Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality.

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6. The SDA define 'employee' broadly.

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8. The SDA should be drafted in similar terms to section 664 of the *Workplace Relations Act 1996* (Cth) (**WRA**) such that the onus of proof is reversed.

9. HREOC be vested with the powers of audit, issuance of codes of practice and that there be an ability to make Memoranda of Understanding with employers and other relevant organisations.

10. Education should be part of HREOC's multi-faceted approach to eliminating discrimination.

11. Complainants should have access to legal advice at HREOC.

12. There should be a definitive framework for resolving complaints.

13. HREOC should have standing to enforce conciliation settlement agreements at a court or tribunal on behalf of the complainant.

14. That certain cost order protections be introduced to ensure applicants are not discouraged from making complaints.

15. Legislating that, in all but the most exceptional circumstances, each party must bear there own costs in any claim made under the SDA.

16. The symptoms or outcomes of an attribute should not be taken into account when constructing the comparator. That is, the characteristics of the aggrieved person related to the proscribed ground should not be attributed to the comparator.

17. Orders for compensation need to be high enough to discourage discrimination and to make it worthwhile litigating a complaint.

18. Expand the scope of family responsibilities discrimination, and provide a positive duty to not unreasonably refuse to accommodate an employee's family responsibilities.

19. Amend the SDA to make the “all reasonable steps” defence to vicarious liability unavailable to respondents where it can be shown that no action was taken after a formal or informal complaint was made to them.

20. Remove blanket exemptions under the SDA, however HREOC may grant exemptions on a case by case basis so long as the exemption is in the public interest.

21. The SDA should be amended to make sexual harassment and sex discrimination unlawful when it occurs in a common workplace but where individuals are not employed by the same employer or are independent contractors.

22. The SDA should be amended to make sex discrimination unlawful in partnerships and firms and in the offering partnerships and establishing firms.

2. Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) (**SDA**) in eliminating discrimination and promoting gender equality (**Inquiry**).

JobWatch strongly supports the Inquiry and it is hoped that the Inquiry will lead to amendments that will further the objectives of the SDA redress institutional and systemic barriers to gender equality, particularly in the area of employment.

The case studies provided in this submission are those of actual but de-identified JobWatch clients or callers to JobWatch's telephone information service.

2.1 About JobWatch

JobWatch is an employment rights community legal centre which, since 1980, has operated as the only service of its type in Victoria. The centre is funded primarily by the Victorian State Government (the Department of Innovation, Industry and Regional Development – Industrial Relations Victoria).

JobWatch's core activities include:

- The provision of assistance by way of information and referral to Victorian workers via a free and confidential telephone information service which received 22,022 calls in the 2007/2008 financial year;
- A community education program that includes publications, information via the internet and seminars aimed at workers, students, lawyers, community groups and other organisations; and
- A legal casework service provided by JobWatch's legal practice for disadvantaged workers;
- Research and policy work on employment and industrial law issues.

JobWatch maintains a database record of our callers, which assists us to identify key characteristics of our callers and trends in workplace relations.

Our records indicate that our callers have the following characteristics:

- The majority are not covered by collective agreements and are only entitled to the minimum conditions under federal awards or the minimum Standard under the *Workplace Relations Act 1996* (Cth) (**WRA**);
- A significant proportion do not know what industrial instrument provides the terms and conditions of their employment;
- A large proportion are employed in businesses with up to 100 employees and of those businesses a significant proportion have less than 20 employees;
- The majority are not union members;
- A significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting;
- Many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, pregnancy status, socio-economic status or because of the potential for exploitation due to the nature of the employment arrangement, for example apprenticeships and traineeships; and

- Many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment.

3. Statistical Analysis

The following information provides an overview of the number and type of calls to JobWatch's telephone information service that fall within the scope of the SDA. It also details the demographic profile of those callers.

Volume of sex discrimination related inquiries

JobWatch's telephone inquiry service receives on average 848 sex discrimination related inquiries per year and over the last 6 years has received in total approximately 5,089 sex discrimination related inquiries (see Table 1).

Table 1: Type of sex discrimination inquiry to JobWatch, 02/03 to 07/08.

Sex discrimination inquiry	2002/2003	2003/2004	2004/2005	2005/2006	2006/2007	2007/2008
Maternity	294	338	273	258	262	289
Parental and carer status discrimination	154	125	158	213	186	250
Pregnancy and breast feeding discrimination	158	143	163	141	135	161
Sex Discrimination	49	64	62	68	65	80
Sexual Harassment	163	206	180	158	148	145
Total	818	876	836	838	796	925

Source: JobWatch telephone information service database (**JobWatch database**)[1]

The main types of sex discrimination inquiries JobWatch receives relate to maternity leave, parental and carer status discrimination closely followed by sexual harassment, pregnancy and breast feeding discrimination (see Figure 1).[2] Over the last 12 months there has been an increase in all inquiries, except sexual harassment, but the largest increase has occurred in parental and carer status discrimination.

[1] Prior to 24 December 2001 the JobWatch database only had the category of discrimination/equal opportunity in its problem field. When the JobWatch database was upgraded on 24 December 2001 seven individual discrimination categories were introduced in the problem field to capture and reflect the main types of discrimination enquiries to JobWatch.

[2] The types of sex discrimination inquiry are largely based on protected attributes under the *Equal Opportunity Act 1995* (Vic).

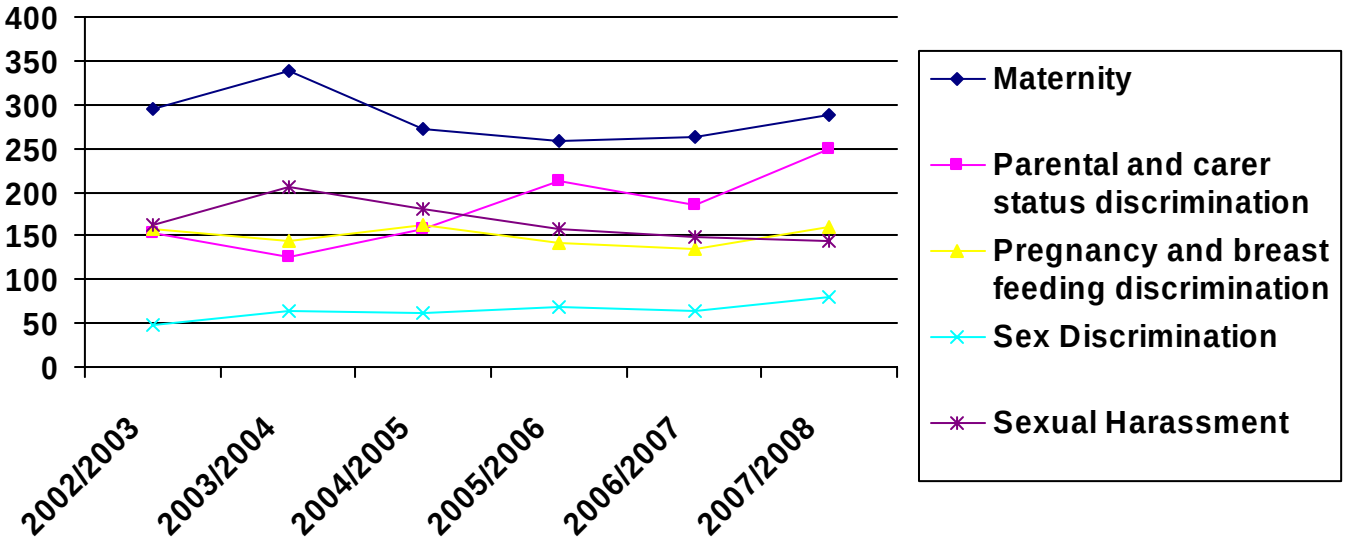


Figure 1: Type of sex discrimination inquiry to JobWatch telephone information service, 02/03 to 07/08.

Gender of callers

Approximately 88 percent of callers making sex discrimination inquiries to JobWatch are female (see Table 2). This is a much higher proportion compared to JobWatch's general caller base (55.2 percent).[3]

If the type of sex discrimination calls are analysed by gender we see that females dominate all categories. While the greatest proportion of male callers making sex discrimination inquiries is in the categories of parental and carer status (24.8 percent), sexual harassment (19.9 percent) and sex discrimination (18.6 percent) (see Table 3). A significant number of male callers contacting JobWatch in relation to these issue would be calling on behalf of their wife or partner. Sex discrimination is overwhelmingly an issue involving and affecting women.

Table 2: Sex discrimination callers to JobWatch by gender, 02/03 to 07/08.

Gender	No.	%
Female	4464	87.7
Male	625	12.3
Total	5089	100

Source: JobWatch database

[3] The gender breakdown for all JobWatch callers for the period 02/03 to 07/08: female (55.2 percent) and male (44.8 percent).

Table 3: Gender of sex discrimination callers to JobWatch by type of sex discrimination, 02/03 to 07/08.

Type of sex discrimination	Gender	
	Female	Male
	%	%
Maternity	96.8	3.2
Parental and carer status discrimination	75.2	24.8
Pregnancy and breast feeding discrimination	96.6	3.4
Sex discrimination	81.4	18.6
Sexual harassment	80.1	19.9
Total	87.7	12.3

Source: JobWatch database

Age group

The main age groups callers making sex discrimination inquiries are the 25-34 year age group (52.6 percent) and the 35-44 age group (27.8 percent) (see Table 4). These age groups comprise a much larger proportion of sex discrimination callers compared to JobWatch's general caller base due to most child bearing and rearing occurring within these age groups.[4]

Table 4: Sex discrimination callers to JobWatch by age group, 02/03 to 07/08.

Age	No.	%
18 and under	81	2.2
19 – 24	413	11.2
25 – 34	1933	52.6
35 – 44	1023	27.8
45 and over	227	6.2
Total	3367	100.0

Source: JobWatch database

Industry

The main industries callers making sex discrimination inquiries to JobWatch come from are: property and business services, retail trade, health and community services, manufacturing and accommodation, cafes and restaurants (see Table 5). This is in line with the general JobWatch caller base except for a slightly lower proportion of callers from health and community services industry.[5]

Table 5: Sex discrimination callers to JobWatch by industry, 02/03 to 07/08.

Industry	No	%
Accommodation, cafes and restaurants	299	7.1
Agriculture, Forestry and Fishing	70	1.7
Communication Services	185	4.4
Construction	90	2.1

[4] The main age groups of all JobWatch callers for the period 02/03 to 07/08: 25 to 34 year age group (31.5 percent) and 35 to 44 year age group (25.6 percent); under 25 age group (19.1 percent) and over 45 age group (23.9 percent).

[5] The main industries in which JobWatch callers were employed for the period 02/03 to 07/08: property and business services (17.4 percent), retail industry (17.3 percent) manufacturing (10.9 percent), health and community services (9.8 percent) and accommodation, cafes and restaurants (8.1 percent).

Cultural and recreational services	117	2.8
Education	107	2.5
Electricity, gas and water supply	26	0.6
Finance and insurance	235	5.6
Government Administration and Defence	103	2.4
Health and community services	455	10.8
Manufacturing	446	10.6
Mining	8	0.2
Personal and other services	220	5.2
Property and business services	819	19.4
Retail trade	628	14.9
Transport and storage	182	4.3
Wholesale trade	233	5.5
Total	4223	100

Source: JobWatch database

Size of employer

Approximately 47 percent of sex discrimination callers to JobWatch are employed by companies with over 100 employees (see Table 6). There is also significant representation of callers who are employed by companies with less than 20 employees (25.2 percent). The figures seem to suggest that sex discrimination is a greater problem among larger companies (despite having human resource departments and being more likely to be members of employer associations and/or having access to training/legal assistance) compared to small and medium sized companies who have less resources. These figures are also in contrast to JobWatch's general caller base which has a larger representation of employees of companies with less than 20 employees and a smaller representation of companies with greater than 100 employees.[6]

Table 6: Sex discrimination callers to JobWatch by industry, 01/02 to 06/07.

Size of Company	No.	%
Less than 5 employees	182	5.9
5 to 19 employees	592	19.3
20 to 49 employees	439	14.3
50 to 100 employees	320	10.4
Greater than 100 employees	1458	47.4
Caller doesn't know	83	2.7
Total	3074	100

Source: JobWatch database

Employment status

The overwhelming majority of sex discrimination calls to JobWatch come from people who are employed and only 1.3 percent are from job seekers (see Table 7). Of the sex discrimination callers who are employed most are employed either on a permanent full-time or part-time basis (approximately 84 percent) and only 11 percent are in precarious employment arrangements such as

[6] The size of businesses in which JobWatch callers were employed in for the period 02/03 to 07/08: less than 5 employees (10.8 percent), 5 to 19 employees (24 percent), 20 to 49 employees (15 percent), 50 to 100 employees (8.8 percent), and greater than 100 employees (36.5 percent), and caller does not know (4.9 percent).

casual or fixed-term. These figures are in contrast with JobWatch's general caller base which has a lower representation of permanent workers (74 percent) and a higher proportion of workers in precarious employment arrangements (16.3 percent).[7] The figures are also in contrast with ABS labour market statistics which show that as at July 2006 71.9 percent of working women were employed on a part-time basis.[8]

Table 7: Sex Discrimination callers to JobWatch by employment status, 6 year period from 02/03 to 07/08, number and percentage

Employment Status	No.	%
Apprentice/trainee	60	1.2
Casual full time	200	4.1
Casual part time	342	6.9
Fixed term contract	59	1.2
Fixed term contract extended or renewed	30	0.6
Independent contractor	26	0.5
Job seeker	66	1.3
Permanent full time	3205	65.0
Permanent part time	943	19.1
Total	4931	100

Source: JobWatch database

[7] The employment status of all JobWatch callers for the period 02/03 to 07/08: apprentice/trainee (2.8 percent); casual full time (6.0 percent); casual part time (10.3 percent); fixed term contract including fixed tern contract extended or renewed (1.7 percent); independent contractor (3.1 percent); job seeker (2.3 percent) permanent full time (60.9 percent); and permanent part-time (12.9 percent).

[8] ABS Australian Labour Market Statistics 6105.0.

4. Overview - Scope of the SDA: A new approach based on the "corporations power"

Recommendation 1: Re-draft the SDA based on the Commonwealth Corporations Power, to expand the scope and effect of the SDA and to remove inconsistencies and unnecessary complexities.

In this submission, JobWatch will discuss ways in which the SDA could be improved within the bounds of the current or accepted international convention, legislative and constitutional framework.

Nevertheless, JobWatch submits that the time is right for a complete overhaul and modernisation of the SDA based on s51(xx) of the *Commonwealth of Australia Constitution Act 1900* (Cth) (**Constitution**). Section 51(xx) (**Corporations Power**) gives the federal Parliament power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.

On 14 November 2006, by a majority of 5:2, the High Court upheld the validity of the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) (**WorkChoices**) which used the Corporations Power to substantially amend the *Workplace Relations Act 1996* (Cth) (**WRA**).[9]

Prior to WorkChoices, the WRA was based on s51(xxxv), the "Conciliation and Arbitration" power. The High Court's WorkChoices decision clarified that the Commonwealth has extensive power to legislate with respect to constitutional corporations.

As the majority of complaints under the SDA are in the area of employment (81 percent)[10] and as corporations are the majority of employers in Australia,[11] JobWatch submits that the best way to eliminate, as far as possible, sex discrimination and sexual harassment is to expand the reach and simplify workings of the SDA by basing it entirely (or at least largely) on the Corporations Power.

Whilst JobWatch's submission only deals with sex discrimination and sexual harassment in the area of employment, obviously the Corporations Power could also be used to regulate other areas covered by the SDA where corporations are commonly involved such as education, the provision of goods and services or facilities, accommodation and housing, the buying or selling of land, some clubs and even in the administration of Commonwealth laws and programs.

The High Court has also interpreted the meaning of "trading or financial corporation" very broadly such that a corporation will be covered by the Corporations Power where a significant part of its activities is trading or financial.[12] This means the federal Parliament can make laws with regard to almost every imaginable type of corporation.

The following recommendations in JobWatch's submission should therefore be viewed from the perspective that the SDA can be re-drafted based on the Corporations Power.

[9] *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52.
[10] HREOC Annual Report 2006/2007 p57.
[11] JobWatch could not locate any recent research but a NSW Parliamentary Library report on WorkChoices (Briefing Paper 11/2005) estimated that only 26% of employees in the private sector were not employed by constitutional corporations.
[12] E.g. *R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190.*

4.1 Increasing the scope of the SDA

Recommendation 2: The SDA should be modeled on the Equal Opportunity Act 1995 (Vic) (the EO Act) because of its relatively clear and comprehensible structure.

The SDA protects individuals across Australia from discrimination on the basis of sex, marital status or pregnancy and, in relation to termination of employment, family responsibilities. The SDA also makes sexual harassment unlawful.

Section 3 sets out the objectives of the SDA. Leaving aside the objective of giving effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the main objective of the SDA could be summarised as being "to eliminate, as far as possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy" in certain areas of public life including work and the provision of goods, facilities and services.[13] The purpose of the SDA could be further summarised as the promotion of gender equality.

In basing a new SDA on the Corporations Power the federal Parliament can better achieve the main objectives and purpose of the SDA by:

a) expanding the scope of the SDA to include further grounds of sex discrimination; and
b) removing inconsistencies, unnecessary complexities and other perceived problems stemming from the SDA's current reliance on the external affairs power under the Constitution.[14]

JobWatch submits that the SDA should be amended based on the Corporations power to make sex discrimination and sexual harassment unlawful (or clearly unlawful) in relation to the following additional areas:

- males;
- gender identity;
- intersexuality;
- sexual orientation;
- lawful sexual activity;
- breastfeeding; and
- family/carer responsibilities.

Generally, the EO Act simply lists a number of defined attributes, concerning which it is unlawful to discriminate against a person for having, for example, sexual orientation.[15] The EO Act then sets out what is meant by direct and indirect discrimination which apply equally to each and every attribute in particular areas of public life.[16]

This approach to a re-drafted SDA would not only allow an expansion of the scope of the SDA (as discussed immediately above) but would also allow perceived problems and/or inconsistencies caused by the SDA's dependency on international conventions to be removed. It would also enable a large degree of harmonisation with State laws.

[13] See s3(b) SDA.
[14] For example, males cannot make a claim of sex discrimination or sexual harassment under s9(10) of the SDA because that section gives effect to the *Convention on the Elimination of all Forms of Discrimination Against Women* (entered into force 3 Sept 1981).
[15] See s6 EO Act.
[16] See ss7-9 EO Act.

For example, currently under the SDA, family responsibilities discrimination only relates to direct discrimination and only applies where the employee has actually been terminated as opposed to where the employee may have been demoted or suffered any other detriment. This is the kind of unnecessary internal inconsistency that could be removed by redrafting the SDA based on the Corporations power without any concern that a constitutional basis may be lacking.[17]

5. Definitions and Interpretation

5.1 Definitions

5.1.1 "spouse" and "defacto spouse"

Recommendation 3: Definition of "spouse" and "defacto spouse" include same-sex partner.

Currently the SDA does not include same-sex partners in the definition of "spouse"[18] or "defecto spouse".[19] The effect of this, for example, is that a person can be lawfully terminated from their employment in circumstances where that person's same-sex partner is wholly or substantially dependant on the person for care. JobWatch submits that same-sex couples should be recognised by the SDA.

The following case study illustrates the inequity of application of the SDA.

Sam works as a maintenance serviceperson on a permanent full-time basis. He is in a same-sex relationship and his partner was hospitalised with serious injuries to both arms. Sam had one day off in relation to caring for his partner. When he went back into work, he filled out a statutory declaration and asked to take the day as special care leave. Sam's employer told him that he could not take it as special care leave because it did not relate to a family member, or 'spouse', as the person requiring care had to be of the opposite sex. He checked the company's special care policy and procedures book, and noted that that was what it said in the book.

5.1.2 "family responsibilities"

Recommendation 4: Definition of "family responsibilities" be updated and expanded.

JobWatch submits that the meaning of "*family responsibilities*"[20] should be updated and expanded.

Under Section 4A, "*family responsibilities*" in relation to an employee means "responsibilities of the employee to care for or support a dependent child of the employee or any other immediate family member."

[17] Federal Parliament should also consider using the Commonwealth corporations power to amalgamate all federal anti-discrimination acts to create uniform federal anti-discrimination law within the one Act of Parliament.
[18] See s4A SDA.
[19] See s4 SDA.
[20] See s4A SDA.

'immediate family member'

The current definition of 'immediate family member' is narrow and antiquated in contrast to currently accepted notions of the immediate family unit. The current definition fails to take into account non-traditional family structures.

JobWatch submits that the definition of "immediate family member" be expanded to recognise a broader range of family structures and arrangements that is more reflective of the breadth and variety of family life in Australia. This could be achieved by adding "…or other significant family member" or the definition.

Alternatively, the definition could include a reference to "carer", where "carer" is defined in a similar manner to section 4(1) of the EO Act which provides that "carer" means "a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis."

'Child'

The definition of 'child' is also too narrow to incorporate the multitude of caring arrangements that currently exist. For example, an employee who is the guardian of a child may be excluded from making a discrimination complaint on the basis of family responsibilities pursuant to the current definition.

5.1.3 "employment"

Recommendation 5: Definition of "employment" to include volunteer worker

The SDA defines "employment"[21] to include part-time and temporary employment, work under a contract for services, and work as a Commonwealth employee. JobWatch submits that this definition should be expanded to include volunteer workers as it is erroneous that just because a worker is not paid a wage they are somehow immune from sex discrimination and sexual harassment.

Recommendation 6: The SDA define 'employee' broadly

Further, the SDA does not define "employee". JobWatch submits that the SDA should include a broad definition of employee to include contract workers (that is employees contracted under labour-hire arrangements), a person employed under a contract of service, a person engaged under a contract for services and volunteers.

5.1.4 Definition for systemic discrimination

Recommendation 7: Systemic discrimination should be defined and directly addressed by the SDA.

Additionally, if the SDA is to better address systemic discrimination, systemic discrimination should be defined and included in the act as an actionable unlawful form of discrimination.

[21] See s4 SDA.

5.2 Interpretation - onus of proof

Recommendation 8: The SDA should be drafted in similar terms to section 664 of the Workplace Relations Act 1996 (Cth) such that the onus of proof is reversed.

Generally, under the SDA, the onus of proof rests with the complainant to prove on the balance of probabilities that they have suffered direct or indirect discrimination. This can often be very difficult especially in a claim alleging sexual harassment, systemic discrimination, vicarious liability or any other claim where the respondent's financial and legal resources far outweigh those of the complainant. Additionally, the decision in *Purvis v NSW* [22] (***Purvis***) (see below) has raised the burden of proof in direct discrimination cases to almost insurmountable heights. Both these factors represent real and present barriers to complainants (or potential complainants) making or following through with their complaints.

One possible way in which these barriers to making a complaint may be addressed is to reverse the onus of proof in discrimination cases so that it is the respondent who is burdened with the responsibility to prove that their actions were not in breach of the SDA.

JobWatch submits that the SDA should mirror the unlawful termination provisions of the WRA in this regard. Under section 664 of the WRA, the employee applicant does not have to prove that the termination was for a proscribed reason such as their sex, race, religion, disability, sexual preference etc.[23] Rather, where unlawful termination is alleged, the onus of proof rests with the respondent to show that the proscribed reason was not the reason or part of the reason for the decision to terminate the employee's employment. As with the SDA, it is not necessary for the proscribed reason to be the dominant or even a substantial reason, as long as it was one of the reasons for the discriminatory conduct.

6 The powers of the Human Rights and Equal Opportunity Commission (HREOC)

This section of the submission will address the powers of HREOC regarding inquiries into systemic discrimination and the prevention of discrimination by educative means.

6.1 Systemic discrimination

Discussions of the meaning of systemic discrimination focus on behaviours, structures and patterns that exclude members of a social group from full participation in particular fields such as employment, education and the provision of goods, services and facilities. For example, in a recent report on employment equality internationally, the International Labour Organisation defined systemic discrimination as:

> '*Structural discrimination inherent or institutionalised in social patterns, institutional structures and legal constructs that reflect and reproduce discriminatory practices and outcomes. These may include, for example, differential or inferior conditions of training available to ethnic minorities, or shortcomings in educational, transport and other services in*

[22] [2003] HC 62.
[23] section 659(2((f) of *the Workplace Relations Act 1996* lists 14 proscribed reasons which relate to discrimination.

neighbourhoods or ghettos in which there is a large proportion of ethnic minorities or immigrants'.[24]

In essence, systemic discrimination occurs when there are entrenched structures, policies and patterns that result in an unequal effect or treatment of a particular class of people.

Whilst our society has changed much since the SDA commenced in 1984, what hasn't changed is that women comprise the vast majority of primary carers of children and dependant adults despite increased workplace participation. Workplaces over the last 25 years have become more accustomed to the concept of flexible work practices required to accommodate the carer status of women. However, an unwanted side effect has been that women have been discriminated against on a systemic basis at exactly the same time as achieving the relative acceptance and benefits of workplace flexibility.

That is to say, directly or indirectly as a result of women workers' need for flexible work practices to accommodate carer or family responsibilities (or proposed responsibilities), women as a class suffer systemic discrimination in relation to security of employment and career advancement opportunities. For example, women are more likely to work on a part-time or casual basis rather than be permanently employed[25] and are also likely to suffer pay inequity compared with male workers. Women are also less likely than men to be employed in high status managerial or executive roles.[26] This is just one form of systemic sex discrimination which will not be remedied without significant cultural change.

Case study – systemic sex discrimination

Erica has been working as a research manager for a health organisation for 6 years. She recently returned to her position from maternity leave. She asked her employer if she could work part-time, but was told that her job as a Research Manager was not a part-time role. Erica said nine women had left the organisation because it does not accommodate workers who go on maternity leave, and then ask for part-time work. She said it will only offer employees part-time work in junior roles, that is demote them.

Interestingly, if the ABS statistics are cross-referenced with the JobWatch statistics it also appears that women working in permanent full-time positions are more likely to make a complaint about discrimination than women employed under precarious working arrangements despite the latter being in the vast majority.[27]

In its 2007 paper entitled "It's About Time: Women, Men, Work and Family"[28] HREOC canvassed a number of ideas for the promotion of gender equality whilst preserving flexible work practices such as:

- encouraging the development of quality part-time work;
- making grants available to fund senior part-time work;
- monitoring of women's wage and employment conditions; and
- development of employer and employee guidelines regarding rights and responsibilities in relation to carer and family responsibilities.

[24] ILO, Equality at Work, 2007 Global Report 9-10.
[25] ABS Australian Labour Market Statistics 6105.0.
[26] As above.
[27] This presumes that a person calling JobWatch is more likely to make a complaint.
[28] HREOC – It's About Time: Women, Men, Work and Family, final paper 2007.

JobWatch endorses all of HREOC's recommendations and submits that HREOC should be given increased powers to actively confront systemic discrimination.

6.2 Confronting systemic discrimination

There are economic arguments in favour of addressing systemic discrimination. A recent consultation paper in the United Kingdom's Discrimination Law Review has stated that:

> *"There is a clear business case for equality. In a rapidly changing world we cannot as a nation afford to waste potential talent and skills of all individuals in our increasingly diverse society. We want a flourishing economy in which all have equal opportunities to thrive and contribute."*[29]

If unlawful discrimination is to be eliminated, more than an individual complaints system is required. As Joseph, Shultz and Castan have noted in relation to the elimination of systemic inequality regarding civil and political rights:

> *"Although ICCPR [International Covenant for Civil and Political Rights] rights are essentially bestowed on individuals, certain civil and political rights abuses are so endemic that they cannot realistically be addressed at an individual level. For example, systemic inequality may arise where certain groups have been oppressed in a certain society for centuries."* [30]

This presents certain problems as "*it is hard to prove that one individual is an individual victim of 'systemic inequality'. Such systemic abuses of civil and political rights are not so easily identifiable or rectifiable under individualistic [procedures]."*[31]

In JobWatch's view, systemic discrimination can best be addressed by removing barriers to individual complainants and representative organisations prosecuting discrimination actions, as well as through HREOC having adequate regulatory and educative functions. JobWatch's recommendations in relation to these are outlined below.

Case study – systemic sex discrimination

Melanie had been employed as an account manager at a large firm for over 10 years. She is on a common law contract and is paid above the award. Melanie returned to work after one year on maternity leave. During her absence wages of all employees were increased for CPI but her wage remained the same post her return. Her responsibilities and remuneration package is the same as her male colleagues in the same role but she is paid 20% less. Melanie discussed this with her manager, who agreed her salary should be increased by 20% to bring her into line with her male colleagues. Senior management, however, rejected this proposal and told her they could only give her 5%, as all increases for this year were capped at 5%.

[29] United Kingdom, Communities and Local Government, *Discrimination Law Review: A Framework for fairness: Proposals for a single equality bill for Great Britain*, Consultation Paper (June 2007) 8.
[30] Joseph, S, Schultz, J, Castan, M *International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd editions, 2004) 38.
[31] As above, 38.

6.3 HREOC as regulator

To redress the above concerns and to be able to effectively redress systemic discrimination in the area of employment JobWatch believes HREOC should be given additional powers to regulate anti-discrimination and equal opportunity in employment and in the community more widely.

Under the International Covenant on Civil and Political Rights (**ICCPR**), institutions such as HREOC are referred to as 'national human rights institutions.' The standards of for these institutions are the Paris Principles, as endorsed by the United Nations Commission on Human Rights. These principles state that the role, power and mandate of such institutions should be as broad as possible.[32]

JobWatch submits that HREOC needs three separate but interacting functions:

a) ***Complaints handling***: in addition to handling individual complaints, HREOC should also be able to deal with individual and representative complaints alleging systemic discrimination.

b) ***Regulatory***: proactive function to identify systemic discrimination and provide practical assistance for cultural change.[33]

c) ***Research and education:*** analysing data gathered through the complaints system, producing reports and educating the community on issues of discrimination.

A system aimed at addressing individual discrimination complaints cannot effectively prevent systemic discrimination. In order to address discrimination at its roots it is essential to have a proactive body with a regulatory function. A combination of all or some of the following powers, under a regulatory branch of HREOC, would assist in preventing discrimination by imposing cultural change.

6.4 Regulatory models in other jurisdictions

Other jurisdictions have adopted a regulatory model in addressing unlawful discrimination. An overview of some of these models and suggestions regarding their implementation is provided below.

Recommendation 9: HREOC be vested with the powers of audit, issuance of codes of practice and that there be an ability to make Memoranda of Understanding with employers and other relevant organisations.

[32] General Comments No.31 (26 May 2004), the Nature of the general legal obligation imposed on States Parties to the Covenant, paragraph 15 – Paris principles, 20 December 1993, principle 2 & 3

[33] It is essential that interaction between the three proposed functions of HREOC be delineated at the outset as there will be potential for conflict of interest between them. The private nature of the complaints handling function will be in direct conflict with the presentation of information to the community by the research and education function. Additionally, the neutrality required in the handling of complaints may be compromised if there is too much interaction between the regulatory body and the complaints handling body. It will be necessary for advice to be given to individuals who come to HREOC's attention in the course of regulatory investigation as possible victims of discrimination, however it would be unfair to Respondents if one complaint against them resulted in investigation by HREOC's regulatory body. It may be the case that electronic records could be kept of the number of successful complaints against specific people or employers. Investigation may then be warranted after a certain number of meritorious complaints have been filed against a particular Respondent.

6.4.1 Audits (Canada)

The process of auditing is used to ensure that employers comply with the Canadian *Employment Equality Act (1995, c.44)*. The process involves a preliminary assessment phase and a progress assessment phase (conducted three to five years after the preliminary assessment) involving the following:

Preliminary assessment phase

1. *Notification*
   The audit begins with a notification of the audit sent to the employer and a questionnaire. The employer fills out a questionnaire on their current compliance with the *Employment Equity Act (EEA)*.

2. *Assessment*
   A Compliance Review Officer assesses the questionnaire. The process of assessment may include on-site visits to verify information provided.
   - If the employer is found to be compliant, a recommendation is made to the relevant Commission and the Commission communicates their decision to the employer. The preliminary assessment phase is then complete.
   - If the employer is found to be non-compliant with the EEA, the Compliance Review Officer negotiates undertakings, to redress areas of non-compliance with the employer, and the employer has 4 months to fulfil its undertakings.

3. *Commission Direction*
   - If the employer fulfils its undertakings, an audit report will be submitted to the Commission for approval, and the preliminary assessment phase of audit is complete.
   - If, on assessment after 4 months, the employer is still not in compliance the Commission may issue a Direction with a deadline for completion.

4. *Employment Equity Review Tribunal*
   If the employer does not comply with the Direction, the Commission may refer the employer to an Employment Equity Review Tribunal.

Progress Assessment Phase

Three to five years after the preliminary assessment, the process is conducted again to ensure continuing compliance. This includes -

- Collection of workforce information;
- Workforce analysis;
- Review of employment systems, policies and practices;
- Employment Equity Plan;
- Implementation and monitoring of Employment Equity Plan;
- Periodic review and revision of Employment Equity Plan;
- Information about employment equity;
- Consultation; and
- Employment equity records.

The process of Audits in Canada is conducted under the EEA and therefore only applies to employers. The same process could be used to regulate all bodies in 'areas of activity' covered by the SDA, however it would be resource intensive. The process may need to be stripped back to allow for the fact that it will be covering a larger number of bodies than the Canadian Act. It may be the case that the Preliminary Assessment would be conducted on all relevant bodies, but the Progress Assessment only conducted on those bodies that are flagged as repeat offenders by HREOC's complaint handling function.

6.4.2 Memorandum of understanding (Canada)

The Canadian Human Rights Commission establishes Memoranda of Understanding with employers and other relevant organisations regarding their discriminating practices. Essentially the employer undertakes to review their workplace, identify discrimination and work towards eliminating it. The Canadian Human Rights Commission undertakes to provide assistance where it can, including the provision of training for the employers' staff and mediators to assist with conflicts or grievances concerning discrimination.

The process relies heavily on the body to implement the MEMORANDA OF UNDERSTANDING and seek advice and assistance from the Canadian Human Rights Commission, and as such, is a less invasive practice than the auditing process.

6.4.3 Codes of practice (UK), Guidelines (HREOC), Standards (Commonwealth Attorney-General)

UK Codes of practice

Codes of practice regarding compliance with specific Acts are issued by the UK Equality and Human Rights Commission. They are not legally binding, but courts and tribunals can take them into account when deciding issues of compliance with the legislation.

HREOC best practice guidelines

All federal anti–discrimination laws provide HEROC with the power to make guidelines to assist persons and the organisations to comply with the relevant Act.[34] However, the guidelines are not legally binding. JobWatch submits that the guidelines should be legally binding and that penalties should be applied where there is a breach.

Commonwealth Attorney-General Standards

The Attorney-General can issue Disability Standards under the *Disability Discrimination Act* 1992 (Cth) (**DDA**) in order to provide more detail on rights and responsibilities under that Act. Non-compliance with a standard is unlawful under the DDA.[35]

To achieve results in the pursuit of elimination of systemic discrimination it would be necessary to give HREOC power of enforcement for such Standards in relation to the SDA.

[34] Powers given to HEREOC other federal laws, *Age Discrimination Act 2004* (CTH) - Section 53(1)(f), *Disability Discrimination Act 1992* (CTH) - Section 67(1)(k), *Racial Discrimination Act 1975* (CTH) - Section 20(1)(d), *Sex Discrimination Act 1984* (CTH)
[35] s. 32 Disability Discrimination Act (Cth).

An example of a standard under the SDA may be requiring an employer to ensure their managerial staff include a certain percentage of a women (mirroring the percentage of that group in the available employee pool) by a set date, as set out in the Canadian systemic discrimination cases.

6.4.4 Preventing discrimination – Education

Recommendation 10: Education should be part of HREOC's multi-faceted approach to eliminating discrimination.

JobWatch recommends a multi-faceted approach to eliminating unlawful discrimination through education and acknowledges that HREOC is doing much to educate the community on discrimination issues.

Nevertheless, research is required with consultation from stakeholders. HREOC should be more able to track incidents and costs of discrimination.

Community education and community campaigns on a number of levels need to be undertaken. The Federal Government also needs to ensure that its departments and statutory authorities lead by example in eliminating systemic discrimination.[36]

Campaigns can also be used to target particular industries where systemic discrimination emerges as an issue. Industries could be identified as part of a commissioned research project and through ensuring that HREOC and relevant stakeholders collect detailed statistics about callers and their particular complaints including the industry, size of business etc.

6.5 HREOC complaints process

Recommendation 11: Complainants should have access to legal advice at HREOC.

Recommendation 12: There should be a definitive framework for resolving complaints.

In JobWatch's experience, HREOC is highly professional and knowledgeable when it comes to handling discrimination complaints.

Nevertheless, JobWatch submits that the current complaints handling process could be improved in the following areas:

- **Assist Complainants to draft complaints and provide legal advice**

  Often there are missed opportunities to complain against particular respondents or to make additional complaints under the SDA arising from the same set of facts. This leads to inefficiencies as complaints then become bogged down in legalistic arguments about amendments, refiling of

[36] The Productivity Commission is currently undertaking an inquiry into paid maternity leave. This is due to be completed by February 2009. As part of the submissions process, the Australian Public Service Commission studied the female public servants who took maternity leave in 2000-2001 and examined what had happened to their careers after taking leave. The APSC's study found that, of those public servants who took maternity leave in 2000-2001, by June 2007, 65 percent of them had **not** been promoted. Over the same period, 42 percent of women without children had not received a promotion. This indicates that women who do not have children (and thus do not take maternity leave) are more likely to be promoted in the APS than those who take maternity leave.

complaints and the joining or adding of parties. HREOC should draft complaints where required or requested and take a more legalistic approach especially where systemic discrimination to alleged.

Case study - Inability of HREOC to provide legal advice

Jayne works as a casual part-time cleaner. She filed a claim for sexual harassment against her employer. HREOC informed Jayne that she required legal advice. She was told to obtain advice about her options and what sort of outcome she sought.

Victoria Legal Aid and many community legal centres run duty lawyering programs at the courts to provide advice and representation. A similar system could be set up at HREOC, or internal lawyers could be hired to assist parties in drafting or responding to complaints. This would enhance the current system in two ways. Firstly, it would reduce the incidence of drafting irregularities and secondly, parties will have received legal advice about the strengths and weaknesses of their case and what may be an appropriate settlement outcome. Implementing this recommendation should lead to a higher incidence of matters being resolved at the conciliation stage.

- **Reduce the duration and delays in the complaints process.**

  Currently the investigative period can be too long, especially when the complainant is still in employment with the Respondent.

  The complaints process should be similar to the current federal system of compulsory conciliations at the Australian Industrial Relations Commission (**AIRC**). At the AIRC, a respondent must file a response to the application within 7 days of receiving it from the AIRC. Conciliation conferences usually take place within 3 to 4 weeks of filing the application. This system is quick and efficient, comprehensible to all parties and, although still quite informal, effective at resolving disputes.

- **Improve conduct of conciliations**

  Conciliators will not comment on the merit of a case and/or its strengths and weaknesses.

- **Enable Complainants to have complaints expedited more easily**

  The current mechanism is not effective and, even where an employee complainant is still employed by or working with a respondent, it is still notoriously difficult to have a complaint expedited.

6.6 Removing barriers for complainants

Recommendation 13: HREOC should have standing to enforce conciliation settlement agreements at a Court or Tribunal on behalf of the Complainant.

In JobWatch's experience there are multiple barriers to individuals making a formal complaint:-

- Financial and emotional cost outweighs the benefit of often insubstantial compensation;
- Problem of legal costs being awarded against complainants;
- Complexity and formality of the process;

- Fear of victimisation;
- Stress and uncertainty created by the process; and
- Concerns about the enforceability of conciliation settlement agreements.

Further, even in cases where the actual risk of an adverse costs order is low, the inherent risk in litigation and potentially large quantum of a cost order, which may be particularly burdensome for financially disadvantaged parties, may act as a strong deterrent to prosecuting an unlawful discrimination claim.

This cost risk may deter complainants and representative organisations from running test cases concerning systemic discrimination.

As discussed above, a strong barrier to individual actions under the SDA is the risk borne by complainants of a costs order being made against them in the event their complaint is unsuccessful. This is because, in actions brought under the SDA in the Federal Court, costs "follow the event". The following case examples show the extent of the costs risk:

- ***Kowalski v Domestic Violence Crisis Service Inc (No. 2)*** [37]

  An application for relief for breach of the SDA was dismissed. The respondent had incurred substantial legal costs in defending the applicant's claim, and sought an award of costs in their favour. It was ordered that the applicant pay all costs of, and incidental to, the application; and all reasonably incurred disbursements.

- ***Ho v Regulator Australia Pty Ltd & Anor (No.2)***[38]

  Two instances of a breach of the SDA were found, however, "[T]he first was trivial and did not result in damages. The second was more significant but only called for a modest award of damages on account of non-economic loss." Overall, the applicant was substantially unsuccessful. As such, it was held that the respondents were entitled to receive costs in the sum of $4,707.50 in respect of the final day of the trial.

- **Ingui v Ostara & Anor (No.2)**[39]

  The Applicant was ordered to pay $3000 towards the Respondent's costs.

- **O'Brien v Crouch and Anor**[40]

  The Applicant was ordered to pay the Respondent's costs of $3511.

[37] [2003] FMCA 210 (20 June 2003).
[38] [2004] FMCA 402 (25 June 2004).
[39] [2003] FMCA 531 (22 December 2003).

[40] [2007] FMCA 1976.

6.6.1 Cost order protections

Recommendation 14: That certain cost order protections should be introduced to ensure applicants are not discouraged from making complaints.

Recommendation 15: Legislating that, in all but the most exceptional circumstances, each party must bear their own costs in any claim made under the SDA

JobWatch recommends the introduction of the following cost protections in order to reduce barriers for Complainants:

a) The prohibition of the making of cost orders against a party unless a party makes an application for costs and proves on the balance of probabilities that:
   - another party issued proceedings which were vexatious or frivolous; or
   - another party acted unreasonably during the proceedings, including by failing to accept a reasonable offer of settlement, causing the party making the costs application to incur costs.

b) The party making the costs order application ought to bear the burden of proof and costs should be limited to party/party legal costs and witness expenses.

   A power to award costs drafted in this form balances the rights of complainants and respondents by:
   - Encouraging meritorious claims to be made;
   - Discouraging frivolous or vexatious complaints;
   - Encouraging parties to act reasonably and to accept a reasonable offer of settlement;
   - Protecting parties against unreasonable behaviour during the conduct of litigation;
   - Protecting from cost orders an unsuccessful complainant with an arguable case; and
   - Protecting an unsuccessful respondent from cost orders where the respondent has an arguable defence or has not received a reasonable offer of settlement.

Other forms of cost protection that the Inquiry might consider are:

c) Costs orders against a party only to be made after a strike out application and not following a final hearing. Such a strike out application to made within 14 days of conciliation or mediation. If the strike out application is unsuccessful, no costs order can be made against the Complainant after the final hearing.

d) Where a conciliation is unsuccessful at HREOC, HREOC must provide a certificate as to whether a claim has merit, no merit or merit could not be determined. The Federal Court or the Federal Magistrates' Court must take the certificate into account when considering cost orders against a party.

e) HREOC to have the power to grant immunity against cost orders in test cases, cases involving systemic discrimination, certain representative actions, or where a certificate stating a case has merit has been issued, or in other matters where the public interest demands it.

Any such protections need to be balanced against Respondents' rights not to be burdened with unmeritorious or vexatious claims. JobWatch believes that such a balance is achieved successfully in

the protections provided under the WRA in relation to unlawful termination claims filed in the AIRC and these protections ought to be mirrored in the SDA.

7 Significant judicial rulings on the interpretation of the SDA and their consequences.

Recommendation 16: The symptoms or outcomes of the attribute should not be taken into account when constructing the comparator. That is, the characteristics of the aggrieved person related to the proscribed ground should not be attributed to the comparator.

Direct discrimination - The problem of constructing the comparator

Assessing whether direct discrimination has occurred requires a comparison to be made between how the alleged discriminator treated the person making the complaint and how the alleged discriminator would have treated a hypothetical person in circumstances that are the same or not materially different than those of the person making the complaint but who is, for example, of the opposite sex or a different marital status etc (**Comparator**).

Discrimination occurs where a person is treated less favourably than the comparator in the "same or not materially different circumstances".[41]

The High Court case of *Purvis*[42] presents difficulties for complainants in proving direct discrimination under the SDA and any other Australian anti-discrimination laws. This is because the decision has reconceptualised the notion of the Comparator in narrow and onerous terms making it almost impossible for complainants to succeed in complaints of direct discrimination.

Prior to *Purvis* the manifestations of a person's sex or marital status etc were not imputed to the Comparator. Hence, direct discrimination would occur where a person is treated less favourably than a hypothetical person without those manifestations.[43] *Purvis* overturned this position.

In *Purvis*, a school expelled a student with an intellectual disability that allegedly caused violent outbursts. A complaint was made on the student's behalf alleging direct disability discrimination. The question was whether to include the manifestation of the disability (the violent outbursts) as part and parcel of the disability and therefore exclude it from the analysis of the Comparator, or whether the violent outburst was to be considered objectively as part of the 'same or similar circumstances.' The minority of McHugh and Kirby JJ held that this behaviour was a manifestation of the disability and therefore should be excluded from the construction of the Comparator.[44] However, the majority of the Court thought that it was the outburst that led to his expulsion and it would seem artificial to remove this aspect from the objective circumstances.[45] The High Court found that the school did not directly discriminate against the student because the school would have also expelled a violent student who did

[41] See for example, section 5(1) SDA (direct sex discrimination).
[42] *Purvis v NSW* [2003] HCA 62.
[43] See *Sullivan v Department of Defence* (1992) EOC 92 – 421 at 79,005 per Toohey and Kirby JJ, *IW v City of Perth* (1997) 191 CLR at 33-43 and 66-67
[44] Per McHugh and Kirby JJ, Purvis at 66-67; Edwards, S (2004) "Notes and Comments: Purvis in the High Court Behaviour, Disability and the Meaning of Direct Discrimination", vol 26 *Sydney Law Review* 638; Campbell, C (2007) "A Hard Case Makes Bad Law: Purvis v NSW and the Role of the Comparator under the Disability Discrimination Act 1992 (CTH)", vol 35 *Federal Law Review* 111.
[45] Per Gummow, Hayne and Heydon JJ, *Purvis* at 185, 186.

not have an intellectual disability so the student was not treated differently than the Comparator would have been treated.

A similar case that followed *Purvis* was that of *Hollingdale v North Coast Area Health Service.*[46] In that case, the attribute, a bi-polar disorder, was separated from the manifestation of the disability – the sarcastic and aggressive nature of the complainant. The Comparator in this case was someone without bi-polar but who displayed anti-social behavior.

As various commentators have noted, however, there is no clear distinction between characteristics of an attribute and manifestations of that attribute[47] so the distinction in *Purvis* is an artificial and confused one which will lead to absurd outcomes that are inconsistent with the objectives of the SDA.

The effect of the test in *Purvis* is that complainants now face added difficulty in establishing that direct discrimination has occurred. Complainants must show, for example, that they were discriminated against specifically because of their pregnancy or family responsibilities, not merely because, for example an employer didn't like children.

This test makes it too easy for a respondent to evade liability for direct discrimination by claiming that their discriminatory behaviour was because of a consequence of the complainant's sex or marital status etc and not the sex or marital status itself.

Hence, several commentators have suggested that legislators incorporate the reasoning of the minority judgements of McHugh and Kirby JJ in *Purvis* into the drafting of anti-discrimination legislation.[48] Their Honours stated that:

> *'Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment and which are related to the prohibited ground are to be excluded from the circumstances of the comparator.'* [49]

In *Sullivan v Department of Defence* [(1992) EOC 92-421 at 79,005], Sir Ronald Wilson said:

> *'It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act'.*

JobWatch supports this view.

[46] [2006] FMCA 585.
[47] Edwards, S (2004) "Notes and Comments: Purvis in the High Court Behaviour, Disability and the Meaning of Direct Discrimination", vol 26 Sydney Law Review 638; Campbell, C (2007) "A Hard Case Makes Bad Law: Purvis v NSW and the Role of the Comparator under the Disability Discrimination Act 1992 (CTH)", vol 35 Federal Law Review 111.
[48] Kate Rattigan, The Purvis Decision: A Case for Amending the Disability Discrimination Act 1992 (Cth) [2004], 28 MULR 532.
[49] Per McHugh and Kirby JJ, *Purvis* at 119

8 Providing effective remedies

Recommendation 17: Orders for compensation need to be high enough to discourage discrimination and to make it worthwhile litigating a complaint.

Amounts awarded as Compensation

JobWatch's casework experience shows that, because of the modest amounts of compensation awarded by the courts under the SDA, employers are more likely not to make reasonable offers to settle a complaint during the conciliation stage.

In a paper presented by Barrister-at-law, Kellie Edwards, Denman Chambers, Nov 2006, Ms Edwards reviewed case law awarding damages under the SDA over the past ten years, and found the review indicated that earlier decisions of the Federal Court (such as *Gilroy v Angelov*[50] and *Elliott v Nanda & Cth*[51]) awarded much larger amounts of compensation than more recent cases such as *Frith v The Exchange Hotel*[52] and *Ware v OAMPS Insurance Brokers Ltd.*[53]

Further, neither earlier nor recent federal decisions come close to the kinds of damages awarded in common law cases – such as *Nikolich v Goldman Sachs JB Were Services Pty Ltd*[54] and *Walker v Citigroup.*[55]

Chris Ronalds SC has also commented on the issue of the "modest" amounts of general damages for hurt, humiliation and distress:[56]

> *"The damages in the discrimination arena under this head are relatively modest and amounts between $8 000-$20 000 are common. It appears that the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment."*

JobWatch submits that such modest awards of compensation do not act as a deterrent. May LJ, in *Alexander v Home Office,*[57] said:

> *"Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect."*

JobWatch also submits that "modest" amounts make it difficult to commit limited resources to pursuing a complaint through the courts. In *Clarke v Catholic Education Office,*[58] however, Madgwick J rejected the suggestion "that an award should not be so low that it might be eaten up by non-recoverable costs."

[50] (2000) FCA 1775 ($24,000 awarded).
[51] (2001) FCA 418 ($15,000 + $5,000 aggravated damages).
[52] (2005) FMCA 402 ($10,000 awarded).
[53] (2005) FMCA 664 ($10,000 awarded).

[54] (2006) FCA 784 ($500,000+).
[55] (2006) FCAFC 101($2.5million).
[56] Chris Ronalds SC, *Discrimination Law and Practice*, 3rd ed, 2008, at p. 223.
[57] (1988) 2 All ER 118.
[58] (2003) 202 ALR 340.

Finally, it is our experience (also acknowledged by Driver FM in *Cooke v Plauen Holdings Pty Ltd*[59]*)* that an apology is frequently worth more to an applicant than money. JobWatch submits that, as in *Cooke*, the applicant's entitlement to an apology should be taken into account in assessing the appropriate award of damages – and where an apology has not been offered, damages should be increased.

See Appendix 1 for an extract of the HREOC *Federal Discrimination Online*, Chapter 7, which gives an overview of damages awarded in sexual harassment cases under the SDA since the transfer of the hearing function to the FMCA and the Federal Court on 13 April 2000

9 Addressing discrimination on the ground of family responsibilities

Recommendation 18: Expand the scope of family responsibilities discrimination to include a positive duty to not unreasonably refuse to accommodate an employee's family responsibilities.

The SDA provides limited protection for employees discriminated against on the basis of their family responsibilities. Employees are protected by the SDA from direct discrimination on the ground of family responsibilities only if their employment has been terminated because of their family responsibilities. The SDA does not protect employees who have been demoted or suffered any other detriment because of their family responsibilities.

Discrimination on the ground of 'family responsibilities' pursuant to the SDA should be redrafted, so that employers have a positive obligation to accommodate an employee's family responsibilities. JobWatch submits that reformulated family responsibility provisions should mirror the provisions contained in Victoria's *Equal Opportunity Act* 1995 (see '**Victorian Model**' below) which provides for a proactive response to eliminating discrimination.

JobWatch submits that if the Victorian model is not implemented, as a minimum, direct and indirect discrimination on the basis of family responsibilities should be unlawful in the following areas: in employment, against commission agents, against contract workers, in partnerships, in qualifying bodies, in registered organizations under Schedule 1B to the Workplace Relations Act 1996 and in employment agencies. That is, sections 14(1), 14(2), 15(1), 15(2), 16, 17(1), 17(2), 18, 19(1), 19(2) and 20 should be amended to include unlawful discrimination on the basis of family responsibilities.

Discrimination on the ground of 'family responsibilities' is too narrow

As demonstrated by JobWatch statistics a much higher proportion of women make inquiries or express concerns regarding their parental and carer status.[60] The following case study taken from JobWatch's database demonstrates the disadvantage suffered by women in the workplace with family responsibilities and the lack of remedy through the SDA.

Jane works in customer service on a permanent full time basis for a retail store. Her contract states that she has to work occasionally on Saturdays. Jane has had to take legal action against her ex husband in relation to custody of her child and as part of the legal agreement reached he has access on alternate weekends and she needs to not be working on those days. The employer is insisting that she must work three weekends out of four and will not negotiate.

[59] (2001) FMCA 91.
[60] See 'Statistical Analysis' at paragraph 2 above.

In this case, the employer refused to accommodate Jane's family responsibilities, that is, a request for flexible working arrangements. Currently under the SDA, Jane would not be able to bring a discrimination complaint on the basis of family responsibilities, even though the employer is imposing a condition (that Jane work three weekends out of four) which has the effect of disadvantaging Jane.

Indirect discrimination on the basis of family responsibilities for men

While Jane (above) may have a claim for indirect discrimination on the basis of sex, this claim is based on recognition that a refusal to consider alternate work arrangements may involve the imposition of an unreasonable condition that is likely to disadvantage women because of their a disproportionate responsibility for the care of children.[61]

The same condition, however, being a refusal to consider alternate work arrangements because of family responsibilities, may not be considered an unreasonable condition that is likely to disadvantage men, as they are not disproportionally responsible for providing care. The following case study illustrates how men are exposed to family responsibility discrimination. Indirect discrimination on the basis of sex would not protect a male employee with family responsibilities from detrimental treatment because of his family responsibilities.

Don has been working as a youth outreach worker for over 6 years. His partner was recently diagnosed with an illness and he informed his employer that he can no longer run group sessions at work in case he needed to leave work at short notice for his partner (these sessions are not actually part of his role). Don was then overlooked for what he believes was a promotion.

The 'family responsibility' discrimination provisions in the SDA are too limited and do not adequately address systemic discrimination or promote gender equality in the workplace.

9.1 Victorian Model

Recent amendments to the *Equal Opportunity Act* 1995 (VIC) (**EO Act**) implement a more proactive approach to preventing discrimination on the basis of family responsibilities than the SDA. JobWatch submits that the Victorian approach more effectively addresses sex discrimination and promotes gender equality.

In Victoria, from 1 September 2008, an employer, principal or firm (**employer**) must not unreasonably refuse to accommodate the parental or carer responsibilities of a person offered employment, an employee, a contract worker, a person invited to become a partner of a firm, or a partner in a firm (**worker**).[62]

A worker will not have to prove direct or indirect discrimination in order to make a complaint that they have been discriminated against on the basis of family responsibilities. A worker need only show that the employer breached the EO Act, that is, they will have to prove that their employer unreasonably refused to accommodate their parental or carer responsibilities.

The new amendments to the EO Act provide a non-exhaustive list of considerations to be addressed when determining whether an employer unreasonably refuses to accommodate the family responsibilities of a worker, for example, the nature of the role, the size and nature of the workplace,

[61] *Escobar v Rainbow Printing Pty Ltd (No 2) [2002] FMCA 122*
[62] Sections 13A, 14A, 15A, 16A EO Act

the consequences for the employer of making the accommodation and the consequences for the person of not making such accommodation.

The amendments provide workers with parental or carer responsibilities additional protections when negotiating flexible working arrangements in order to meet their family responsibilities. They require employers to accommodate flexible working arrangements as a general rule which will have a flow on effect and positively affect workplace culture by eliminating the stigma that many parents and carers face trying to manage competing work and family responsibilities.

This approach enables employers to treat workers differently in order to address the needs of workers with family responsibilities, and allows them to take positive actions to accommodate a worker who has family responsibilities. An example given in the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) is that, "An employer may be able to accommodate a person's responsibilities as a parent or carer by offering work on the basis that the person could work additional daily hours to provide for a shorter working week or occasionally work from home". The Victorian Equal Opportunity and Human Rights Commission has collaborated with key stakeholders to draft guidelines to assist employers and employees regarding the new law.

9.2 Consistency with federal laws - National Employment Standards

One of the main ways that employees manage their family responsibilities in conjunction with work obligations is to negotiate flexible working arrangements. JobWatch submits that the 'family responsibilities' discrimination provisions in the SDA should at least provide protection for employees attempting to enforce their minimum entitlement to request flexible working arrangements under the National Employment Standards (which are to be incorporated into the *Workplace Relations Act* 1996 in 2010 pursuant to the *Forward with Fairness* reforms)[63]. The 'right to request flexible working arrangements' minimum standard applies to employees who are parents or have the responsibility for the care of a child under school age.

There is currently no enforcement mechanism for this minimum standard. Given that a large majority of employees do not have access to the protection of unfair dismissal laws following the *WorkChoices* amendments to the *Workplace Relations Act* 1996, the SDA should at least provide employees with protection from discriminatory treatment when attempting to enforce their minimum workplace rights in relation to family responsibilities. Alternatively, the SDA could be amended to provide an enforcement mechanism to the right to request flexible working arrangements under the National Employment standards.

JobWatch refers to our NES Exposure Draft Submission to the Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations, April 2008, which details areas of concern in regards to the scope and implementation of this minimum standard.

[63] Division 3, National Employment Standards (2008) (http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper_web.pdf) released on 16 June 2008 at a joint media release with Prime Minister Kevin Rudd and the Minister for Employment and Workplace Relations, Julia Gillard

10 Miscellaneous recommendations

10.1 Vicarious liability

Recommendation 19: Amend the SDA to make the "all reasonable steps" defence to vicarious liability unavailable to respondents where it can be shown that no action was taken after a formal or informal complaint was made to them.

Under section 106 (2) of the SDA, and employer can escape vicarious liability for unlawful discrimination and sexual harassment if it can show that it took "all reasonable steps" to prevent its employee or agent from doing the discriminatory act.

What are "reasonable steps" is dependant on case law and the relevant facts of each individual case. Respondents often refer to having Equal Opportunity training and an internal complaints process as being all that is required to show "all reasonable steps". As such, it is very difficult for complainants to be confident that an employer will be found vicariously liable even where the employee or agent has been found to have breached the SDA or not even admitted discriminatory conduct. Where a complainant is only successful against the individual employee or agent and not the employer, such orders for compensation are often unenforceable due to the impecunious position of individual respondents.

JobWatch submits that this area could be made clearer for both complainants and respondents if the SDA was amended to make the "all reasonable steps" defence unavailable to employers where it can be shown that an employee actually made a formal or informal complaint to the employer and no action was taken by the employer or if action was taken where is was not taken within a reasonable time.

10.2 Exemptions

Recommendation 20: Remove blanket exemptions under the SDA, however HREOC may grant exemptions on a case by case basis so long as the exemption is in the public interest..

JobWatch submits that there should be no blanket exemptions under the SDA.

JobWatch also submits that only HREOC should be able to grant exemptions on a case by case basis, after conducting a public hearing, if such an exemption is found to be in the public interest. Such exemptions should have a limited period of application and HREOC's decisions should be appealable.

10.3 Common workplaces

Recommendation 21: the SDA should be amended to make sexual harassment and sex discrimination unlawful when it occurs in a common workplace but where individuals are not employed by the same employer or are independent contractors.

10.4 Partnerships and firms

Recommendation 22: The SDA should be amended to make sex discrimination unlawful in partnerships and firms and in the offering partnerships and establishing firms.

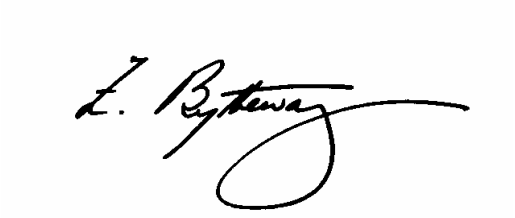
10.5 Sexual Harassment

JobWatch endorses the submission of the Public Interest Clearing House Inc dated 1 August 2008 in relation to sexual harassment.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

For further information, please contact Ian Scott of JobWatch's Legal Practice on (03) 8643 1118.

Yours sincerely,



per
JobWatch Inc
Authorised by Zana Bytheway, Executive Director

Appendix 1

The following table from the HREOC *Federal Discrimination Online*, Chapter 7, gives an overview of damages awarded under the SDA (excluding sexual harassment cases) since the transfer of the hearing function to the FMCA and the Federal Court on 13 April 2000.

Table 2: Overview of damages awarded under the SDA

	Case	**Damages awarded**
(a)	*Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142	Total Damages: $17,500 $7,500 (exemplary damages) $10,000 (non-economic loss)
(b)	*Grulke v KC Canvas Pty Ltd* [2000] FCA 1415	Total Damages: $10,000 $7,000 (economic loss) $3,000 (non-economic loss)
(c)	*Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91	$750 (non-economic loss)
(d)	*Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31	Total Damages: $22,222 (approx) $10,000 (non-economic loss) $244.44 per week from 21 February 2001 until the date of judgment, less $977.76 already paid (economic loss)
(e)	*Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122	Total Damages: $7,325.73 $2,500 (non-economic loss) $4,825.73 (economic loss)
(f)	*Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209	Total Damages: $39,294 $30,695 (economic loss: includes salary, motor vehicle benefits and superannuation) $5,000 (non-economic loss) $3,599 (interest) (*minus an amount due for income tax, to be paid to the Australian Taxation Office*)
(g)	*Evans v National Crime Authority* [2003] FMCA 375, partially overturned on appeal: *Commonwealth v Evans* [2004] FCA 654	Total Damages: $41,488.57 $12,000 (non-economic loss – reduced from $25,000 on appeal) $7,493.84 (interest – subject to recalculation after appeal) $21,994.73 (economic loss – not challenged on appeal)
(h)	*Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160	$10,000 plus interest (non-economic loss)
(i)	*Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214	$7,500 (non-economic loss)
(j)	*Gardner v All Australia Netball Association Ltd* (2003) 197 ALR 28	$6,750 (non-economic loss)
(k)	*Ho v Regulator Australia Pty Ltd* [2004] FMCA 62	$1,000 (non-economic loss)
(l)	*Howe v Qantas Airways Ltd* (2004) 188 FLR 1*; Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934	Total Damages: $27,753.85 (plus interest) $3,000 (non-economic loss) $24,753.85 (economic loss) plus interest

	Case	Damages awarded
(m)	*Dare v Hurley* [2005] FMCA 844	Total Damages: $12,005.51 $3,000 (non-economic loss) $9,005.51 (economic loss)
(n)	*Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3	Total Damages: $1,338 $500 (non-economic loss) $838 (economic loss – including associated contractual claim)
(o)	*Rankilor v Jerome Pty Ltd* [2006] FMCA 922	$2,000 (non-economic loss including out-of-pocket expenses)
(p)	*Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960, upheld on appeal: *Sterling Commerce (Australia) Pty Ltd* [2008] FCA 702	$22, 211.54 (economic loss - plus interest[64] and less tax)

The following table, from the HREOC *Federal Discrimination Online*, Chapter 7, gives an overview of damages awarded in sexual harassment cases under the SDA since the transfer of the hearing function to the FMCA and the Federal Court on 13 April 2000.

Table 3: Overview of damages awarded in sexual harassment cases under the SDA

	Case	Damages awarded
(a)	*Gilroy v Angelov* (2000) 181 ALR 57	Total Damages: $24,000 $20,000 (non-economic loss) $4,000 (interest)
(b)	*Elliott v Nanda* (2001) 111 FCR 240	Total Damages: $20,100 $15,000 (non-economic loss) $100 (economic loss – cost of counseling) $5,000 (aggravated damages)
(c)	*Shiels v James* [2000] FMCA 2	Total Damages: $17,000 $13,000 (non-economic loss) $4,000 (economic loss)
(d)	*Johanson v Blackledge* (2001) 163 FLR 58	Total Damages: $6,500 $6,000 (non-economic loss) $500 (economic loss – cost of counseling)
(e)	*Horman v Distribution Group* [2001] FMCA 52	$12,500 (non-economic loss - includes cost of medication)
(f)	*Wattle v Kirkland (No 2)* [2002] FMCA 135	Total Damages: $28,035 $7,600 (economic loss - reduced from $9,100 on appeal) $15,000 (non-economic loss) $5,435 (interest)
(g)	*Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81	$7,500 (non-economic loss)
(h)	*McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109	Total Damages: $5,100 $4,000 (non-economic loss) $1,100 (economic loss)

	Case	Damages awarded
(i)	*Beamish v Zheng* [2004] FMCA 60	$1,000 (non-economic loss)
(j)	*Bishop v Takla* [2004] FMCA 74	Total Damages: $24,386.40 $20,000 (non-economic loss) $13,246.40 (economic loss: medical expenses and interest) Note that the award of damages was reduced by an amount received in settlement against other respondents.
(k)	*Hughes v Car Buyers Pty Ltd* (2004) 210 ALR 645	Total damages: $24,623.50 $7,250 (non-economic loss – being $11,250 less $4,000 paid by a respondent against whom proceedings were discontinued) $5,000 (aggravated damages) $12,373.50 (economic loss - $12,086 for loss of income and $287.50 for expenses)
(l)	*Trainor v South Pacific Resort Hotels Pty Ltd* (2004) 186 FLR 132; upheld on appeal *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402	Total Damages: $17,536.80 $6,564.65 (non-economic loss – being $5,000 plus $1.564.65 interest) $1,907.50 (economic loss – medical expenses) $6,564.65 (economic loss – being $5,000 plus $1.564.65 interest) $2,500 (future loss of income)
(m)	*Phillis v Mandic* [2005] FMCA 330	$4,000 (non-economic loss)
(n)	*Frith v The Exchange Hotel* [2005] FMCA 402	Total Damages: $15,000 $10,000 (non-economic loss) $5,000 (economic loss)
(o)	*San v Dirluck Pty Ltd* (2005) 222 ALR 91	$2,000 (non-economic loss)
(p)	*Cross v Hughes* [2006] FMCA 976	Total Damages: $11,322 $3,822 (economic loss) $7,500 (non-economic loss - including aggravated damages)
(q)	*Hewett v Davies* [2006] FMCA 1678	Total Damages: $3,210 $210 (economic loss) $3,000 (non-economic loss - including aggravated damages)
(r)	*Lee v Smith* [2007] FMCA 59	$100,000 (non-economic loss)
(s)	*Lee v Smith (No 2)* [2007] FMCA 1092.	Total Damages: $392,422.32 (approx) + interest Interest on the above figure of $100,000 from 23 March 2007 at 10.25% $232,163.22 (economic loss, plus interest on the amount of $53,572.72 at the rate of 5.125% from 5 December 2001 to 14 June 2007 and thereafter at 10.25%). $35,000 (future loss of income) $20,259.10 (economic loss – past medical expenses) $5,000 (future medical expenses)