ANTI DISCRIMINATION
COMMISSION QUEENSLAND

**SUBMISSION**

**THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITIONAL AFFAIRS**

# INQUIRY INTO THE EFFECTIVENESS OF THE COMMONWEALTH SEX DISCRIMINATION ACT 1984 IN ELIMINATING DISCRIMINATION AND PROMOTING GENDER EQUALITY

1 August 2008

# 1. INTRODUCTION

This submission is made by the Anti-Discrimination Commission Queensland (ADCQ), in relation to the following aspects:

1. Scope of the Commonwealth *Sex Discrimination Act 1984*; and
2. Discrimination Issues Not Adequately Addressed by the *Sex Discrimination Act 1984.*

The submission then lists a number of recommendations for strengthening the *Sex Discrimination Act 1984* to make it more effective in eliminating discrimination and promoting gender equality.

## 1.1 About the ADCQ

The Anti Discrimination Commission (the ADCQ) is established under the *Anti-Discrimination Act 1991* (the Queensland ADA). One of the functions of the ADCQ is to promote an understanding and acceptance, and the public discussion of human rights in Queensland.

One of the roles of the ADCQ under the Queensland ADA is to promote equality of opportunity for women. In passing the Queensland ADA, the Queensland Parliament cited its support of the Commonwealth in ratifying a number of international instruments. Those instruments include the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Labour Organisation (ILO) Convention concerning Discrimination in respect of Employment and Occupation (ILO 111) and the International Labour Organisation Convention on Workers with Family Responsibilities (ILO 156).

The scheme of the Queensland ADA is to prohibit discrimination, both direct and indirect, on certain grounds in certain areas of activity, unless an exemption under the Act applies, and to provide a mechanism for resolving contraventions of the Act.

There are 16 prohibited grounds of discrimination, including sex, pregnancy, breastfeeding, family responsibilities and association with a person with any of those attributes.

Discrimination on these grounds is prohibited in the areas of work, education, goods and services, superannuation, insurance, accommodation, club membership and affairs, administration of State laws and programs and local government.

The prohibition against sexual harassment is not limited to these areas of activity.

# 2. SCOPE OF THE *SEX DISCRIMINATION ACT 1984*

## 2.1 Background

When Australia ratified the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) twenty-five years ago, it agreed to pursue all appropriate means to realise the principle of equality of men and women.

The Sex Discrimination Bill was introduced as a measure towards achieving equality of men and women, and at the time it was controversial. Consequently the Bill was amended and redrafted, and affirmative action provisions were dropped. Although affirmative action provisions are now in the Commonwealth *Equal Opportunity for Working Women Act 1999*, there is still inequality between men and women, particularly in the workplace and as a consequence of the inequities associated with work.

The objects of the *Sex Discrimination Act 1984* (the SDA) stated in the SDA make it clear it was not intended to give effect to all of the provisions of the CEDAW, even though the power under which the Act was made is in part premised on the CEDAW and it is re-produced as a Schedule to the SDA.

So even on the face of it, the SDA goes only part way to eliminating discrimination against women, both to the extent to which it purports to give effect to the CEDAW and in the areas in which it proscribes discrimination. In so far as the SDA purports to address discrimination against men, its application is limited by the powers of the Commonwealth under the Constitution.

## 2.2 Exemptions

Many of the exemptions under the SDA recognise differences between the sexes and that in some cases it is necessary to provide special services or measures in order to achieve equality for a disadvantaged group. The need for special measures is specifically recognised in CEDAW, and consistent with the requirement to ensure the full development and advancement of women for the purpose of achieving equal rights and freedoms.

However the SDA allows some exemptions that are inconsistent with CEDAW, namely:

- Schools based on religion are able to discriminate on the basis of sex, pregnancy and marital status in work arrangements, and on the basis of marital status and pregnancy in connection with the provision of education or training (s38).
- Voluntary bodies are free to discriminate on the basis of sex, marital status and pregnancy in connection with membership and the provision of benefits, services and facilities (s39). Clubs are able to discriminate on the ground of sex if membership of the club is available to persons of the one sex only (s25(3)).
- Discrimination of the basis of sex and marital status is permitted, in certain circumstances, in the superannuation area (ss41A & B).

### 2.2.1 Educational institutions

The ADCQ supports the recommendation of the Australian Law Reform Commission[1] that "the exemption contained in section 38 of the SDA for educational institutions established for religious purposes be removed. At the very least the exemption should be removed in relation to discrimination on the ground of sex and pregnancy. The exemption for discrimination on the ground of marital status, if it is to be retained, should be amended to require a test of reasonableness".

The ADCQ shares the view of the ALRC that "religious freedom and the right to enjoy culture and religion must be balanced with the right to equality and with the principle of non-discrimination. [This] exemption prefers one right over another and precludes any consideration of where the balance between rights should be. Women employed in religious educational institutions should have the same right to be free from discrimination as other women".

### 2.2.2 Voluntary Bodies & Clubs

The SDA defines voluntary bodies as an association or other body that engages in activities for purposes other than making a profit (it does not include clubs with more than 30 members that provide facilities from its funds that include the sale or consumption of liquor). Clubs have the benefit of an exemption that allows them to operate as single sex clubs.

The ADCQ supports previous recommendations[2] that voluntary organisations should not be prioritised over the human rights goals of anti-discrimination law, and strongly supports removal of the exemption in favour of clubs.

[1] ALRC Report 69 Part 1 Equality Before the Law: Justice for Women – Part II
[2] Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984,* AGPS, Canberra, 1992; ALRC 69, *Equality Before the Law*, 1994; Research Paper, *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984,* 1999

### 2.2.3 Superannuation

In 1996 the Senate Select Committee on Superannuation tabled a report, *Super and Broken Work Patterns*. The Committee recommended that the Government encourage and monitor research on the use of gender and morbidity actuarial tables with a view to amending the SDA to exclude the exemption relating to actuarial data or to exclude gender based actuarial tables from the exemption.

When the current exemptions relating to superannuation were introduced in 1991, they were intended to be temporary. The Sex Discrimination Commissioners have worked towards removal of the exemptions. It is time to review the exemptions with a view to removing them.

## 2.3 Benefits and Disadvantages in How the SDA Operates

The way the SDA endeavours to achieve its objects is to proscribe certain types of discrimination on certain grounds, and then provide a mechanism to re-dress the discrimination. The mechanism, like those in State anti-discrimination laws, is an individual complaint based process, followed by a conciliation process, and if not resolved by agreement, then resolution through a judicial process.

Like State anti-discrimination laws, the SDA is based on concepts of direct discrimination and indirect discrimination. Direct discrimination is only established where the complainant can demonstrate less favourable treatment than a person of the other sex in the same or similar situation. It can be effective in identifying more blatant instances of unequal treatment, usually towards individuals.

Indirect discrimination, although more focussed on the impact of a facially neutral requirement, is a complex notion and not readily identified in terms of the obligations of employers, service providers and the like. At the ADCQ, it is common to hear "but how can that be discrimination if the policy (or requirement) applies to everyone?". Little

headway can be made in achieving equality where discrimination remains misunderstood, including by those who are victims of it.[3]

So the effectiveness of the SDA is impaired by the difficulty for both victims and perpetrators of discrimination to recognise it as such, and even when it is recognised by the victim, it is not simply a matter of the victim making a complaint. The complainant has to convince the perpetrator of the discrimination as well as postulate a remedy.

In spite of the these difficulties, the ADCQ believes that the complaints mechanism is an important and significant mechanism to deal with the types of discrimination covered in the SDA, but it cannot be relied upon as the sole means of eliminating sex discrimination.

The complaint process contained in the SDA allows for individuals who believe they have been discriminated against on the basis of the attributes contained in the SDA to make a complaint to the Human Rights and Equal Opportunity Commission (HREOC), and to attend a conciliation conference in an attempt to resolve the complaint with the respondent. Conciliation can be a relatively low cost and effective means of resolving a dispute, particularly when it is attempted at an early stage in a dispute. There are numerous ways in which complaints may be resolved. Negotiations, where successful, can lead to positive and substantive outcomes for the individual complainant. On occasions, negotiations may also lead to significant changes in a workplace, business or enterprise that may benefit a much larger group of persons.

Not all complaints can be successfully conciliated, and some may ultimately proceed to a public hearing before the Courts. The decisions made by the Federal Magistrates Court (or the higher appeal courts) can indirectly affect more individuals and

[3] See the examples given by Sara Charlesworth in the Clare Burton Memorial Lecture 2007 "Understandings of Sex Discrimination in the Workplace: Limits and Possibilities"

workplaces or other enterprises than just those individuals and respondents involved in that specific complaint. The broader public benefit of Court decisions is that they can build up a body of case law that can illustrate the circumstances and parameters of prohibited discriminatory conduct in relation to the grounds covered by the SDA. Unfortunately, developing a body of case law can be very slow, and does not necessarily lead to the development of larger systemic changes that may be necessary to eliminate discriminatory practices.

The ADCQ argues that as well as a complaint based process, additional processes must be put into place to aid in eliminating the types of discrimination contemplated within the CEDAW. Some of these processes may be appropriately placed within the SDA, and others may require the passing of complimentary legislation and/or the implementation of broad changes in public policy to achieve the objective of the elimination of discrimination.

# 3. DISCRIMINATION ISSUES NOT ADEQUATELY ADDRESSED BY THE *SEX DISCRIMINATION ACT 1984.*

## 3.1 Need for Extension of Grounds and Areas Covered by the SDA.

Unlike the other grounds of discrimination in the SDA, family responsibilities discrimination only applies to dismissal of an employee, not to other aspects of employment or in other areas of public life, and it is limited to direct discrimination. Although Courts and tribunals have interpreted the provision (s14(3A)) to include constructive dismissal, which has extended its ambit, the effect is still to require a total breakdown in the employment relationship, or job loss, before the discrimination is unlawful. It cannot be applied to issues of recruitment or promotion for example, or other aspects of the terms and conditions of employment, such as a refusal to reduce or adjust working hours.

Accordingly, it is recommended that the prohibition of discrimination on the basis of family responsibilities be extended to all areas under the SDA, including both direct and indirect discrimination, thus removing the limitation of dismissal in work area.

ADCQ also recommends that breastfeeding be included as an attribute covered by the SDA, and that sexual harassment be prohibited generally, as is presently the case under the Queensland ADA.

## 3.2 Need for Transparent, Enforceable Standards

The comparator test can be particularly problematic in relation to the attributes of family responsibilities, or pregnancy, breastfeeding or other aspects of maternity, which are the markers of women's difference. In its *Handbook for Practitioners on International Discrimination Law*, Interights considers all the problems with the comparator test and advances the alternative of appealing to substantive standards or principles. It notes that "appealing to substantive standards has several advantages over other methods of establishing a case. It eliminates the need to find a similarly situated individual or group for individual or statistical comparison. This approach also helps raise human rights standards by focusing on higher standards rather than relative standards of comparison".[4]

These arguments support the proposal, made in the Australian Law Reform Commission Report *Equality Before the Law*, that there should be a power for the Sex Discrimination Commissioner and/or the Minister to formulate standards to further the objectives of the Sex Discrimination Act[5]. This proposal for enforceable standards, which could apply for example to the development of family friendly work standards, is modelled on the provisions in the *Disability Discrimination Act 1992*.

[4] Published by Interrights, the International Centre for the Legal protection of Human Rights, London, 2005, para 2.2, p.118
[5] see ALRC Report No 69 *Equality before the Law*, 1994, Sydney, para 3.41 – 3.45; Recommendation 3.4

Standards developed in consultation with all stakeholders, would clarify the policies and practices that facilitate work and family balance while promoting gender equity. The standards can draw on and codify the extensive work already done by State and Federal agencies, and internationally, on family friendly work arrangements, and can incorporate the standards and principles established by case law. A major advantage of this approach is the improved transparency and practical guidance it could offer to employers about their legal obligations.

## 3.2 Need for Positive Duties

The way in which the SDA prohibits discrimination can result in it being difficult to "see" discrimination. A means of raising awareness and understanding is to make obligations clearer by imposing positive duties.

For example, a female worker may be able to demonstrate indirect discrimination on the basis of sex if she is denied part-time work after having a child. It involves an assumption that child care is the primary responsibility of women, which perpetuates a stereotype of women as primary carers, as well as limiting the rights and responsibilities of men in relation to child care. A better alternative is to impose a duty on employers to accommodate family responsibilities and a duty to consider flexible work arrangements.

The concept of positive duties is not new. The Productivity Commission recommended amendment of the *Disability Discrimination Act 1992* to include a general duty to make reasonable adjustments.[6] The HREOC has reported submissions arguing for the inclusion of positive duties in the SDA.[7] The ADCQ supports these recommendations.

[6] *Productivity Commission Review of the Disability Discrimination Act 1992*, Productivity Commission Canberra 2004
[7] It's About Time: Women, Men, Work and Family Final Paper 2007, chapter 3

## 3.3 Discrimination on multiple grounds

At the ADCQ, many complaints are accepted on more that one ground. For example, in the 2006-2007 period, the ADCQ accepted 540 complaints on 821 grounds.

Women from different backgrounds often experience discrimination involving other attributes: for example; sex and race, sex and age, sex and disability. The intersection of grounds of discrimination was reported in the Australian Law Reform Commission Report 69 Part 1 *Equity Before the Law: Justice for Women – Part II Measures to Combat Discrimination*.

The ALRC describes the structure of federal anti-discrimination legislation, as providing separate laws on specific grounds: the SDA deals with discrimination on the ground of sex, marital status and pregnancy, the *Racial Discrimination Act 1975* (the RDA) deals with discrimination on the basis of race, colour and national of ethnic origin, the *Disability Discrimination Act 1992* deals with discrimination on the basis of disability, and since the report, the *Age Discrimination Act 2004* deals with discrimination on the basis of age.

This structure derives in part because the legislation was introduced at different times to give effect to different international human rights instruments. The ALRC reported that this structure does not provide for cases of discrimination on more than one ground at any given time, and assumes that men and women only ever experience discrimination in separate categories.

"Putting discrimination into separate boxes causes problems for those with characteristics covered by different Acts as they may fit a number boxes simultaneously. Women may experience 'multiple oppressions simultaneously ' ……. Is the Aboriginal woman who experiences discrimination to be characterised by her gender and proceed under the SDA or by her race and therefore under the RDA?

Either way it will be inadequate because she experiences discrimination because she is an Aboriginal woman.[8]

The ALRC reported "there is a need to develop an approach that is able to recognise the indivisibility and simultaneity of disadvantages that different women may experience", and recommended amending the Commonwealth discrimination legislation to enable HREOC to deal with complaints that fall across the discrimination legislation.

## 3.4 Systemic Discrimination

An individual complaints based system has limited ability to address systemic discrimination because it is concentrated on correcting individual behaviour and compensating for individual loss.

Systemic discrimination is the creation, perpetuation or reinforcement of persistent patterns of inequity among disadvantaged groups. It is often the result of seemingly neutral legislation, policies, procedures, practices or organisational structures. It can be based on assumptions and stereotypes that become entrenched through societal practices and acceptances.

For instance, an area where there is large scale systemic discrimination is in the workplace, where for a range of reasons, women in Australia have still not achieved pay equity with men. This has an impact on the retirement and superannuation saving of women, which are substantially less than the savings of males of the same age. [9]

[8] ALRC Report 69 part 1 Equality Before the Law: Justice for Women – Part II, para 3.62
[9] The HREOC report *It's About Time: Women, men, work and family*, released in March 2007 discusses this issue. See also *Pay Equity:Time to Act* Report of Queensland Industrial Relations Commission released in September 2007.

Another area that is arguably an instance of systemic discrimination is the failure to prevent and effectively deal with the much higher levels of domestic and family violence perpetrated on women than men. It has been argued that this type of violence is partly attributable to the lower status of women in society.

The SDA should formally give the Sex Discrimination Commissioner the function of identifying, researching and suggesting means to eliminating systemic discrimination.

# 4. RECOMMENDATIONS

The ADCQ recommends the following changes to make the SDA more effective:

4.1 Make discrimination on the ground of family responsibilities, both direct and indirect, unlawful in relation to all aspects of work and employment.

4.2. Give the Sex Discrimination Commissioner and/or the Minister powers under the SDA to formulate standards and guidelines for family-friendly work arrangements that promote gender equity.

4.3 Include breastfeeding as a ground of unlawful discrimination in all areas covered by the SDA.

4.4 Prohibit sexual harassment generally, as is presently the case in Queensland ADA.

4.5 Include affirmative action provisions requiring employers to identify barriers and implement measures to increase the employment of under-represented groups (women) as well as flexible work practices, and empower the Sex Discrimination Commissioner to investigate and audit compliance (without relying on an individual complaint to trigger this process).

4.6 Give the Sex Discrimination Commissioner an explicit power to investigate and report on systemic discrimination.

4.7 Remove the exemptions relating to educational institutions established for religious purposes, voluntary bodies and clubs, and superannuation.

4.8 Re-frame prohibitions into clear positive duties – e.g. duty to accommodate parental and carer responsibilities though flexible work practices, duty to accommodate part-time work after maternity leave, duty not to ask a person their age, sex, relationship status or parental status.

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