Employment Rights Act 2004*, which is being broadened in the UK due to its success.

Limitations to the SDA's ability to recognise intersectional discrimination

Federal discrimination laws do not provide effective mechanisms for taking account of discrimination that is based on intersecting grounds, such as that suffered by migrant women, or women with a disability. Where the two grounds are prohibited by different discrimination laws, it is difficult to see how such a claim could be proved and argued in court. Even where the intersecting grounds are both within the SDA, as in the case of motherhood discrimination (discrimination against female parents) it is unclear what would need to be shown to establish discrimination. The victim of discrimination cannot know what motivated their treatment and should not be expected to prove it with any precision. Explicit steps should be taken in any revision of the SDA to ensure that in a claim based on intersecting grounds, the complainant need not identify which ground is the cause of the disadvantage, provided they can establish that they were treated less favourably than a person who did not embody the same combination of characteristics. A reversal of the onus of proof of the ground for the particular treatment, such as is required by the Workplace Relations Act s 659; see s 664, would be an effective (though not complete) contribution towards dealing with such cases.

Limitations to the SDA's ability to implement CEDAW obligations on temporary special measures

Under the SDA, any such action has to pass the test in s 7D for Special measures intended to achieve equality. In these situations it is counterproductive to label the necessary action positive discrimination, affirmative action, or even special measures of positive action. All these terms tend to suggest that special favours or unfair advantages are being given. A more accurate term should be adopted which will help to keep the justification for such action at the forefront, such as 'action towards substantive equality' or 'substantive equality measures'.

Recommendations

➤ Recommendation 1

That the phrase 'so far as is possible' be removed from the preamble.

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- Recommendation 2
That the objects section of the SDA, to be renumbered s 3(1), be strengthened (see Appendix C).
- Recommendation 3
That the qualifying phrase 'to eliminate, so far as possible' contained in ss (b), (ba) and (c) be removed and replaced with the words 'to prohibit', which is already used in the Preamble.
- Recommendation 4
That a new ss 3(2) be added as a guide to judicial interpretation, as follows:
It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.
- Recommendation 5
That the SDA definitions of discrimination be reviewed to give full effect to CEDAW obligations pertaining to formal equality and substantive equality.
- Recommendation 6
Review the SDA to establish the elements of the test for determining the reasonableness of a disadvantaging effect of a condition, requirement or practice. An employer should have to establish a high degree of business necessity, have at the very least considered other alternatives in light of the degree of disadvantage identified, and ensured that the measure was proportionate to the harm it caused.
- Recommendation 7
The circumstances in which judges can set aside findings on reasonableness should be prescribed in the SDA.
- Recommendation 8
Amend the SDA to address shortcomings pertaining to judicial rulings on motive and onus of proof in sex discrimination cases. In doing so we commend the approach of s 63A of the *UK Sex Discrimination Act 1975* (adopted in 2001) and the *EU Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex*.
- Recommendation 9
Amend the SDA to re-establish the principle, held in the High Court judgment, *Waters v Public Transport Corporation* (1992), that the services provided, or employment involved in a case, should not be characterised in such a way as to preclude the possibility of a finding of discrimination.
- Recommendation 10
Amend the SDA to provide full protection against discrimination against all people with family or caring responsibilities. In amending the SDA an inclusive definition of parental and caring responsibilities should be adopted, including ensuring the extension of rights to same sex couples and same sex attracted individuals.
- Recommendation 11
Establish an obligation on employer's to make adjustments to enable workers with family or caring responsibilities. In formulating such an obligation it should be clear that an employer can only refuse on the basis of a specific justification and must provide evidence for such a refusal. The obligation should also establish a regulatory timetable for this process. We commend to the attention of the SLAC Committee the model adopted in the *UK Employment Rights Act 2004*.

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➤ Recommendation 12

Amend the SDA to ensure that in a claim based on intersecting grounds of discrimination, the complainant need not identify which ground is the cause of the disadvantage, provided that they can establish that they were treated less favourably than a person who did not embody the same combination of characteristics.

➤ Recommendation 13

Reconceptualise the category of 'special measures' as 'actions towards substantive equality' or 'substantive equality measures'.

The powers and capacity of HREOC and the SDC to initiate inquiries into systemic discrimination and to monitor progress towards equality (terms of reference C)

To what extent do the powers of HREOC and the SDC enable the objects of the SDA to be realised? And what can be done to strengthen the powers?

In our view the expertise of the specialist commissioners such as the Sex Discrimination Commissioner within Human Rights and Equal Opportunity Commission, are crucial to the effectiveness of the SDA, and essential if complex areas of intersecting and systemic discrimination are adequately to be addressed. However, if she is to be effective, her capacity to address issues of systemic discrimination needs to be further strengthened, particularly through a broadened power of intervention and a power to initiate non-complaint-based inquiries.

There have been a range of actions which have strengthened the SDA, for example, amendments to the SDA which enabled the Commissioner to refer complaints relating to federal industrial instruments to the Australian Industrial Relations Commission; and the introduction of the amicus curiae (friend of the court) capacity for the specialist Commissioners. However, the amicus curiae function contained in the HREOC Act is confined to intervention in the Federal Court and the Federal Magistrates Court. In our view the Sex Discrimination Commissioner should not be so constrained. She should be able, for example, to intervene in Fair Pay hearings. She should also be able to apply to make representations before State courts and tribunals where there is provision to intervene, although this would require a change to the HREOC Act, s 46PV.

We would also like to see SDA contain a power that enables the Human Rights and Equal Opportunity Commission (HREOC) and/or the Sex Discrimination Commissioner to initiate inquiries into systemic discrimination.

As discrimination is woven into the historic fabric of society, it is frequently impossible to identify a single respondent who can be held responsible for a specific act of discrimination. Unless an unbroken causal thread connects the complainant and respondent with the act of discrimination, the complaint fails. Moreover, the complaints-based model relies upon victims identifying and standing up for their rights and prompting social change through individual litigation and its subsequent ripple effect. It assumes that victims have the time, security and resources to pursue such litigation, despite the financial and psychological costs of pursuing a complaint in the public interest against a corporate respondent. The latter is likely to have deep pockets and can either pass the costs onto consumers or, in the case of a government respondent, have recourse to the public purse. The individualisation of complaints may mean that a woman who lodges a complaint of sex

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discrimination becomes very visible, not only within an organisation, but within an industry. This is particularly the case with women occupying high-profile and senior positions, whose careers may be ruined as a result, as happened in *Dunn-Dyer v ANZ*.

Even if an employer is found to have discriminated, they will only be ordered to compensate the victim. The courts lack power to order systemic corrective orders, such as a change in policy, the introduction of a compliance program that might prevent further discrimination, an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant or to set reform standards. In this way, the laws are more focused on redressing, not preventing harm or promoting equality. Having settled a complaint of discrimination, an employer may not even see a connection between the individual complaint and other equality issues in the workplace.

These problems would be met to some extent if the SDA contained a power that enabled HREOC and/or the Sex Discrimination Commissioner to initiate inquiries into systemic sex discrimination, such as within the legal profession, an industry or a workplace. The SDA contains a power of initiation but it is limited to laws; it does not extend to the sites of discrimination.¹⁰ This power of initiation should not be contingent on the lodgement of a complaint.

We note also in this context that the Director of the Equal Opportunity for Women in the Workplace Agency (EOWA) receives reports from employers of more than 100 people across all occupations and industry sectors. There is little remedial action available to the Director when possible industry sector or occupation wide-systemic discrimination is identified through her agency's activities, which include employer consultations, worksite visits, and industry data analyses. However, if the Sex Discrimination Commissioner had a power to initiate an inquiry into systemic sex discrimination in an industry or occupational group, the Director EOWA would be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry

In order to move beyond the limitations of the individualised complaint that is close to the surface, this power to initiate inquiries into systemic, class-wide and structural discrimination, is crucial. We stress that the Sex Discrimination Commissioner must be adequately funded in order to conduct these inquiries in addition to her other functions. Otherwise, in the context of efficiency dividends, the urgent will always drive out the important. In particular we note additional budgetary pressures. For 2007/08, the Commission's appropriation revenue has been decreased by \$5.867 million as a result of the savings identified under the new measure 'Workplace Relations reform'. Additional resourcing for the Human Rights and Equal Opportunity Commission is urgently required.

On 27 May 2008, President Von Doussa informed the Senate Legal and Constitutional Affairs Estimates (at p. 76): "Effectively, there has been about a 12.5 per cent drop in our appropriation allowance from the original 2007-08 budget to the 2008-09 figure. The difficulty that I have as the CEO of the organisation is to work out how we are going to manage that significant drop in funding and still continue to meet our core statutory obligations. My present intention is to spread that loss across all units of the commission rather than let it fall entirely on the complaints section."¹¹

¹⁰ Sex Discrimination Act 1984 ss 48(1)(f) and (g)

¹¹ <http://www.aph.gov.au/hansard/senate/committee/s10850.pdf>, p. 76

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Recommendations

- Recommendation 14
That the *Human Rights and Equal Opportunity Commission Act 1986* be amended to extend the Sex Discrimination Commissioner's capacity to exercise her amicus curiae function beyond the Federal Court and the Federal Magistrates Court. In particular she should be able to intervene in Fair Pay hearings and to apply to make representations before State courts and tribunals.
- Recommendation 15
That HREOC and the Sex Discrimination Commissioner be authorised to initiate inquiries into systemic discrimination;
- Recommendation 16
That the Sex Discrimination Commissioner be empowered to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA;
- Recommendation 17
Director of EOWA should be able to refer appropriate matters that have come to her attention to the Sex Discrimination Commissioner for a possible systemic discrimination inquiry.
- Recommendation 18
The Committee may wish to inquire how the budget measures will affect the work of the Sex Discrimination Commissioner and how any strengthening of the role can be assured sufficient resources to be successful.

What can be done to strengthen the capacity of the Sex Discrimination Commissioner to monitor progress towards equality?

A key element in achieving any kind of equity goal is the establishment of effective monitoring mechanisms. For the integrity of such mechanisms to be maintained they need to be at arms length from government and able to undertake independent analysis and evaluation of evidence.

The federal government currently lacks effective mechanisms for monitoring progress towards gender equality. In the past there were units within government with specific responsibilities for monitoring aspects of gender equality such as equal pay. These included the Women's Bureau within the employment portfolio (1963-97) and the Equal Pay Unit within the Department of Employment and Workplace Relations (1991-98). The fact that these units no longer exist suggests the vulnerability of such monitoring mechanisms when they are located within government.

In order to ensure renewed progress towards gender equality new agendas are needed and new monitoring mechanisms to ensure that attention is paid to any shortfalls. The independence of HREOC as Australia's national human rights institution makes it the appropriate location for monitoring progress towards gender equality. The Sex Discrimination Commissioner should be given a new statutory responsibility to monitor and report annually to parliament on progress towards gender equality. This new statutory role must be accompanied by new resources. Past experience suggests that such monitoring and reporting functions must be allocated discrete resources so that they are not competing with the other functions of the Commission. A dedicated

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unit is required for the new monitoring unit, with a minimum staffing level of five researchers—the equivalent of previous monitoring bodies such as the Women and Statistics Unit within government.

In order to measure progress in overcoming major sources of gender inequality the annual reports should focus on key performance indicators. An indicative set of data items is attached to this submission, but as a minimum these should include:

- the overall gender pay gap for ordinary hours full-time work, as well as other forms of pay disparity across industries, occupations and types of work;
- the impact of caring responsibilities on income security, as measured by the gender ratio of those living in poverty;
- access to quality childcare;
- access to paid maternity and parental leave;
- the level of gender-based violence;
- representation of women in public decision-making, including parliaments and local government.

The information in such annual reports should be presented graphically where possible and in a highly visual, accessible and economic way, to assist in the goal of raising public awareness of persistent obstacles to gender equality. To ensure that such reports are not lost on being tabled in parliament, there should be a statutory responsibility for government to respond to them within 15 sitting days.

Recommendations

- Recommendation 19
That the Sex Discrimination Commissioner be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality.
- Recommendation 20
That such reports focus on key performance indicators (please see the WEL submission for further details).
- Recommendation 21
That government respond within 15 sitting days to such reports.
- Recommendation 22
That a discrete unit be established within HREOC to undertake the research required for the monitoring and reporting role.

Significant judicial rulings on the interpretation of the SDA and their consequences (terms of reference E)

How have judicial rulings undermined the SDA and what can be done to remedy this?

We note our concern that a persistently narrow interpretation of the SDA, particularly on the part of the High Court, is undermining efficacy of the SDA. It is notable that, in the 12 years since *Wik*, not a single discrimination case has succeeded before the High Court. With the exception of Justice

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Kirby, High Court judges have ignored the beneficent purpose of the SDA and the contents of CEDAW, which has frustrated the aims of the legislation.

For example, *Purvis* (2003) is a disability case that has reconceptualised the notion of the comparator in narrow and onerous terms that raises the burden of proof in direct discrimination complaints to insuperable heights. We shall return to this point under **m** below. *Amery* (2006) is only the third sex discrimination case to be heard by the High Court in 30 years. Again, the approach was narrow and legalistic, displaying little understanding of how socially constructed choices regarding mobility in employment contributes to systemic discrimination for women with family responsibilities.

We have addressed these matters in our recommendations under terms of reference A and B.

Preventing discrimination, including by educative means (terms of reference G)

HREOC has done a fine job of bringing public attention to various manifestations of sex discrimination, over the last 24 years, often in a politically hostile context. This has included for example, the 1991/92 Inquiry into Sex Discrimination into Overaward Payments, the 1998/1999 inquiry on pregnancy discrimination, the development in 2001/2002 of a proposal for a national paid maternity leave (PML) scheme and the 2006/2007 Striking the Balance Inquiry into gender equality and work and family balance. In addition HREOC has developed a range of material and campaigns that have sought to address sexual harassment (eg *Harsh Realities* in 1999 and 2000) and encourage the uptake of equal pay audits. HREOC has also provided guidelines for organizations and employers in a range of areas including employment. Unfortunately awareness raising and education are not enough. To discourage if not prevent discrimination and to address systemic disadvantage, we need positive action measures which are linked to a responsive and effective individual complaints mechanism.

Two key positive action measures are an equality duty and the strategic use of government procurement policy.

What is an equality duty and how would it strengthen the SDA?

An equality duty would place the legal responsibility on public and private bodies to promote gender equality and eliminate sex discrimination, in respect of employment, the provision of services and policy making. In respect of employment, for example, an equality duty would shift the burden onto the workplace to identify and address systemic disadvantage regardless of any receipt of complaints.

Legislation has been enacted in most Australian jurisdictions requiring public authorities to identify sources of inequality, take steps and report on outcomes of steps to improve equal employment opportunities for women and other designated groups. In practice the implementation of such legislation has waxed and waned over time depending on government resourcing and commitment. It has generally focused more on the provision of equal employment opportunities rather than

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substantive equality outcomes and also on the completion of reports rather the active auditing of outcomes.

In the private sector, the Affirmative Action Act 1986 (AAA) required employers with 100 or more employees to lodge an annual public report with the Affirmative Action Agency. This report was to contain statistics and other relevant information on the gender composition of their workforce as well as reporting on steps taken to develop and implement their affirmative action program. Sanctions could be imposed for failure to lodge a report—although not for failure to develop an adequate program—by naming the transgressor in Parliament. In 1998 shifts in government policy and business concern with the costs of compliance led to a review of the AAA and the enactment of the *Equal Opportunity for Women in the Workplace Act 1999*. The new Act watered down the minimal reporting requirements of the AAA significantly and moved from an emphasis on compliance to 'reasonably practicable' actions, with the weak sanctions of the legislation only to be used 'as a last resort.' In essence these changes explicitly limited the achievement of EEO to by the 'capacity to comply' of employers.

In the light of this experience, an effective equality duty under the SDA would need to be accompanied by the proactive publication and auditing of equality plans. It would also need to be accompanied by an appropriate compliance regime moving from encouragement and support to promote a co-operative rather than adversarial approach, to scrutinising report and equality plans and their implementation, with provision for sanctions as a last resort. HREOC would be the appropriate body to have the responsibility for scrutinising reports and equality plans and their implementation relevant to any public or private sector duties, with the prosecution of any breaches by HREOC a matter to be determined by the Federal Court or Federal Magistrates Court.

In the UK a public sector Gender Equality Duty, in place since 2007, requires public authorities to identify and then take steps and report on outcomes to eliminate disadvantage and inequality. It is envisaged that this Equality Duty will become part of a boarder public sector equality duty (see below). Similar duties also exist in Canada.

In Northern Ireland there has been a statutory requirement on private sector employers for the last 20 years to monitor and report on their equality practices, in relation to the employment of Catholics. If companies fail to meet statutory reporting and workforce monitoring requirements, or instructions to apply affirmative action, sanctions can be placed on employers including exclusion from public authority contracts. As noted by the European Commission's Community Action Program to Combat Discrimination, these requirements have had a greater long term deterrent effect than the sanctions following litigation.

How can government purchasing power be used to strengthen the realisation of equality?

The government's purchasing power should be used to 'buy' equality outcomes, by encourage good practice in relation to the elimination of discrimination and the promotion of equality and also to effectively sanction those organizations that breach the SDA. Currently there are some very limited powers under the Commonwealth Government Contract Compliance policy in respect of 'non-compliant' organisations under the EOWA. The policy provides that:

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- Commonwealth departments and agencies will not enter into contracts for the purchase of goods and services from non-compliant organisations;
- Employers that have been named in Parliament for non-compliance will not be eligible for grants under specified industry assistance programs.

However given 'non-compliance' with the EOWA is based on failure to provide a report rather than failure to develop an adequate program, the effect of this policy on equality outcomes in organisations reporting to the EOWA has been very limited. We note for example that just 16 organisations were deemed non compliant in 2007.

One way of ensuring that employers in the private sector adhere to minimum decent employment and anti-discrimination standards set by HREOC and move to address systemic discrimination is to ensure that government contracts are only awarded to those organisations that can demonstrate that they meet those standards. The use of government purchasing policy has been particularly effective in Victoria where law firms tendering to carry out services for the government are obliged to provide evidence of a minimum amount of pro bono work undertaken and provide details on the quantity and value of the legal work given to women barristers.

The UK Equalities Review found that there was evidence that using procurement to promote equality in employment is generally accepted by the business community to be a sensible approach for government to take and further that requiring suppliers to follow sound equalities principles, and to adopt the provisions of an updated public sector duty to promote equality, could have a profound impact.

As noted above, in Northern Ireland the effective use of government procurement has been an important mechanism to enforce anti-discrimination legislation.

Recommendations

➤ Recommendation 23

Amend the SDA to introduce an equality duty which places a legal responsibility on public and private bodies to promote gender equality and eliminate sex discrimination. Ensure that such a measure is accompanied by the publication and auditing of equality plans and a compliance regime which moves from a facilitative role to sanctions as a measure of last resort. Vest responsibility for monitoring of compliance with HREOC (and include reporting on compliance in the new reporting obligation to Parliament), with the prosecution of any breaches to be determined by the Federal Court or Federal Magistrates Court.

➤ Recommendation 24

Amend the SDA and the EOWA Act to strengthen the capacity of the government to 'buy' equality outcomes.

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Providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process (terms of reference H)
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Anti-discrimination legislation, such as the SDA establishes a limited framework within which individual employees have the right to lodge a complaint in certain circumstances.¹²

Except in a few exceptional cases, remedies granted under the SDA have been very low, and arguably do not fully compensate women for their loss, especially where discrimination or harassment leads to termination of employment. This leads to a situation where there is little incentive for individuals to bring enforcement actions as they may end up with little gain after paying their solicitor client costs. Secondly, the remedies provided in the SDA and awarded by courts do not address systemic issues such as requiring employers to change their systems, to prevent similar discrimination occurring in future. In cases of unequal pay, an effective remedy must be systemic. What is needed are provision for awarding full compensation that is sufficient incentive for individuals to enforce the law, and for remedies that will ensure systemic change to avoid future discrimination.

Where complaints are brought, it is only in rare cases that large damages awards are made. Damages awards must begin to properly value the loss that is suffered in sex discrimination matters. While awards for back pay are common, awards for pain and suffering, and for front pay are often not given, or are unjustifiably low. Pain and suffering awards are often only several thousand dollars, which is quite inadequate in a matter where a complainant has had to persist with litigation in which her competence, personality and motives may have been subject to attack and where she has had to risk the possibility of paying the respondents costs if she lost. This is particularly an issue in cases against government and large corporations where the respondents are not affected in their litigation decisions by resource limitations. For example, in *Hickie v Hunt and Hunt*, the compensation awarded was a very small sum for loss of a career as a law firm partner. A woman who has brought a successful and well publicised claim of discrimination in one of Australia's professions may have a very reduced chance of getting another such position, and under-compensation in that situation is a strong deterrent to challenging discriminatory practices. Where cases appear likely to result in large damages awards (*Thomson v Orica*, *Christina Rich v PricewaterhouseCoopers Australia*), they are usually settled so that the amounts paid out do not become public knowledge.

There is a strong argument for public support of some strategic litigation to ensure the development of an effective set of precedents in Australian discrimination law. This would require provision of a litigation fund to an organisation with responsibility and expertise to resource selected cases to provide clear guidance to all parties on what the law requires. The minimal provision of legal aid in Australia for discrimination claims means that enforcement is restricted, and the resource and consequent power imbalance in many litigated matters impacts undesirably on the development of precedent.

In relation to damages assessment, courts should be directed to assess the full loss a successful complainant suffers, including future loss of pay and loss of career advancement that would have been expected from the pre-discrimination employment, unless the complainant disclaims it. Where

¹² Thornton, Margaret, 2001 'EEO in a Neo-Liberal Climate' *Journal of Interdisciplinary Gender Studies*, pp. 77-104

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many litigants are not well represented because of resource limitations, the legislation should ensure that basic entitlements are provided to those who succeed.

Systemic remedies should be explicitly part of the court's powers and courts should be directed in awarding remedies to do what is necessary not only to compensate the particular complainant but to ensure that any discriminatory practices identified are changed so that others will not be similarly affected.

Anti-discrimination legislation, such as the SDA, establishes a limited framework within which individuals have the right to lodge a complaint in certain circumstances. The enforcement process places the burden on the person discriminated against to take action, and the conciliation process, which has become increasingly legalized under the SDA, have emerged as particular structural problems.¹³

At a time when labour market and employment deregulation has been arguably producing a lot of unfairness for women, formal complaints lodged under the SDA in the area of employment remain relatively low. The number of complaints has fluctuated for example from 413 in 2001/2002 to 259 in 2005/2006. While complaints under the SDA in the area of employment increased in 2006/2007 to around 382 with the rise of complaints as a result of WorkChoices, on a per capita basis they remain well below those in the UK where complaints under the Sex Discrimination Act 1986 (UK) and the Equal Pay Act 1970 (UK) are growing rapidly.

While in recent years HREOC has improved the responsiveness of the complaint handling process, including under the SDA, it remains a relatively slow and non-transparent process. There is, for example, little detailed publicly available data on the type of detriments alleged in complaints made, the type of respondents against which they are made (including on repeat respondents), and on individual outcomes.

To improve the practical accessibility of the complaint process and the speedy resolution of complaints under the SDA, it would be useful to consider the New Zealand Human Rights Commission's (NZ HRC) dispute resolution process, which focuses on resolving complaints in the most effective, informal and efficient manner at the earliest possible opportunity.¹⁴

The main steps in this process are as follows:

Triage of complaints

- Step one: Assessment as to whether the Commission is the right agency and/or whether information can help the parties clarify or resolve their complaint.
- Step two: Assessment as to whether it may be within the unlawful discrimination provisions or whether it relates to broader human rights issues. Complaints that relate to unlawful discrimination are either passed to the duty mediator (to start to deal with on the day); or acknowledged and assessed further (if the nature of the complaint suggests that immediate intervention will not be productive).

¹³ Gaze, Beth 2004, 'The Sex Discrimination Act After 20 years: Achievements, Disappointments, Disillusionment and Alternatives' *UNSWLJ Forum* vol. 27 pp. 914-921

¹⁴ New Zealand Human Rights Commission Annual Report 2007, p32
http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/19-Nov-2007_11-42-32_HRC_ANNUAL_REPORT_07.pdf .

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- Step three: After assessment, complaints are assigned to mediators. Mediation depends on the engagement of all parties. Mediators give and receive expectations from parties against timeframes, follow them up and keep all parties informed as to progress or reasons for delay
- Step four: Where matters are unresolved after mediation, they are referred to the Human Rights Review Tribunal. At this stage the Office of Human Rights Proceedings, an independent part of the Human Rights Commission, may also be involved in providing legal representation to complainants.

The flexible dispute resolution process allows a range of interventions. Some complaints are resolved through the provision of information which can enable self help. In 2007, the NZ HRC managed to close 90 percent of complaints within three months of receipt. This compares to an average of 20 percent of complaints under the SDA in the same period. (55 percent of complaints lodged under the SDA were finalized in 6 months, with 80 percent of complaints within 9 months)

The system of triage, in particular, has enormous potential as does the role of Duty Mediators in providing the sort of practical support and non-technical, non-legalistic advice that those who are experiencing discrimination require. On the NZ HRC website the role of the duty mediators in this respect is to:

- Provide informal intervention and try to resolve dispute
- Provide sounding board for discussion of human rights issues
- Gather data for systemic issues
- Encourage attitudinal change

We note that the very recent Review of the Victorian Equal Opportunity Act 1995 has also recommended a new complaints system that will encourage the early resolution of disputes, which is very similar to the NZ model.

Linking the individual complaints system to measures to address systemic discrimination

A simpler, quicker, more accessible individual complaints system under the SDA needs to be linked with measures to address systemic discrimination. This can be addressed in a number of ways. For example, in the United Kingdom, the new Equality Law is to provide for tribunals to make wider recommendations in discrimination cases, which will extend the impact of the remedy from the individual to the rest of the workforce of a discriminatory employer. In Australia links between both individual complaints lodged with HREOC and in determinations made by the Federal Court of Australia or the Federal Magistrates Court should be made with other action-based and goal-oriented equality duties.

In addition to a broader conceptualisation of measures to address systemic discrimination, the collection, publication and use of de-identified data on the complaint process and outcomes would enable proactive steps to reduce sex discrimination and promote gender equality more generally to be taken, and to educate both potential complainants and respondents. Such data would include:

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- The types of detriment alleged by complaints: Socio-demographic data on complainants by each jurisdiction, instead of aggregated under all federal AD legislation as is currently the case in HREOC's annual reports.
- Legal and other representation of complainants and respondents: The industries, sectors in which complaints are made as the basis of taking action to address issues in particular industries or sectors.
- Settlements reached, both monetary and other.

We note that the very recent Review of the Victorian Equal Opportunity Act 1995 has also recommended that the collection and analysis of quantitative and qualitative data including that in respect of individual complaints is critical.

Technical aspects of scope

Finally, we note that the SDA is narrower in a number of ways than comparable legislation, such as the RDA and DDA. Both of the latter Acts bind the Crown in right of the States as well as the Crown in right of the Commonwealth, and there is no good reason why the SDA should not also do this. Section 10 of the RDA allows a direct remedy where state legislation is discriminatory on racial grounds, and the SDA should have a similar provision. The DDA contains provision for action plans and standards, and consideration should be given to adopting similar mechanisms for the SDA. For example provision for organisations to develop their own action plan for gender equality and lodge it with HREOC or the Sex Discrimination Commissioner may provide an incentive for action, especially if compliance with the plan then became a relevant factor for the court to consider in any subsequent discrimination claims. For example, a set of guidelines for managing pregnant employees and for managing parental leave and return from parental leave would be of great value, even if they were only advisory.

Recommendations

- Recommendation 25
Review the SDA to ensure that the provision of compensation properly value the loss suffered in sex discrimination cases – including future loss of pay and career advancement, and also establishes the basis for punitive damages which will contribute to the systemic change required to avoid future discrimination.
- Recommendation 26
Strengthen the funding available to support strategic public interest litigation in the field of discrimination and equality law.
- Recommendation 27
Strengthen the individual complaints process. We commend to the SLAC Committee the model adopted by the NZ Human Rights Commission, noting also the recent review of the Victorian Equal Opportunity Act recommends the adoption of a similar model.
- Recommendation 28
Review the capacity of the judicial system to make broader recommendations in discrimination cases, as per provisions in the UK *Equality Act*.

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➤ Recommendation 29

Increase resourcing to the Sex Discrimination Commissioner to enable the collection, publication and use of de-identified complaint data as an education mechanism for both potential complainants and respondents.

➤ Recommendation 30

Amend the SDA to include similar provisions to the *Race Discrimination Act* s 10 on direct remedy for discriminatory state/territory legislation.

➤ Recommendation 31

Amend the SDA to include similar provisions to the *Disability Discrimination Act* on the development of action plans and standards.

Addressing discrimination on the grounds of family responsibilities (terms of reference I)

At the outset, we would like to commend to the SLAC Committee the report of the HREOC inquiry into work and family balance, *It's About Time*. In particular we note the HREOC view that the current provisions of the SDA did not enable women and men to balance their work and family responsibilities. HREOC recommended the adoption of a new act addressing this matter, and the establishment of a new unit to administer the act.

In our view the current federal legislative arrangements do not adequately address discrimination on the grounds of family responsibilities. While the ILO Convention 156 on workers with family responsibilities simply establishes an obligation to prevent discrimination in dismissal from employment, it also obligates states to promote laws and policies to facilitate workers with family responsibilities to participate in their workplace without discrimination. Moreover, the obligations in CEDAW to understand maternity as a social function and to recognise the common role of women and men in raising children, establish a broader set of measures than those provided for in s 7A and s 14(3A) of the SDA.

In our view workers with family responsibilities should enjoy protection and remedy across the employment spectrum. In proposing an expansion of the SDA we seek to ensure that a full range of employment practices are taken into consideration. We also seek to ensure that a broad range of family structures are recognised, noting that the current definition excludes same sex couples from protection.

Three factors have arisen to undermine the protection afforded to workers with family responsibilities:

- challenges associated with finding a comparator;
- the limitations of the indirect discrimination provisions, including the reasonableness test;
- the model of equality pursued in the SDA.

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The comparator problem under ss 7A and 14(3A)

As it stands the direct discrimination provisions of the SDA require that a comparison be made between the complainant and a ‘straw group’, to prove that the complainant has been less favourably treated because of their family responsibilities. In judicial interpretation of the provisions the identification of the comparator group has been contested and unclear. In *Song v Ainsworth Game Technology Group Pty Ltd* individuals alleging discrimination on the basis of family responsibilities were compared to workers who could have been subject to discrimination for accessing a 20 minute smoking break. The necessity of finding the comparator group undermines the ability to address the endemic and structural discrimination that women and men with family responsibilities encounter as they seek full-time or part-time employment.

The limitations of indirect discrimination provisions

HREOC notes that in the absence of broad family responsibilities provisions women are using alternative sections of the SDA to pursue allegations of workplace failure to accommodate family responsibilities. In particular, s 5(2) and 7(BI), which define indirect discrimination and the reasonableness test respectively, have been used.

The jurisprudence in this area goes some way to enabling women with family responsibilities to negotiate a flexible return to work following a period of maternity leave. Of particular importance has been the judicial notice that far more women than men seek part-time work to enable them to care for young children. The primary case in this regard is *Hickie v Hunt and Hunt* where Commissioner Evatt found that a refusal to provide for part-time work arrangements constituted indirect discrimination on the basis of sex. Subsequent decisions have adopted a more restrictive interpretation, undermining the capacity of the SDA to offer effective remedy for women experiencing workplace based discrimination on the basis of their family responsibilities.

Equality models

CEDAW establishes a clear obligation to ensure that women and men are supported to recognise their common responsibility for raising children; ILO Convention 156 on workers with family responsibilities has expanded this understanding to include family responsibilities generally. The current provisions in the SDA and judicial notice of women’s role in child raising afford limited protection to women workers with family responsibilities. However, they offer no avenue for remedy for male workers with family responsibilities. If we are to achieve substantive equality for women then we must address the social and economic pressures which inhibit men from playing a more active role in their children’s lives. The anti-discrimination framework at the federal level needs to offer men as well as women access to remedy when they encounter discrimination on the basis of their family responsibilities.

Recommendations

We have addressed many of the matters raised in this section in our recommendations at terms of reference A and B. However, we note the additional recommendation:

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➤ Recommendation 32

That the SDA or a Carers Act ensure that men with caring responsibilities are afforded protection under the act.

Impact on the economy, productivity and employment (terms of reference J)

A framework that fails to reflect the reality of women's employment experiences

It is now nearly 25 years since the SDA was first enacted. The prohibition against sex discrimination in the area of employment continues to be the major focus of formal complaints made to HREOC. However participation in, and the nature of, employment has changed dramatically since 1986. In our view it is time for the SDA to be modernised to more effectively respond to the working realities for men and women in the changed workplace of the 21st century.

The case for modernisation is set out clearly in a recent audit on how well Australian democracy services women. The picture that emerges is not positive.

Whereas Australia was once a leader in the global struggle for gender equality, this report makes clear that in recent years Australia has resiled from this commitment and many of the achievements of an earlier period have now been undone. This is most obviously true with regard to the dismantling of women's policy machinery and the silencing of the women's non-government sector. While the body of legislation designed to protect women from discrimination remains substantially intact, it is evident that on its own the legislative framework is inadequate to ensure a substantial political equality between women and men...¹⁵

Yet without significant renovation of the SDA to provide a basis and a framework for action any progress towards this goal will be limited.

The SDA has not kept pace with the profound changes to the labour market and for women workers within it. While there has been an increasing participation of women in the paid workforce, including those with children under school age, much of this employment growth has been concentrated in poorer quality part-time employment.

Since the enactment of the SDA, the conditions of employment have become increasingly deregulated moving from centralised wage fixing to enterprise bargaining in the early 1990s to an increasingly emphasis on individual bargaining and degraded employment minima from the late 1990s on. Casual employment has increased dramatically and now comprises almost a quarter of all employment and a third of female employment in particular.

As set out in a recent analysis of women's employment in Australia, there are increasing gaps in the outcomes for different groups of women, with not only a persistent pay gap between men and

¹⁵ Maddison, S. & Partridge, E.Y. 2007, *How well does Australian democracy serve Australian women? Report No. 8*, [prepared for Democratic Audit of Australia], Australian National University, Canberra, Australia.

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women but increasing gaps between women working full-time and part-time and those in different occupations.¹⁶

The interaction of changes in participation and employment has led to an increase in gender-based inequalities in the labour market and, in many cases, to more entrenched systemic discrimination within organisations.¹⁷ The current definitions of discrimination and mechanisms to address inequality in the SDA are not suitable to addressing this form of entrenched systemic discrimination.

When the costs of failing to fully address sex discrimination are weighed against the benefits of achieving equality in the workplace, the case for continuing action is clear.

The Costs of Discrimination

Research demonstrates discrimination in employment has a range of adverse consequences for individuals, including psychological impacts such as depression and other forms of mental illness^{18,19} and financial impacts associated with seeking legal redress and, in the case of sex discrimination, reduced earning capacity.

The costs of discrimination are also felt by organisations. These include direct costs associated with damages and legal fees, as well as indirect costs relating to absenteeism, 'down-time' for resolving issues, resignations, recruitment and re-training, reduced staff morale, reduced productivity, and damage to the company's reputation. By way of example, complaint management costs have been estimated at \$35,000²⁰ for the average 'in-house complaint' to as much as \$125,000²¹ for a serious external complaint.

Discrimination also adversely affects the general community, with the Economic and Social Survey for Asia and the Pacific 2007 identifying barriers to employment for women cost the region \$42 billion to \$47 billion annually.²²

The Benefits of Equality

The benefits of workplace equality flow to both individuals and organisations. Individuals, for instance, benefit from increased financial independence, a sense of dignity and self-worth, and associated improved psychological and physical outcomes. While organisations experience economic benefits including higher financial performance²³, reduced absenteeism, increased staff

¹⁶ Preston, Alison, Therese Jefferson, and Richard Seymour. 2006. *Women's pay and conditions in an era of changing workplace relations: Towards a "Women's Employment Status Key Indicators" (WESKI) database*. Perth Western Australia: Curtin University

¹⁷ Maddison and Partridge; Preston et al.

¹⁸ VicHealth, 2007. *More than tolerance: Embracing diversity for health*.

[http://www.vichealth.vic.gov.au/assets/contentFiles/DCASv2%20\(4\)%20-%20FINAL%20060907.pdf](http://www.vichealth.vic.gov.au/assets/contentFiles/DCASv2%20(4)%20-%20FINAL%20060907.pdf)

¹⁹ Cooklin, A., Rowe, H. & Fisher, J. 2007. *Workplace discrimination continues for women*.

<http://www.onlineopinion.com.au/view.asp?article=6656>

²⁰ New South Wales Anti-Discrimination Tribunal, 1996.

²¹ Diversity Council Australia, 2008.

²² United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), 2007. *Asia-Pacific: The Economic Costs of Discrimination against Women*

²³ Catalyst, 2007. *The bottom line: Corporate performance and women's representation on Boards*

<http://www.catalyst.org/publication/200/the-bottom-line-corporate-performance-and-womens-representation-on-boards>

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retention, reduced turnover costs, and increased productivity – as demonstrated in the examples below.

- Deloitte Touche in the US generated savings of \$250 million by implementing initiatives aimed at retaining and developing their female staff, which reduced their annual turnover from 25 % to 18 %.²⁴
- The Australian Catholic University offers female staff with more than two years service maternity leave of three months full pay and nine months at 60% pay (provided the staff member returns for at least six months). The University says that even if every potential paid maternity leave person took the leave, it would still represent only 1% of their payroll – compared with the cost of departing employees being 75-100% of their annual salary.
- In 1995, Westpac introduced paid maternity leave, flexible work practices and work-based childcare. As a result its return to work rate RTW rate increased by 30%, saving them \$6 million.
- AMP increased its return to work rate from 50% in 1992 to 90% in 1997, saving the company \$50,000 to \$150,000 per woman returned. AMP calculated its return on investment on work-life initiatives since 1992 as \$400 million.

Recommendations

➤ Recommendation 33

That the SDC be properly resourced to develop materials demonstrating the business case for preventing and managing sex discrimination and achieving equality.

Sexual harassment (terms of reference K)

It is difficult to extrapolate how widespread the problem of sexual harassment is across Australia but in her recent report *Gender equality: what matters to Australian women and men (The Listening Tour Community Report)* the Sex Discrimination Commissioner identified reports of sexual harassment in every, site, industry and workplace that she visited. Further action to prevent and respond to sexual harassment particularly in the workplace is imperative.

A review of the effectiveness of the SDA in eliminating discrimination and promoting gender equality must acknowledge that despite increased community awareness of the problem since the implementation of the SDA, sexual harassment is a continuing problem in many workplaces with existing complaints mechanisms and processes obviously failing to serve as a sufficient deterrent.

The Working Women's Centres (WWCs) (South Australia, Northern Territory and Queensland) provide advisory and advocacy services to women on employment related matters and have identified that one of the most common concerns reported by women to the WWCs is the

²⁴ Kingsmill, D. 2001 *Report into Women's Employment and Pay* <http://www.equalities.gov.uk/pay/kingsmill.htm>

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inadequate way in which their employers and supervisors handled their complaint or concerns about sexual harassment.

The status of sexual harassment as unlawful under the SDA does not act as sufficient deterrent to sexual harassment occurring nor is this unlawful status sufficient to ensure appropriate courses of action when a complaint is made within a workplace context, despite the fact that policies and procedures may exist.

Many women contacting the WWCs, in particular young, lower skilled and precariously employed women, report to the centres that they feel that they have no alternative than to resign or take periods of leave after experiencing sexual harassment, especially when it is ongoing. The WWCs have also documented numerous cases where the woman has complained internally and the ultimate result is that she is compensated or paid out to terminate her employment but the harasser has remained employed in the organisation and in some cases promoted or moved sideways.

It follows that women contacting the WWCs for assistance with sexual harassment complaints may therefore be only be the 'tip of the ice berg', representing a small percentage of women who experience harassment and who decide to enquire about possible complaints mechanisms, and rights to redress or just to receive some support for their situation.

A study published in 2008 which examined sexual harassment data from the Queensland Working Women's Service²⁵ asserted that recognising the full range of behaviours and sources associated with sexual harassment, as well as taking decisive and appropriate action where it occurs, is an essential prerequisite to allowing women to overcome unequal labour market opportunities based on imbalanced power relations. Stronger legislation is needed to force employers to take responsibility for the actions of their employees and take proactive measures to prevent and respond appropriately to internal complaints.

In drafting amendments to the SDA it is important to recognise further conceptual limitations to the definitions. Importuning another for sexual favours is the paradigmatic case of sexual harassment. While this conduct is appropriately proscribed within the SDA, its present conceptualisation raises two problems: one, the requirement that the complaint would be 'offended, humiliated or intimidated' and, two, that it does not adequately deal with sex-based harassment. We are concerned by the way the sexual harassment is separated from sex discrimination.²⁶

First, the requirement that the person harassed would be 'offended, humiliated or intimidated' contains questionable moralistic overtones. While sexual harassment undoubtedly contributes to the inequality of women at work, the phrasing of the SDA requires the person harassed to present themselves as exceptionally fragile and vulnerable. One of the descriptors may be appropriate in some cases, but not in others. Most significantly, it plays down the *discriminatory effect* of the conduct.

²⁵ McDonald, P., Backstrom, S. and Dear, K. 2008, 'Sexual Harassment: Quid pro quo versus hostile environment claims and progression to formal redress'. *Asia-Pacific Journal of Human Resource Management*

²⁶ Thornton, Margaret, 2002 'Sexual Harassment losing Sight of Sex Discrimination' *Melbourne University Law Rev* vol. 26, pp. 422-44

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Secondly, sex-based harassment tends to fall through the cracks of the SDA. This includes verbal abuse, bullying and gender disparagement. However, the biologicistic focus of sexual harassment makes demeaning sex-based conduct difficult to succeed as sexual harassment, while the comparability requirement makes it difficult to succeed as sex discrimination. For example, in *Malone v Pike* [1996] EOC 92-868, HREOC held that the poking of a woman in the chest and telling her to do what she was told was not sufficiently sexual to succeed as sexual harassment (despite the physical location of a woman’s chest). In *Hosemans v Crea’s Glenara Motel P/L* [2000] EOC 93-082, calling a complainant a ‘stupid bitch’ and telling her that she had a ‘fat arse’ was found by HREOC to be personal abuse rather than sexual harassment (despite the sexual and sex-based connotations).

The definition of sexual harassment in the SDA, Part II Div3, section 28A, needs review and revision.

Recommendations

- Recommendation 34
That s 28A (1) be amended to remove the moralistic requirement that the person harassed would be ‘offended, humiliated or intimidated’ and replace it with a requirement ‘that the person harassed would find the conduct unwelcome’.
- Recommendation 35
Review s 28A (1b) & (2) to ensure that the use of modern technological tools such as multimedia SMS messages and the internet can also be the instrument of harassment and great offence.
- Recommendation 36
That sex-based harassment be expressly proscribed by the SDA. This should be defined to include verbal disparagement, threatening gestures, improper bodily contact and bullying.

Effectiveness in addressing intersecting forms of discrimination (terms of reference L)

Please see earlier commentary.

Scope of existing exemptions (terms of reference N)

The number and extent of exemptions under the SDA attest to the weak commitment on the part of the legislature to the non-discrimination principle and contrasts sharply with the RDA, which contains no provision for exemptions.

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Exemptions for religious bodies (s 37)

Automatic exemptions for religious and other bodies need to be removed from the SDA, because they entrench discrimination against women in significant male-dominated sectors of Australian society. As the exemptions are automatic, religious bodies are not required to justify exemption, or demonstrate if and how they are promoting the equality of women as far as is possible within the parameters of their doctrines, tenets or beliefs. Nor, as concerns Section 38, are they required to demonstrate if and how they ensure that individual officers responsible for employment, training and education always act in good faith when they discriminate ‘in order to avoid injury to the religious susceptibilities of adherents of [their] religion or creed’.

Automatic exemption for religious bodies takes no account of a range of important factors. Religious bodies are, to a greater or lesser degree, male-dominated. The views of female adherents – those who are disadvantaged by the exemption - are not able to be heard because of the nature of the exemption. Systemic discrimination against women is thus entrenched, prolonging a situation where issues of equality and discrimination are absent from the agenda of the (mostly male) leadership. As it stands, the SDA abandons significant numbers of women in certain occupations, roles and activities and fails to protect their rights - the rationale for the SDA in the first place.

The doctrines, tenets or beliefs of religious bodies change over time. For example, since the SDA came into force in 1984, the Anglican Church of Australia has provided for the admission of women into all three levels of its ordained ministry. Approximately one sixth of its clergy are now women²⁷, including two women bishops. However, although in 18 of the 23 dioceses women are now officially accorded full equality, anecdotal evidence suggests that women clergy are at times discriminated against in employment because of their gender in ways that would not otherwise be acceptable under the SDA. More than 600 women clergy around Australia are left without any legal protection against gender-based discrimination in their employment. (Those five Anglican dioceses which have so far not adopted the national church’s changed laws would not be disadvantaged by the removal of automatic exemption; they would be able to apply for exemption on the basis of *their* belief.)

Automatic exemption has significant flow on effects. For example, there is no incentive for an exempted religious body to ensure that it provides significant, let alone mandatory, levels of representation for women in areas that do not conflict with its doctrines, tenets or beliefs. An example would be representation levels of women on lay church bodies. The automatic exemption makes it difficult for women adherents to argue for a satisfactory level of representation. If religious bodies had to apply for exemption, demonstrating commitment to equality principles wherever possible for them could be required as part of the application process.

Automatic exemption allows religious bodies to resist re-examination of their beliefs regarding the role of women. If exemption had to be applied for at regular intervals, re-examination would be required from time to time, and female adherents would take encouragement to challenge the status of current beliefs. At present, women members of major religious bodies that claim their beliefs prevent extending full equality to women, have little opportunity or incentive to challenge their situation. Many feel that the discrimination they face is not taken seriously by wider society. Removing automatic exemption would redress that perception.

²⁷ see The Australian Anglican Directory 2008

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So long as automatic exemptions exist, the SDA is fundamentally flawed and compromised, and a significant body of women, left without the protection of law against discrimination, are effectively discriminated against by the SDA.

Exemptions for education institutions established for religious purposes (s 38)

It is unacceptable for educational institutions conducted by religious organisations (the preponderance of private schools) to discriminate on the ground of sex in respect of either employment or education when such institutions are the recipients of significant public funding. It is noted that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the spirit of the SDA and CEDAW about the position of women and girls in contemporary Australian society.

As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding be permitted to discriminate on any of the legislatively proscribed grounds. Furthermore, proof of the existence of non-discriminatory policies should be a precondition to the receipt of public funds. The inclusion of s 38 is over-inclusive and unnecessary.

Since education is widely regarded as the key to the acceptance of the non-discrimination principle, educational institutions that are the recipients of substantial government funding should not be permitted to flout the general law of the land.

We also support submissions from Volunteering Australia which as recommended an extension to the SDA to extend coverage to include volunteers through removing the exemptions currently in place for voluntary bodies in s 39.

Grant of exemptions (s 44)

Discretionary exemptions have recently been granted in every mainland State jurisdiction and the ACT on the ground of race (involving applications from ADI, Raytheon and Boeing). In all these applications, profits were privileged over racism. The absence of guidelines from the legislation or a statement that the grant of any discretion should be beneficial was significant. While such perverse examples do not seem to have occurred to date in relation to the SDA, it could happen in the future. Accordingly, the beneficial effect of any discretionary exemption needs to be made clear.

Recommendations

- **Recommendation 37**
Repeal both s 37 and s 38 of the SDA.
- **Recommendation 38**
Amend s 44 to include the proviso that any exemption granted must promote the objects of the SDA.

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Other matters relating and incidental to the SDA (terms of reference O)

Does Australia need an Equality Act?

A number of matters have arisen during the course of our discussions of issues raised by this submission. While we welcome the opportunity to review the efficacy of the SDA and recognise its instrumental and fundamental role in providing a legislative framework to address discrimination, the practice of the SDA in the previous 25 years points to some limitations in its framework.

To that end, we encourage the SLAC Committee to consider whether the federal anti-discrimination framework in its entirety could usefully be reviewed. In particular, we draw the Committee's attention to the recent three-year process undertaken by the Government of the United Kingdom in its consideration of the adoption of an Equality Act. The timeframe of the review and consultation process is as important a part of the story as the decision to revise the legislative framework. By embracing a three-year process the Government has been able to bring people along.

Within this context we also note that any review of the legislative framework for equality in Australia could also usefully address the vexed question of multiple legislative heads for the achievement of equality in employment. At present both anti-discrimination law and employment law addresses this matter.

A new UK Equality Bill was announced in June 2008, which will be introduced in Parliament in the next session. The proposed Equality Bill builds on the UK Equality Act 2006, which brought together the separate race, disability and sex discrimination jurisdictions. The draft Equality Bill is currently being consulted on and is the Brown government's response to the wide-ranging Discrimination Law Review that commenced in February 2005 and reported in June 2007. The main features of the new proposed policy and legislative framework include:

- a new public sector Equality Duty, which brings together the existing public sector race, disability, and gender equality duties, and which will also cover gender reassignment, age, sexual orientation and religion or belief. Public bodies will be required to publicly report on equality areas such as:
 - gender pay;
 - ethnic minority employment; and
 - disability employment.
- strengthening enforcement:
 - in the area of employment to allow tribunals to make wider recommendations in discrimination cases, which will go beyond benefiting the individual taking the case so that there are benefits for the rest of the workforce of the employer found to have discriminated.
 - Currently, individuals who have been discriminated against have to shoulder the burden of bringing a claim. This carries financial, and emotional costs, as well as reputational risk. However, some discrimination is systemic and a number of employees may face the same kind of unfair treatment.

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- By providing for representative actions that would enable bodies such as trade unions or the Equality and Human Rights Commission to take cases to court on behalf of a group of individuals as a single claim.
- Extending the scope of positive action so that:
 - employers can take into account, when selecting between two equally qualified candidates, under-representation of disadvantaged groups, for example women and people from ethnic minority communities
 - permission to use women-only shortlists in selecting parliamentary candidates is extended from 2015 to 2030
 - under existing equality duties public bodies as purchasers of goods and services are required to tackle discrimination and promote equality through their procurement activity. The government is looking under the new Equality Duty at clarifying and strengthening the existing requirements so public bodies comply with the duty more effectively to encourage greater transparency among private sector contractors.
 - inequality in different sectors can be investigated. For example, the Equality and Human Rights Commission is to launch a series of inquiries into inequality in the financial and professional services and construction sectors, beginning in 2008.
 - the development of trade union equality representatives is supported. Workplace equality representatives play a supportive role for individuals in the workforce. They look at a range of issues which are of concern to employees, including flexible working, equal pay, discrimination and harassment.
- Requiring transparency
 - The Equality Bill will outlaw pay secrecy clauses and make it unlawful to stop employees discussing their pay.

The potential of the proposals for policy and legislative change around positive action will depend very much on the extent of the resourcing and commitment of the Equality and Human Rights Commission and the commitment of the UK government. For example research into the impact of the race equality duty, four years after its initial implementation, revealed a variation in its application, some lack of action and a concern that the focus was more on procedures than on measurable outcomes.²⁸ Further while the former Equal Opportunities Commission (EOC) had the power to conduct formal investigations into specified unlawful sex discrimination, the powers of the former EOC and the race and disability equality bodies were relatively underused for a number of reasons, including legal challenges and failure by the equality bodies to use these powers strategically.²⁹

²⁸ Dickens, L, 2007 'The Road is Long: Thirty Years of Equality Legislation in Britain', *British Journal of Industrial Relations* vol. 45, no. 3, pp 463-474

²⁹ Fredman, S, 2002 *Discrimination Law* Oxford University Press, Oxford

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Recommendations

- Recommendation 39
That the SLAC recommend the review of the entire anti-discrimination framework in Australia with a view to the adoption of an Equality Act
- Recommendation 40
That such a review look to the lessons of the UK in this matter, both in terms of substantive content (including lessons learnt subsequent to its introduction) and procedural mechanisms adopted for the review

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Appendix A

Endorsments of Submission

1. Aboriginal Legal Rights Movement SA
2. Alex Haynes
3. Ann Skamp
4. Archdeacon Dr Sarah Macneil
5. Australian Church Women
6. Australian Federation of Medical Women
7. Australian Federation of University Women
8. Australian Lawyers for Human Rights
9. Australian Reproductive Health Alliance
10. Australian Women's Health Network
11. Business and Professional Women Australia
12. Canon Dr Colleen O'Reilly
13. Catholic Women's League Australia
14. Children by Choice
15. Conflict Resolving Women's Network of Australia
16. Dr Muriel Porter OAM
17. International Women's Development Agency
18. Judith Willis – Monash University
19. Leigh Haywood
20. Mothers Union of Australia
21. Muslim Women's National Network of Australia
22. National Council of Jewish Women of Australia
23. National Council of Women of Australia
24. National Foundation for Australian Women
25. National Rural Women's Coalition
26. Ordination of Catholic Women
27. Pan Pacific and SE Asia Women's Association of Australia
28. Professor Margaret Thornton, ANU College of Law, Australian National University
29. Public Health Association of Australia (Women's Special Interest Group)
30. Rose Elu
31. Soroptimist International Australia
32. The Association of Women Educators
33. Unity of Ethiopians in WA

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Appendix A

Endorsments of Submission

34. UTS Students Association
35. Victorian Immigrant and Refugee Women's Coalition
36. WEL Australia
37. Women in Adult and Vocational Education (WAVE) Australia
38. Women With Disabilities Australia
39. Women's International League for Peace and Freedom
40. Working Women's Centre Queensland
41. Working Women's Centre South Australia
42. YWCA Australia

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Appendix B

Extract from CEDAW Committee's 2006 Review of Australia's Implementation of CEDAW

8. In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

9. Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

10. The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.

11. Women's biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in social and cultural structures and institutions. As steps are being taken to eliminate discrimination against women, women's needs may change or disappear, or become the needs of both women and men. Thus, continuous monitoring of laws, programmes and practices directed at the achievement of women's de facto or substantive equality is needed so as to avoid a perpetuation of non-identical treatment that may no longer be warranted.

16. While noting that the Sex Discrimination Act allows for the adoption of special measures to ensure equality of opportunity or in order to meet the special needs of women, the Committee is concerned that the State party does not support the adoption of targets or quotas to promote greater participation of women, particularly indigenous women and women belonging to ethnic minorities, in decision-making bodies.

17. The Committee recommends that the State party fully utilize the Sex Discrimination Act and consider the adoption of quotas and targets, in accordance with article 4, paragraph 1, of the Convention and the Committee's general recommendation 25, to further increase the number of women in political and public life and to ensure that the representation of women in political and public bodies reflect the full diversity of the population, particularly indigenous women and women belonging to ethnic minorities.

Inquiry into the effectiveness of the Sex Discrimination Act

Appendix C

Recommended review of the objects of the SDA

Sex Discrimination Act 1984 - s 3

Objects

The objects of this Act are:

- (1)
 - (a) to give effect to the Convention on the Elimination of All Forms of Discrimination Against Women; and
 - (b) to **prohibit** discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
 - (ba) to **prohibit** discrimination involving dismissal of employees on the ground of family responsibilities; and
 - (c) to **prohibit** discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
 - (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

- (2) **It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.**