



**Human Rights and Equal  
Opportunity Commission**

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**Submission of the  
HUMAN RIGHTS AND EQUAL OPPORTUNITY  
COMMISSION (HREOC)  
to the  
SENATE LEGAL AND CONSTITUTIONAL  
AFFAIRS COMMITTEE  
on the  
INQUIRY INTO THE EFFECTIVENESS OF THE  
*SEX DISCRIMINATION ACT 1984* (Cth) IN  
ELIMINATING DISCRIMINATION AND  
PROMOTING GENDER EQUALITY  
1 September 2008**

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# 1. Introduction

1. The Human Rights and Equal Opportunity Commission ('HREOC') makes this submission to the Senate Legal and Constitutional Affairs Committee for its Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* (Cth) ('SDA') in eliminating discrimination and promoting gender equality ('the Inquiry').
2. HREOC is Australia's national human rights institution ('NHRI')<sup>1</sup> and is responsible for administration of the SDA.
3. This Inquiry is the first occasion upon which HREOC has developed specific recommendations for reform to the SDA as an entire piece of legislation since 1994.
4. HREOC has undertaken recent policy work about ways in which national laws could be improved to increase legal protection from discrimination on the grounds of pregnancy and family responsibilities, relevant to some of the Terms of Reference of this Inquiry. In particular, HREOC conducted its National Pregnancy and Work Inquiry, which led to publication of *Pregnant and Productive: It's a right not a privilege to work while pregnant* ('*Pregnant and Productive* (1999)')<sup>2</sup>. HREOC also conducted its Women, Men, Work and Family Project, leading to publication of *It's About Time: Women, Men, Work and Family (2007)* ('*It's About Time (2007)*')<sup>3</sup>.
5. The SDA has also been subject to two previous national inquiries:
  - House of Representatives Standing Committee on Legal and Constitutional Affairs. 'Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992). Findings from this inquiry are published in *Halfway to*

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<sup>1</sup> HREOC is established by the *Human Rights and Equal Opportunity Commission Act 1986*. Sections 11 and 31 of the *Human Rights and Equal Opportunity Act 1986* (Cth) set out HREOC's functions relating to human rights and equal opportunity in employment respectively. HREOC also has functions under the *Commonwealth Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

<sup>2</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999) at <[http://www.humanrights.gov.au/sex\\_discrimination/publication/pregnancy/report.html](http://www.humanrights.gov.au/sex_discrimination/publication/pregnancy/report.html)>.

<sup>3</sup> Human Rights and Equal Opportunity Commission, 'It's About Time: Women, Men, Work and Family: Final Paper' (2007), at <[http://www.hreoc.gov.au/sex\\_discrimination/its\\_about\\_time/index.html](http://www.hreoc.gov.au/sex_discrimination/its_about_time/index.html)>.

*Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia (1992) ('Halfway to Equal (1992)')*<sup>4</sup>; and

- Australian Law Reform Commission, *Inquiry into Equality before the Law Justice for Women (1994)*. Findings from this inquiry are published in *Equality Before the Law: Justice for Women (1994) ('Equality Before the Law (1994)')*.<sup>5</sup>
6. Each report made many recommendations about how to improve the SDA, only some of which have been implemented.
  7. In Victoria, the *Equal Opportunity Act 1995* (Vic) has been the subject of a recent review. The Victorian review raises many similar issues to the present Inquiry. The findings of the Victorian review were released on 30 June 2008 in *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report (2008)*.
  8. HREOC draws on its recent policy work, recommendations from past national inquiries, the Victorian review process, external academic and civil society analysis, relevant jurisprudence and HREOC's direct experience of the operation of the SDA for this Submission.
  9. However, in light of the limited time available to prepare this submission, HREOC has not had the opportunity to undertake external consultations regarding its proposals for reform. HREOC would welcome the opportunity to make supplementary submissions to the Committee during the course of this Inquiry, as required.
  10. HREOC is committed to working with the Australian Government and all interested parties to achieve a high quality outcome from this Inquiry.

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<sup>4</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992).

<sup>5</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994).

## 2. Executive summary

11. HREOC welcomes this Inquiry as a unique opportunity to assess the effectiveness of the SDA in 2008 and to make proposals for reform that will ensure it exists as a first class national gender equality law.
12. There has been significant progress in reducing direct sex discrimination since 1984, when the SDA was passed by the Australian Parliament. However, the application of the SDA over a quarter of a century has highlighted some serious limitations with its current form and content. It is clear that our progress on achieving substantive gender equality in Australia has stalled, and the SDA is currently limited in its ability to proactively address this problem. It is also widely acknowledged that the SDA has never fully implemented our international legal obligations, particularly under the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW').<sup>6</sup>
13. HREOC believes the SDA needs to be amended to:
  - Address the problems with existing provisions which have emerged in the quarter of a century since its adoption;
  - Enhance its ability to actively progress substantive gender equality and promote systemic reform; and
  - Fulfil our international legal obligations.
14. HREOC recommends a two-staged reform process to achieve this result.

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<sup>6</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

## **Stage one**

15. In Stage One, HREOC urges the Committee to adopt as soon as possible a range of ‘Recommendations’ to strengthen the SDA and improve associated institutional arrangements.
16. In summary, in Stage One, HREOC recommends that the SDA should be amended now to:

<b>Objects and Interpretation</b>	<ul style="list-style-type: none"><li>• Improve the objects and interpretation of the Act to comply with international obligations</li></ul>
<b>Definition of discrimination</b>	<ul style="list-style-type: none"><li>• Remove the comparator element in direct discrimination</li><li>• Reform indirect discrimination in accordance with human rights principles</li></ul>
<b>Grounds of discrimination</b>	<ul style="list-style-type: none"><li>• Specify breastfeeding as a separate protected ground</li><li>• Remove discriminatory effects of the current definition of ‘marital status’ by renaming as ‘couple status’ and expanding the definition of ‘de facto’</li></ul>
<b>Family Responsibilities</b>	<ul style="list-style-type: none"><li>• Increase protection from discrimination on the grounds of family and carer responsibilities and include a positive duty</li></ul>
<b>Coverage</b>	<ul style="list-style-type: none"><li>• Provide equal coverage for women and men</li><li>• Expand coverage regarding state and territory governments, instrumentalities, and laws and programs, as well as volunteers, independent contractors, partnerships and other business enterprises, and students</li></ul>

- Sexual harassment**
  - Strengthen sexual harassment laws, both in terms of what constitutes harassment and who is protected and liable
  
- Exemptions**
  - Place a sunset clause of three (3) years on all permanent exemptions and exceptions (and undertake an inquiry into removing or refining the exemptions and exceptions strictly in accordance with human rights principles)
  
- Complaint handling**
  - Extend the time limit for commencing actions in the Federal Court or Federal Magistrates Court.
  - Enable public interest organisations to commence actions for breaches under the SDA
  
- Powers and capacity of HREOC and the Commissioner**
  - Increase the statutory functions of HREOC and the Sex Discrimination Commissioner (subject to being appropriately funded) in relation to:
    - broad inquiries into gender equality;
    - initiating complaints for breaches of the SDA;
    - certifying special measures;
    - intervening and appearing as *amicus curiae* in court proceedings; and
    - independent monitoring and reporting to the Australian Parliament on progress to achieve gender equality.

17. In addition to the above amendments, HREOC also recommends the following in relation to funding:

- Increase funding for HREOC to handle complaints, and to perform existing non-complaint handling functions;
  - Increased availability of legal aid and specialist free and low cost legal assistance to help people take action for breaches of the SDA, including working women’s centres, community legal centres and legal aid
  - Assess new funding that would be needed to undertake new functions for HREOC and the Commissioner
18. Full details of all Recommendations are set out in the **Table of Recommendations and Options for Reform**, below.

## **Stage two**

19. HREOC also sets out in this submission a range of ‘Options for Reform’ which it proposes for a second stage of reform of the SDA, to be completed within three (3) years.
20. This Inquiry represents a significant law reform opportunity. It raises fundamental issues about the adequacy of the way in which the human right to gender equality – and equality in general – should be protected under Australian law. Some changes to the SDA could have implications for other discrimination and equality laws in Australia, including the *Age Discrimination Act 2004* (Cth) (‘ADA’), the *Disability Discrimination Act 1992* (Cth) (‘DDA’) and the *Race Discrimination Act 1975* (Cth) (‘RDA’). There is also a need to consider other areas in need of equality protection, including sexuality and ‘sex and gender identity’.<sup>7</sup>
21. Some changes to the SDA could affect significant constituencies, including religious bodies, sporting bodies, and voluntary bodies. Proposed reforms

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<sup>7</sup> Protection on the basis of sex and gender identity would address discrimination against individuals who are transgender, transsexual, intersex or sex and/or gender diverse. Full definitions of these terms can be found at Human Rights and Equal Opportunity Commission, *Sex and gender diversity: Examples of terminology used in legislation* (2008), available at <[http://www.humanrights.gov.au/genderdiversity/gd\\_terminology20080805.doc](http://www.humanrights.gov.au/genderdiversity/gd_terminology20080805.doc)>.

may raise important public debates about our national culture of equality and how we view the role of men and women in modern Australian life.

22. For these reasons, HREOC submits that Options for Reform discussed in this Submission may require further consultation with all interested parties, in order to reach firm recommendations. This is outside the time available for this Inquiry.

23. Accordingly, HREOC recommends that the Committee support a second stage of reform to the SDA, arising out of this Inquiry, to be completed within three (3) years. The form of Stage Two would be either:

- A national inquiry into the merits of a comprehensive *Equality Act* for Australia; or, alternatively,
- A reference to the Australian Law Reform Commission ('ALRC') or other suitable body to consider adopting a human-rights based framework for the SDA, including:
  - A general prohibition on gender-based discrimination;
  - A general right to gender equality before the law;
  - A general positive duty to eliminate gender-based discrimination, including sexual harassment, and promote gender equality;
  - Removal of all permanent exemptions under the SDA in their current form or limit them on strictly human rights grounds (linked to the sunset clause introduced in Stage One);
  - A general limitations clause, which permits differential treatment strictly in accordance with human rights principles; and
  - Power to adopt legally-binding standards and audit gender equality action plans.

24. HREOC would welcome the Committee's support for a second stage inquiry into the merits of a comprehensive *Equality Act*. An inquiry into an *Equality Act* would be an appropriate vehicle to consider harmonising and improving existing

federal anti-discrimination laws. It would also be an opportunity to consider extending protection from discrimination on other grounds, such as sexuality, and 'sex and gender identity'.

25. An inquiry into an *Equality Act* could also take place as a stage of reform arising out of the forthcoming Australia-wide consultation to determine how best to recognise and protect human rights and responsibilities. HREOC expresses support for the national consultation into human rights.
26. If an inquiry into an *Equality Act* does not proceed, HREOC supports a second stage reference to the ALRC or other suitable body to complete the necessary reforms to the SDA.
27. A second stage of inquiry is essential to complete the process of converting the SDA into a first class national gender equality law.
28. Full details of all Options for Reform for consideration in stage two are set out in the **Table of Recommendations and Options for Reform**, below.

### 3. Table of Recommendations and Options for Reform

Issue	Recommendations (Stage One) or Options for Reform (Stage Two)	Terms of Reference
<p><b>Two Stage Reform Process</b> (Page 45)</p>	<p><b>Recommendation 1: A Two-Stage Inquiry Process</b></p> <p>(1) Support a two-stage inquiry process for the SDA, with some amendments made now to the existing law (Recommendations), and the rest completed within three (3) years (Options for Reform)</p> <p>(2) Complete reforms as part of an inquiry into an <i>Equality Act</i> for Australia</p> <p>(3) Alternatively, refer stage two of the SDA inquiry to the ALRC or other suitable body</p>	<p><b>M</b></p>
<p><b>Objects and interpretation</b> (Page 48)</p>	<p><b>Recommendation 2: Objects of the SDA (Stage One)</b></p> <p>Amend the objects of the SDA to remove ‘so far as is possible’ and fully reflect the obligations of CEDAW and other international legal obligations under the ICCPR, ICESCR and ILO Conventions to eliminate discrimination and promote substantive gender equality.</p>	<p><b>A, B</b></p>
<p>(Page 49)</p>	<p><b>Recommendation 3: Interpretation of the SDA (Stage One)</b></p> <p>Insert in the SDA the express requirement that it be interpreted in accordance with Australia’s international legal obligations, including relevant provisions of CEDAW, ICCPR, ICESCR and ILO Conventions</p>	<p><b>A, B</b></p>

<p><b>CEDAW</b> (Page 50)</p>	<p><b>Recommendation 4: Removal of Paid Maternity Leave Reservation under CEDAW (Stage One)</b>  The Australian Government should remove its reservation under art 11(2)(b) of CEDAW about paid maternity leave</p>	<p><b>B</b></p>
<p><b>Definition of discrimination</b> (Page 54)</p>	<p><b>Recommendation 5: Direct Discrimination (Characteristics extension) (Stage One)</b>  Amend the wording of the characteristics extension in the definitions of direct discrimination to include characteristics that are actually imputed by the alleged discriminator, even if not generally imputed by others</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b> (Page 62)</p>	<p><b>Recommendation 6: Removal of comparator element (Stage One)</b>  Amend the definition of direct discrimination to remove the comparator element, along the lines of the equivalent definition in the ACT</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b> (Page 65)</p>	<p><b>Recommendation 7: Clarifying causation (Stage One)</b>  In making any changes to the definition of direct discrimination, parliament should make clear its intention, either via legislation or even extrinsic materials such as explanatory memoranda or second reading speech to any amending Bill, that the SDA does not require an applicant to prove that the relevant ground of discrimination was the true basis or real reason for the impugned conduct and confirm the operation of s 8 of the SDA</p>	<p><b>A</b></p>

<p><b>Definition of discrimination</b></p> <p>(Page 71)</p>	<p><b>Recommendation 8: Shifting the onus (Stage One)</b></p> <p>Amend the SDA to make establishing causation more achievable, such as by:</p> <p>(a) directing courts to draw an adverse inference where a respondent fails to establish a non-discriminatory basis for its conduct;</p> <p>(b) shifting the onus to the respondent to establish a non-discriminatory basis for its conduct in circumstances where its conduct was plausibly based (in whole or in part) on a protected attribute or characteristic, such as along the lines of s 63A of the <i>Sex Discrimination Act 1975</i> (UK); or</p> <p>(c) reversing the onus of proof in relation to establishing causation, along the lines of s 664 of the <i>Workplace Relations Act 1996</i> (Cth)</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b></p> <p>(Page 76)</p>	<p><b>Recommendation 9: Requirement, condition or practice element (Stage One)</b></p> <p>Amend the SDA to remedy the narrow approach taken in certain cases to the requirement, condition or practice element, such as by providing that an applicant must simply establish that the relevant circumstances (including any terms, conditions or practices imposed by the respondent) disadvantaged women (or other relevant groups). The onus would then shift to the respondent to establish that the relevant circumstances were reasonable</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b></p> <p>(Page 79)</p>	<p><b>Recommendation 10: Reasonableness standard (Stage One)</b></p> <p>Review the standard of reasonableness as part of the definition of indirect discrimination to become more closely aligned with human rights based principles of legitimacy and proportionality</p>	<p><b>A</b></p>

<p><b>Definition of discrimination</b></p> <p>(Page 82)</p>	<p><b>Option for Reform A: Positive duty to eliminate discrimination and promote gender equality (Stage Two)</b></p> <p>Consider inserting into the SDA a positive duty to take reasonable steps to eliminate discrimination and promote gender equality, in addition to the prohibition on discrimination</p>	<p><b>A, B</b></p>
<p><b>Definition of discrimination</b></p> <p>(Page 84)</p>	<p><b>Recommendation 11: Proposed treatment (Stage One)</b></p> <p>Amend the definitions of discrimination to cover proposed treatment</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b></p> <p>(Page 84)</p>	<p><b>Recommendation 12: Associate of a person (Stage One)</b></p> <p>Amend the definitions of discrimination to cover disadvantage suffered as a result of an association with a person with a protected attribute or characteristic</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b></p> <p>(Page 84)</p>	<p><b>Recommendation 13: Unfavourable or less favourable treatment (Stage One)</b></p> <p>Clarify that it is not necessary for an applicant to establish that the respondent regarded the relevant treatment as unfavourable or less favourable</p>	<p><b>A</b></p>
<p><b>Definition of discrimination</b></p> <p>(Page 87)</p>	<p><b>Option for Reform B: Equality before the law (Stage Two)</b></p> <p>Consider the merits of amending the SDA be amended to provide equality before the law, along the lines of s 10 of the RDA or by giving binding effect to paragraph 2 of the Preamble to the SDA (including family and carer responsibilities)</p>	<p><b>A, B</b></p>

<p><b>Grounds of discrimination</b></p> <p>(Page 90)</p>	<p><b>Recommendation 14: Breastfeeding as a separate ground (Stage One)</b></p> <p>Amend the SDA to specifically prohibit discrimination on the ground of breastfeeding as a protected attribute.</p>	<p><b>A</b></p>
<p><b>Grounds of discrimination</b></p> <p>(Page 91)</p>	<p><b>Recommendation 15: Ensure equal protection from discrimination on the grounds of couple status for all couples (Stage One)</b></p> <p>Amend the SDA to replace the protected ground of ‘marital status’ with ‘couple status’ and ensure that definitions such as ‘de facto spouse’ are amended to give all couples equal protection under the SDA, including same-sex couples</p>	<p><b>A, B</b></p>
<p><b>Grounds of discrimination</b></p> <p>(Page 92)</p>	<p><b>Option for Reform C (Stage Two): Protection from discrimination on the grounds of sexuality, sex identity and gender identity</b></p> <p>Consider securing the legal protection from discrimination on the grounds of sexuality, sex identity or gender identity as part of a stage two inquiry into improving equality laws in Australia, for example, through a federal <i>Equality Act</i>.</p>	<p><b>A, B</b></p>
<p><b>Family responsibilities</b></p> <p>(Page 104)</p>	<p><b>Recommendation 16: Extend family and carer responsibilities protection under the SDA (Stage One)</b></p> <p>(1) Make direct and indirect family and carer responsibilities discrimination unlawful in all areas covered by Part II Div 1</p> <p>(2) Extend the definition of family responsibilities to include family and carer responsibilities which is inclusive of same-sex families, and provide a definition of family members and dependents which ensures adequate cover for both children and adults to whom care is being provided.</p>	<p><b>I, B</b></p>

<p><b>Family responsibilities</b></p> <p>(Page 104)</p>	<p><b>Option for Reform D: Include family and carer responsibilities as a specified ground in a potential Equality Act, or enact specialised legislation (Stage Two)</b></p> <p>If an <i>Equality Act</i> is adopted, insert family and carer responsibilities as a specified protected ground. Alternatively, a specialised piece of federal equality legislation could be enacted, as recommended in <i>It's About Time (2007)</i></p>	<p><b>I, B</b></p>
<p><b>Family responsibilities</b></p> <p>(Page 109)</p>	<p><b>Recommendation 17: Positive duty to reasonably accommodate the needs of workers who are pregnant and/or have family or carer responsibilities (Stage One)</b></p> <p>Introduce a positive obligation on employers and other appropriate persons to reasonably accommodate the needs of workers in relation to their pregnancy or family and carer responsibilities. Failure to meet this obligation would be an actionable form of discrimination</p>	<p><b>I, B</b></p>
<p><b>Coverage</b></p> <p>(Page 113)</p>	<p><b>Option for Reform E: Protection from discrimination in any area of public life (Stage Two)</b></p> <p>Consider the merits of amending the SDA to include a general prohibition against discrimination in all areas of public life, along the lines of s 9 of the RDA</p>	<p><b>A, B</b></p>
<p><b>Coverage</b></p> <p>(Page 116)</p>	<p><b>Recommendation 18: Extend coverage to state and state instrumentalities (Stage One)</b></p> <p>Repeal s 13 of the SDA</p>	<p><b>A</b></p>
<p><b>Coverage</b></p> <p>(Page 116)</p>	<p><b>Recommendation 19: Extend coverage to bind the Crown in right of the state (Stage One)</b></p> <p>Amend s 12(1) of the SDA to comprehensively bind the Crown in right of the State, along the lines of s 14 of the DDA, s 6 of the RDA and s 13 of the ADA.</p>	<p><b>A</b></p>

<p><b>Coverage</b> (Page 117)</p>	<p><b>Recommendation 20: Provide equal coverage for men and women (Stage One)</b> Amend s 9(10) of the SDA to ensure equal coverage for men as women, such as along the lines of s 12(8) of the DDA.</p>	<p><b>A, B</b></p>
<p><b>Coverage</b> (Page 119)</p>	<p><b>Recommendation 21: Extend coverage to volunteers and other unpaid workers (Stage One)</b> Provide equivalent protection to volunteers and other unpaid workers as with paid workers</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 120)</p>	<p><b>Recommendation 22: Extend coverage of independent contractors (Stage One)</b> Provide equivalent protection against discrimination and sexual harassment to independent contractors as applies to other categories of workers</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 123)</p>	<p><b>Recommendation 23: Liability of individual employees (Stage One)</b> Amend s 14 of the SDA to confer personal liability on the individual employee, or other worker, who engaged in the discrimination rather than just the employer.</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 124)</p>	<p><b>Recommendation 24: Abolish minimum size regarding partnerships (Stage One)</b> Amend s 17 of the SDA to abolish the minimum size requirement of partnerships and proposed partnerships</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 125)</p>	<p><b>Recommendation 25: Extend coverage to statutory appointees et al (Stage One)</b> Clarify that statutory appointees, judges and members of parliament are adequately protected, as well as personally liable, under the SDA.</p>	<p><b>A</b></p>

<p><b>Coverage</b> (Page 126)</p>	<p><b>Recommendation 26: Review coverage to ensure all types of workers protected (Stage One)</b> Review Part II Div 1 of the SDA to ensure that all potential categories of workers are protected</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 127)</p>	<p><b>Recommendation 27: Expand definition of services (Stage One)</b> Expand the definition of services under the SDA or, alternatively, amend the definition to be non-exhaustive</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 128)</p>	<p><b>Recommendation 28: Administration of state and territory laws and programs (Stage One)</b> Amend the SDA to make discrimination in the administration of State (including Territory) laws or programs unlawful.</p>	<p><b>A</b></p>
<p><b>Coverage</b> (Page 130)</p>	<p><b>Recommendation 29: Extend coverage of ancillary liability (Stage One)</b> Amend s 105 to include acts that are unlawful under the SDA generally, rather than being limited to acts that are unlawful under Divisions 1 or 2 of Part II only.</p>	<p><b>A</b></p>
<p><b>Sexual harassment</b> (Page 138)</p>	<p><b>Recommendation 30: Amend the reasonable person standard (Stage One)</b> Amend the definition of sexual harassment in relation to the reasonable person standard, along the lines of the relevant provisions in Queensland and the Northern Territory.</p>	<p><b>K</b></p>
<p><b>Sexual harassment</b> (Page 140)</p>	<p><b>Recommendation 31: Extend coverage of sexual harassment to better protect workers (Stage One)</b> Amend the SDA to protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment</p>	<p><b>K</b></p>

<p><b>Sexual harassment</b> (Page 141)</p>	<p><b>Recommendation 32: Extend sexual harassment protection to all students regardless of their age (Stage One)</b></p> <p>Amend s 28F (2)(a) of the SDA by removing the words ‘an adult student’ and replacing with the words ‘a student’.</p>	<p><b>K</b></p>
<p><b>Sexual harassment</b> (Page 142)</p>	<p><b>Recommendation 33: Extend sexual harassment to provide protection to students from all staff members and adult students, not just those at their own education institution (Stage One)</b></p> <p>Amend s 28F of the SDA to ensure that students who are sexually harassed in connection with their education or attendance at school-related activities are entitled to bring a claim against the perpetrator, irrespective of whether the harasser is from the same or a different educational institution.</p>	<p><b>K</b></p>
<p><b>Sexual harassment</b> (Page 143)</p>	<p><b>Option for Reform F: Enact a free standing prohibition against sexual harassment in public life (Stage Two)</b></p> <p>Consider amending the SDA to include a general prohibition against sexual harassment in any area of public life, along the lines of s 9 of the RDA</p>	<p><b>K</b></p>
<p><b>Sexual harassment</b> (Page 145)</p>	<p><b>Option for Reform G: Positive duty to avoid sexual harassment (Stage Two)</b></p> <p>Consider imposing a positive obligation on employers (and other appropriate respondents) to take all reasonable steps to avoid sexual harassment of or by their employees</p>	<p><b>K</b></p>
<p><b>Victimisation</b> (Page 150)</p>	<p><b>Recommendation 34: Protected action need only be a reason (Stage One)</b></p> <p>Amend s 94 of the SDA to clarify that an applicant need only establish that a protected action was a reason for the victimising conduct even if not the dominant or a substantial reason.</p>	<p><b>A</b></p>

<p><b>Victimisation</b> (Page 150)</p>	<p><b>Recommendation 35: Extend vicarious liability (Stage One)</b> Amend s 106(1) to apply to any act that is unlawful under the SDA, including victimisation.</p>	<p><b>A</b></p>
<p><b>Exemptions</b> (Page 157)</p>	<p><b>Recommendation 36: Temporary exemptions in accordance with the objects of the SDA (Stage One)</b> Amend s 44 of the SDA to make it clear that the power to grant a temporary exemption is to be exercised in accordance with the objects of the SDA</p>	<p><b>N, B</b></p>
<p><b>Exemptions</b> (Page 159)</p>	<p><b>Recommendation 37: Consolidate permanent ‘exemptions’ which are consistent with gender equality with s 7D about temporary special measures (Stage One)</b> Remove permanent exemptions, such as 31 and 32 which are consistent with gender equality, from Division 4, and consolidate with s 7D regarding temporary special measures.</p>	<p><b>N</b></p>
<p><b>Exemptions</b> (Page 164)</p>	<p><b>Recommendation 38: A three (3) year sunset clause on permanent exemptions (Stage One)</b>  (1) Place a three (3) year sunset clause on all permanent exemptions and exceptions that limit gender equality  (2) Refer all permanent exemptions to a second stage of review, with a view to them either being removed, or narrowed on human right grounds</p>	<p><b>N, B</b></p>
<p><b>Exemptions</b> (Page 164)</p>	<p><b>Option for Reform H: Process for removing permanent exemptions (Stage Two)</b>  (1) Consider removal of all permanent exemptions, or narrowing on strictly human rights grounds  (2) Consider introducing a general limitations clause which is strictly compliant with human rights principles</p>	<p><b>N, B</b></p>

<p><b>Funding</b></p> <p>(Page 203)</p>	<p><b>Recommendation 39: Increase funding for complaint handling service (Stage One)</b></p> <p>Increase funding to ensure that HREOC is adequately resourced to (i) continue to provide information to ensure people understand the law and rights and responsibilities under the law and (ii) ensure the ongoing provision of an efficient and effective complaint service.</p>	<p><b>H</b></p>
<p><b>Funding</b></p> <p>(Page 203)</p>	<p><b>Recommendation 40: Increase funding for free and low cost legal services (Stage One)</b></p> <p>Increase funding provided to Working Women’s Centres, Community Legal Centres, specialist low cost legal services and Legal Aid to assist people make complaints under federal anti-discrimination law. This may also require changes to Legal Aid funding guidelines.</p>	<p><b>H</b></p>
<p><b>Complaints</b></p> <p>(Page 204)</p>	<p><b>Recommendation 41: Extend time limit for taking court action (Stage One)</b></p> <p>Amend the HREOC Act to extent the time limit for taking court action from 28 to 60 days</p>	<p><b>H</b></p>
<p><b>Complaints</b></p> <p>(Page 209)</p>	<p><b>Recommendation 42: Extend standing to public interest organisations to bring proceedings (Stage One)</b></p> <p>Review the provisions in the HREOC Act relating to standing to bring claims under the SDA (and other federal discrimination Acts) to widen the scope for proceedings to be brought by public interest-based organisations.</p>	<p><b>H</b></p>
<p><b>Funding</b></p> <p>(Page 219)</p>	<p><b>Recommendation 43: Impact of Reduction in Funding (Stage One)</b></p> <p>Increase funding to HREOC to perform its existing policy development, education, research, submissions, public awareness and inquiry functions to eliminate discrimination and promote gender equality.</p>	<p><b>C</b></p>

<p><b>Powers</b> (Page 224)</p>	<p><b>Recommendation 44: Broad inquiry function (Stage One)</b></p> <p>Amend the SDA to include a broad formal inquiry function in relation to the elimination of discrimination and the promotion of gender equality in Australia.</p>	<p><b>C</b></p>
<p><b>Funding</b> (Page 225)</p>	<p><b>Recommendation 45: Dedicated funding to be made available for formal inquiries, particularly on referral from the Minister (Stage One)</b></p> <p>Where HREOC undertakes a formal inquiry, particularly when undertaken on referral from the Minister, adequate resources should be made available, in order to preserve the capacity of HREOC to undertake other ongoing functions relevant to addressing systemic discrimination and promoting gender equality.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 229)</p>	<p><b>Recommendation 46: Self-initiated investigation (Stage One)</b></p> <p>(1) Insert a function for the Sex Discrimination Commissioner to commence self-initiated investigations for alleged breaches of the SDA, without requiring an individual complaint. The new function would include the ability to enter into negotiations, reach settlements, agree enforceable undertakings, and issue compliance notices.</p> <p>(2) Insert a function for HREOC to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the SDA.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 231)</p>	<p><b>Recommendation 47: Certification of special measures (Stage One)</b></p> <p>Amend s 7D of the SDA to give HREOC power to certify temporary special measures for up to five (5) years.</p>	<p><b>C, B</b></p>

<p><b>Powers</b> (Page 235)</p>	<p><b>Recommendation 48: Extend the <i>amicus curiae</i> function (Stage One)</b>  Amend s 46PV of the HREOC Act to include appeals from discrimination decisions in the Federal Court and Federal Magistrates Court.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 235)</p>	<p><b>Recommendation 49: Intervening or appearing as <i>amicus curiae</i> as of right (Stage One)</b>  Consider empowering HREOC to intervene, and the Sex Discrimination Commissioner to appear as <i>amicus curiae</i>, as of right.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 235)</p>	<p><b>Recommendation 50: Broadening the intervention power (Stage One)</b>  Consider redrafting s 48(1)(gb) of the SDA to operate more broadly.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 240)</p>	<p><b>Recommendation 51: Independent monitoring of national gender equality indicators and benchmarks (Stage One)</b>  (1) Insert into the SDA a specific function for the Commissioner, on behalf of HREOC, to undertake periodic, independent monitoring of gender equality indicators and benchmarks and report to the Australian Parliament, subject to appropriate and specific funding being made available.  (2) Consider the merits of inserting this function as a statutory duty, taking into account the concerns of HREOC about the need for tied funding.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 245)</p>	<p><b>Option for Reform I: Implement legally-binding standards (Stage Two)</b>  Consider inserting into the SDA the ability to adopt legally-binding standards</p>	<p><b>C</b></p>

<p><b>Powers</b> (Page 248)</p>	<p><b>Option for Reform J: Gender Equality Action Plans (Stage Two)</b></p> <p>Consider introducing the ability for EOWA and/or HREOC to receive Gender Equality Action Plans, from bodies other than employers currently covered by the EOWW Act.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 249)</p>	<p><b>Option for Reform K: Auditing function (Stage Two)</b></p> <p>Consider amending the EOWW Act or the SDA Act to provide for an auditing function of Gender Equality Action Plans which is properly resourced.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 249)</p>	<p><b>Recommendation 52: New functions will require new funding (Stage One)</b></p> <p>If new functions are created for HREOC or the Commissioner, provide new funding reasonably necessary for the effective use of that function.</p>	<p><b>C</b></p>
<p><b>Powers</b> (Page 250)</p>	<p><b>Recommendation 53: Purchasing power of the Australian Government (Stage One)</b></p> <p>Consider how the Australian Government can best use its purchasing power to promote gender equality and address systemic discrimination.</p>	<p><b>O</b></p>

<p><b>Harmonisation</b>  (Page 258)</p>	<p><b>Recommendation 54: Harmonisation should promote ‘best practice’ in equality law and ensure compliance with international legal standards (Stage One)</b></p> <p>Any process of harmonisation should: (a) Ensure laws comply with international human rights standards; (b) Promote ‘best practice’ models rather than the ‘lowest common denominator’ from each jurisdiction; (c) Provide greater clarity about the practical application of equality rights and responsibilities in specific contexts; (d) Reduce the transactional costs for both applicants and respondents; and (e) Promote access to justice, with particular focus on improving access for people who are mostly intensely affected by inequality and violation of other human rights in Australia.</p>	<p><b>D</b></p>
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## 4. Gender equality in Australia: the state of the nation

This section is for **information**.

It summarises:

- key issues of gender inequality in Australia in 2008: and
- Commissioner Broderick's national *Listening Tour* about gender equality in Australia and her *Plan of Action towards Gender Equality*.

The *Plan of Action towards Gender Equality* identifies reforming the SDA as a national priority.

The section also explains the structure of the Submission.

29. This Inquiry signifies the beginning of an important new process for women and men in Australia committed to gender equality. It enables us to focus our attention at the national level on what must be done now, almost a quarter of a century after the enactment of the SDA, to secure a first-class national gender equality law which will build a fair and equal Australia.
30. In 2007, Elizabeth Broderick was appointed as the new federal Sex Discrimination Commissioner at HREOC. Commissioner Broderick embarked on a national *Listening Tour* over the first months of her term. The *Listening Tour* was designed to assess the current state of gender equality in Australia through direct experiences. It addressed three key themes:
- Economic independence for women;
  - Work and family balance over the life cycle; and
  - Freedom from discrimination, harassment and violence.

31. During the *Listening Tour*, Commissioner Broderick personally met over 1000 women and men from all walks of life. Many more contributed through the Listening Tour blog.
32. While people acknowledged the progress made towards achieving equality between women and men, the *Listening Tour* confirmed that ongoing and persistent gender inequality remains entrenched in Australian life.

### ***Economic independence for women***

33. Achieving economic independence for women is at the core of gender equality. Economic independence is about expanding the capacity of women to make genuine choices about their lives through full and equal participation in all spheres of life. Importantly, it involves recognising women's work, paid and unpaid, as valuable, both socially and in monetary terms.
34. Currently, women working full-time earn 16 per cent less than men.<sup>8</sup> The gender pay gap is even greater when women's part-time and casual earnings are considered, with women earning two thirds what men earn overall.<sup>9</sup> Women are more likely to be working under minimum employment conditions and be engaged in low paid, casual and part time work. Australian women are overrepresented in low paid industries with high levels of part time work such as retail, hospitality and personal services.<sup>10</sup>
35. The gender pay gap has a number of critical flow-on effects. Women, having earned less than men and carried a significantly greater share of unpaid work, have significantly less retirement savings compared to men. Current superannuation payouts for women are one third of those for men<sup>11</sup>. And half of all of women aged 45 to 59 have \$8000 or less in superannuation savings, compared to \$31,000 for men.<sup>12</sup>

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<sup>8</sup> Australian Bureau of Statistics, *Average Weekly Earnings, Australia, May 2008, Cat no. 6302.0* (2008).

<sup>9</sup> *Ibid.*

<sup>10</sup> Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly, May 2008 Cat no. 6291.0.55.003* (2008).

<sup>11</sup> Ross Clare, *Are retirement savings on track?* (2007).

<sup>12</sup> S Kelly, 'Entering Retirement: the Financial Aspects' (Paper presented at the Communicating the Gendered Impact of Economic Policies: The Case of Women's Retirement Incomes, Perth, 12-13 December 2006).

36. In Australia, women continue to be significantly under-represented in senior leadership positions across business, government and the community, despite Australia leading the world levels of educational attainment for women.<sup>13</sup> For the top 200 companies listed on the Australian Stock Exchange at 1 February 2006, women held only 8.7 per cent of board directorships.<sup>14</sup> Women make up 25 per cent of the House of Representatives in the Parliament of Australia.<sup>15</sup> The statistics of women's representation in leadership positions are indicative of the barriers faced by women to equal participation and progression in the workplace.
37. The *Listening Tour* confirmed that women's full and equal participation in the workforce is impeded by a range of factors including: ongoing direct and indirect discrimination based on sex, pregnancy and family responsibilities; limited availability of quality part-time work; gendered assumptions about women's roles as carers; and a lack of family friendly work policies.
38. One *Listening Tour* participant shared her story on the Commissioner's blog, giving voice to a common trajectory for women of her generation in Australia. This story highlights the persistent barriers to economic independence experienced by women over the life course:

I'm a mother who has been out of the paid workforce for two years and will probably be for the next 4 years, until my children are ready for pre-school. My return to work will probably be on a part-time basis and I will probably have to re-start my career after so many years out so I don't expect that I will earn very much. I never thought this would be the case - I studied for many years, earned a higher degree, worked overseas and then started my family...I can't see how, after this time out of the workforce, my earnings will ever come close to my partner's. I dread to think of how I will ever manage if I have to rely upon my meagre superannuation contributions in retirement.<sup>16</sup>

39. An explanation offered by *Listening Tour* participants for the gap between women and men's earnings is the lack of value ascribed to what is commonly

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<sup>13</sup> Laura Tyson and Saadia Zahidi Ricardo Hausmann, *The Global Gender Gap Report 2007* (2007).

<sup>14</sup> Equal Opportunity for Women in the Workplace Agency, *2006 EOWA Australian Census of Women in Leadership* (2006).

<sup>15</sup> Parliament of Australia, Women in the Current (42nd) Parliament, Parliamentary Library, <http://www.aph.gov.au/library/parl/42/womennow>, viewed 17 July 2008.

<sup>16</sup> Tamara, *Blog entry* (2008) Human Rights and Equal Opportunity Commission Listening Tour website at 21 March 2008

characterised as ‘women’s work’. A woman working in the child care sector drew attention to the complex set of skills required in her work and the social benefit of high quality care for children. She pointed out that the pay and status of workers in this sector fails to acknowledge the skills required or the benefits returned:

The amount of pay is incredibly low and the work is undervalued. Caring for children should be valued in our society but we are invisible.<sup>17</sup>

40. Many older women who participated in the *Listening Tour* expressed their anxieties about living in poverty in their later years, providing a personal narrative to the notable difference between women and men’s retirement savings. One woman commented that many women are working longer for financial security:

As a baby boomer approaching retiring age and having spent most of my years raising children, I have very little hope of retiring and will need to work for as long as possible. I will not be independent financially...The pressure is really on women who have not been high income earners and the outlook for the future is bleak. I see many tired women who are working fulltime, supporting husbands and trying to be a helpful grandparent.<sup>18</sup>

### ***Work and family balance across the life cycle***

41. Successfully balancing paid work with caring responsibilities remains a major challenge for a large number of Australian women and men. With women continuing to carry the majority of Australia’s unpaid caring work, creating workplaces to support women *and men* to balance paid work and share caring responsibilities is critical to achieving gender equality.<sup>19</sup>
42. Women and men are juggling their paid work with caring for their children, their grandchildren, family members with disability and increasingly, for their parents. Yet there remains a notable gap in support provided by governments

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<sup>17</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 6* (2008).

<sup>18</sup> Anonymous, *Blog entry* (2007) Human Rights and Equal Opportunity Commission Listening Tour website at 18 December 2007

<sup>19</sup> Australian Bureau of Statistics, *How Australians Use Their Time, 2006, Cat no. 4153.0*, (2008).

and employers in allowing women and men to take on these responsibilities without a personal cost.

43. Australia remains one of only two OECD countries without a legislated paid maternity leave scheme. Paid maternity leave is accessed by only around one third of employed pregnant women.<sup>20</sup> The use of paid paternity or parental leave by male partners is even lower at 25 per cent.<sup>21</sup>
44. A culture of long work hours is a further barrier to employees balancing their paid work with family responsibilities. Over one third of men are currently working longer than 45 hours per week, with fathers of young children likely to work longer hours.<sup>22</sup>
45. Securing flexible work arrangements, without a cost to career progression, is a major challenge for women. One *Listening Tour* focus group participant described her frustration with the difficulty she experienced finding work that would allow her to fulfil her caring responsibilities:

I followed my husband around so wherever he has had a job I've had to either find a job or just sit back and watch the world go by. It has been difficult because at certain points of my life I've had a young child that I've really wanted to look after or be with a little bit more than a full time job would allow me to be with her. So, it's the inflexibility of the work place that I found really difficult to deal with.<sup>23</sup>

46. In addition, men who also want greater ability to participate in family life need to be supported to do so. There was a widely held view on the *Listening Tour* that supporting women and men to equally share caring responsibilities is at the heart of gender equality. A male participant expressed his frustration in attempting to gain access to workplace policies to allow him to equally share caring responsibilities with his partner:

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<sup>20</sup> Australian Bureau of Statistics, *Pregnancy and Employment Transitions, Australia, Cat no. 4913.0* (2005).

<sup>21</sup> Gillian Whitehouse et al, *The Parental Leave in Australia Survey: November 2006 Report* (2006).

<sup>22</sup> Australian Bureau of Statistics, *Australian Labour Market Statistics October 2007, Australia Cat No 6105.0* (2007); Australian Institute of Family Studies, *Growing Up in Australia: Longitudinal Study of Australian Children* (2005) data from the first wave.

<sup>23</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 4* (2008).

You can create all the policies in the world. If they're not binding then they're not going to change. Try and be the person who walks in and says, I'm going to work an eight hour day - start work at eight and walk out of the office between four and five o'clock. They're going to stare at you when you leave...you don't want to walk out of the office early and have all your mates look at you. You're letting the team down.<sup>24</sup>

## ***Freedom from discrimination, harassment and violence***

47. The continuing presence of discrimination, harassment and violence against women is a key marker of gender inequality. Ending discrimination, harassment and violence against women is essential for women to be able to equally contribute to and benefit from economic, social, cultural and political life.
48. Sex discrimination and sexual harassment overwhelmingly affect women more than men. There were 472 complaints made to HREOC under the *Sex Discrimination Act 1984 (Cth)* in the 2006-07 financial year. Of these complaints, 87 per cent came from women.<sup>25</sup>
49. A telephone poll commissioned by HREOC in 2003 found that 41 per cent of women have experienced sexual harassment and 28 per cent of women experienced it in the workplace, compared to seven per cent of men. The research also found that 70 per cent of all sexual harassment involved men sexually harassing women.<sup>26</sup>
50. Violence against women remains a major human rights issue facing Australia. Research has found that nearly one in five women has experienced sexual violence since the age of fifteen.<sup>27</sup> An international study found that around one in three Australian women have experienced violence from an intimate partner in their lifetime.<sup>28</sup> Domestic violence presents a significant cost to the economy

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<sup>24</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Men's focus group 6* (2008).

<sup>25</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2006-2007* (2007).

<sup>26</sup> Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue Sexual Harassment in the Australian Workplace* (2004), 9.

<sup>27</sup> Australian Bureau of Statistics, *Personal Safety, Australia, 2005, Cat no. 4906.0* (2005).

<sup>28</sup> Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004).

with Australian businesses losing at least \$500 million per year because of the effects of violence on their employees.<sup>29</sup>

51. On the *Listening Tour*, the Commissioner heard that sex discrimination remains a reality of women's lives, despite nearly 25 years of legislation. A participant at the Hobart community consultation described the experience of her daughter-in-law, highlighting the powerlessness that many women feel:

I have a daughter-in-law who works for a call centre. She fell pregnant and had a baby, at this time her boss said that if she wanted to come back she could. After six months, he gave her a hard time and said she had to work full time if she wanted to work. He did this because he thought women should be in the home. She ended up leaving. She knew it was discrimination but he is the boss.<sup>30</sup>

52. The Commissioner also heard many experiences of sexual harassment, ranging across industries and professions. One woman commented on her experience of repeated unwelcome sexual advances where she lives in close quarters to her male colleagues:

I've been living [in these work quarters] for three years and I've had knocks on my door at night with guys saying, "Guess you're feeling a bit lonely, love?" It shouldn't happen. I've been sitting with a group of males and one will ask, "Don't you think it's my turn [for sex] tonight?"<sup>31</sup>

## ***Overall findings of the Listening Tour***

53. The Sex Discrimination Commissioner concluded from her *Listening Tour* that, whilst there are far fewer examples of overt gender-based discrimination in Australia, our progress towards true substantive gender equality has clearly stalled.

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<sup>29</sup> VicHealth, *The health costs of violence: Measuring the burden of disease caused by intimate partner violence* (2004).

<sup>30</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Hobart Community Consultation* (2007)

<sup>31</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 7* (2008)

54. Systemic gender-based discrimination remains the key barrier to achieving substantive gender equality. Systemic discrimination was defined by the ALRC in *Equality Before the Law (1994)* to mean ‘practices which are absorbed into the institutions and structure of society and which have a discriminatory effect’.<sup>32</sup> Hunter has described it as ‘... a complex of directly and/or indirectly discriminatory (or subordinating) practices which operates to produce general... disadvantage for a particular group’.<sup>33</sup>
55. Some examples of this systemic gender-based discrimination have been described above such as the gap between women and men’s earnings due to the lack of value ascribed to what is commonly characterised as ‘women’s work’, inflexible work practices, and systems that condone sex discrimination and sexual harassment. The disparity between women and men’s retirement savings due to the superannuation system being linked to paid work is another example, as is the disadvantage faced by women in engaging in paid work and the undervaluing of unpaid work. Addressing these forms of systemic discrimination is crucial to achieving gender equality.
56. In July 2008, the Sex Discrimination Commissioner released the report setting out her findings from the Listening Tour, *What matters to Australian women and men: Gender equality in 2008* (‘Listening Tour Community Report (2008)’).<sup>34</sup>

### ***National Plan of Action towards Gender Equality***

57. On 22 July 2008, Commissioner Broderick launched her *Plan of Action towards Gender Equality*, based on her findings from the *Listening Tour*. The *Plan of Action* sets out five priority areas, each equally important, which the

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<sup>32</sup> Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) Sydney 1994, 3.29

<sup>33</sup> R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 13. See also Women’s Electoral Lobby Australia (Submission no 97) to the Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) Sydney 1994.

<sup>34</sup> Human Rights and Equal Opportunity Commission, *What matters to Australian women and men: Gender equality in 2008: the Listening Tour Community Report (2008)*, available at <[http://www.humanrights.gov.au/sex\\_discrimination/listeningtour/index.html](http://www.humanrights.gov.au/sex_discrimination/listeningtour/index.html)>.

Commissioner will address during her term of office. The priorities are set in the *Listening Tour Community Report*.<sup>35</sup> The five priority areas are:

- improving laws to address sex discrimination and promote gender equality;
- advocating for policies and systems to achieve a greater balance of paid work and family responsibilities for women and men;
- reducing the incidence and impact of sexual harassment in the workplace;
- reducing the gender gap in retirement savings to increase women's financial security across the lifecycle; and
- increasing the number of women in leadership positions, including supporting Indigenous women's leadership.

### ***Improving laws to address sex discrimination and promote gender equality: a national priority***

58. In her *Plan of Action Towards Gender Equality*, Commissioner Broderick highlighted the need to improve legal protection against unlawful discrimination as a national priority. She identified that current laws need to be strengthened to actively promote gender equality and challenge entrenched systemic discrimination in Australian society.
59. Accordingly, this Inquiry is timely, commencing immediately after the findings of the Commissioner. The Inquiry poses the crucial question:
60. "In 2008, is the SDA effective as a national law to eliminate gender-based discrimination and promote gender equality?"
61. This Submission identifies ways in which the SDA is currently inadequate and presents proposals for necessary reform.
62. The Submission provides:

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<sup>35</sup> Background fact sheets detailing each priority area are at <http://www.humanrights.gov.au/listeningtour/launch/action.html>.

- an overview of the current SDA and how it works; and
  - an explanation as to why a two stage reform process is a preferred approach.
63. The Submission then addresses specific aspects of the SDA that are in need of reform to convert the SDA into a first class national gender equality law, including:
- Objects and interpretation;
  - The definition of discrimination;
  - Grounds of discrimination;
  - Family responsibilities;
  - Coverage of the SDA;
  - Sexual Harassment;
  - Victimisation;
  - Exemptions;
  - Complaint Handling; and
  - Powers and Capacity of HREOC and the Sex Discrimination Commissioner.
64. Finally, the Submission discusses:
- Harmonisation of federal discrimination and equality laws; and
  - The merits of an *Equality Act* for Australia.
65. Each section includes both Recommendations for immediate implementation in stage one of a reform process, and Options for Reform, to be considered in stage two, within the next three (3) years.
66. HREOC has also prepared three Annexures for the Committee which set out detailed background information in three key areas. The Annexures include:
- **Annexure A:** Background to the SDA and subsequent amendments;

- **Annexure B:** Comparison of the SDA with the RDA, DDA, ADA and HREOC Act; and
- **Annexure C:** Comparison of the SDA with gender equality laws in the United Kingdom, New Zealand and Canada.

67. HREOC will refer to these Annexures, where relevant, in the Submission to highlight ways in which the SDA can be an effective gender equality law in 2008, and fulfil Australia's international legal obligations under CEDAW and other international laws.

## 5. The SDA and how it works: an overview

This section is for **information**.

The section provides an overview of the SDA and how it currently works.

Separate sections of the Submission, below, will then address specific provisions and make Recommendations to adopt now, or propose Options for Reform to be considered in a second stage of reform.

68. The SDA was passed in 1984, and was designed to give effect, in part, to Australia's international legal obligations under CEDAW. The SDA was highly controversial, and its enacted form represented a political compromise. The SDA has since been amended on many occasions.<sup>36</sup> Some amendments arose out of two past national inquiries into the SDA:
- House of Representatives Standing Committee on Legal and Constitutional Affairs. 'Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992). See *Halfway to Equal (1992)*,<sup>37</sup> and
  - Australian Law Reform Commission, *Inquiry into Equality before the Law Justice for Women (1994)*. See *Equality Before the Law (1994)*.<sup>38</sup>
69. This Inquiry represents the first national inquiry into the SDA since 1994.
70. The SDA sets out a range of objectives to be achieved by the Act, which include giving effect to certain provisions of CEDAW.
71. The SDA protects direct and indirect discrimination on the following grounds: sex, marital status, pregnancy or potential pregnancy.

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<sup>36</sup> Amendments to the *Sex Discrimination Act 1984* (Cth) have been made in 1984, 1986, 1988, 1990, 1992, 1995, 1999, 2000, 2001, 2002 and 2003. See, further, **Annexure A**.

<sup>37</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992)

<sup>38</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994).

72. The protection from discrimination applies in specified areas of life: work, education, goods and services and facilities, accommodation, land, clubs, administration of Commonwealth laws and programs, and requests for information.
73. It also provides limited protection from discrimination on the grounds of family responsibilities in relation to dismissal from employment.
74. The SDA addresses sexual harassment and also provides protection from certain kinds of victimisation under the Act.
75. There are limits to the coverage under the SDA. There are also a large number of permanent exemptions.
76. The SDA operates in conjunction with the HREOC Act to provide for:
- complaints; and
  - non-complaint handling functions, including policy development, education, research, submissions, public awareness, inquiries, and *amicus curiae* and intervention applications.
77. HREOC, the President of HREOC and the Sex Discrimination Commissioner have specified roles and responsibilities for exercising these functions under the SDA, and the HREOC Act. As Australia's national human rights institution, HREOC operates in compliance with the United Nations General Assembly *Principles relating to the status and functioning of national institutions for protection and promotion of human rights* ('Paris Principles').<sup>39</sup> HREOC is an independent statutory authority, created under the *Human Rights and Equal Opportunity Act 1986* (Cth) ('HREOC Act'). It is funded by the Australian Government, and accountable to the federal Attorney-General.
78. There are some significant similarities and differences between the SDA and other federal, state and territory anti-discrimination laws,<sup>40</sup> and there is a case for working towards harmonisation of equality laws in Australia generally (see **Harmonisation of discrimination and equality laws**, below). One way of

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<sup>39</sup> United Nations General Assembly, *Principles relating to the status and functioning of national institutions for protection and promotion of human rights* UN Doc A/Res/48/134 (20 December 1993).

<sup>40</sup> For further detail on federal discrimination law, see Human Rights and Equal Opportunity Commission, 'Federal Discrimination Law' (2008), available at <<http://www.hreoc.gov.au/legal/FDL/index.html>>.

achieving harmonisation at the federal level is to consider the merits of introducing a comprehensive *Equality Act* (see **Merits of an *Equality Act* for Australia**, below).

79. The rest of this submission provides a more detailed assessment of the effectiveness of the SDA in eliminating discrimination and promoting gender equality. Sections deal with specific provisions of the SDA and associated institutional arrangements to support its operation. Each section includes proposals for reform.
80. As explained in the next section, HREOC considers that the Committee should adopt a two-staged process of reform to fully achieve a first class gender equality law in Australia.

## 6. A two-staged process of reform

This section is for **information**.

It explains why HREOC recommends a two stage process over three (3) years for reforming the SDA.

Many changes to the SDA and associated institutional arrangements can be made now. However, some changes require a more extended inquiry process, with the aim of completing reform within three (3) years.

A second stage of inquiry, preferably to consider the merits of a comprehensive *Equality Act* for Australia, would:

- promote harmonisation of discrimination and equality laws;
- include consideration of other grounds in need of equality protection, including sexuality and gender identity; and
- enable a full assessment of how best to adopt a human rights framework for equality laws to fully prohibit discrimination, create positive duties and provide limitations strictly in accordance with human rights principles.

81. In the following sections, HREOC makes ‘Recommendations’ to amend the SDA and to improve supporting institutional arrangements. HREOC considers that these Recommendations are suitable for immediate implementation.

82. However, HREOC considers that some proposals for reform represent a major change in the equality law jurisdiction in Australia. The short time frame of this Inquiry and some of the complexities involved in major law reform call for a two-staged reform process to ensure adequate consultation with all parties, and to promote ongoing harmonisation of Australia’s equality law jurisdiction.

83. Some reforms to the SDA would preferably be considered in conjunction with possible reform to other federal discrimination and equality laws, including the ADA, DDA, RDA and HREOC Act, and the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ('EOWW Act').
84. For example, if Gender Equality Action Plans are to be supported (see **Powers of HREOC and the Sex Discrimination Commissioner**, below), it may be best to consider how this mechanism could operate with the current Disability Action Plan mechanism under the DDA and the operation of the EOWW Act.
85. If permanent exemptions are to be removed, what is the best way to ensure that the right to equality is appropriately balanced with other human rights considerations, such as the right to freedom of association, and religious freedoms? When should the right to equality be limited? (See **Exemptions**, below). These are questions relevant to all areas of discrimination, not just gender equality. Some proposed changes to the SDA would significantly change the way that gender equality is protected in comparison to other areas of equality protection.
86. HREOC supports the principle of harmonisation of discrimination and equality laws. In the interests of harmonisation, HREOC considers that there is merit to supporting a specific second stage of inquiry into the benefits of adopting a comprehensive *Equality Act* for Australia (see **Merits of an Equality Act for Australia**, below).
87. An *Equality Act* could be an appropriate way to bring together existing federal discrimination laws including the ADA, DDA, RDA, and SDA whilst retaining special-purpose Commissioners. It could also be an appropriate legislative mechanism for adopting a substantive equality approach in the federal jurisdiction.
88. An *Equality Act* could also extend equality protection in other areas in need of equality protection, for example in the area of sexuality and 'sex and gender identity'.
89. There may be merit to considering how an *Equality Act* could simplify compliance for business and simplify the law for affected bodies, including applicants.

90. On the other hand, an *Equality Act* which replaces specific federal discrimination laws may reduce the focus on specific issues of inequality, such as race, sex and disability. The role of special-purpose Commissioners may be even more important.
91. These are complex questions. The adoption of an *Equality Act* would be a major reform and is outside the terms of the current Inquiry.
92. Accordingly, HREOC has proposed 'Options for Reform' to the SDA which may be more suitable to consider in a second-stage inquiry, preferably as part of considering the merits of a comprehensive *Equality Act*.
93. An inquiry into an *Equality Act* could take place as a stage of reform arising out of the forthcoming Australia-wide consultation to determine how best to recognise and protect human rights and responsibilities. HREOC expresses support for the national consultation into human rights.
94. Alternatively, a second stage of full inquiry into the SDA could be undertaken by the ALRC or other suitable body to consider some of the more fundamental reforms to the legal protection of gender equality.
95. HREOC recommends that reforms from a second stage of inquiry regarding the federal equality jurisdiction be completed within three (3) years.

**Recommendation 1: A Two-Stage Inquiry Process (Stage One)**

- (1) Support a two-stage inquiry process for the SDA, with some amendments made now to the existing law, and the rest completed within three (3) years.
- (2) Complete reforms as part of an inquiry into an *Equality Act* for Australia.
- (3) Alternatively, refer stage two of the SDA inquiry to the ALRC or other suitable body.

## 7. Objects and interpretation

This section addresses **Term of Reference B** of the Inquiry. It explains that:

- The statutory objects of the SDA do not meet our international obligations under CEDAW and other relevant international instruments, including the ICCPR, ICESCR and ILO Conventions.
- There is no express requirement to interpret the SDA in accordance with international obligations.

96. As noted above, the SDA was enacted to give effect to Australian's obligations under CEDAW. However, it has always been acknowledged that the SDA did not fully implement all obligations under CEDAW<sup>41</sup> nor other relevant international legal obligations in the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>42</sup>, the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')<sup>43</sup> and International Labour Organisation ('ILO') Conventions.

97. In subsequent sections of this submission, HREOC presents recommendations or options for reform which would improve the extent to which the SDA would fulfil our international legal obligations, for example, by the areas of public life

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<sup>41</sup> See, generally, Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 27 (3) *University of New South Wales Law Journal* 858; Sara Charlesworth, 'Understandings of Sex Discrimination in the Workplace: Limits and Possibilities' (Speech delivered at the Clare Burton Memorial Lecture, RMIT University, 2007), 2-3; Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), [3.2].

<sup>42</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>43</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1973).

in which the SDA operates (see **Coverage**, below), or in the area of family responsibilities (see **Family Responsibilities**, below).

98. However, there are also some areas of the SDA which could be reformed so that the entire law is a better framework for meeting our international legal obligations. In particular, the SDA should be amended to ensure that its objects better reflect our international legal obligations, and that the SDA is interpreted accordingly.

### ***Objects of the SDA***

99. Section 3 of the SDA sets out the objects of the Act as follows:

(a) To give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) To eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs.

100. The objects currently fall short of reflecting international legal obligations under CEDAW in a number of ways.

101. In particular, s 3 qualifies its objects by use of the term ‘so far as is possible’ in relation to eliminating discrimination, including in the areas of sexual harassment and family responsibilities. The term ‘so far as is possible’ limits the object of the SDA in a way that is not provided under CEDAW. CEDAW provides that state parties are under a general obligation to eliminate discrimination against women. The term ‘so far as is possible’ reflects that the substantive provisions of the SDA do not go as far as this obligation under CEDAW.

102. HREOC also observes that the term ‘so far as is possible’ is not one that is typically used by Parliament aside from the discrimination law context. HREOC

considers that this term results in a qualified commitment to international obligations, which is inappropriate in respect of an Act of such importance as the SDA.

103. HREOC considers that the objects of the SDA should fully reflect Australia's international obligations under CEDAW and other relevant provisions international treaties, including the ICCPR, ICESCR and ILO Conventions. As discussed below, HREOC supports progressive amendment to the substantive sections of the SDA to fully implement international legal obligations to eliminate discrimination and promote gender equality. On this basis, HREOC considers that the objects of the SDA should also be amended, including an object to achieve substantive gender equality.

**Recommendation 2: Objects of the SDA (Stage One)**

Amend the objects of the SDA to remove 'so far as is possible' and fully reflect the obligations of CEDAW and other international legal obligations under the ICCPR, ICESCR and ILO Conventions to eliminate discrimination and promote substantive gender equality.

***Interpretation of the SDA***

104. The SDA currently does not provide any guidance as to how its provisions are to be interpreted with respect to Australia's international legal obligations. This may be contrasted with other more modern human rights laws, such as the *Human Rights Act 2004 (ACT)* and the *Charter of Rights and Responsibilities Act 2006 (Vic)*. For example, s 32 of the Victorian Charter provides:

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

105. HREOC acknowledges that, according to well settled rules of statutory construction, domestic legislation should be interpreted and applied consistently

with Australia's obligations under international law.<sup>44</sup> These rules have particular application where a domestic statute gives effect to Australia's obligations under a particular international treaty or convention, in which case the statute should be interpreted in a manner consistent with that treaty or convention.<sup>45</sup> Nevertheless, HREOC considers that an explicit direction within the SDA to codify this common law principle would help to clarify this point for courts and litigants and help to ensure that the SDA is applied consistently with CEDAW and relevant international obligations under the ICCPR, ICESCR and ILO Conventions in all cases. It would also help to elevate this presumption of statutory construction above the melee of competing presumptions.

### **Recommendation 3: Interpretation of the SDA (Stage One)**

Insert in the SDA the express requirement that it be interpreted in accordance with Australia's international legal obligations, including relevant provisions of CEDAW, ICCPR, ICESCR and ILO Conventions.

## **Reservations to CEDAW**

106. HREOC notes that Australia retains two reservations under CEDAW:

- Paid maternity leave (Art 11(2)(b)); and
- Combat duties (Art 11(1)(c)).<sup>46</sup>

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<sup>44</sup>See, eg, *Dietrich v R* (1992) 177 CLR 292 at 321 (Brennan J), 360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7 (Mason CJ and Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ). See further D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6<sup>th</sup> ed, 2006), 38-42, 75-8.

<sup>45</sup> See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265 (Brennan J); *Yager v R* (1977) 139 CLR 28 at 43-4 (Mason J); *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225 at 230-1 (Brennan J). See further D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6<sup>th</sup> ed, 2006), 38-9.

<sup>46</sup> Upon ratification of CEDAW, the Government of Australia made the following reservations:  
"The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

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

107. HREOC has previously recommended that the Australian Government should remove its reservation under art 11(2)(b). For example, see HREOC's *Submission to the Productivity Commission Inquiry into Paid Maternity Leave, Paternity Leave and Parental Leave (2008)*.<sup>47</sup> HREOC retains this view.

108. HREOC does not express a view in relation to combat duties at this time.

**Recommendation 4: Removal of Paid Maternity Leave Reservation under CEDAW (Stage One)**

The Australian Government should remove its reservation under art 11(2)(b) of CEDAW about paid maternity leave.

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Full text in *United Nations, Treaty Series, vol. 1325*, p 378.

<sup>47</sup> Human Rights and Equal Opportunity Commission, 'Submission to the Productivity Commission Inquiry into Paid Maternity Leave, Paternity Leave and Parental Leave' (2008), at <[http://www.hreoc.gov.au/legal/submissions/2008/20080602\\_productivity.html](http://www.hreoc.gov.au/legal/submissions/2008/20080602_productivity.html)>.

## 8. Definitions of discrimination

This section addresses **Terms of Reference A, B and E** of the Inquiry.

The current definitions of direct and indirect discrimination have operated to restrict protection from discrimination in a variety of ways.

Amendments should include addressing:

- The characteristics extension (direct)
- The comparator element (direct)
- Proof of causation (direct)
- The ‘requirement, condition or practice’ element (indirect)
- The reasonableness standard (indirect)
- Proposed treatment
- Disadvantage of an associated person

Creating a general positive duty to eliminate discrimination and promote gender equality is also worthy of consideration.

109. This section describes the current application of the provisions of the SDA which deal with direct and indirect discrimination. The section makes recommendations for clarifying the definition of direct and indirect discrimination. It also proposes that consideration be given to including a general positive duty to eliminate discrimination and promote gender equality in a stage two of reform.

### ***Direct discrimination***

110. Section 5(1) of the SDA defines what is commonly referred to as ‘direct discrimination’ on the ground of sex, as follows:

(1) For the purposes of this Act, a person (in this subsection referred to as the *discriminator*) discriminates against another person (in this subsection referred to as the *aggrieved person*) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

111. Sections 6, 7 and 7A go on to define discrimination on the grounds of marital status, pregnancy, potential pregnancy and family responsibilities, following essentially the same statutory formula to s 5(1).

112. The first point to observe is that direct discrimination is not limited to the protected attribute (ie. sex, marital status, pregnancy, potential pregnancy or family responsibilities), but includes discrimination on the ground of a **characteristic** that appertains generally, or is generally imputed, to the protected attribute (**the characteristics extension**).

113. The second point to observe is that the definition requires an aggrieved person to establish **both** that:<sup>48</sup>

- (a) he or she has been treated less favourably than a person of the opposite sex (or a person of a different marital status, a person who is not pregnant or potentially pregnant or who does not have family responsibilities) in circumstances that are the same or are not materially different (the comparator element); and

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<sup>48</sup> *Purvis v NSW (Dept of Education)* (2003) 217 CLR 92, 160-161 [223]-[225] (Gummow, Hayne and Heydon JJ). See further Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 8, 19.

- (b) the differential treatment was by reason of the aggrieved person's sex, marital status, pregnancy, potential pregnancy or family responsibilities (the causation element).

114. The following sections consider particular concerns in relation to the characteristics extension, comparator element and causation element under the current definitions of direct discrimination in the SDA.

### **Characteristics extension**

115. The characteristics extension is of critical importance in achieving the objects of the SDA. Less favourable treatment most frequently occurs because of the perceived undesirability and inconvenience that a respondent associates with a protected attribute, rather than the attribute *per se*.
116. For example, the primary concern of employers in relation to pregnant or potentially pregnant women is not the fact of their pregnancy itself. Rather, it is the perceived impact that the pregnancy will have on the employer's business due to absences for pregnancy-related illness and maternity leave as well as the ongoing demands and distractions of juggling work and family responsibilities following maternity leave.
117. To limit direct discrimination to less favourable treatment based on the attribute itself, but not the characteristics that appertain or are generally imputed to that attribute, would rob direct discrimination of much of its force and render it a hollow promise of equality. As discussed below, HREOC is therefore concerned that the practical effect of the characteristics extension has been significantly diminished due to the approach taken by the courts to the comparator element.
118. HREOC further submits that the current wording of the characteristics extension would benefit from re-drafting to cover the situation of a characteristic which is actually imputed to a group by the alleged discriminator, even if that characteristic is not generally imputed to that group by others.<sup>49</sup>

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<sup>49</sup> See, further, NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [3.59].

**Recommendation 5: Direct Discrimination (Characteristics extension) (Stage One)**

Amend the wording of the characteristics extension in the definitions of direct discrimination to include characteristics that are actually imputed by the alleged discriminator, even if not generally imputed by others.

**Comparator element**

119. The comparator element requires a comparison between how the applicant was treated compared with how a person without the applicant's relevant attribute (ie sex, pregnancy, potential pregnancy, marital status and/or family responsibilities) would have been treated in the same or similar circumstances. In a claim of sex discrimination by a woman, for example, the relevant comparison is with the treatment of a man in comparable circumstances.<sup>50</sup>
120. For the following reasons, HREOC considers that the comparator element under the SDA is problematic and has undermined the effectiveness of the SDA in achieving its objects. For example, HREOC considers that it is highly artificial to hypothetically compare the treatment of two groups where the particular circumstances or experiences are unique to one group only.
121. To take the example of breastfeeding, s 5(1A) of the SDA confirms that breastfeeding is a characteristic that appertains generally to women. However, as discussed below, the courts have held that the characteristics extension does not apply to the comparator element. Accordingly, the comparison required is not with the treatment of someone who was not breastfeeding, but with the treatment of a man. Given that breastfeeding is something unique to women, a comparison with the hypothetical treatment of a man in the same or similar circumstances is highly artificial.
122. HREOC also notes that persuasive criticisms have also been raised that the comparative approach under most Australian discrimination statutes essentially

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<sup>50</sup> *Commonwealth v Evans* [2004] FCA 654, [50]-[51].

incorporates an ideal, male-based standard, whereby only treatment that deviates from this standard is capable of falling foul of the comparator element.<sup>51</sup>

123. The practical application of the comparator element by the courts has also proved problematic, due primarily to the thorny question of how to construct the same or similar circumstances for carrying out the comparison.<sup>52</sup> In particular, to what extent should circumstances or characteristics related to the protected attribute be included or excluded from the comparison?<sup>53</sup>

124. Earlier cases appeared more receptive to the notion that direct discrimination included less favourable treatment on the ground of a characteristic associated with a protected attribute, rather than a narrower approach which distinguishes attributes from their related characteristics. For example, in *Sullivan v Department of Defence*,<sup>54</sup> Sir Ronald Wilson observed:

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.<sup>55</sup>

125. However, the current approach is to exclude consideration of the characteristics extension when applying the comparator element. That is, the courts have held that the comparison required is with a person without the protected attribute. The

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<sup>51</sup> See, eg, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990), 1-2; Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 25; Archana Parashar, 'The Anti-Discrimination Laws and the Illusory Promise of Sex Equality' (1994) 13 *University of Tasmania Law Review* 83, 99.

<sup>52</sup> See, eg, Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 83: 'There are numerous instances in which courts and tribunals have struggled with the overlapping factual issues of identifying a person, either real or hypothetical, who may stand as the 'comparator' and when determining the *relevant characteristics* for the purposes of contrasting the respondent's treatment of the complainant with the treatment of the comparator. ... The various judgments in *Purvis* illustrate that there is considerable scope, in some areas, for quite different approaches to these issues which are, essentially, questions of fact.'

<sup>53</sup> See, eg, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 2-3: 'Confusion has inevitably arisen because of the uncertainty which exists within the concept of comparability; that is, how should differences associated with women and minority groups be dealt with? Should they be dismissed as irrelevant, in accordance with a strict application of the equal treatment standard, or should they be celebrated?'

<sup>54</sup> (1992) EOC 92-421.

<sup>55</sup> *Ibid* 79,005. This passage was expressly approved by the minority in *Purvis* (2003) 217 CLR 92, 131-2 [119]. See, also, *HREOC v Mount Isa Mines Ltd* (1993) 46 FCR 310, 327 (Lockhart J); *IW v City of Perth* (1997) 191 CLR 1, 67 (Kirby J).

comparison is **not** with a person without the relevant characteristic appertaining or imputed to the protected attribute.<sup>56</sup> This approach has been premised on a close reading of the relevant definitions of direct discrimination under the SDA, which include the characteristics extension in the causation element but not the comparator element.

126. For example, in *Thomson v Orica*,<sup>57</sup> the applicant (Ms Thomson) had been employed for nine years before taking 12 months maternity leave to which she was entitled under the company's family leave policy (which reflected a statutory right to return under the *Industrial Relations Act 1996* (NSW)). A few days before she was due to return to work, Ms Thomson was effectively demoted.
127. Allsop J accepted that the taking of maternity leave is a characteristic that appertains to women who are pregnant (and to women generally). However, comparing the treatment of Ms Thomson with that of someone who did not take maternity leave was not, in his Honour's view, 'what the SDA calls for'.<sup>58</sup> Rather, his Honour held, the comparison required was with a person who is not pregnant (or with a person of the opposite sex), not with a person without the relevant *characteristic*.<sup>59</sup>
128. A similar approach was taken in relation to marital status discrimination by a majority of the Full Federal Court in *Commonwealth v HREOC* ('*Dopking No I*').<sup>60</sup> The facts of the case involved a member of the armed forces who challenged a particular relocation allowance that only applied to members with a family. The applicant (who was single and without a family) successfully argued at first instance<sup>61</sup> that not having a family was a characteristic generally appertaining to the marital status of being single and, accordingly, he had been treated less favourably on the basis of his marital status. The majority of the Full

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<sup>56</sup> See, eg, *Thomson v Orica* [2002] FCA 939, [120]; *Commonwealth v HREOC* (1993) 46 FCR 191, 204-5 (Lockhart J), 211 (Wilcox J); *Commonwealth v Evans* [2004] FCA 654, [50]-[51], [69]-[76].

<sup>57</sup> [2002] FCA 939.

<sup>58</sup> *Ibid* [120].

<sup>59</sup> *Ibid* [120]-[123].

<sup>60</sup> (1993) 46 FCR 191.

<sup>61</sup> *Sullivan v Department of Defence* (1992) EOC 92-421.

Federal Court disagreed, on the basis that the comparison was with a person of a different attribute, not with a person without the characteristic.<sup>62</sup>

129. The above narrow approach to identifying the comparator is now consistent with the narrow approach subsequently taken under the DDA by the majority of the High Court in *Purvis v New South Wales (Dept of Education)*<sup>63</sup> (*'Purvis'*). The court accepted that, for the purposes of identifying or defining a person's disability, the behavioural manifestations associated with that disability are to be included.<sup>64</sup> However, when it came to applying the comparator element, the behavioural manifestations were discarded. Rather than comparing the treatment of the student with another hypothetical student without his disability *and the violent behaviour it caused*, the majority required a comparison with another hypothetical student who also engaged in the same violent behaviour.<sup>65</sup>
130. The practical effect of the approach taken by the courts to the comparator element in cases such as *Thomson* and *Dopking No 1* (and consistent with *Purvis*) is that the characteristics extension is effectively stripped out of the definition of direct discrimination under the SDA. Whilst consistent with a close reading of the statute, it is at odds with the beneficial objects of the legislation. Applicants may still be able to repackage their claim under indirect discrimination. However, this would appear to be contrary to Parliament's intent

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<sup>62</sup> Ibid 204-5 (Lockhart J): 'In this case s 6(1) requires the comparison to be made between Mr Dopking as a person with the characteristic mentioned in para (b) or (c) of subs (1) and a person of a different marital status. There is no extension of that other person's marital status for the purposes of the section. In other words, the comparison is not made with a person having a characteristic that appertains generally to or is generally imputed to persons of another marital status; it is made with a person of a different marital status – for example a married person.' See also Wilcox J (at 211), who said that the definition required a comparison between 'the treatment of an aggrieved person having a particular marital status (or characteristic which appertains generally, or is perceived to appertain generally, to persons of a particular marital status) and the treatment accorded to persons having a different marital status, without reference to the characteristics that generally appertain, or are imputed, to that marital status.'

<sup>63</sup> (2003) 217 CLR 92.

<sup>64</sup> Ibid 100-101 [11] (Gleeson CJ), 119 [80] (McHugh and Kirby JJ), 175 [210]-[212] (Gummow, Hayne and Heydon JJ).

<sup>65</sup> For further criticism of the reasoning of the majority in *Purvis* see, eg, Kate Rattigan, '*Purvis v New South Wales (Department of Education and Training)*; A Case for Amending the *Disability Discrimination Act 1992* (Cth)' (2004) 28 *Melbourne University Law Review* 532; Jonathon Hunyor, 'Discrimination Law: Significant Issues in the Federal Jurisdiction' (Paper presented at the 11<sup>th</sup> Annual AIJA Tribunals Conference; Session Five: Human Rights and Anti-Discrimination, 6 June 2008) 1, 4-5; Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 15-9; Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395, 408-9; Susan Roberts, 'The Inequality of Treating Unequals Equally: The Future of Direct Discrimination under the *Disability Discrimination Act 1992* (Cth)', (2004) 45 *AIAL Forum* 20.

in including the characteristics extension in the definition of direct discrimination in the first place. As noted earlier, the significance of the characteristics extension is that it seeks to prevent less favourable treatment not only on the basis of protected attributes, but related and imputed characteristics as well.<sup>66</sup>

131. Furthermore, the application of the comparator element has effectively resulted in characteristics associated with protected attributes being devalued, particularly where the characteristic is unique to women. For example, in cases involving discrimination associated with maternity leave, such as *Thomson*, the courts have consistently held that the appropriate comparison is with other types of leave, such as study leave.<sup>67</sup> Accordingly, the reason behind the taking of maternity leave (namely, to have a baby) is regarded as irrelevant, with all types of leave essentially treated as being of equal significance.

132. However, to equate maternity leave with any other type of leave for the purposes of assessing direct discrimination devalues the central importance that society places on child-birth and child-rearing. As a matter of principle, should a person who wishes to take 12 months leave to go surfing or write their memoirs be entitled to the same level of protection against less favourable treatment as a person taking 12 months leave to have a child?<sup>68</sup>

133. Furthermore, the current approach ignores the significance of characteristics associated with a protected attribute as a discrete source of disadvantage in need of protection. Equating maternity leave with other types of leave, for example,

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<sup>66</sup> See, further, Jonathon Hunyor, 'Discrimination Law: Significant Issues in the Federal Jurisdiction' (Paper presented at the 11<sup>th</sup> Annual AIJA Tribunals Conference; Session Five: Human Rights and Anti-Discrimination, 6 June 2008), 10: 'The effect of this approach is to require the causation element to be determined on one basis and the comparator element on a different basis. While a strict reading of s 7(1) may support such an approach it seems, with respect, highly artificial. It also seems to disregard the intention of the legislation - namely, to prohibit discrimination *because of* pregnancy, potential pregnancy *and* those characteristics appertaining or imputed generally to women who are pregnant or potentially pregnant. To require a comparison on any other basis thwarts that intention. See also Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395, 407-8; Belinda Smith, 'From *Wardley* to *Purvis* - How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 20.

<sup>67</sup> See, eg, *Thomson v Orica* [2002] FCA 939, [121]-[123]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [82]; *Ilian v Australian Broadcasting Corporation* (2006) 236 ALR 168, 202-3 [162]-[164].

<sup>68</sup> Jonathon Hunyor, 'Discrimination Law: Significant Issues in the Federal Jurisdiction' (Paper presented at the 11<sup>th</sup> Annual AIJA Tribunals Conference; Session Five: Human Rights and Anti-Discrimination, 6 June 2008), 9.

ignores the systemic and historical barrier for women in obtaining, retaining and regaining employment as a consequence of the need to take maternity leave.<sup>69</sup> To achieve substantive equality in this context requires a recognition that not all forms of leave are deserving of equal treatment – that some reasons for leave are more important than others.<sup>70</sup>

134. HREOC further submits that the comparator element is an unnecessary (and often distracting) element in the definition of direct discrimination. In circumstances where the court must apply the comparison using a hypothetical comparator, it is meaningless to consider whether there was less favourable treatment without also considering the *reason* for such treatment. As the NSW Administrative Decision Tribunal has observed:

[I]t is not until the ground for the actual treatment is known that it is possible to say whether a hypothetical person not of the applicant's race would have been treated differently.<sup>71</sup>

135. The House of Lords reached the same conclusion in *Shamoon v Chief Constable of the RUC*<sup>72</sup> ('*Shamoon*'), where it was acknowledged that a two-step approach to assessing discrimination, namely assessing the comparator element first followed by the causation element second, was often inappropriate and apt to mislead. Rather, their Lordships accepted that the comparator question and the causation question were frequently 'intertwined'.<sup>73</sup> Indeed, Lord Hope noted that:

...the need for a comparator has been one of the most problematic and limiting aspects of direct discrimination...<sup>74</sup>

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<sup>69</sup> See, further, Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395, 396-7.

<sup>70</sup> See, eg, Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395, 416: 'By equating maternity leave with, for example, long service leave, it ignores the critical link between the trait of pregnancy and the taking of maternity leave and thereby denies that the legislation was established and is designed to protect people with particular traits that have been identified as the source of past and ongoing disadvantage.' See also Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 14.

<sup>71</sup> *Dutt v Central Coast Area Health Service* [2002] NSWADT 133, [63]. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [3.34].

<sup>72</sup> [2003] 2 All ER 26.

<sup>73</sup> *Ibid* 30 [8] (Ld Nicholls, Ld Rodger agreeing, 65 [125]). See also 41-2 [44]-[47], 44-5 [54] (Ld Hope), 61-2 [108]-[110] (Ld Scott).

<sup>74</sup> *Ibid* 39 [39].

136. HREOC considers that the central question in discrimination matters is one of causation – was the relevant treatment because of the applicant’s protected attribute or related/imputed characteristic? As Lord Nicholls observed in *Shamoon*,

[E]mployment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the applicant was treated as she was.<sup>75</sup>

137. Whilst a comparative analysis may assist in answering that question, it is not a necessary ingredient of the definition.<sup>76</sup> In this respect, HREOC agrees with the conclusion of Lord Scott in *Shamoon* that comparators:

...are no more than tools which may or may not justify an inference of discrimination on the relevant ground.<sup>77</sup>

138. HREOC considers that the comparator element has significantly eroded the capacity of the direct discrimination provisions to advance the objects of the SDA. As Neil Rees, Katherine Lindsay and Simon Rice rightly point out:

Despite the superficial appeal of the idea of differential treatment, it has brought unnecessary complexity and artificiality to the notion of direct discrimination.<sup>78</sup>

139. Similarly, whilst not putting forward a clear alternative, the Final Report of the recent Equal Opportunity Review in Victoria recommended that the definition of direct discrimination required amendment to ‘overcome the limitations of the comparator test’.<sup>79</sup>

140. An alternate approach is that taken in the ACT, where the legislation retains the causation element but does away with the comparator element.<sup>80</sup> Applicants need

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<sup>75</sup> Ibid 31 [11].

<sup>76</sup> See, further, Jonathon Hunyor, ‘Discrimination Law: Significant Issues in the Federal Jurisdiction’ (Paper presented at the 11<sup>th</sup> Annual AIJA Tribunals Conference; Session Five: Human Rights and Anti-Discrimination, 6 June 2008), 2-3.

<sup>77</sup> Ibid 61 [108].

<sup>78</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 80.

<sup>79</sup> State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008), Recommendation 41.

<sup>80</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 110-1.

only establish that they have been treated **unfavourably** because of their protected attribute or a characteristic imputed to, or associated with, their protected attribute.<sup>81</sup> In this respect, the focus of the test is on whether the applicant has suffered a detriment by reason of their protected attribute or characteristic.<sup>82</sup>

141. The application of the relevant definitions by the ACT courts has indicated that a comparative-based mode of inquiry will often be adopted by the courts in assessing whether the unfavourable treatment was on the ground of a protected attribute or characteristic.<sup>83</sup> This is not surprising. As noted above, a comparative analysis will often provide a useful analytical tool in determining whether particular treatment was partly or wholly on the ground of a protected attribute and not some other unrelated reason.<sup>84</sup>
142. Importantly, however, under the ACT approach the comparator element is not a rigid threshold requirement which must be met by an applicant in every case. Where good reasons warrant departing from a comparative analysis in assessing the causation element, such as where a particular circumstance is unique to women (or pregnant women), a court is not bound to still apply the comparator element as a necessary element of the definition.
143. HREOC also notes that the SDA itself adopts a similar model to the ACT approach in relation to the test for victimisation under s 94. Rather than requiring a comparative approach, s 94 simply asks whether the applicant was subjected to a detriment on the ground that he or she had engaged in protected action. The approach is therefore essentially the same as under the ACT definition of direct discrimination.
144. HREOC considers that this amendment would not raise any constitutional difficulties, as a definition of direct discrimination based on whether treatment is ‘unfavourable’ would be reasonably capable of being considered an appropriate

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<sup>81</sup> *Discrimination Act 1991* (ACT) s 8(1)(a).

<sup>82</sup> See also the recommendation of the NSWLRC to introduce a ‘detriment’ based, rather than comparative based, definition of discrimination, NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [3.51]-[3.53].

<sup>83</sup> See, eg, *Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, [24]-[25].

<sup>84</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 110-1.

and adapted implementation of Australia's treaty obligations<sup>85</sup> under CEDAW, as well as other relevant international conventions that deal with discrimination such as the ICCPR,<sup>86</sup> ICESCR<sup>87</sup> and relevant ILO Conventions.<sup>88</sup>

**Recommendation 6: Removal of comparator element (Stage One)**

Amend the definition of direct discrimination under the SDA to remove the comparator element, along the lines of the equivalent definition in the ACT.

**Causation element**

*Relationship between the 'true basis' approach and s 8*

145. The causation element requires the applicant to establish that the relevant treatment complained of was **by reason of** his or her protected attribute (such as sex, pregnancy, potential pregnancy, marital status or family responsibilities) or a characteristic generally appertaining or imputed to that attribute.
146. The authorities make clear that, in establishing causation, an applicant need not prove that the respondent was actuated by a discriminatory motive or ill-intent.<sup>89</sup> However, the applicant must nevertheless establish a causal nexus between the relevant treatment and the relevant attribute.<sup>90</sup> This requires an assessment of

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<sup>85</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Airlines of NSW Pty Ltd v New South Wales* (No 2) (1965) 113 CLR 54, 136 (Menzies J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 130-131 (Mason J), 172 (Murphy J), 232 (Brennan J), 259 (Deane J); and *Richardson v Forestry Commission* (1988) 164 CLR 261, 288-289 (Mason CJ and Brennan J), 303 (Wilson J), 311-312 (Deane J), 336 (Toohey J) and 342 (Gaudron J)

<sup>86</sup> See, esp, arts 2(1) and 26.

<sup>87</sup> See, esp, arts 2(2).

<sup>88</sup> See, eg, *Convention Concerning Discrimination in respect of Employment and Occupation* (ILO 111) (ratified by Australia in 1993); *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (ILO 156) (ratified by Australia in 1990).

<sup>89</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (McHugh CJ and Gaudron J, McHugh J agreeing, 382), applied in relation to the *Sex Discrimination Act 1984* (Cth) in *HREOC v Mount Isa Mins Ltd* (1993) 46 FCR 301, 325 (Lockhart J). See further HREOC, *Federal Discrimination Law* (2008), 52-3, 104-6, 173-7. Indeed, the courts have accepted that a respondent may breach anti-discrimination legislation even when acting with a benevolent intent, see further Pelma Rajapakse, 'An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia' (1999) 90 *University of Queensland Law Journal* 90, 94.

<sup>90</sup> *Purvis v New South Wales (Department of Education & Training)* (2003) 217 CLR 92, 163 [236] (Gummow, Hayne and Heydon JJ).

why the respondent acted as it did, by asking what was the ‘true basis’ or ‘real reason’ for the relevant treatment.<sup>91</sup>

147. The ‘true basis’ approach appears to have evolved from the judgment of Deane and Gaudron JJ in *Australian Iron & Steel Pty Ltd v Banovic*,<sup>92</sup> where their Honours noted that:

...there may be other situations in which habits of thought and preconceptions may so affect an individual’s perception of persons with particular characteristics that genuinely assigned reasons for an act or decision may, in fact, mask the **true basis** for that act or decision.<sup>93</sup>

148. Their Honours’ use of the ‘true basis’ test seems to have been employed by their Honours to encourage courts to look behind a respondent’s proffered explanation to identify whether the ‘true’ causal basis of the respondent’s conduct may have been nevertheless based on a protected attribute, albeit perhaps only in part or even subconsciously. In other words, the true basis approach appears to have been initially intended as a reminder that courts must properly scrutinise the alternate explanations put forward by a respondent.

149. However, since the decision of the High Court in *Purvis*, the ‘true basis’ approach has often tended to translate into an attempt to distil the causal basis of particular treatment down to a single or dominant cause, usually to confound an apparent connection with a protected attribute.

150. For example, in *Purvis*, Gleeson CJ was of the view that the ‘true basis’ of the school’s decision to expel the student was to protect the other students and staff of the school.<sup>94</sup> His Honour continued:

Even though functional disorders may constitute a disability, and disturbed behaviour may be an aspect of a disability, it is not contrary to the scheme and

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<sup>91</sup> *Purvis v New South Wales (Department of Education & Training)* (2003) 217 CLR 92, 102 [13] (Gleeson CJ), 143-4 [166] (McHugh and Kirby JJ), 163 [236] (Gummow, Hayne and Heydon JJ); *Forbes v Australian Federal Police (Commonwealth)* [2004] FCAFC 95, [68]-[70], [76].

<sup>92</sup> (1989) 168 CLR 165.

<sup>93</sup> Ibid 176. Their Honours continued: ‘Thus in the ascertainment of the true basis of an act or decision it may well be significant that there is some factor, other than the ground assigned, which is common to all who are adversely affected by that act or decision. In certain situations that common factor may well be seen to be the true basis of the fact or decision. And that may also be the case where some factor is identified as common to a significant proportion of those adversely affected.’

<sup>94</sup> (2001) 217 CLR 92, 101-2.

objects of the Act to permit a decision-maker to identify a threat to the safety of other persons for whose welfare the decision-maker is responsible, resulting from the conduct of a person suffering from a disorder, as the basis of a decision. ...[T]o identify the pupil's disability as **the basis** of the decision would be unfair to the principal and to the first respondent. In particular, it would leave out of account obligations and responsibilities which the principal was legally required to take into account.<sup>95</sup> (emphasis added)

151. The above passage invites courts to weigh up the various contributing factors that motivated the respondent's conduct in an attempt to isolate '**the**' (singular) true basis. Where the conduct of the respondent was motivated by other more pressing considerations, such as public safety concerns, the complainant's disability (or other protected attribute) is not to be regarded as the 'true basis' and the claim fails for lack of causation.<sup>96</sup>

152. The problem with this development of the 'true basis' approach is that it has diminished the significance of s 8 of the SDA (and the equivalent provisions in the DDA<sup>97</sup> and RDA<sup>98</sup>). Section 8 provides that if an act is done for two or more reasons, it is sufficient that a protected attribute or characteristic is a reason for the doing of the act, even if not the dominant or a substantial reason. As Neil Rees, Katherine Lindsay and Simon Rice point out:

Over time the 'true basis' or 'real reasons' approach to causation has evolved. It is unsatisfactory because it deflects attention away from the central issue of determining whether a prohibited ground of discrimination, such as race or sex, **influenced** the conduct in question.<sup>99</sup> (emphasis added)

153. The authors go on to conclude that:

The 'real reason' (or 'true basis') approach, when stripped bare, seems to focus on the respondent's underlying reason, or motive, for acting as he or she did rather than on the actual factors which influenced the decision in question. This

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<sup>95</sup> Ibid 102-3 [14].

<sup>96</sup> See also *Queensland (Queensland Health) v Forest* [2008] FCAFC 96, [47] (Black CJ), [112]-[118] (Spender and Emmett JJ); *Forbes v Australian Federal Police (Commonwealth)* [2004] FCAFC 95, [76] (Black CJ, Tamberlin and Sackville JJ); *Trindall v NSW Commissioner for Police* [2005] FMCA 2, [149].

<sup>97</sup> Section 10.

<sup>98</sup> Section 18; compare the *Age Discrimination Act 2004* (Cth) s 16, which requires age to be the dominant reason.

<sup>99</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 69.

is a highly problematic approach to the issue of causation in direct discrimination cases because it introduces, by judicial invention rather than by legislative action, an excuse or defence of ‘pure motive’ in those cases where the respondent was clearly influenced by the complainant’s protected attribute when making the decision in question but maintains that his or her underlying reason for doing so was good, or pure.<sup>100</sup>

154. HREOC agrees with these observations and recommends that consideration be given to options for resolving the current uncertainty surrounding the relationship between s 8 of the SDA and the prevailing ‘true basis’ or ‘real reason’ approach to assessing causation.

**Recommendation 7: Clarifying causation (Stage One)**

In making any changes to the definition of direct discrimination, parliament should make clear its intention, either via legislation or even extrinsic materials such as explanatory memoranda or second reading speech to any amending Bill, that the SDA does not require an applicant to prove that the relevant ground of discrimination was **the** true basis or real reason for the impugned conduct and confirm the operation of s 8 of the SDA.

*Difficulties for an applicant in establishing causation*

155. There are a number of additional difficulties for an applicant in establishing the causation element. Notwithstanding that a discriminatory motive is not required, the court’s assessment almost invariably involves an inquiry into the respondent’s state of mind. This is a notoriously difficult and imprecise line of inquiry. As Kirby J pointed out in *IW v City of Perth*,<sup>101</sup> ‘typically, human motivation is complex’<sup>102</sup> and ‘[d]iscriminatory conduct can rarely be ascribed to

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<sup>100</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 100.

<sup>101</sup> (1997) 191 CLR 1.

<sup>102</sup> *Ibid* 63.

a single “reason” or “ground”.<sup>103</sup> Similarly, in *Australian Iron & Steel Pty Ltd v Banovic*,<sup>104</sup> Deane and Gaudron JJ observed that

there may be other situations in which habits of thought and preconceptions may so affect an individual’s perception that genuinely assigned reasons for an act or decision may, in fact, mask the true basis for that act or decision.<sup>105</sup>

156. The line of inquiry into the respondent’s state of mind is especially difficult for the applicant to sustain. It is, after all, a matter within the domain of the respondent, yet it is a matter in respect of which the applicant carries the onus of proof.<sup>106</sup> As Lord Browne Wilkinson observed in *Glasgow City Council v. Zafar*:<sup>107</sup>

[Discrimination claims] present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.<sup>108</sup>

157. The difficulty is compounded by the fact that prejudices against disadvantaged groups are often infused with, or disguised by, seemingly neutral factors such as

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<sup>103</sup> Ibid 63.

<sup>104</sup> (1989) 169 CLR 165.

<sup>105</sup> Ibid 176.

<sup>106</sup> See, eg, S Wilborn ‘Proof of Discrimination in the United Kingdom and the United States’ (1986) 5 *Civil Justice Quarterly* 321 at 321: ‘[P]roving motivation is an extremely difficult and subtle task. The ‘true’ motivation for an employment decision is to be found in the mind of the employer. But providing the state of the employer’s mind at the time an employment decision is made is an extremely delicate task.’ See also Wilborn at p 26: ‘[I]t is not easy to determine another person’s state of mind at any time, especially when dealing with a matter such as discriminatory behaviour which many people will wish to conceal.’

<sup>107</sup> [1998] 2 All ER 953, cited with approval in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ).

<sup>108</sup> [1998] 2 All ER 953, 958. See also *Shamoon v Chief Constable of the RUC* [2003] 2 All ER 26, 71 [143] (Ld Rodger): ‘Discrimination is rarely open and may not even be conscious. It will usually be proved only as a matter of inference.’ See also *Nagarajan v London Regional Transport* [2001] 1 AC 501, 511 (Ld Nicholls): ‘Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.’ *Ellenbogen v Federal Municipal and Shire Council Employees Union of Australia* [1989] EOC 92-252: ‘[R]acial discrimination will mostly if not always have to be proved inferentially or circumstantially. Thus evidence of discrimination will often be solely in the hands or minds of the respondents, and will be difficult for complainants to elicit in any credible form.’ See also *Hercules v Queensland Department of Corrective Services* [1988] HREOCA 6; *Bennet & Anor v Everitt & Anor* (1988) EOC 92-244, 77,271 (Einfield J); *Fenwick v Beveridge Building Products Pty Ltd* (1985) 62 ALR 275, 281; *NIB Health Funds Ltd v Hope & Anor* (Unreported, NSW Supreme Court, McInerney J, 15 November 1996), 38. See, generally, Jonathon Hunyor, ‘Skin-Deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535; Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 69, 93; Loretta De Plevitz, ‘The *Briginshaw* ‘standard of proof’ in anti-discrimination law: ‘Pointing with a wavering finger’ (2003) 25 *Sydney Law Review* 308.

individual merit or whether the person is a ‘team player’. For example, Margaret Thornton has noted that individual prejudice, such as sexism or racism:

quickly becomes interwoven with bona fide considerations of merit, including formal qualifications, experience, workplace practices and relations with one’s peers.<sup>109</sup>

158. She concludes:

The concept of merit – a central value in determining the ‘best person for the job’ – conveys a veneer of neutrality because of its assumptions of genuine job-relatedness but, in fact, is capable of disguising racism (as well as sexism, homophobia, etc).<sup>110</sup>

159. HREOC considers that further consideration is warranted of possible options for alleviating the difficulties for an applicant in establishing the causation element.

160. One option would be for the SDA to clarify that where an inference is available that the respondent’s conduct may have been based on the applicant’s sex (or other protected attribute or characteristic), the failure on the part of the respondent to plausibly explain the basis of the relevant conduct gives rise to an adverse inference that sex (etc) was a causal factor.<sup>111</sup> This would be an appropriate and adapted extension of the settled rule in *Jones v Dunkel*<sup>112</sup> that an adverse inference may be drawn where particular information is within the domain of a particular party who fails to present it. For example, in *G v H*,<sup>113</sup> Deane, Dawson and Gaudron JJ stated:

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<sup>109</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990), 90.

<sup>110</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990), 91-2. See also, in relation to similar problems with proving causation in race discrimination claims, Jonathon Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535, 537-9

<sup>111</sup> This approach has been accepted in the UK: see, eg, *King v Great Britain-China Centre* [1992] ICR 516, 528-9 (Neil LJ), quoted in *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958 (Ld Browne-Wilkinson) (*Zafar* was cited with apparent approval in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ). See further Jonathon Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535, 552: ‘Recognising ... that the true basis for a decision, which may manifest conscious or reflect unconscious discrimination, is peculiarly within the knowledge of an employer, an evidential burden should rest on a respondent employer to provide an explanation for that decision.’

<sup>112</sup> (1959) 101 CLR 298.

<sup>113</sup> (1994) 181 CLR 387.

[I]t is well settled that, in the course of the ordinary processes of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his or her power to provide or give evidence on some issue, declines to do so.<sup>114</sup>

161. Similarly, the Full Federal Court recently confirmed that, when assessing whether evidence supports an inference of discrimination, courts should apply

...the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict...<sup>115</sup>

162. A similar approach was taken by the UK courts (prior to the enactment of s 63A, discussed below) in discrimination matters. For example, in *King v Great-Britain-China Centre*,<sup>116</sup> Neil LJ noted that once an applicant had established a prima facie case of less favourable treatment in circumstances where race was a possible basis:

...the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the tribunal to infer that the discrimination was on racial grounds.<sup>117</sup>

163. Similarly, in *Shamoon*, Lord Scott noted that, in assessing whether evidence gave rise to an inference of discrimination:

Unconvincing denials of a discriminatory intent given by the alleged discriminatory, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice.<sup>118</sup>

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<sup>114</sup> Ibid 402. See also *Weissensteiner v The Queen* (1993) 178 CLR 217, 227 (Mason CJ, Deane and Dawson JJ): '[I]t has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. That is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it.'

<sup>115</sup> *Qantas Airways Limited v Gama* [2008] FCAFC 69, [139] (Branson J, French and Jacobson generally agreeing, [110]), citing *Medtel Pty v Courtney* (2003) 130 FCR 182, [76] (Branson J).

<sup>116</sup> [1992] ICR 516.

<sup>117</sup> Ibid 528-9, approved in *Shamoon v Chief Constable of the RUC* [2003] 2 All ER 26, 25 [56]-[57] (Ld Hope).

<sup>118</sup> *Shamoon v Chief Constable of the RUC* [2003] 2 All ER 26, 63 [116].

164. A second option would be to adopt a provision similar to s 63A<sup>119</sup> of the *Sex Discrimination Act 1975* (UK).<sup>120</sup> Section 63A was enacted in 2001 to give effect to the EU Burden of Proof Directive,<sup>121</sup> which had been introduced to try and address concerns over the persistent failure of applicants to succeed in discrimination claims due to the difficulties in proving why the respondent had acted as it did. The Equality and Human Rights Commission (UK) has explained the effect of s 63A as follows:

The effect of s.63A of the SDA is that the [employment tribunal] **must** find unlawful discrimination where the claimant proves facts from which the [employment tribunal] could conclude - in the absence of an adequate explanation from the respondent - that the respondent has unlawfully discriminated, unless the respondent provides a non-discriminatory explanation for the act complained of.<sup>122</sup> (emphasis in original)

165. The leading authority on the effect of s 63A is the decision of the Court of Appeal in *Wong v Igen Ltd Ors*,<sup>123</sup> in which the Court annexed to its reasons a detailed set of guiding principles on the application of s 63A.<sup>124</sup> Those principles

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<sup>119</sup> Section 63A states:

**63A.— Burden of proof: employment tribunals**

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

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

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of [Part 2 or section 35A or 35B], or

(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination or harassment against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

<sup>120</sup> Section 63A was introduced under the *Sex Discrimination (Indirect Discrimination & Burden of Proof) Regulations 2001*.

<sup>121</sup> Council Directive 97/80/EC of December 15, 1997 (OJ 1998 L14/6). See, further, Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), [6.24]-[6.25].

<sup>122</sup> See Equality and Human Rights Commission, 'What Constitutes Sexual Harassment' (2007, available at

<http://www.equalityhumanrights.com/en/foradvisers/EocLaw/eoclawenglandwales/Sexualharassment/Isthereasexualharassmentclaim/Pages/Whatconstitutessexualharassment.aspx>).

<sup>123</sup> [2005] 3 All ER 812.

<sup>124</sup> These principles were adopted in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332, available at

<http://www.equalityhumanrights.com/en/foradvisers/EocLaw/eoclawenglandwales/Legalframeworkandprocedure/TheScopeoftheSexDiscriminationAct1975/Pages/Provingliabilityfordiscrimination.aspx>).

make clear that the main object of s 63A is to overcome the difficulties discussed above in establishing causation.<sup>125</sup>

166. Alternatively, a third and more robust option would be for the SDA to follow the approach taken under the *Workplace Relations Act 1996* (Cth).<sup>126</sup> Pursuant to s 664, in claims alleging termination of employment for a proscribed reason (including sex, marital status, pregnancy, family responsibilities and absences from work during maternity leave or other parental leave<sup>127</sup>), the onus is on the respondent to establish that the termination was **not** for a proscribed reason.<sup>128</sup>

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<sup>125</sup> See further *Barton v Investec Henderson Crosthwaite Securities Limited* [2003] IRLR 332; *Dresdner Kleinwort Wasserstein Ltd v Adebayo* [2005] IRLR 514; *EB v BA* [2006] IRLR 471; *Netowrk Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865.

<sup>126</sup> See further, in relation to establishing causation under the *Racial Discrimination Act 1975* (Cth), HREOC, *An International Comparison of the Racial Discrimination Act 1975: Background Paper No 1* (2008), Chapt 8.

<sup>127</sup> *Workplace Relations Act 1996* (Cth), s 659(2)(f) and (h).

<sup>128</sup> See, eg, *Bognar v Merck Sharp Dohme (Australia) Pty Ltd* [2008] FMCA 571, [47]: ‘By virtue of s.664 of the WR Act, the respondent bears the onus of proving that it did not terminate the applicant’s employment for a prohibited reason, or for reasons that included a prohibited reason.’ See also *Liquor, Hospitality Miscellaneous Union, Liquor & Hospitality Division, NSW Branch on behalf of its member, Wayne Roberts v Woonoona Bulli RSL Memorial Club Ltd* [2007] FCA 1460, [21]: ‘In this proceeding it is thus not necessary for the Union to prove that Mr Roberts’ employment was terminated for the reason, or for reasons including the reason, that he refused to negotiate in connection with, make or sign an AWA. However, the Club will have established a defence to the Union’s application if it has proved that Mr Roberts’ employment was terminated for a reason or reasons that do not include a proscribed reason.’ See also *Tandoegoak Anor v Marguerite Gerard Pty Ltd* [2007] FMCA 621, [38]: ‘The Court is cognisant of the reverse onus of proof contained in section 664 of the Act.’ See also *Abrahams v Qantas Airways Ltd* [2007] FMCA 634, [10].

### **Recommendation 8: Shifting the onus (Stage One)**

Amend the SDA to make establishing causation more achievable, such as by:

- a. directing courts to draw an adverse inference where a respondent fails to establish a non-discriminatory basis for its conduct;
- b. shifting the onus to the respondent to establish a non-discriminatory basis for its conduct in circumstances where its conduct was plausibly based (in whole or in part) on a protected attribute or characteristic, such as along the lines of s 63A of the *Sex Discrimination Act 1975* (UK); or
- c. reversing the onus of proof in relation to establishing causation, along the lines of s 664 of the *Workplace Relations Act 1996* (Cth).

## ***Indirect discrimination***

### **Operation of indirect discrimination provisions**

167. Section 5(2) of the SDA defines what is commonly described as ‘indirect discrimination’ on the ground of sex, as follows:

For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

168. The definitions of indirect discrimination on the grounds of marital status (s 6(2)) and pregnancy or potential pregnancy (s 7(2)) are set out in similar terms.

169. In essence, the indirect discrimination provisions require the applicant to establish that the respondent imposed a requirement, condition or practice that disadvantaged persons who share the applicant’s protected attribute. The onus then shifts to the respondent to establish that the relevant requirement, condition or practice was ‘reasonable’.<sup>129</sup> Section 7B(2) provides some assistance to the

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<sup>129</sup> *Sex Discrimination Act 1984* (Cth), s 7B(1).

courts in assessing reasonableness, by outlining a non-exhaustive list of factors to be taken into account.<sup>130</sup>

### **Significance of the indirect discrimination provisions**

170. The indirect discrimination provisions are of critical significance in achieving substantive equality under the SDA. Indirect discrimination targets facially neutral barriers which appear to treat everyone equally, but which disproportionately impact on particular groups (ie women) due to structural, historical, attitudinal, biological and social inequalities and barriers.
171. In this respect, whilst direct discrimination is predominantly concerned with the relationship between individual applicants and individual respondents, indirect discrimination is often about challenging a status quo that harms disadvantaged groups generally. The claim will therefore often have important implications for a wider class of persons than just the individual applicant. This point was noted by the Western Australian Equal Opportunity Commission in its recent review of the *Equal Opportunity Act 1984 (WA)*, where it observed:
- [W]hereas an act of direct discrimination might affect one person, possibly several, indirect discrimination, in the form of an apparently neutral policy or procedure, can impact adversely on hundreds of people at once.<sup>131</sup>
172. Furthermore, the increasingly narrow approach taken by the courts to the direct discrimination provisions has made establishing direct discrimination very difficult. This in turn has placed additional strain on the indirect discrimination provisions in achieving substantive equality under the SDA.<sup>132</sup>
173. HREOC therefore submits that the Committee should be mindful of ensuring that the indirect discrimination provisions are as broad and effective as possible in facilitating the achievement of substantive equality. HREOC considers that previous amendments to the definition of indirect discrimination significantly improved the effectiveness of the SDA. However, the current Review provides a

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<sup>130</sup> For further discussion of the elements of indirect discrimination under the *Sex Discrimination Act 1984 (Cth)*, see HREOC, *Federal Discrimination Law* (2008), 120-31.

<sup>131</sup> Western Australia Equal Opportunity Commission, *Review of Equal Opportunity Act 1984: Report*, (May 2007), 30-1.

<sup>132</sup> Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3.

valuable opportunity to consider whether further improvements in this area may be warranted.

### **Requirement, condition or practice**

174. As noted above, the applicant must establish that the respondent imposed a requirement, condition or practice. The courts have held that this element should be interpreted broadly, such as to encompass ‘any form of qualification or prerequisite demanded by an employer of his employees’.<sup>133</sup> Similarly, in *Waters v Public Transport Corporation*, the High Court emphasised the need for a beneficial approach when identifying the requirement or condition that is consistent with the remedial objects of anti-discrimination legislation.<sup>134</sup>
175. However, two more recent cases have raised some cause for concern as to whether this element has been unduly narrowed by the courts, which has undermined the capacity of the SDA to achieve its objects.
176. In *Kelly v TPG Internet Pty Ltd*,<sup>135</sup> the applicant alleged indirect discrimination because of her employer’s failure to grant her request for part-time work following her return from maternity leave. Raphael FM rejected this aspect of the claim on the basis that there was no relevant requirement, condition or practice. His Honour reasoned that the refusal of part-time work was merely the refusal of an employment-related benefit, which his Honour distinguished from a requirement, condition or practice of employment.<sup>136</sup>

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<sup>133</sup> *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 185 (Dawson J). This passage was approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J).

<sup>134</sup> *Ibid* 393-4 (Dawson and Toohey JJ), 407-8 (McHugh J). For example, McHugh J noted (at 407) that the relevant provision ‘should be given a liberal interpretation in order to implement the objectives of the legislation. In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.’

<sup>135</sup> (2003) 176 FLR 214.

<sup>136</sup> Note, however, that his Honour’s reasoning was strongly criticised by Driver FM in *Howe v Qantas Airways Ltd* (2004) 188 FLR 1. The decision is also inconsistent with the weight of opinion on this point. See further HREOC, *Federal Discrimination Law* (2008), 122-4. For further criticism of the approach taken in *Kelly v TPG*, see Sharan Burrow, ‘An Unequal World’ (2004) 27 (3) *University of New South Wales Law Journal* 884, 889-90; Craig Lenehan and John Von Doussa, ‘Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act’ (2004) 27 (3) *University of New South Wales Law Journal* 892, 902-3; Belinda Smith and Joellen Riley, ‘Family-friendly Work Practices and The Law’ (2004) 26 *Sydney Law Review* 395, 414.

177. The other case of concern is the latest word from the High Court on indirect discrimination, *New South Wales v Amery*<sup>137</sup> ('Amery'). The applicants in *Amery* alleged that different pay scales for permanent and long-term casual teachers under a NSW industrial award indirectly discriminated against women, because:

- (a) a significantly greater proportion of casual teachers were women compared with men;
- (b) the requirements for becoming a permanent teacher disadvantaged women; and
- (c) the upper limit of the pay scale applicable to casual teachers was significantly lower than for permanent teachers, even where the casual teachers were performing the same work as permanent teachers on a long-term basis.

178. A majority of the High Court held that the applicants had failed to establish a relevant requirement or condition of the position (the NSW legislation does not include 'practices'). The majority distinguished casual and permanent teachers as being separate positions and, accordingly, the pay scales applicable to one position could not be regarded as a condition, requirement or practice in relation to the other position.<sup>138</sup>

179. The above decisions have compounded the difficulties for applicants in establishing indirect discrimination. By taking an unduly narrow approach to identifying the requirement, condition or practice, the decisions run counter to the objects of the SDA and earlier pronouncements by the courts on the need for a broad approach on this issue. The decisions also arguably risk permitting excessive deference to the discretion of employers in dividing and classifying their workforce to avoid their obligations under the SDA, even when such divisions and classifications clearly disadvantage women or permit unequal pay for essentially the same work. As K Lee Adams has observed:

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<sup>137</sup> (2006) 230 CLR 174.

<sup>138</sup> Ibid 196 [69], 198-9 [78]-[82] (Gummow, Hayne and Crennan JJ, Callinan J agreeing, 232 [205]). For criticism of the approach taken by the majority, see K Lee Adams, 'Defining Away Discrimination' (2006) 19(3) *Australian Journal of Labour Law* 263; Joanna Hemingway, 'Implications for pay equity' (2006) 44(5) *Law Society Journal* 44.

The very mischief anticipated and avoided in *Waters* –that if the ‘requirement or condition’ was interpreted narrowly, defendants would be able to evade scrutiny under discrimination law simply through how they define their services or structure jobs – has captured a majority in *Amery*.<sup>139</sup>

180. In cases involving facts such as *Amery* or *TPG*, HREOC considers that the role of the court should be to consider whether the relevant classifications imposed by management can in fact be justified by the employer, rather than allowed to pass unscrutinised on a technical approach to the requirement, condition or practice element.
181. One approach to remedying this situation would be to require that an applicant simply establish that the relevant circumstances (including any terms, conditions or practices imposed by the respondent) disadvantaged women (or other relevant groups). The onus would then shift to the respondent to establish that the relevant circumstances were reasonable. This would remove the need for technical disputes over whether the respondent has imposed a relevant requirement, condition or practice. Instead, the focus would be on the impact of the prevailing circumstances on the relevant protected group and whether the circumstances can be regarded as reasonable. To the extent that the relevant circumstances are not directly referable to the employer, but are due to external factors or pressures, this would be taken into account in assessing reasonableness.

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<sup>139</sup> K Lee Adams, ‘Defining Away Discrimination’ (2006) 19(3) *Australian Journal of Labour Law* 263, 277.

**Recommendation 9: Requirement, condition or practice element (Stage One)**

Amend the SDA to remedy the narrow approach taken in certain cases to the requirement, condition or practice element, such as by providing that an applicant must simply establish that the relevant circumstances (including any terms, conditions or practices imposed by the respondent) disadvantaged women (or other relevant groups). The onus would then shift to the respondent to establish that the relevant circumstances were reasonable.

**Reasonableness element**

182. The test for reasonableness in respect of indirect discrimination has been described by the courts as ‘less demanding than one of necessity, but more demanding than one of convenience.’<sup>140</sup>
183. A number of commentators have queried whether reasonableness is a sufficiently rigorous standard in assessing whether barriers that disproportionately disadvantage women (or other protected groups) should be tolerated. In particular, the reasonableness standard is sometimes seen as operating to legitimise historically oppressive practices rather than challenging respondents to justify why such practices are in fact necessary. For example, Beth Gaze argues:

Because of its open texture, the test of reasonableness can be a vehicle for the transmission of traditional views of social practices, and the rejection of any requirement for change.<sup>141</sup>

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<sup>140</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251.

<sup>141</sup> Beth Gaze, ‘The Sex Discrimination Act After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives’ (2004) 27 (3) *University of New South Wales Law Journal* 914, 918. See also at 917, where the author argues that the reasonableness test in the definition of indirect discrimination ‘seriously blunts the Act’s challenge to systemic discrimination.’ See also Anna Chapman, ‘Corporate Restructuring and Discrimination’ (1998) 11 *Australian Journal of Labour Law* 136, 141-3; Z Stella Tarrant, ‘Reasonableness in the Sex Discrimination Act: No Package Deals’ (2000) 19 *University of Tasmania Law Review* 38, 53-4; Belinda Smith and Joellen Riley, ‘Family-friendly Work Practices and The Law’ (2004) 26 *Sydney Law Review* 395, 417. See also the discussion of this issue in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992), [10.1.83]-[10.1.85].

184. HREOC also notes that the reasonableness standard is somewhat weaker than the approach required under international human rights law when assessing the legitimacy of acts or practice that infringe a person's rights. In essence, a human rights approach requires the respondent to demonstrate that the infringement was pursuant to an aim that was legitimate under the relevant instrument and was proportionate to the achievement of that aim. This generally requires the respondent to establish that a less restrictive measure was not available.<sup>142</sup>
185. HREOC also notes that the approach taken to this issue in comparable jurisdictions overseas has been more closely aligned with human rights principles. In the United Kingdom, for example, a respondent is required to establish that the relevant requirement or condition is 'a proportionate means of achieving a legitimate aim'.<sup>143</sup> Under European Community law, the threshold is slightly higher,<sup>144</sup> with the Equal Treatment (Amendment) Directive requiring a respondent to establish that the relevant requirement or condition is 'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.<sup>145</sup>
186. In Canada, once an applicant has established a prima facie case of discrimination, the respondent must establish that the impugned requirement or condition was a 'bona fide occupational requirement'. This expression has been interpreted strictly to involve an application of a proportionality test.<sup>146</sup>

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<sup>142</sup> See generally Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [6]; United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 'General Interpretative Principles relating to the Justification of limitations', U.N. Doc. E/CN.4/1985/4, Annex (1985), esp at IA(11). See also, Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), [14]. See also the application of the proportionality test by the European Court of Human Rights in *Handyside v United Kingdom* [1976] ECHR 5, [48]-[49]; *The Sunday Times v the United Kingdom* [1979] ECHR 1, [62].

<sup>143</sup> *Sex Discrimination Act 1975* (UK) s 2(b)(iii).

<sup>144</sup> Equal Opportunities Commission (UK), *Submission to the Discrimination Law Review Green Paper*, (April 2006), 36-7.

<sup>145</sup> Council Directive 2002/73/EU, 23 September 2002, art 2, amending Council Directive 76/2007/EEC.

<sup>146</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (also known as the *Meiorin* case) [1999] 3 SCR 3, [54]; see further [56]-[68] for elaboration on these elements. The Supreme Court has also confirmed that the above approach is not confined to employment related discrimination, but applies in all cases of alleged discrimination: *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (also known as the *Grismer* case) [1999] 3 SCR 868, [19]. See also *McGill University Health Centre v Syndicat des employés de l'Hôpital général de Montréal* [2007] 1 SCR 161, [52] where Abella J noted that the proportionality test imposes 'an onerous burden, and properly so'.

187. In the United States, a respondent must satisfy a standard of ‘business necessity’.<sup>147</sup> In New Zealand, the test applied is whether the respondent has a ‘good reason’ for the requirement or condition.<sup>148</sup> However, this apparently weaker standard has been bolstered by the strict interpretation given to it by the courts. For example, in *Northern Regional Health Authority v Human Rights Commission*,<sup>149</sup> Cartwright J observed:

Where the test is an objective one, it is not sufficient for the plaintiff to assert that it has good reason for adopting a particular policy; it must also satisfy the Court that there are no other non-discriminatory mechanisms which would meet its objectives. Otherwise it cannot satisfy the Court that its policy is a suitable means of achieving those objectives.<sup>150</sup>

188. Similarly, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) now introduces a proportionality test in respect of any limitation of a person’s human rights by a public authority. Such limitations are only permitted if they are ‘demonstrably justified in a free and democratic society’ taking account of certain factors, such as whether there were ‘any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’.<sup>151</sup>

189. HREOC acknowledges that a reasonableness standard is a familiar concept to Australian courts. HREOC also acknowledges that the SDA explicitly includes a reference to proportionality as a relevant factor in assessing reasonableness.<sup>152</sup> However, as a statute giving effect to Australia’s international human rights obligations, HREOC considers that the applicable standard for assessing whether a limitation on a person’s rights is permissible should be more closely aligned with a human rights approach. In particular, HREOC recommends that consideration be given to adopting a revised standard which more explicitly requires an assessment of the legitimacy of the object being sought as

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<sup>147</sup> *Griggs v Duke Power Co* 401 US 424 (1971).

<sup>148</sup> *Human Rights Act 1993* (NZ) s 65.

<sup>149</sup> [1998] 2 NZLR 218, cited in *Claymore Management Systems v Anderson* [2003] 2 NZLR 537.

<sup>150</sup> [1998] 2 NZLR 218, 245.

<sup>151</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>152</sup> *Sex Discrimination Act 1984* (Cth) s 7B(2)(c).

compatible with human rights and the proportionality of the means being adopted as the least restrictive available.

**Recommendation 10: Reasonableness standard (Stage One)**

Review the standard of reasonableness as part of the definition of indirect discrimination to become more closely aligned with human rights based principles of legitimacy and proportionality.

***Positive duty to eliminate discrimination and promote gender equality***

190. Another criticism sometimes made of the existing SDA model is that it is expressed as a purely proscriptive, negative-based standard. Discriminatory conduct is *prohibited*, rather than non-discriminatory or other positive conduct being *required*.<sup>153</sup>

191. For example, the indirect discrimination provisions effectively prohibit employers from imposing unreasonable requirements, conditions or practices that disadvantage women with family responsibilities,<sup>154</sup> rather than being stated as a positive obligation to reasonably accommodate the needs of workers with family responsibilities.

**Shift towards positive obligations under the DDA**

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<sup>153</sup> See further Krysti Guest, 'The Elusive Promise of Equality: Analysing the Limits of the *Sex Discrimination Act 1984*' (Research Paper No 16, Law and Bills Digest Group, 1998- 1999) 1, 4: 'Rather than instigating a regime that confers a positive right to equality or freedom from discrimination *per se*, the *Sex Discrimination Act 1984* (Cth) provides a much more limited framework whereby one has the right of individual complaint in specific circumstances of discrimination.' See also Belinda Smith, 'It's About Time – for a New Regulatory Approach to Equality' (2008) *Federal Law Review* (forthcoming) (also available at <http://ssrn.com/abstract=1101187>), 13: 'Australian anti-discrimination laws impose a negative duty *not* to discriminate, but otherwise impose no obligations on employers' (emphasis in original). And further (at 16): 'The negative, tort-like rule enables redress but does not require preventative or positive measures to be taken.' See also the recent comments of the Full Federal Court in *Qantas Airways Limited v Gama* [2008] FCAFC 69, [81] (French and Jacobson JJ, with whom Branson J generally agreed, [122]): 'It is not prima facie unlawful to fail to take steps to prevent discrimination.'

<sup>154</sup> See, eg, *Hickie v Hunt & Hunt* [1998] HREOCA 8 (extract at (1998) EOC 92-910; *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.

192. By contrast to the proscriptive approach under the SDA, in the context of disability discrimination there has been an increasing shift towards imposing positive obligations on employers, educators, service providers and other would-be respondents to take reasonable steps to improve access and equality for people with disabilities.
193. The *Disability Standards for Education 2005* ('Education Standards'), for example, introduce a positive obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities, subject to an unjustifiable hardship defence.<sup>155</sup> The Education Standards also impose an obligation on education providers to consult with affected students and their associates in relation to the development of such adjustments.<sup>156</sup> The failure to comply with the Education Standards is itself a form of unlawful discrimination.<sup>157</sup>
194. Likewise, the *Disability Standards for Accessible Public Transport 2002* ('Transport Standards') introduce fixed targets and detailed compliance criteria for operators and providers of public transport to ensure that transport premises, conveyances and related infrastructure meet specified minimum standards of accessibility.<sup>158</sup> Again, non-compliance with the Transport Standards constitutes unlawful discrimination of itself.<sup>159</sup>
195. The Productivity Commission, in its review of the DDA, has also recommended the introduction of a general obligation to make reasonable adjustments in all areas in which the DDA applies, counterbalanced with a defence of unjustifiable

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<sup>155</sup> See, generally, Education Standards, Part 3. The obligation to provide reasonable adjustments arises from ss 4.2(3)(c), 5.2(2)(c), 6.2(2)(c), 7.2(5)(c) and 7.2(6)(c). See further HREOC, *Federal Discrimination Law* (2008), 213-4 as well as information available at: <[http://www.humanrights.gov.au/disability\\_rights/education/education.html](http://www.humanrights.gov.au/disability_rights/education/education.html)>.

<sup>156</sup> See, generally, Education Standards, s 3.5.

<sup>157</sup> *Disability Discrimination Act 1992* (Cth), s 32.

<sup>158</sup> See further: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_Disabilitystandardsforaccessiblepublictransport](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Disabilitystandardsforaccessiblepublictransport).

<sup>159</sup> *Disability Discrimination Act 1992* (Cth), s 32. HREOC also notes that significant progress has also been made in the development of a further disability standard in relation to access to buildings. See further: <[http://www.humanrights.gov.au/disability\\_rights/buildings/access\\_to\\_premises.html](http://www.humanrights.gov.au/disability_rights/buildings/access_to_premises.html)>. See also HREOC, *Federal Discrimination Law* (2008), 214; G Innes, '2006 – An opportunity not to be missed?' Opinion piece, available at: [http://www.humanrights.gov.au/disability\\_rights/speeches/2006/opportunity.htm](http://www.humanrights.gov.au/disability_rights/speeches/2006/opportunity.htm). An edited version of this piece appeared in the Daily Telegraph, 21 January 2006.

hardship.<sup>160</sup> HREOC understands that the government will introduce legislation in the Spring session of Parliament to incorporate this recommendation.<sup>161</sup> A similar recommendation was also made in the Final Report of the Equal Opportunity Review in Victoria.<sup>162</sup>

196. A similar shift has also occurred in United Kingdom, where employers are now under a positive duty to take appropriate reasonable steps to prevent conditions or physical barriers from having a disadvantaging impact on workers with a disability.<sup>163</sup>

197. HREOC supports the adoption of a positive duty provision in the SDA to take appropriate reasonable steps to eliminate discrimination and promote gender equality. This would improve the effectiveness of the SDA as a law which supports systemic change to achieve gender equality and would be consistent with Australia's obligations under CEDAW.

198. For example, s 24 of the *Anti-Discrimination Act* (NT) sets out a positive obligation to accommodate the special needs of a person arising due to their sex, disability or other protected 'attribute'. Section 24 provides:

A person shall not fail or refuse to accommodate a special need that another person has because of an attribute [including 'sex'].

(2) For the purposes of subsection (1) -

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<sup>160</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No 30, Vol 1, (2004), Recommendation 8.1.

<sup>161</sup> The Hon Bill Shorten MP, 'Rudd Government to improve Australia's disability discrimination system' (Press Release, 18/07/08). Copy available at: [http://www.fahcsia.gov.au/internet/billshorten.nsf/content/disability\\_discrimination\\_18jul08.htm](http://www.fahcsia.gov.au/internet/billshorten.nsf/content/disability_discrimination_18jul08.htm).

<sup>162</sup> State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008), Recommendation 43.

<sup>163</sup> *Disability Discrimination Act 1995* (UK), s 6: 'Where (a) any arrangements made by or on behalf of an employer, or (b) any physical feature of premises occupied by the employer, place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.' Section 6(3) then provides examples of the steps that should be considered: '(a) making adjustments to premises; (b) allocating some of the disabled person's duties to another person; (c) transferring him to fill an existing vacancy; (d) altering his working hours; (e) assigning him to a different place of work; (f) allowing him to be absent during working hours for rehabilitation, assessment or treatment; (g) giving him, or arranging for him to be given, training; (h) acquiring or modifying equipment; (i) modifying instructions or reference manuals; (j) modifying procedures for testing or assessment; (k) providing a reader or interpreter; (l) providing supervision.' See also *Disability Discrimination Order 2006* (Northern Ireland), s 21E(4).

- (a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and
- (b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.
- (3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to -
  - (a) the nature of the special need;
  - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
  - (c) the financial circumstances of the person;
  - (d) the disruption that accommodating the special need may cause; and
  - (e) the nature of any benefit or detriment to all persons concerned.

199. HREOC recognises that the move towards the adoption of a positive duty to eliminate discrimination and promote gender equality may require further consultation to identify the way in which a positive duty should be defined, and how it should be applied. For this reason, HREOC recommends that introduction of a general positive duty should be considered in Stage Two of reform. However, as discussed below in **Family Responsibilities**, HREOC considers that immediate steps are required in relation to establishing a positive duty on employers to reasonably accommodate the needs of workers who are pregnant or have family responsibilities or caring responsibilities.

**Option for Reform A: Positive duty to eliminate discrimination and promote gender equality (Stage Two)**

Consider inserting into the SDA a positive duty to take reasonable steps to eliminate discrimination and promote gender equality, in addition to the prohibition on discrimination.

## ***Additional issues regarding the definition of discrimination***

200. HREOC also notes that the definitions of discrimination under the SDA are arguably narrower than equivalent provisions in other Federal, State and Territory anti-discrimination statutes in the following respects:

- (a) The SDA definition of direct discrimination only applies to actual treatment but not proposed treatment.<sup>164</sup> Whilst HREOC considers that most cases of threatened or proposed discriminatory conduct would be caught under the SDA,<sup>165</sup> it is noted that a number of discrimination claims at the State level have failed because no act of discrimination had yet occurred.<sup>166</sup>
- (b) The SDA only prohibits discrimination on the basis of personally having a protected attribute, but not on the basis of an association or relationship with another person having a protected attribute or characteristic (ie. a husband being treated less favourably because his wife is pregnant).<sup>167</sup>
- (c) Several Australian jurisdictions clarify that it is not necessary for an applicant to establish that the respondent regarded the relevant treatment as unfavourable or less favourable.<sup>168</sup>

201. In the interests of national harmonisation, as well as ensuring that the SDA represents ‘best practice’ in providing the most effective means of achieving substantive equality, the current definitions of discrimination under the SDA would benefit from statutory clarification in relation to the issues set out above.

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<sup>164</sup> Compare: *Disability Discrimination Act 1992* (Cth) (s 5(1)); *Age Discrimination Act 2004* (Cth) (s 14(a)); *Discrimination Act 1991* (ACT) s 8(1)(a); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 10(1); *Equal Opportunity Act 1995* (Vic) s 8(1). The NSW Law Reform Commission recommended amending the *Anti-Discrimination Act 1977* (NSW) to also cover proposed treatment, see NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report No 92 (1999), Recommendation 4, as well as [3.45]-[3.46], [3.58].

<sup>165</sup> Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992), 45.

<sup>166</sup> See, eg, *Woods v Wollongong City Council* (1986) EOC 92-174; *Ellis v Metropolitan Transit Authority* (1987) EOC 92-207; compare *Waters v Rizkalla* [1991] VR 12.

<sup>167</sup> Compare: *Racial Discrimination Act 1975* (Cth) s 3(4); *Disability Discrimination Act 1992* ss 15-29; *Anti-Discrimination Act 1997* (NSW) s 24(1); *Anti-Discrimination Act 1992* (NT) s 19(1)(r); *Anti-Discrimination Act 1991* (Qld) s 7(p); *Anti-Discrimination Act 1998* (Tas) s 16(s); *Equal Opportunity Act 1995* (Vic) s 6(m); *Discrimination Act 1991* (1991) s 7(1)(n).

<sup>168</sup> *Anti-Discrimination Act 1992* (NT) s 20(3)(b); *Anti-Discrimination Act 1991* (Qld) s 10(2); *Anti-Discrimination Act 1998* (Tas) s 14(3)(b); *Equal Opportunity Act 1995* (Vic) s 8(2)(a).

**Recommendation 11: Proposed treatment (Stage One)**

Amend the definitions of discrimination to cover proposed treatment.

**Recommendation 12: Associate of a person (Stage One)**

Amend the definitions of discrimination to cover disadvantage suffered as a result of an association with a person with a protected attribute or characteristic.

**Recommendation 13: Unfavourable or less favourable treatment (Stage One)**

Clarify that it is not necessary for an applicant to establish that the respondent regarded the relevant treatment as unfavourable or less favourable.

## ***Equality before the law***

### **Section 10 of the RDA**

202. Section 10 of the RDA provides a general right to equality before the law, implementing Australia's obligations under article 5 of ICERD to 'guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.'

203. The purpose of s 10 is not to make acts, omissions or practices of individuals unlawful, but rather is 'concerned with the operation and effect of laws.'<sup>169</sup> To make a successful claim under s 10, the applicant must be able to show that:

- (d) by reason of a law of the Commonwealth or of a State or Territory (or a provision of the law);
- (e) persons of a particular race, colour or national or ethnic origin:
  - i. do not enjoy a right that is enjoyed by persons of another race; or

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<sup>169</sup> *Mabo v Queensland* (1988) 166 CLR 186, 230 (Deane J).

- ii. enjoy a right to a more limited extent than persons of another race.<sup>170</sup>

204. Accordingly, the applicant must be able to show that the discrimination complained of arises by reason of the terms or practical effects of a statutory provision.<sup>171</sup>

205. However, in assessing whether particular legislation limits the enjoyment of the rights of a particular racial group, the courts have acknowledged that the enjoyment of rights in most cases is not absolute, but may involve a balancing against competing rights and interests. In *Bropho v Western Australia*,<sup>172</sup> for example, the Full Federal Court held that, in applying s 10, it is necessary to recognise that some rights, such as property rights, are not absolute in their nature. Accordingly, actions that impact upon the ownership of property may not necessarily invalidly diminish the right to ownership of property. The Court held that ‘no invalid diminution of property rights occur where the State acts in order to achieve a legitimate and non-discriminatory public goal.’<sup>173</sup> The Court noted, however, that its reasoning was not ‘intended to imply that basic human rights protected by the [RDA] can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory’.<sup>174</sup>

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<sup>170</sup> *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ). See further HREOC, *Federal Discrimination Law* (2008), 35-6.

<sup>171</sup> See *Gerhardy v Brown* (1985) 159 CLR 70, 81 (Gibbs CJ), 92-93 (Mason J) and 119 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 204 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ) and 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, 98 [103] and 107 [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, [73]; *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ); *Bropho v Western Australia* [2008] FCAFC 100, [64], [73].

<sup>172</sup> [2008] FCAFC 100.

<sup>173</sup> *Ibid* [83], see generally [80]-[83].

<sup>174</sup> *Ibid* [82]. In *Bropho*, the *Reserves (Reserve 43131) Act 2003* (WA) (‘Reserves Act’) and actions taken under it were said to have limited the enjoyment of the property rights of the Aboriginal residents of the Swan Valley Nyungah Community (Reserve 43131) by, in effect, closing that community. The Court held that any interference with the property rights of residents was effected in accordance with a legitimate public purpose, namely to protect the safety and welfare of residents of the community. It therefore did not invalidly diminish the property rights of the residents.

## Application to the SDA

206. Like ICERD, CEDAW also creates an obligation on Australia to ‘accord to women equality with men before the law’.<sup>175</sup> The right to equality before the law is also enshrined in Article 26 of the ICCPR<sup>176</sup> and has recently been given domestic legislative expression in the Victorian Charter.<sup>177</sup> Indeed, the Human Rights Committee has stated:

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.<sup>178</sup>

207. It is noted that the Preamble to the SDA affirms the right to equal protection and equal benefit of the law without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy. However, the Preamble does not give rise to enforceable legal rights or obligations. It has no application to the discriminatory effects of statutory provisions. The current wording of the Preamble also fails to mention family and carer responsibilities.

208. In the interests of ensuring complete and faithful implementation of Australia’s international human rights obligations, HREOC considers that the reference to equality before the law in the Preamble of the SDA is insufficient. Rather, it may be appropriate to include the right to equality before the law within the body of the SDA by inclusion of a similar provision to s 10 of the RDA.

209. HREOC proposes that this reform be considered during stage two of the reform process, as part of harmonising federal equality laws.

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<sup>175</sup> CEDAW Art 15(1).

<sup>176</sup> ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

<sup>177</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

<sup>178</sup> HRC, General Comment 18 (Non-discrimination), [1].

**Option for Reform B: Equality before the law (Stage Two)**

Consider the merits of amending the SDA to provide equality before the law, along the lines of s 10 of the RDA or by giving binding effect to paragraph 2 of the Preamble to the SDA (including family and carer responsibilities).

## 9. Grounds of discrimination

This section is relevant to **Terms of Reference A, B, and D**.

Breastfeeding should be an expressly protected ground of unlawful discrimination.

‘Marital status’ should become ‘couple status’ and same sex couples should be included in the definition of ‘de facto’.

Extending equality protection on the grounds of sexuality and sex and gender identity would be included in the second stage reform process.

Family responsibilities is dealt with later in the Submission.

210. The SDA prohibits direct and indirect discrimination on the grounds of:

- (a) sex;<sup>179</sup>
- (b) marital status;<sup>180</sup> and
- (c) pregnancy or potential pregnancy.<sup>181</sup>

211. In addition, a limited prohibition also applies in relation to discrimination on the basis of family responsibilities.

212. Sexual harassment may also amount to sex discrimination. However, protection from sexual harassment is dealt with separately under the Act.

213. This section considers the following issues in relation to the grounds of discrimination covered under the SDA:

- (a) whether breastfeeding should be included as a separate ground of discrimination;
- (b) the need to ensure the definition of marital status does not discriminate against same sex couples; and
- (c) protection from discrimination on the grounds of sexuality or gender identity.

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<sup>179</sup> *Sex Discrimination Act 1984* (Cth), s 5.

<sup>180</sup> *Sex Discrimination Act 1984* (Cth), s 6.

<sup>181</sup> *Sex Discrimination Act 1984* (Cth), s 7.

214. The section makes several recommendations for immediate improvement. It also presents options for future reform.
215. Subsequent sections will then deal specifically with the need to expand the prohibition against discrimination on the basis of family responsibilities (see **Family Responsibilities**, below) and the adequacy of the prohibition on sexual harassment (see **Sexual Harassment**, below).

## ***Breastfeeding***

216. The SDA clarifies that breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women for the purposes of the definition of direct discrimination.<sup>182</sup> However, as noted earlier in this submission, the approach taken by the courts to the comparator element has cast doubt on the effectiveness of the characteristics extension in direct discrimination claims.
217. Whilst discrimination on the basis of breast-feeding has not featured heavily in Australian discrimination law, its current protection under the SDA is arguably unclear. Furthermore, in the interests of national harmonisation, HREOC notes that breastfeeding is protected as a separate ground in most Australian jurisdictions.<sup>183</sup> In *Pregnant and Productive (1994)*, HREOC has previously recommended that the SDA be amended to specifically cover breastfeeding as a ground of unlawful discrimination.<sup>184</sup>

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<sup>182</sup> *Sex Discrimination Act 1984* (Cth), s 5(1A).

<sup>183</sup> *Equal Opportunity Act 1995* (Vic) ss 3, 6; *Anti-Discrimination Act* (NT) ss 19, 20; *Anti-Discrimination Act 1998* (Tas) ss 16, 28; *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1991* (Qld) s 7 (but only in the area of the provision of goods and services: s 7(2)). The inclusion of breastfeeding as a separate ground has also been recommended in Western Australia: Western Australia Equal Opportunity Commission, *Review of Equal Opportunity Act 1984: Report*, (May 2007), 3, 14. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report No 92 (1999), Recommendation 31; [5.41]-[5.42].

<sup>184</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), Recommendation 43.

**Recommendation 14: Breastfeeding as a separate ground (Stage One)**

Amend the SDA to specifically prohibit discrimination on the ground of breastfeeding as a protected attribute.

***Marital status***

218. Section 6 of the SDA provides for a prohibition on discrimination on the grounds of marital status. Section 4 defines ‘marital status’ as the status or condition of being single, married, married but living separately and apart from one’s spouse, divorced, widowed, or the de facto spouse of another person.’

219. The term ‘de facto spouse’ is then also separately defined, as follows

**De facto spouse** in relation to a person, means a person of the opposite sex to the first-mentioned person who lives with the first-mentioned person as the husband or wife or that person on the bona fide domestic basis although not legally married to that person.

220. Accordingly, same-sex couples are not be protected from discrimination on the grounds of their couple status on an equal footing with couples already protected by the SDA.

221. HREOC is committed to promoting equality before the law for people regardless of sexuality, or gender identity. HREOC considers that the SDA should be amended to ensure that same-sex couples are protected from discrimination on the grounds of their couple status on an equal footing with couples currently protected under the SDA.

222. HREOC considers that this amendment would not raise any constitutional difficulties, as protection from discrimination in these areas would be reasonably capable of being considered an appropriate and adapted implementation of Australia’s treaty obligations<sup>185</sup> under CEDAW, as well as other relevant

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<sup>185</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Airlines of NSW Pty Ltd v New South Wales* (No 2) (1965) 113 CLR 54,136 (Menzies J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 130-131 (Mason J), 172 (Murphy J), 232 (Brennan J), 259 (Deane J); and *Richardson v Forestry Commission* (1988) 164 CLR 261, 288-289 (Mason CJ and Brennan J), 303 (Wilson J), 311-312 (Deane J), 336 (Toohey J) and 342 (Gaudron J)

international conventions that deal with discrimination such as the ICCPR,<sup>186</sup> and ICESCR.<sup>187</sup>

**Recommendation 15: Ensure equal protection from discrimination on the grounds of couple status for all couples (Stage One)**

Amend the SDA to replace the protected ground of ‘marital status’ with ‘couple status’ and ensure that definitions such as ‘de facto spouse’ are amended to give all couples equal protection under the SDA, including same-sex couples

### ***Sexuality, Sex Identity and Gender Identity***

223. The SDA does not include sexuality, sex identity or gender identity as prohibited grounds of discrimination.<sup>188</sup>
224. HREOC supports the principle of equality for people regardless of sexuality, sex identity or gender identity.
225. Between 2006 and 2007, HREOC conducted its *National Inquiry into Discrimination against People in Same-Sex Relationships*. The report from that inquiry, *Same-Sex: Same Entitlements (2007)*,<sup>189</sup> identified 58 laws which have operated to discriminate against people on the grounds of their sexuality in the area of financial and work-related entitlements and benefits. HREOC continues to advocate for reform to remove this discrimination. HREOC did not include protection from discrimination on the grounds of sexuality generally in the scope of that national inquiry.
226. On 8 August, the federal Human Rights Commissioner, Graeme Innes AM , launched the HREOC Sex and Gender Diversity Blog, entitled *Sex files: The*

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<sup>186</sup> See especially arts 2(1) and 26.

<sup>187</sup> See especially arts 2(2).

<sup>188</sup> Protection on the basis of sex and gender identity would address discrimination against individuals who are transgender, transsexual, intersex or sex and/or gender diverse. Full definitions of these terms can be found at Human Rights and Equal Opportunity Commission, *Sex and gender diversity: Examples of terminology used in legislation* (2008) available at [http://www.humanrights.gov.au/genderdiversity/gd\\_terminology20080805.doc](http://www.humanrights.gov.au/genderdiversity/gd_terminology20080805.doc)

<sup>189</sup> Human Rights and Equal Opportunity Commission, 'Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits' (2007).

*legal recognition of sex in documents and government records.* This online blog is providing an opportunity to consult with people of diverse sex and gender identity about key issues affecting them, including discrimination.<sup>190</sup>

227. HREOC considers that it is important that the Australian Government commit to securing legal protection from discrimination on the grounds of sexuality, or diverse sex and gender identity. However, HREOC has not conducted public consultation on the best legal method for achieving this outcome. HREOC therefore does not make recommendations about this issue. HREOC instead urges the Australian Government to include this issue in stage two of an inquiry into improving equality laws in Australia, for example, through an *Equality Act*.

**Option for Reform C: Protection from discrimination on the grounds of sexuality, sex identity and gender identity (Stage Two)**

Include consideration of securing the legal protection from discrimination on the grounds of sexuality, sex identity or gender identity as part of a stage two inquiry into improving equality laws in Australia, for example, through a federal *Equality Act*.

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<sup>190</sup> Available at <<http://www.hreoc.gov.au/genderdiversity/index.html>>.

## 10. Family responsibilities

This section addresses **Term of Reference I** of the Inquiry.

Family and carer responsibilities are inadequately protected under the SDA.

Protection should be extended to indirect discrimination, and apply to work generally.

A positive duty to reasonably accommodate pregnancy, and family and carer responsibilities should be included to build on existing case law, complement National Employment Standards, provide clarity about employer responsibilities, and equally protect men.

228. Section 7A sets out the current protection from discrimination on the ground of family responsibilities under the SDA. However, it is more limited than other grounds, in only providing protection from:

- direct discrimination; and
- dismissal (including constructive dismissal<sup>191</sup>) from employment.<sup>192</sup>

229. Family responsibilities are defined in the Act as the responsibility to care for or support a dependent child or immediate family member, being a spouse, adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee.<sup>193</sup> The definition of de facto spouse excludes a same sex partner.<sup>194</sup>

230. Section 7A was inserted into the SDA in 1992.<sup>195</sup> The context of this amendment was Australia's ratification of the International Labour Organisation *Convention*

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<sup>191</sup> *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31; *Evans v National Crime Authority* [2003] FMCA 375. See also *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [74].

<sup>192</sup> *Sex Discrimination Act 1984* (Cth), s 7A. See further HREOC, *Federal Discrimination Law* (2008), 118-20.

<sup>193</sup> Sections 4 and 4A.

<sup>194</sup> Section 4. This omission is coupled with weak protection at federal level against discrimination on the ground of sexuality under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

<sup>195</sup> Human Rights and Equal Opportunity Bill (No 2) 1992.

*(No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers and Family Responsibilities* ('ILO 156').<sup>196</sup>

231. Australia ratified ILO 156 in 1990.<sup>197</sup> Amongst other things, ILO 156 obliges Australia:

to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment;<sup>198</sup> and

with a view to creating effective equality of opportunity for men and women workers, to take measures to take account of the needs of workers with family responsibilities in terms and conditions of employment.<sup>199</sup>

232. ILO 156 has a dual purpose, to create:

[e]quality of opportunity...between men and women with family responsibilities, on the one hand, and between men and women with such responsibilities and workers without such responsibilities, on the other.<sup>200</sup>

233. The rationale for that approach was that:

[i]t was considered that full equality of opportunity and treatment for men and women could not be achieved without broader social changes, including a more equitable sharing of family responsibilities and that the excessive burden of family and household tasks still borne by women workers constituted one of the most important reasons for their continuing inequality in employment and occupation...<sup>201</sup>

234. When s 7A was inserted into the SDA in 1992, the Australian Government said the new provision was the first legislative stage in improving protection, and the second stage was to:

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<sup>196</sup> *Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983), ratified by Australia 30 March 1990.

<sup>197</sup> ILO 156 was opened for signature in 1981 and entered into force for Australia on 30 March 1990, [1991] ATS 7. Second Reading Speech to the Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 *House of Representatives Hansard* 3 November 1992, pp 2399-2400. The then Industrial Relations Act was also amended to ensure that the Australian Industrial Relations Commission took account of the family responsibilities of workers in its work.

<sup>198</sup> Article 8.

<sup>199</sup> Article 4(b). See also the Preamble and arts 3(1) and 6.

<sup>200</sup> International Labour Organization General Survey, *Workers with Family Responsibilities International Labour Conference 80<sup>th</sup> session 1993* (1993) 25.

<sup>201</sup> International Labour Organization General Survey, *Workers with Family Responsibilities International Labour Conference 80<sup>th</sup> session 1993* (1993) 25.

enter into wide ranging consultation with a view, at this point, to a further amendment to the SDA to prohibit more generally, discrimination in employment on the ground of family responsibilities... While some members of the community may be concerned that this amendment does not go far enough, I am confident that it points the way to a much broader direction being pursued by the Government, with the assistance of employees and employers.<sup>202</sup>

235. Section 7A has not since been amended.

236. Family responsibilities are also dealt with in CEDAW.<sup>203</sup> CEDAW requires governments to 'take all appropriate measures to eliminate discrimination against women in ... employment'<sup>204</sup> and to 'encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities.'<sup>205</sup>

237. The Preamble to CEDAW states that:

... the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole ...

238. The preamble also recognises:

... the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children ...

[and that] ... a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women ...<sup>206</sup>

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<sup>202</sup> Hansard, Senator McMullan, 24 November 1992, p 336). See, also, Second Reading Speech to the Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 *House of Representatives Hansard* 3 November 1992, 2399-2400 and Second Reading Speech to the Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 *Senate Hansard* 24 November 1992, 3336.

<sup>203</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), ratified by Australia 28 July 1983. The Convention is set out in the Schedule to the *Sex Discrimination Act 1984* (Cth).

<sup>204</sup> Article 11(1).

<sup>205</sup> Article 11(2)(c).

<sup>206</sup> Preamble to the *Convention on the Elimination of All Forms of Discrimination Against Women*.

239. As noted above, the family responsibilities provisions are more limited than other grounds of discrimination under the SDA in the following respects:
- family responsibilities discrimination is limited to direct discrimination on dismissal. There is no protection for discrimination during the period of employment;
  - family responsibilities discrimination is limited to employment arrangements only and does not include partnerships or other workplace arrangements; and
  - indirect discrimination is not covered.
240. The fact that the family responsibilities provision is limited to direct discrimination only has proved to be a serious restriction.<sup>207</sup> Most unfavourable treatment that people experience in the workplace because of family responsibilities is the indirect effect of inflexible workplace policies and practices. For example, requirements to work full time, overtime or rotating shifts appear to be fair because they apply to all employees equally. However, workers with family responsibilities will often be disadvantaged by them, for example, by being unable to apply for promotion to a position if it requires overtime.
241. As a result of these limitations, there are relatively few complaints under these provisions of the SDA.<sup>208</sup>
242. Many women complainants use the sex and pregnancy discrimination provisions of the SDA to pursue allegations of workplace failure to accommodate family responsibilities rather than relying on the limited family responsibilities provisions. In particular, the indirect sex and pregnancy discrimination provisions of the SDA have proved useful to complainants. In a number of cases

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<sup>207</sup> Like other direct discrimination provisions, there is a requirement that a comparison be made between the treatment of the person alleging discrimination and the way another person without the relevant characteristic, in this case, family responsibilities, is treated or would be treated in the same or similar circumstances. This is referred to as the comparator element. For discrimination to be made out, there must have been less favourable treatment accorded to the person alleging discrimination than their comparator would have received. In addition, as with other direct discrimination provisions, a test of causality between the less favourable treatment and the ground of discrimination applies. See John von Doussa QC and Craig Lenehan, 'Barbequed or Burned? Flexibility in work arrangements and the Sex Discrimination Act' (2004) 10(2) *SWLJ Forum: The Sex Discrimination Act - A Twenty Year Review* 45.

<sup>208</sup> Please see section, **Complaint Handling**, below.

requests for part time work have been considered in the context of the definition of indirect sex discrimination.<sup>209</sup>

243. Despite the fact that the family responsibilities provisions of the SDA are equally available to both men and women, men have not generally made use of them.<sup>210</sup>
244. However, as explained later in this submission, certain restrictions apply to men in their use of some provisions of the SDA (see **Coverage**, below). Men are unable to access the indirect sex discrimination provisions to address discrimination on the basis of their family responsibilities, as women have done. This is because men cannot argue, as women have, that *as a sex* they are more likely to take on family care obligations and that less favourable treatment because of family responsibilities is therefore attributable to their sex. Men have not traditionally had primary responsibility for caring work, and so could not argue that such responsibilities were associated with being a man.<sup>211</sup>
245. This in effect restricts men's abilities to seek assistance under the SDA. This is of particular concern in light of the SDA's broader objective of promoting gender equality. The application of the indirect sex discrimination provisions in these cases may, by protecting women but not men, actually serve to entrench traditional domestic arrangements as the responsibility of women and discourage a more equal sharing of caring and domestic work. This in turn may limit women's workforce participation.
246. Equal use of family friendly work arrangements by men and women is important in promoting gender equality. The protection that currently exists under the SDA for men is an obstacle to achieving this objective.
247. In HREOC's view, the family responsibilities provisions of the SDA provide insufficient protection for men and women workers with family responsibilities, and a limited platform to support and promote systemic change.

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<sup>209</sup> *Hickie v Hunt & Hunt* [1998] HREOCA (extract at (1998) EOC 92-910) and *Escobar v Rainbow Printing* (No 2) [2002] FMCA 122.

<sup>210</sup> Please see section, **Complaint Handling**, below.

<sup>211</sup> In addition, to avoid problems of constitutional validity, ss 9(2) and 9(4) make clear that the *Sex Discrimination Act 1984* (Cth) has effect only by the operation of s 9(3) and ss 9(5) to (20), which reflect relevant heads of Commonwealth legislative power. See discussion above at [cross reference].

## **HREOC's *It's About Time* (2007) findings**

248. HREOC has undertaken extensive work on the importance of improving support for women and men to balance paid work and family responsibilities.
249. A key focus of HREOC's Women, Men, Work and Family Project was an examination of how the SDA operates to support people to balance paid work and family responsibilities and whether any law reform was necessary.<sup>212</sup>
250. One of the key findings of HREOC's 2007 *It's About Time: Women, Men, Work and Family* final paper ('*It's About Time* (2007)') was the need for expansion of the family responsibilities provisions of the SDA in order to better support men and women workers with family and carer responsibilities across the life cycle.
251. Another key finding of *It's About Time* (2007) was that this failure of the federal anti-discrimination framework to provide adequate coverage for workers with family responsibilities does not work well for women and effectively locks men into what has been termed the 'ideal worker' model of working life.<sup>213</sup>
252. The 'ideal worker' norm refers to a traditional male breadwinner pattern of continuous full time work with no recognition of caring responsibilities.<sup>214</sup> Together with inflexible workplace structures and family-hostile workplace cultures, this model maintains the status quo whereby women remain

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<sup>212</sup> *Striking the Balance: Women, Men, Work and Family* discussion paper (2005) Chapter 7 and *It's About Time: Women, Men, Work and Family* final paper (2007) Chapter 3.

<sup>213</sup> This issue was raised in the case of *Howe v Qantas* [2004] FMCA 242. In this case, a woman complained of family responsibilities and indirect sex discrimination, arguing that inflexible working conditions conflicted with her caring responsibilities. The respondent argued that allowing women to claim discrimination on the basis of sex by reason of family responsibilities is to entrench gendered stereotypes that women are the natural primary carers. The Sex Discrimination Commissioner, participating in that case, argued that so long as family responsibilities are not equally shared between the sexes and overwhelmingly devolve upon women, a claim for indirect sex discrimination under the *Sex Discrimination Act 1984* (Cth) is and should remain available to women. The Commissioner accepted that there will be no relevant "disadvantage" (under the indirect sex discrimination provisions of the *Sex Discrimination Act 1984* (Cth)) when the unequal sharing of family responsibilities is addressed. However, until that time, women will continue to be disadvantaged by family responsibilities as compared to men and a claim for indirect sex discrimination under the *Sex Discrimination Act 1984* (Cth) is and should remain available to prevent this inequality between the sexes within the family from restricting women's possibilities of preparing for, entering, participating in or advancing in economic activity. See also International Labour Organization General Survey, *Workers with Family Responsibilities International Labour Conference 80<sup>th</sup> session 1993* (1993) 29.

<sup>214</sup> See Joan Williams *Unbending Gender: Why work and family conflict and what to do about it* (2000) 2. See also HREOC, *Striking the Balance: Women, men, work and family* (2005) 59 and *passim*.

disproportionately responsible for family responsibilities and as a consequence remain disadvantaged in the workplace relative to men.

253. This historical model of working life is at odds with the work and family preferences of the majority of Australian families. As reported in *It's About Time* (2007) and confirmed in *Listening Tour Community Report* (2008), HREOC has found that many men and women workers with family responsibilities want to share the care of children and other dependents more equally. However, they face a number of barriers to doing so.
254. One of the major barriers for men with family responsibilities that HREOC has identified is a lack of support within workplaces either in terms of lack of access to family-friendly policies such as flexible working arrangements and paid paternity leave, or where there is access to such policies, family-hostile workplace cultures prevent their take up.<sup>215</sup>
255. As was the case in 1984 when the SDA was introduced, women in Australia continue to experience workplace disadvantage despite a gradual increase in workforce participation over time. Pay inequity, occupational segregation in low paid, undervalued work and women's under-representation in leadership and senior decision-making positions are ongoing policy challenges with harsh effects on women's daily lives.<sup>216</sup> Workforce inequities such as these all impact on the capacity of women to balance their paid work with their family responsibilities.
256. Despite the overall increase in women's workforce participation over time, with women's labour market participation rate now 58.4 per cent,<sup>217</sup> mothers' workforce participation continues to be low by international standards. The employment rates for Australian women with children, particularly those where the youngest child is under six years of age, are low by comparison with other OECD countries. The employment rate of mothers with a youngest child under

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<sup>215</sup> See HREOC, *It's About Time: Women, men, work and family* (2007).

<sup>216</sup> See HREOC, *It's About Time* (2007) Chapter 2 and Chapter 4. HREOC heard many stories about the impact of these aspects of working life on the Sex Discrimination Commissioner's recent national Listening Tour: HREOC, *Listening Tour Community Report* (2008). See Gender Equality in Australia: the state of the nation, above.

<sup>217</sup> ABS, *Labour Force, Australia* Cat No 6202.0 April 2008 (2008) 6.

six years of age is 49.6 per cent, compared with the OECD average of 59.2 per cent.<sup>218</sup>

257. Women's continuing workforce disadvantage due to their maternal role underscores the need for improved legislative protection against discrimination, particularly given that the working population is ageing and more and more women in particular will be combining child rearing and elder care with paid work.<sup>219</sup>
258. Legislation prohibiting discrimination is not the only answer to these problems. HREOC acknowledged this when it made 45 wide-ranging recommendations across a range of policy and program areas in *It's About Time* (2007) in order to better support men and women workers with family responsibilities.
259. However the legislative framework is a crucial plank of the support that men and women workers with family responsibilities need to achieve equality in the workforce.
260. Discrimination and equality legislation serves a dual purpose in this respect. First, laws provide a legal avenue for redress for discriminatory acts and practices. Second, discrimination laws promote principles of non-discrimination as they are a public policy statement of the right to equality. As Belinda Smith has noted, anti-discrimination laws promote 'non-discrimination through the persuasive, normative power of a legislated, public policy statement of the right to equality.'<sup>220</sup>
261. Further, limiting family responsibilities discrimination to direct discrimination the SDA 'fails to address the primary forms of family responsibilities discrimination which are structural and systemic (which indirect discrimination prohibitions better address), rather than individual and blatant (which direct discrimination prohibitions best address)'.<sup>221</sup>

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<sup>218</sup> ABS, *Australian Social Trends*, 2007 Cat No 4102.0 (2007).

<sup>219</sup> The Australian Institute of Health and Welfare anticipates there will be at least around 600,000 primary carers by 2013, with 70 per cent likely to be women: AIHW, *Carers in Australia: assisting frail older people and people with a disability* (2004). For an extensive discussion on this point see HREOC, *Striking the Balance* (2005) Chapter 4 and Chapter 6 and HREOC, *It's About Time* (2007) 173-179.

<sup>220</sup> Belinda Smith, cited in Human Rights and Equal Opportunity Commission, *It's About Time* (2007) 53.

<sup>221</sup> Belinda Smith, Submission 106.

262. Drawing on evidence collected for *It's About Time* (2007), HREOC recommended the expansion of the family responsibilities provisions to broaden its coverage to all forms of family and carer responsibilities across the life cycle and in all aspects of employment.
263. In *It's About Time* (2007) HREOC recommended that this expansion could be implemented through a separate specialised piece of legislation called a *Family Responsibilities and Carers' Rights Act* ('FRCRA'). It was also proposed that the FRCRA include a right to request flexible work arrangements.
264. HREOC's argument was that family responsibilities discrimination is distinct from sex discrimination and that it warrants its own legislative framework. Further, to include expanded family responsibilities protection in the SDA could serve to entrench the idea that caring is women's work and thereby mitigate against the achievement of substantive gender equality.
265. As a separate Act, *It's About Time* (2007) proposed that the FRCRA would expressly encompass both men and women with family responsibilities. Such a specialised piece of legislation would assist in overcoming gendered stereotypes around caring, and be more accessible to men. These broader objectives were less likely to be achieved if the family responsibilities provisions were extended within the SDA.
266. As Dr Charlesworth argued in her submission to HREOC, broadening the family responsibilities provisions within a framework that better assists men would have an important influence on equality between men and women within the workplace and the home as it would challenge the notion of the 'ideal worker' as one unencumbered by family responsibilities.<sup>222</sup> Broader provisions would not only mean greater access to redress for family responsibilities discrimination by men, it would also influence what both employees and employers consider to be discrimination and potentially have a flow on effect to gendered divisions of unpaid work.<sup>223</sup> If a specialised equality law, such as the FRCRA was enacted, it could mirror other HREOC legislation by requiring HREOC to conduct relevant

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<sup>222</sup> Sara Charlesworth, Submission 98, 9-13.

<sup>223</sup> See Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, disappointments, disillusionments and alternatives' in *Women, Work and Equity Forum* University of Sydney, Sydney 1 August 2004, cited in Sara Charlesworth, Submission 98, 13.

educative, research and policy work, and extend *amicus curiae* and intervention functions to a Commissioner.<sup>224</sup>

267. Since the release of *It's About Time (2007)*, the new Australian Government has now incorporated a 'right to request flexible work arrangements' in its *National Employment Standards* ('NES')

268. HREOC reiterates its view that protection from discrimination on the grounds of family and carer responsibilities needs to be extended. The question arises as to how best to achieve this in light of the new NES and the present inquiry into the SDA.

### ***Extending protection from discrimination under the SDA***

269. HREOC considers that the SDA should be amended as soon as possible to ensure that all forms of discrimination on the grounds of family and carer responsibilities<sup>225</sup> are unlawful. The amendment should:

- make unlawful discriminatory treatment *in all aspects of work*, rather than restricting protection to discriminatory treatment in employment that results in dismissal.<sup>226</sup>
- make unlawful *indirect* family and carer responsibilities discrimination.<sup>227</sup>

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<sup>224</sup> The constitutional basis and the objectives of this new Act could be drawn from CEDAW, ILO 156, the *Convention on the Rights of the Child* and potentially, the *Convention on the Rights of Persons with Disabilities*.

<sup>225</sup> In this submission the term 'family and carer responsibilities' is used to encompass the full range of unpaid/informal care responsibilities that families and workers undertake across the life course. It is clear from HREOC's consultations with the public that 'family responsibilities' are often assumed to refer exclusively to the care of children. Similarly, the term 'carer responsibilities' is often understood as referring only to the care of older people or people with disability. For clarity, HREOC proposes the use of the inclusive term 'family and carer responsibilities'. The exact scope of the types of family and carer responsibilities would need to be defined.

<sup>226</sup> A number of submissions to HREOC supported this change, which would bring the family responsibilities provisions into line with other areas of discrimination under the *Sex Discrimination Act 1984 (Cth)*: Job Watch Inc, Submission 38, 6-7; NSW Equal Employment Opportunity Practitioners' Association, Submission 44, 3-5; K Lee Adams, Submission 70; Sara Charlesworth, Submission 98, 11; Belinda Smith, Submission 106; Women Lawyers' Association of NSW, Submission 112, 8; Australian Capital Territory Human Rights Office, Northern Territory Anti-Discrimination Commission, Anti-Discrimination Commission Queensland, Equal Opportunity Commission Western Australia and Equal Opportunity Commission of South Australia, Submission 117, 12; Law Institute of Victoria, Submission 120; Equal Opportunity Commission Victoria, Submission 125, 9 and 10.

- extend the definition of family responsibilities to include *family and carer responsibilities*, to remove discrimination against people on the grounds of their sexuality, and provide a definition of family members and dependents which ensures adequate cover for both children and adults to whom care is being provided.<sup>228</sup>

270. As discussed below (see **Coverage**), HREOC is also proposing that the SDA be amended to ensure its provisions apply equally to both women and men.

271. This reform may not address the concern that inclusion of family and carer responsibilities in the SDA may entrench the perception that family and carer responsibilities is a ‘women’s issue’ rather than an issue of equality for workers. However, it would significantly improve current protections for both women and men in line with Australia’s responsibilities under ILO 156, as was the intention of parliament in 1992, subject to ensuring that the coverage of the SDA for men is as expansive as is constitutionally feasible.

272. In a stage two inquiry about federal equality laws, the Australian Government could then either insert family and carer responsibilities as a distinct protected ground under a federal *Equality Act*, or give consideration to a specialised piece of legislation, such as the FRCRA, proposed in *It’s About Time (2007)*.

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<sup>227</sup> A number of submissions to HREOC supported this change: Belinda Smith, Submission 106; Bronwen Burfitt, Submission 107, 21 and 22; Women Lawyers’ Association of NSW, Submission 112, 7; Women’s Electoral Lobby, Submission 115, 14; Australian Capital Territory Human Rights Office, Northern Territory Anti-Discrimination Commission, Anti-Discrimination Commission Queensland, Equal Opportunity Commission Western Australia and Equal Opportunity Commission of South Australia, Submission 117, 12; Equal Opportunity Commission Victoria, Submission 125, 9 and 10; Queensland Government, Submission 166, 47.

<sup>228</sup> Submissions to *It’s About Time (2007)* advocated the extension of ‘family responsibilities’ protection to all workers with carer responsibilities. See, for example, Women Lawyers Association of New South Wales, Submission 112, 9-10. This would provide protection to workers based on the nature of their responsibilities rather than the more arbitrary nature of their relationship to the person requiring care.

**Recommendation 16: Extend family and carer responsibilities protection under the SDA (Stage One)**

(1) Make direct and indirect family and carer responsibilities discrimination unlawful in all areas covered by Part II Div 1.

(2) Extend the definition of family responsibilities to include family and carer responsibilities, to include same-sex families, and provide a definition of family members and dependents which ensures adequate cover for both children and adults to whom care is being provided.

**Option for Reform D: Include family and carer responsibilities as a specified ground in a potential Equality Act, or enact specialised legislation (Stage Two)**

If an *Equality Act* is adopted, insert family and carer responsibilities as a specified protected ground. Alternatively, a specialised piece of federal equality legislation could be enacted, as recommended in *It's About Time (2007)*.

***Positive duty to reasonably accommodate family and carer responsibilities***

273. As noted above, the new NES, due to become operational by 2010, have introduced a right to request flexible working arrangements into the industrial relations system.<sup>229</sup>

274. A right to request flexible work arrangements is a form of positive obligation to promote gender equality, in the specific area of family responsibilities (Positive obligations to eliminate discrimination and promote gender equality are discussed in general terms above, under **Definitions of Discrimination**).

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<sup>229</sup> Australian Government, *The National Employment Standards*, available at <[http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper\\_web.pdf](http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper_web.pdf)>. See especially s 22 relating to requests for extensions of parental leave and s 13 relating to requests for flexible working arrangements.

275. Similar to the current trend in the area of disability discrimination, there has been a sustained push for the introduction of obligations to make reasonable adjustments in other areas of discrimination, including family and carer responsibilities.
276. For example, the decision of the Australian Industrial Relations Commission in the *Family Provisions Test Case* established the right of workers under a relevant federal award to request flexible work arrangements to accommodate their family responsibilities. Employers bound by such awards are required to consider such a request and only refuse 'on reasonable grounds related to the effect on the workplace or the employer's business'.<sup>230</sup>
277. However, the impact of the *Family Provisions Test Case* was blunted by the limited number of awards to which it applied.
278. Whilst the new *National Employment Standard* is a positive development, it is insufficient to address the needs of workers with family responsibilities in a number of respects.<sup>231</sup> In particular, the right to request is confined to children under school age, does not apply to workers unless they have at least 12 months continuous service and also, in the case of casual workers, a reasonable expectation of continuing employment. Regrettably, these limitations disproportionately impact on employment categories dominated by women with family responsibilities. As Sara Charlesworth and Iain Campbell observe:

This qualification requirement will exclude many of the working parents of pre school age children who are most likely to make requests. In 2006 for example, 21 percent of working women of child bearing age (25-44 years) and 44 percent of women employed on a casual basis had less than 12 months service with their current employer.<sup>232</sup>

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<sup>230</sup> *Parental Leave Test Case 2005* (2005) 143 IR 245, [396].

<sup>231</sup> See, further, Human Rights and Equal Opportunity Commission, 'Submission to the Australian Government Department of Education, Employment and Workplace Relations on the Discussion Paper, National Employment Standards Exposure Draft' (2008), available at [http://www.humanrights.gov.au/legal/submissions/2008/20080404\\_deewr.html](http://www.humanrights.gov.au/legal/submissions/2008/20080404_deewr.html).

See also Belinda Smith, 'It's About Time – for a New Regulatory Approach to Equality' (2008) *Federal Law Review* (forthcoming) (also available at <http://ssrn.com/abstract=1101187>), 14-5.

<sup>232</sup> Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21(2) *Australian Journal of Labour Law* 116, 5. The authors also provide a detailed comparative assessment of Australia's 'right to request' protection compared with equivalent provisions in Europe, and articulate an optimal model for reform in this area.

279. HREOC has also jointly commissioned recent research which shows that parents with children of school age nominate greater flexibility in paid work as a priority for providing better support in balancing their paid work and family responsibilities.<sup>233</sup>
280. HREOC has previously made recommendations to the Australian Government about ways in which the *National Employment Standard* could be expanded to better implement international obligations and be more effective in supporting women and men to secure flexible work arrangements to balance their paid work and family and carer responsibilities across the life cycle.<sup>234</sup> These recommendations were not adopted.
281. Accordingly, notwithstanding the promising potential of the relevant NES in assisting workers with family responsibilities, they are an incomplete solution. Scope remains for the SDA to supplement the NES by making the ‘unreasonable refusal’ of requests for flexible work arrangements an actionable form of unlawful discrimination.
282. HREOC considers that the SDA be amended to include a positive duty on employers (and other relevant respondents) to reasonably accommodate the needs of their workers in relation to pregnancy and family and carer responsibilities, including an obligation to not ‘unreasonably refuse’ requests for flexible work arrangements.
283. The move towards an obligation within anti-discrimination legislation to reasonably accommodate workers with family responsibilities has already taken place in Victoria.<sup>235</sup> From 1 September 2008, employers, principals and partnerships are under an obligation to not ‘unreasonably refuse’ to accommodate the responsibilities that a person has as a parent or carer.<sup>236</sup> The failure to comply with this obligation constitutes a new and discrete form of unlawful

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<sup>233</sup> Newpoll, *Out of School Hours Care Study* (2008). Study jointly commissioned by National Foundation of Australian Women, The WomenSpeak Network, Security for Women, Women’s Information and Referral (Vic), Network of Community Activities (NSW), Queensland Children’s Activities Network and Human Rights and Equal Opportunity Commission.

<sup>234</sup> Human Rights and Equal Opportunity Commission, ‘Submission to the Australian Government Department of Education, Employment and Workplace Relations on the Discussion Paper, National Employment Standards Exposure Draft’ (2008).

<sup>235</sup> *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic).

<sup>236</sup> *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic), ss 13A(1), 14A(1), 15A(1), 31A(1).

discrimination.<sup>237</sup> The Act also provides detailed guidance on the facts and circumstances to be taken into account when assessing the reasonableness of an employer's refusal.<sup>238</sup>

284. Whilst the Victorian model is by no means a complete solution to the issues surrounding family responsibilities and work/life balance, it is a positive development. In particular, the amendments shift the emphasis away from individuals to justify their need for reasonable adjustments and on to employers to justify their refusal to make such adjustments. As Belinda Smith observes, the new Victorian model

reflects a shift in thinking about family responsibilities away from formal equality and toward substantive equality. Rather than merely requiring all workers to be treated the same regardless of their circumstances, the duty requires employers to reasonably accommodate the specific needs of workers with family responsibilities in order to promote substantive equality. Thus, it is akin to a duty to reasonably accommodate, although limited to the specific issue of flexible work arrangements.<sup>239</sup>

285. Similarly, HREOC notes that the NSW Law Reform Commission recommended in 1999 that the *Anti-Discrimination Act 1977* (NSW) be amended to introduce an obligation to take reasonable steps to accommodate the needs of women who are pregnant, potentially pregnant or breastfeeding, as well as the needs of persons with carer or family responsibilities, subject to a defence of unjustifiable hardship.<sup>240</sup>

286. A positive duty obligation would not involve a substantial change from the current system under the SDA. At present, as noted earlier, the practical effect of the prohibition against indirect discrimination translates into a prohibition against the unreasonable imposition of barriers that disadvantage, for example,

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<sup>237</sup> *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic), s 6.

<sup>238</sup> *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic), ss 13A(2), 14A(2), 15A(2), 31A(2).

<sup>239</sup> Belinda Smith, 'It's About Time – for a New Regulatory Approach to Equality' (2008) *Federal Law Review* (forthcoming) (also available at <http://ssrn.com/abstract=1101187>), 13.

<sup>240</sup> See further NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report No 92 (1999), [3.65]-[3.85], [5.40], [5.212]-[5.217].

women with family responsibilities.<sup>241</sup> In this respect, the imposition of a positive obligation on an employer (and other would-be respondents) to reasonably accommodate the needs of workers who are pregnant or have family responsibilities would involve a subtle re-positioning of the SDA, rather than a dramatic change.

287. Nevertheless, the change is an important one. Firstly, the current obligation is merely implied and may not be immediately apparent to employers and others unless they or their advisers have considerable experience in the operation of the SDA. By making the obligation clear and mandatory, respondents are therefore on clear notice of what they are required to do, rather than having to fathom their obligations from the case law.

288. Secondly, repositioning the obligation as a positive duty is an important statement of principle that employers must actually take steps to redress discrimination. It is a clear call to action, rather than a muffled warning that doing nothing carries a liability risk.

289. Thirdly, reliance on the indirect discrimination provisions will not assist men with family responsibilities, given that indirect discrimination on the basis of family responsibilities is not presently unlawful and the authorities clearly establish that women bear the dominant burden of family responsibilities.<sup>242</sup>

290. Fourthly, cases such as *Kelly v TPG Internet Pty Ltd*<sup>243</sup>, have cast doubt on the effectiveness of the indirect discrimination route for claims relating to flexible work arrangements and family responsibilities.<sup>244</sup> As discussed earlier, Raphael FM held that employees did not have a right to request part-time employment, which his Honour regarded as a ‘benefit’ which employers were entitled to refuse.<sup>245</sup>

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<sup>241</sup> See, eg, *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Escobar v Rainbow Printing Pty Ltd (No 3)* [2002] FMC 122; *Mayer v ANSTO* [2003] FMCA 209.

<sup>242</sup> See, eg, *Hickie v Hunt & Hunt #*; *Escobar #*; *Mayer v ANSTO* [2003] FMCA 209. See further Belinda Smith and Joellen Riley, ‘Family-friendly Work Practices and The Law’ (2004) 26 *Sydney Law Review* 395, 417.

<sup>243</sup> (2003) 176 FLR 214.

<sup>244</sup> See further Belinda Smith, ‘It’s About Time – for a New Regulatory Approach to Equality’ (2008) *Federal Law Review* (forthcoming) (also available at <http://ssrn.com/abstract=1101187>), 11-2.

<sup>245</sup> (2003) 176 FLR 214, 234 [82]. For criticism of the reasoning in *Kelly v TPG*, see *Howe v Qantas Airways Ltd* (2004) 188 FLR 1, [119]-[129]. See also Sharan Burrow, ‘An Unequal World’ (2004) 27 (3) *University of New South Wales Law Journal* 884, 889-90; Craig Lenehan and John Von Doussa,

291. HREOC recommends that consideration be given to amending the SDA along similar lines to the Victorian model discussed above, to introduce an obligation on employers, partnerships and principals (and possibly other appropriate categories of respondents) to make reasonable adjustments, or to not unreasonably refuse requests for adjustments, to accommodate the needs of workers who are pregnant or have family responsibilities.
292. Consideration would also be required as to whether an unjustifiable hardship defence would also be necessary, or whether the issues relevant to such a defence would be already accommodated within the limitation that requests for adjustments or accommodation must be reasonable.

**Recommendation 17: Positive duty to reasonably accommodate the needs of workers who are pregnant and/or have family or carer responsibilities (Stage One)**

Introduce a positive obligation on employers and other appropriate persons to reasonably accommodate the needs of workers in relation to their pregnancy or family and carer responsibilities. Failure to meet this obligation would be an actionable form of discrimination.

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‘Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act’ (2004) 27 (3) *University of New South Wales Law Journal* 892, 902-3; Belinda Smith and Joellen Riley, ‘Family-friendly Work Practices and The Law’ (2004) 26 *Sydney Law Review* 395, 414

## 11. Coverage of the SDA

This section is relevant to **Terms of Reference A, B, and N.**

There is a range of areas in which current coverage is too limited under the SDA (including in relation to states and state instrumentalities, men, volunteers and unpaid workers, independent contractors, personal liability of employers, partnerships, statutory appointees, judges, members of parliament, the provision of goods, services and facilities, and the administrations of Commonwealth laws and programs)

In relation to sexual harassment, there are specific problems over coverage about goods, services and facilities, and education

These problems should be fixed

Consideration should be given in stage two of a reform process to inserting a general prohibition on discrimination in all areas of public life.

293. The coverage of the SDA is confined to particular areas of public life, such as employment, education and the provision of goods, services and facilities. This section considers the following issues relevant to this coverage:

- (a) the benefits of incorporating a free-standing prohibition against discrimination and sexual harassment in all areas of public life and a general guarantee of equality before the law, as is the case under the RDA;
- (b) the need to expand the coverage of the SDA in relation to discrimination and sexual harassment:
  - i. by and against States and State instrumentalities and their employees;
  - ii. against men; and
  - iii. against independent contractors,

- (c) potential ways of enhancing the existing provisions that identify particular areas of public life for protection; and
- (d) the need to expand s 105 (ancillary/accessory liability) to include any act that is unlawful under the SDA, including sexual harassment or victimisation.

### ***A free-standing prohibition***

294. The existing SDA model carves out only selected areas of public life for protection against discrimination. As many commentators have noted, this approach represents an incomplete incorporation of Australia's obligations under CEDAW.<sup>246</sup> Article 1 of CEDAW introduces a free-standing prohibition against discrimination in the enjoyment or exercise by women of all 'human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' Accordingly, the scope of CEDAW is not confined to specific areas of public life, but operates more generally.

295. The language of Article 1 of CEDAW follows closely the equivalent Article 1(1) of ICERD, which finds expression in s 9 of the RDA. Similar with the SDA, the RDA identifies particular areas of public life in which racial discrimination is made unlawful.<sup>247</sup> However, the RDA operates more broadly, by also containing a free-standing prohibition in s 9 against racial discrimination in **all** areas of public life.<sup>248</sup> In this respect, the RDA is a more complete and faithful implementation of Australia's international obligations in relation to prohibiting discrimination.

296. CEDAW, as well as the ICCPR and ICESCR, imposes an obligation on states parties to take appropriate and positive steps to ensure that individuals who have

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<sup>246</sup> See further K Guest, *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* (30 March 1999, Research Paper 16, 1998-99, Law and Bills Digest Group); Hilary Charlesworth and Sarah Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 27 (3) *University of New South Wales Law Journal* 858; Sara Charlesworth, 'Understandings of Sex Discrimination in the Workplace: Limits and Possibilities' (Speech delivered at the Clare Burton Memorial Lecture, RMIT University, 2007), 2-3; Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), [3.2].

<sup>247</sup> *Racial Discrimination Act 1975* (Cth) ss 11-16.

<sup>248</sup> The specific provisions do not limit the generality of s 9: *Racial Discrimination Act 1975* (Cth) s 9(4). See further *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ).

been discriminated against have access to an effective remedy.<sup>249</sup> Indeed, the Human Rights Committee has stated that the failure to provide an effective remedy is itself a breach of a person's human rights.<sup>250</sup> HREOC considers that when individuals have been discriminated against in circumstances in which CEDAW (and other relevant international conventions) applies, they should be entitled to an effective remedy. The patchwork approach under the SDA therefore represents an incomplete implementation of Australia's obligations under CEDAW, by allowing applicants to potentially fall between the cracks due to drafting complexities in the relevant areas of public life carved out for protection.

297. For the above reasons, HREOC considers that the inclusion of a free-standing prohibition against discrimination, along the lines of s 9 of the RDA, may be required to ensure compliance with Australia's obligations under CEDAW. HREOC also notes that the experience under the RDA has not shown this to present impracticalities or excessive burdens on the community.

298. Furthermore, HREOC is of the view that a blanket prohibition against discrimination in all areas of public life could represent an important statement of principle. It would make clear that discrimination offends against fundamental human rights in any area of public life and should not be tolerated. This point was noted by both the ALRC and the House of Representatives Standing Committee on Legal and Constitutional Affairs in their respective reviews of the SDA, which each recommended enactment of a free-standing prohibition against sex discrimination along similar lines as the RDA.<sup>251</sup>

299. A blanket prohibition against discrimination in all areas of public life would also make the SDA clearer and simpler. It would minimise the need for complex litigation in interpreting the various provisions giving coverage to specific areas

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<sup>249</sup> CEDAW art 2; ICCPR art 2(3); and ICESCR art 2.

<sup>250</sup> Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [15]-[17].

<sup>251</sup> Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), Recommendation 3.1; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992), Recommendation 60. For example, the Committee noted (at 260 [10.3.7]): 'As discrimination against an individual on the basis of race or sex should be regarded as a contravention of a basic right, the Committee believes that it is desirable to bring the Sex Discrimination Act in line with the general prohibition contained in the Racial Discrimination Act'.

of public life. Rather, the general prohibition would operate largely as a ‘catch-all’ provision.

300. HREOC proposes that these reforms be considered in stage two of the reform process, in conjunction with reviewing all permanent exemptions under the SDA (see **Exemptions**, below).
301. As noted in the section on **Sexual Harassment**, the comments set out above apply equally to the prohibition against sexual harassment under the SDA, which is also confined to particular areas of public life.

**Option for Reform E: Protection from discrimination in any area of public life (Stage Two)**

Consider the merits of amending the SDA to include a general prohibition against discrimination in all areas of public life, along the lines of s 9 of the RDA.

### ***States and State Instrumentalities***

302. Pursuant to s 12(1), the SDA does not bind the Crown in right of a State unless expressly provided. The prohibitions against discrimination in employment (in s 14) and sexual harassment (in Division 3) do not expressly provide that they bind the Crown in right of a State.
303. Section 13(1) also provides that the prohibition against discrimination in employment does not apply in relation to employment by an instrumentality of a State. Likewise, s 13(2) provides that the prohibition against sexual harassment does not apply to an act done by an employee of a State or State instrumentality.
304. The combined effect of the above provisions is that the prohibitions against discrimination in employment and sexual harassment do not bind the States or State instrumentalities (or their employees). HREOC notes that the definition of State under the SDA includes the ACT and Northern Territory.<sup>252</sup> HREOC also

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<sup>252</sup> *Sex Discrimination Act 1984* (Cth), s 4(1).

notes that the scope of the term ‘instrumentality of a State’ is potentially very broad.<sup>253</sup>

305. Whilst an aggrieved person remains at liberty to pursue a claim against a State or State instrumentality in the relevant State-based jurisdiction, this may be insufficient in some cases. For example, most State tribunals are:

- d. subject to a jurisdictional limit, such as the \$40,000 damages cap in the NSW Anti-Discrimination Tribunal; and
- e. no-costs jurisdictions, which may be a disincentive for applicants likely to incur significant legal costs in pursuing a strong claim.

306. In addition, the anti-discrimination legislation in the relevant State may provide less protection than under the SDA in material respects. For example, the vicarious liability provisions are broader and less onerous for applicants under the SDA compared with most of the States.<sup>254</sup> Indeed, the ACT legislation does not include vicarious liability provisions at all. Furthermore, unlike the SDA, the onus to prove unreasonableness in indirect discrimination claims rests with the applicant in most State legislation.<sup>255</sup> Moreover, whilst the SDA requires that a protected attribute or characteristic need only be a reason for the relevant conduct, even if not the dominant or a substantial reason, the legislation in Victoria, South Australia and Queensland is more difficult for applicants by requiring that the relevant ground is a substantial reason for the doing of the act.<sup>256</sup>

307. The existing exclusion of States and State instrumentalities is also inconsistent with Australia’s international human rights obligations to ensure protection of CEDAW rights (and other relevant convention rights) to **all** peoples of Australia. HREOC notes that the CEDAW Committee has already expressed its concern about the inadequacy of CEDAW protection throughout the States and

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<sup>253</sup> See Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It’s a right not a privilege to work while pregnancy* (1999), [5.42]-[5.44].

<sup>254</sup> Brook Hely, ‘Open All Hours: Vicarious Liability for ‘Off-Duty’ Sexual Harassment’ (2008) *Federal Law Review* (forthcoming).

<sup>255</sup> See, eg, *Equal Opportunity Act 1995* (Vic) s 9; *Equal Opportunity Act 1984* (WA) s 8(2); *Anti-Discrimination Act 1991* (Qld) s 11; *Anti-Discrimination Act 1977* (NSW) s 24(1(b)); *Equal Opportunity Act 1984* (SA) s 29(2); *Anti-Discrimination Act 1998* (Tas) s 15; *Anti*

<sup>256</sup> *Equal Opportunity Act 1995* (Vic) s 8(2); *Equal Opportunity Act 1984* (SA) s 6(2); *Anti-Discrimination Act 1991* (Qld) s 10(4).

Territories despite the Federal government's capacity to legislate nationally to provide such coverage.<sup>257</sup>

308. In *Equality Before the Law (1994)*, the ALRC recommended that the exemption for the States be repealed,<sup>258</sup> on the basis that:

Women in all parts of Australia should have access to the same levels of protection against discrimination and sexual harassment.<sup>259</sup>

309. Likewise, the House of Representatives Standing Committee on Legal and Constitutional Affairs in *Halfway to Equal (1992)* concluded:

Whilst this exclusion may have been seen as politically necessary when the legislation was introduced in 1984, there is no longer a need or justification to exclude from the protection of the SDA persons who are employed by State Governments.<sup>260</sup>

310. HREOC also notes that the SDA is anomalous from the other Federal discrimination Acts, which all comprehensively bind the Crown in right of the State.<sup>261</sup>

311. In its 1992 Review of the SDA exemptions, HREOC recommended the repeal of the exemption of State instrumentalities under s 13. HREOC repeated that recommendation in *Pregnant and Productive (1999)* in 1999.<sup>262</sup> HREOC remains of that view. HREOC further considers that the provisions relating to discrimination in employment and sexual harassment require amendment to bind the Crown in right of the State, to remove this significant omission in the SDA's coverage and bring the SDA into line with other federal discrimination Acts.

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<sup>257</sup> Committee on the Elimination of Discrimination Against Women, Concluding Comments on Australia, Thirty Fourth session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5, [10].

<sup>258</sup> Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), Recommendation 3.10

<sup>259</sup> Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), [3.76].

<sup>260</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992), 247 [10.1.121].

<sup>261</sup> *Disability Discrimination Act 1992* (Cth), s 14; *Racial Discrimination Act 1975* (Cth), s 6; *Age Discrimination Act 2004* (Cth), s 13.

<sup>262</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnancy* (1999), Recommendation 10, [5.41]-[5.45].

**Recommendation 18: Extend coverage to state and state instrumentalities (Stage One)**

Repeal s 13 of the SDA

**Recommendation 19: Extend coverage to bind the Crown in right of the state (Stage One)**

Amend s 12(1) to comprehensively bind the Crown in right of the State, along the lines of s 14 of the DDA, s 6 of the RDA and s 13 of the ADA.

## ***Men***

312. The prohibition against discrimination under the SDA is expressed in gender neutral terms, applying equally to discrimination against women and men.
313. Furthermore, the limited application of the SDA by operation of s 9, which draws on all available heads of Commonwealth legislative power, is also expressed in gender neutral terms - with one exception. The exception is s 9(10), which gives effect to the prescribed provisions of Division 3 of Part II to the extent that they give effect to CEDAW. Given that CEDAW only operates for the benefit of women, only female applicants may rely on this provision.<sup>263</sup> Accordingly, whilst in most cases men and women have equal protection under the SDA, in certain limited circumstances where no other head of legislative power applies other than the external affairs power, women will have access to a remedy but men will not, such as where the respondent is an unincorporated entity.<sup>264</sup>
314. As an Act intended to implement Australia's obligations under CEDAW, HREOC considers that the primary purpose of the SDA should be to achieve

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<sup>263</sup> *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528, 557-8 [104]-[110].

<sup>264</sup> See, eg, *Eleven Fellow Members of the McLeod Country Club v McLeod Country Club* [1995] HREOCA 25 (extract at (1995) EOC 92-739). See further Human Rights and Equal Opportunity Commission, 'Federal Discrimination Law' (2008), 102-3. This would also apply to State governments. See *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528, 558 [112]-[114].

substantive equality for women. Nevertheless, HREOC agrees with the views expressed by the NSWLRC that limiting protection against discrimination to particular groups is neither practical nor appropriate, and may in fact be counter-productive and offensive to some members of that group.<sup>265</sup>

315. In addition, as HREOC has noted in this submission and elsewhere, the inadequate level of protection for men against discrimination on the basis of family responsibilities provides a strong disincentive for men to take on a greater care-taking role within the family unit.
316. Furthermore, at the level of principle, HREOC considers that discrimination on the basis of sex is offensive and contrary to Australia's international human rights obligations irrespective of the sex of the victim.<sup>266</sup>
317. Accordingly, HREOC recommends that s 9(10) of the SDA be amended to more closely resemble the equivalent s 12(8) of the DDA, such as by drawing on Australia's obligations under relevant international instruments such as the ICCPR, ICESCR and ILO Convention 156 on the Rights of Workers with Family Responsibilities.<sup>267</sup> This would ensure that the SDA provides equivalent coverage in relation to both men and women.

**Recommendation 20: Provide equal coverage for men and women  
(Stage One)**

Amend s 9(10) to ensure equal coverage for men as women, such as along the lines of s 12(8) of the DDA.

### ***Volunteers and unpaid workers***

318. The discrimination and sexual harassment provisions of the SDA do not currently provide explicit coverage for volunteers and other types of unpaid

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<sup>265</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [3.11].

<sup>266</sup> ICCPR, art 2(1) and 26; ICESCR art 2(2).

<sup>267</sup> *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (ILO 156). ILO 156 was opened for signature in 1981 and entered into force for Australia on 30 March 1990, [1991] ATS 7.

workers. Whilst the SDA may apply in many cases involving volunteers and unpaid workers, even in the absence of explicit provisions, HREOC considers that the existing coverage is unclear and insufficient and in need of immediate amendment. HREOC addressed this issue in *Pregnant and Productive (1999)* and recommended that the SDA be amended to ensure coverage of unpaid workers.<sup>268</sup>

319. As the Victorian Equal Opportunity and Human Rights Commission recently observed in its submission to the Victorian Equal Opportunity Review:

Volunteers make an enormous contribution to the Victorian Community. Given volunteers do this for no payment, it seems especially unreasonable that they should also be expected to sacrifice their fundamental rights. It is also illogical to suggest that simply because a person is not receiving a wage or salary, harassment or discrimination that may be directed toward them is any less repugnant.<sup>269</sup>

320. HREOC notes that the Final Report of that Review has recommended that volunteers and other unpaid workers be explicitly protected from discrimination and sexual harassment.<sup>270</sup>

321. HREOC also notes that volunteers and other unpaid workers are covered in several of the States and Territories.<sup>271</sup> For example, in Queensland, in addition to the forms of employment covered under the SDA, protection against discrimination in ‘work’ also applies to:<sup>272</sup>

- (a) work remunerated in whole or in part on a commission basis;
- (b) work under a statutory appointment;

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<sup>268</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), Recommendations 8 and 9, [5.25]-[5.31].

<sup>269</sup> Victorian Equal Opportunity and Human Rights Commission, *Submission to Equal Opportunity Review: Discussion Paper 2007* (18 January 2008), 88.

<sup>270</sup> State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008), Recommendation 51.

<sup>271</sup> See, eg, the definitions of ‘employment’ and ‘work’ in *Discrimination Act 1991* (ACT) Dictionary; *Anti-Discrimination Act 1991* (Qld) s 4; *Anti-Discrimination Act 1998* (Tas) s 3; *Equal Opportunity Act 1984* (SA) s 5. The *Anti-Discrimination Act 1977* (NSW) provides protection for volunteers and unpaid trainees from sexual harassment, however they do not appear to fall within the definition of ‘employment’ for the purposes of the discrimination provisions of the Act. The inclusion of unpaid and voluntary workers was recommended in NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report No 92 (1999), [4.38]-[4.44]. See also Western Australia Equal Opportunity Commission, *Review of Equal Opportunity Act 1984: Report*, (May 2007), 36.

<sup>272</sup> *Anti-Discrimination Act 1991* (Qld) s 4.

- (c) work under an arrangement within the meaning of s 3(1) of the Education (Student Work Experience) Act 1978;
- (d) work on a voluntary or unpaid basis; and
- (e) work under a guidance program, apprenticeship training program or other occupational or retraining program.

322. Given that unpaid and voluntary workers are often at junior and trainee levels, they will often be in positions of particular vulnerability within the workplace. This makes the need for adequate protection against sexual harassment, as well as discrimination, all the more pressing.

323.

**Recommendation 21: Extend coverage to volunteers and other unpaid workers (Stage One)**

Provide equivalent protection to volunteers and other unpaid workers as with paid workers.

***Independent contractors***

324. At present, neither the discrimination provisions nor the sexual harassment provisions adequately protect independent contractors. The discrimination provisions are narrowly geared towards discrimination within standard employer/employee or principal/contractor relationships. This arguably excludes protection for independent contractors.

325. The sexual harassment provisions appear to be cast more broadly, by including the possibility of claims by one ‘workplace participant’ against another. The Explanatory Memorandum for the Bill that introduced this provision stated that:

The amendment is necessary to ensure that sexual harassment at work is made unlawful without regard to the particular employment or professional relationship between the two persons.<sup>273</sup>

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<sup>273</sup> Explanatory Memorandum, Sex Discrimination and Other Legislation Amendment Bill 1992 (Cth), 26.

326. Unfortunately, the current drafting does not fully realise this objective. Whilst the definition of ‘workplace participant’ in s 28B(7) includes contract workers, the definition of ‘contract worker’ in s 4(1) is confined to persons who perform work under a contract with an employer. This leaves the coverage of independent contractors unclear and potentially excluded.
327. HREOC notes that the proportion of independent contractors within workplaces has increased significantly since the SDA was first enacted. Accordingly, it is important that the SDA keeps pace with these developments by ensuring that independent contractors are protected against discrimination and sexual harassment to the same degree as workers in other employment relationships.

**Recommendation 22: Extend coverage of independent contractors  
(Stage One)**

Provide equivalent protection against discrimination and sexual harassment to independent contractors as applies to other categories of workers.

***Areas of public life in which discrimination is unlawful***

328. As noted above, the introduction of a free-standing prohibition against discrimination would provide comprehensive coverage for all areas of public life. In the absence of such a reform, or in the interim, HREOC considers that further amendments are required to enhance the existing provisions that identify the protected areas of public life to ensure that victims of discrimination are not deprived access to an effective remedy.

**Discrimination in work**

329. Part II, Division I of the SDA deals with sex discrimination in work. Broadly speaking, the provisions prohibit discrimination:

- (a) in employment;<sup>274</sup>
- (b) by principals against commission agents;<sup>275</sup>
- (c) by principals against contract workers;<sup>276</sup>
- (d) by partners in a firm against potential and existing partners;<sup>277</sup>
- (e) by qualifying bodies against people seeking qualifications;<sup>278</sup>
- (f) by registered organisations against potential and existing members;<sup>279</sup> and
- (g) by employment agencies against people seeking employment.<sup>280</sup>

330. The prohibition against discrimination in work is the most significant area in which the SDA operates. As discussed below, work-related complaints have consistently accounted for the vast bulk of complaints under the SDA.<sup>281</sup> Discrimination in work is also of particular importance given its potential impact on the livelihood of the person affected, as well as their families.

331. In light of the prominence and significance of employment-related complaints under the SDA, HREOC submits that it is vital that the scope of coverage provided under Part II, Division I is as fulsome as possible in order to ensure that the objects of the SDA are fully realised. The following sections therefore consider various options for enhancing the existing protection against work-related discrimination.

### **Personal liability for employees**

332. Pursuant to s 14 of the SDA, liability in employment is limited to discrimination engaged in by ‘**an employer**’. This is supplemented by s 106, which provides

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<sup>274</sup> Section 14. ‘Employment’ is defined in s 4 to include (a) part-time and temporary employment; (b) work under a contract for services; and (c) work as a Commonwealth employee.

<sup>275</sup> Section 15.

<sup>276</sup> Section 16.

<sup>277</sup> Section 17.

<sup>278</sup> Section 18.

<sup>279</sup> Section 19.

<sup>280</sup> Section 22.

<sup>281</sup> See **Complaints**, below.

that an employer is vicariously liable for the conduct of its employees in connection with their employment.

333. Importantly, however, a victim of discrimination has no right of redress against the **employee** who actually engaged in the discriminatory conduct. This is a significant deficiency of the SDA. Whilst in most cases an applicant will be content to simply bring a claim against the employer, this may not always be the case. For example:

- (a) the employer may be a company that has been wound up or has no assets, whereas the offender employee may have substantial assets;
- (b) the employer may be able to avoid vicarious liability under the ‘all reasonable steps’ defence under s 106(2) whereas this defence is not available to the offender employee; or
- (c) the applicant may have personal reasons for seeking to bring the claim against just the individual and not the employer, such as to avoid being perceived by the employer as a trouble-maker. Indeed, the applicant may not wish to bring the matter to the employer’s attention to avoid damaging the offender’s standing in the workplace, which might be more conducive to ensuring a satisfactory outcome.

334. Furthermore, as a matter of principle, the exclusion of personal liability for employees sends the disappointing message that eliminating discrimination is simply a matter for employers, but is not an individual responsibility of all employees.

335. On one view, an applicant might be able to utilise s 105 of the SDA to bring a claim against the offender employee, on the basis that the employee ‘caused’, ‘aided’ or ‘permitted’ another person (the employer) to do the unlawful act. This approach has been supported in NSW,<sup>282</sup> where the legislation also suffers from the same deficiency as the SDA. However, this line of reasoning has not attracted support at the Federal level<sup>283</sup> and imposes an unnecessarily indirect

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<sup>282</sup> See, eg, *O’Callaghan v Loder* (1984) EOC 92-229, 75,493-4; *M v R Pty Ltd* (1988) EOC 92-229; *Murphy v Rasmus Pty Ltd* (1989) EOC 92-308; *Moloney v Golden Ponds Corporation Pty Ltd* (1995) EOC 92-674; *Adams v Helios Electroheat Pty Ltd* (1996) EOC 92-856.

<sup>283</sup> See, eg, *Sutton v Ultimate Manufacturing* (1997) EOC 92-891, 77,280. See also the earlier NSW decision of *Hill v Water Resources Commission* (1985) EOC 92-127.

right of action. Furthermore, a successful claim under s 105 would be dependent on their also being a primary finding of discrimination by the employer.<sup>284</sup>

336. In failing to provide a right of redress against the offender employee who engaged in the discriminatory conduct, HREOC also notes that the SDA is inferior to equivalent employment provisions in all other Federal discrimination Acts,<sup>285</sup> most of the States and Territories,<sup>286</sup> as well as the coverage provided under the SDA in respect of sexual harassment.<sup>287</sup>

**Recommendation 23: Liability of individual employees (Stage One)**

Amend s 14 of the SDA to confer personal liability on the individual employee, or other worker, who engaged in the discrimination rather than just the employer.

## **Partnerships**

337. The prohibition under s 17 of the SDA in relation to discrimination by partnerships (including proposed partnerships) against existing and potential partners is limited to partnerships of 6 or more persons.<sup>288</sup>
338. Many women in the workforce, particularly those who have faced difficulties in advancing their career due to family responsibilities, rely on employment in smaller sized partnerships, either as an end in itself or as a stepping stone towards opportunities with larger partnerships. HREOC is therefore concerned that the current provision provides insufficient protection due to the exclusion of smaller partnerships.

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<sup>284</sup> See, eg, *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481.

<sup>285</sup> *Age Discrimination Act 2004* (Cth), s 18; *Racial Discrimination Act 1975* (Cth), ss 9 and 15; *Disability Discrimination Act 1992* (Cth), s 15.

<sup>286</sup> See, eg, *Anti-Discrimination Act 1998* (Tas), s 22; *Anti-Discrimination Act 1991* (Qld), ss 14-15; *Anti-Discrimination Act 1992* (NT), s 31; *Equal Opportunity Act 1984* (WA), s 11.

<sup>287</sup> *Sex Discrimination Act 1984* (Cth), s 28B.

<sup>288</sup> *Sex Discrimination Act 1984* (Cth), s 17. This requirement is the same under the *Equal Opportunity Act 1984* (WA), s 14; the *Anti-Discrimination Act 1991* (Qld) ss 16-18; and the *Anti-Discrimination Act 1977* (NSW), s 10A. By contrast, the partnerships provision of the *Disability Discrimination Act 1992* (Cth) applies to partnerships of 3 or more persons, and the *Equal Opportunity Act 1995* (Vic), ss 32-33, are limited in their operation to partnerships of 5 or more persons.

339. HREOC also submits that the current minimum size of partnerships covered by s 17 is both arbitrary and unnecessary. HREOC notes, for example, that a size requirement is not imposed in the ACT<sup>289</sup> or South Australia.<sup>290</sup> Likewise, there are no minimum size requirements that apply in relation to other employers bound by the SDA. There are also no size limitation requirements in relation to the remaining provisions of the SDA that apply to partnerships.

**Recommendation 24: Abolish minimum size regarding partnerships  
(Stage One)**

Amend s 17 of the SDA to abolish the minimum size requirement of partnerships and proposed partnerships.

### ***Statutory appointees, judges, members of parliament***

340. By virtue of s 9(5) of the SDA, the discrimination and sexual harassment provisions have effect in relation to actual and prospective Commonwealth employees. Section 108 also deems all Commonwealth employees to be employed by the Commonwealth.

341. However, there is potentially some uncertainty as to the coverage of the SDA in relation to statutory appointees, judges and members of Parliament, who may not be considered ‘employees’ of the Commonwealth. This issue was raised by HREOC in *Pregnant and Productive (1999)*. At that time, HREOC recommended that:

The Attorney-General examine the issues of coverage for federal statutory appointees, judicial office holders and Members of Parliament, to provide clarification of coverage and, if necessary, extend the provisions of the *Sex Discrimination Act 1984* (Cth) to cover these positions formally.

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<sup>289</sup> *Discrimination Act 1991* (ACT), s 14.

<sup>290</sup> *Equal Opportunity Act 1984* (SA), s 33. Likewise, no such limitation applies in respect of the sexual harassment provisions of the *Sex Discrimination Act 1984* (Cth), s 28B(5).

342. HREOC directs the Committee to the relevant paragraphs of that report for further consideration.<sup>291</sup>
343. Conversely, in line with the discussion earlier about the need to impose personal liability for individual employees, there is potentially some ambiguity as to bringing a claim directly against a statutory appointee, judge or member of parliament who engages in discriminatory or sexually harassing conduct.<sup>292</sup> In light of the senior and important role played by such persons within our community, HREOC considers that it would be anomalous if they could avoid personal liability under the SDA for such conduct on the basis that they may not be technically an ‘employer’.<sup>293</sup>
344. HREOC notes that, in making this submission, it is not suggesting any amendment to the existing judicial immunity in respect of the exercise of judicial functions or any amendment to Parliamentary privilege.

**Recommendation 25: Extend coverage to statutory appointees et al (Stage One)**

Clarify that statutory appointees, judges and members of parliament are adequately protected, as well as personally liable, under the SDA, by amendment if necessary.

***Other potentially excluded categories of workers***

345. HREOC further recommends that consideration be given as to whether any other categories of workers potentially fall outside the operation of the SDA, such as:
- franchisees / franchisors;

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<sup>291</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnancy* (1999), Recommendation 7, [5.15]-[5.24].

<sup>292</sup> See, eg, *Tony De Domenico v Margot Marshall* [1997] ACTSC 20..

<sup>293</sup> See, eg, *Discrimination Act 1991* (ACT), s 6; *Equal Opportunity Act 1984* (SA), ss 87(6a), (6b), (6c), (6e); *Equal Opportunity Act 1995* (Vic), ss 86(3), 95; *Anti-Discrimination Act 1977* (NSW), ss 22B(7), (8) and (10).

- commissioned officers, such as police officers who arguably may not meet the definition of employees; and
- bailors / bailees.

**Recommendation 26: Review coverage to ensure all types of workers protected (Stage One)**

Review Part II Div 1 of the SDA to ensure that all potential categories of workers are protected

## ***Discrimination in other areas of public life***

### **Provision of goods and services**

346. The definition of ‘services’ under the SDA is defined **exhaustively** to mean:

- (a) services relating to banking, insurance and the provision of grants, loans, credit or finance;
- (b) services relating to entertainment, recreation or refreshment;
- (c) services relating to transport or travel;
- (d) services of the kind provided by the members of any profession or trade; and
- (e) services of the kind provided by a government, a government authority or a local government body.<sup>294</sup>

347. The above definition is arguably narrower than in some other Australian jurisdictions, which also include:

- (f) ‘access to, and the use of, any place that members of the public are permitted to enter’;<sup>295</sup>

<sup>294</sup> *Sex Discrimination Act 1984* (Cth), s 4.

<sup>295</sup> *Anti-Discrimination Act 1998* (Tas), s 3. See also *Equal Opportunity Act 1995* (Vic), s 4; *Anti-Discrimination Act 1997* (NSW), s 4; *Equal Opportunity Act 1984* (SA), s 5.

- (g) selling, buying, leasing, assigning or disposing of an interest in land;<sup>296</sup>
- (h) services provided by an employment agency;<sup>297</sup>
- (i) the provision of a scholarship, prize or award;<sup>298</sup>
- (j) services provided by an introduction agency;<sup>299</sup>
- (k) the provision of coaching or umpiring in a sport.<sup>300</sup>

**Recommendation 27: Expand definition of services (Stage One)**

Expand the definition of services under the SDA or, alternatively, amend the definition to be non-exhaustive.

### **Administration of Commonwealth laws and programs**

348. Section 26 of the SDA renders it unlawful for a person to discriminate in performing any function or exercising any power under a Commonwealth law or program, or when fulfilling any other responsibility for the administration of a Commonwealth law or program.
349. Section 26 binds the Crown in right of a State, but only to the extent that the State is administering a Commonwealth law or program. Importantly, s 26 does not prohibit discrimination in the administration of **State** (including Territory<sup>301</sup>) laws or programs.
350. To date, applicants bringing such claims in the Federal jurisdiction have been forced to rely on characterising the relevant circumstances as the provision of a service.<sup>302</sup> HREOC submits that this is anomalous and imposes an unnecessarily

<sup>296</sup> *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 4. The *Sex Discrimination Act 1984* (Cth) currently has a separate provision (s 24) dealing with discrimination in relation to land, although it is in more limited terms.

<sup>297</sup> *Equal Opportunity Act 1984* (SA), s 5.

<sup>298</sup> See, eg, *Equal Opportunity Act 1984* (SA), s 5; *Discrimination Act 1991* (ACT) Dictionary.

<sup>299</sup> *Equal Opportunity Act 1984* (SA), s 5.

<sup>300</sup> *Equal Opportunity Act 1984* (SA), s 5.

<sup>301</sup> Pursuant to s 4(1) of the *Sex Discrimination Act 1984* (Cth), references to States includes the ACT and Northern Territory.

<sup>302</sup> See, eg, *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528, *Rainsford v Victoria* (2007) 167 FCR 1.

circuitous path. As the Western Australian Equal Opportunity Commission submitted in its review of the *Equal Opportunity Act 1984* (WA):

It should not matter that the ‘service’ in question may be in fact a coercive or regulatory function of government, whatever the source of the authority. The Commission should be able to investigate discriminatory regulatory and compliance functions of government – policing, local government, and other enforcement powers – to the extent that those functions deny a person a benefit or entitlement on discriminatory grounds.<sup>303</sup>

351. Whilst ‘service’ has typically been interpreted broadly in discrimination cases to cover many functions provided by State governments and instrumentalities,<sup>304</sup> potential gaps remain. For example, there has been ongoing confusion as to the circumstances in which State prison authorities are regarded as providing a service to prisoners.<sup>305</sup>

352. HREOC considers it unsatisfactory that an applicant who faces discrimination in the administration of State laws or programs should be deprived a remedy under the SDA simply because they are unable to characterise the relevant conduct as a ‘service’. HREOC also considers that this is an incomplete implementation of Australia’s international obligations to provide an effective remedy against discrimination.

**Recommendation 28: Administration of state and territory laws and programs (Stage One)**

Amend the SDA to make discrimination in the administration of State (including Territory) laws or programs unlawful.

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<sup>303</sup> Western Australia Equal Opportunity Commission, *Review of Equal Opportunity Act 1984: Report*, (May 2007), 37.

<sup>304</sup> See, eg, *IW v City of Perth* (1997) 191 CLR 1; *Rainsford v Victoria* (2007) 167 FCR 1; *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528.

<sup>305</sup> See especially *Rainsford v Victoria* (2007) 167 FCR 1; on appeal *Rainsford v Victoria* (2008) 167 FCR 26. See also Frances Simmons, ‘When is performing a government function a service?’ [2008] 46 *Law Society Journal* 40; Gemma Misrachi, ‘Does the Tasmanian *Anti-Discrimination Act 1998* apply to prisons / prisoners?’ Paper presented at the National Legal, Conciliation and Education Officers’ Conference, Hobart, 8-9 November 2007.

## ***Specific issues re coverage of sexual harassment provisions***

353. There are several issues under the SDA that relate specifically to the extent of the coverage of protection from sexual harassment. These issues are dealt with in the next section. (See **Sexual harassment**, below).

### ***Ancillary / accessory liability***

354. Pursuant to s 105 of the SDA, a person who ‘causes, instructs, induces, aids or permits’ another person to do an act that is unlawful act under Division 1 or 2 of Part II is taken to have done that act also. Section 105 therefore imposes a form of ancillary, or accessory, liability in relation to sex discrimination.

355. However, ancillary liability under s 105 is confined to sex discrimination and does not explicitly include sexual harassment. HREOC considers that this is a significant anomaly that requires immediate amendment. There is no rational basis as to why the SDA renders it unlawful to be an accessory to discriminatory conduct but not sexual harassment, especially given that the courts have accepted that sexual harassment is a ‘species’ of sex discrimination.<sup>306</sup> Indeed, sexual harassment may involve significantly more heinous (possibly criminal) conduct compared with discriminatory conduct.

356. As a matter of practicality, there may be circumstances where an applicant can only rely on the ancillary liability provisions, such as where the alleged harassment was carried out by a customer or where the applicant seeks to bring a claim directly against a fellow employee. In such situations, the applicant must currently bring their claim as one of sex discrimination, notwithstanding that the conduct may fall squarely within the definition of sexual harassment. This is unsatisfactory and likely to engender confusion.

357. HREOC also notes that the exclusion of sexual harassment from ancillary liability under s 105 is inconsistent with the DDA, where the equivalent ancillary liability provision<sup>307</sup> expressly includes the prohibition against

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<sup>306</sup> *Hall v Sheiban* (1989) 20 FCR 217, 277 (French J), see also *Aldridge v Booth* (1988) 80 ALR 1, 16-7; *Elliott v Nanda* (2001) 111 FCR 240, 277-82;

<sup>307</sup> *Disability Discrimination Act 1992* (Cth), s 122.

harassment.<sup>308</sup> Similarly, HREOC notes that the equivalent ancillary liability provisions in most of the States and Territories apply to all of the operative provisions under the relevant Acts,<sup>309</sup> rather than being confined to discriminatory conduct only.

358. HREOC also notes that ancillary liability under s 105 does not apply to victimisation. For the same reasons noted above, this is also a significant weakness of the SDA in need of immediate amendment.

**Recommendation 29: Extend coverage of ancillary liability (Stage One)**

Amend s 105 to include acts that are unlawful under the SDA generally, rather than being limited to acts that are unlawful under Divisions 1 or 2 of Part II only.

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<sup>308</sup> *Disability Discrimination Act 1992* (Cth), Part 2, Division 3. Ancillary liability under s 122 expressly includes conduct under Division 3.

<sup>309</sup> See *Anti-Discrimination Act 1977* (NSW) s 52, *Equal Opportunity Act 1984* (WA) s 160; *Discrimination Act 1991* (ACT) s 73; *Equal Opportunity Act 1984* (SA) s 90; *Equal Opportunity Act 1995* (Vic) s 98; *Anti-Discrimination Act* (NT) s 27; *Anti-Discrimination Act 1998* (Tas) s 21.

## 12. Sexual Harassment

This section addresses **Term of Reference K**.

Sexual harassment continues to affect significant numbers of people, with the vast majority being women

Legal protection from harassment needs to be strengthened by correcting the reasonable person test.

Consider creating a positive duty to avoid sexual harassment in stage two of a reform process

### ***Importance of eliminating sexual harassment***

359. HREOC regards the elimination of sexual harassment as critical to achieving gender equality in the workplace and implementing Australia's obligations under CEDAW. The CEDAW Committee has emphasised that

[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.<sup>310</sup>

360. The Committee has also specifically recognised sexual harassment as a form of discrimination and gender based violence under CEDAW.<sup>311</sup>

361. In addition to meeting Australia's obligations under CEDAW, there is a strong business imperative to eliminate sexual harassment. Sexual harassment presents

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<sup>310</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation 19, para 17, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006).

<sup>311</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation 19, para 18, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006).

a significant cost to employers through lost productivity, absenteeism, workers compensation, staff turnover, drop in staff morale and reputational damage. A review of sexual harassment in employment complaints conducted by HREOC in 2002 found that only 7 per cent of complainants were still working for the organisation where the alleged harassment occurred.<sup>312</sup> It is therefore in everyone's interests - employers and employees alike - to take active steps to eradicate sexual harassment from our workplaces.

362. HREOC acknowledges that important steps have been taken in Australia to combat sexual harassment in the workplace, particularly by making sexual harassment unlawful under the SDA and creating an avenue for redress. However, sexual harassment continues to significantly affect the lives of many people in Australia, particularly workers. A national telephone survey of 1006 respondents commissioned by HREOC in 2003 found that 28 per cent of women and seven per cent of men had experienced sexual harassment in the workplace. Fourteen per cent of respondents had witnessed sexual harassment in the workplace in the five years prior to the survey.<sup>313</sup>

363. Sexual harassment also arose as a key topic of discussion during the Sex Discrimination Commissioner's recent *Listening Tour*. For example, a young female focus group participant shared her experience of working in the cleaning industry:

We were playing [and] mucking around. I knew he liked me. I didn't like him back. He made physical sexual advances and I had to fight him off. He was the boss. It was my word against his [so] I didn't raise it with the employer.<sup>314</sup>

364. Victims of sexual harassment report experiencing a broad range of behaviours including serious criminal offences such as sexual or physical assault. The 2003 HREOC telephone survey found that of those who experienced sexual harassment in the workplace in the last five years 94 per cent experienced crude or offensive behaviour; 85 per cent experienced unwanted sexual attention; 43

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<sup>312</sup> Human Rights and Equal Opportunity Commission, *A Bad Business: Review of sexual harassment in employment complaints 2002* (2003).

<sup>313</sup> Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue Sexual Harassment in the Australian Workplace* (2004) 15.

<sup>314</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 6* (2008).

per cent experienced sexist behaviours; 20 percent experienced sexual assault; 19 per cent experienced sexual coercion; and 62 percent experienced physical harassment.<sup>315</sup>

365. The available research also reveals that the overwhelming majority of sexual harassment victims do not make formal complaints. HREOC's telephone survey found that less than one third of those who experienced sexual harassment made a formal report or complaints about sexual harassment. For those who did not report their experience, almost half expressed a lack of faith in the grievance process as the reason.<sup>316</sup>

366. This finding accords with a survey conducted by Working Against Sexual Harassment, a coalition of women's services in Victoria. This research found that 63 per cent of respondents did not report their experience of sexual harassment. Only five per cent reported using a state or federal complaints mechanism. Based on qualitative interviews, the study also found that there was low levels of awareness and understanding of state and federal complaints mechanisms.<sup>317</sup>

367. Given the understandable hesitancy that inhibits some women coming forward with complaints of sexual harassment, HREOC is currently investigating the merits of alternate strategies for providing assistance and support to victims of sexual harassment in addition to the existing complaints mechanisms. In **Powers of HREOC and the Sex Discrimination Commissioner**, below, HREOC recommends that the Committee support additional funding for these kinds of strategies.

368. HREOC views the consideration of such additional strategies to complement the prohibition and complaints mechanism under the SDA as an important topic for ongoing discussion in conjunction with the current Review.

369. The ongoing prominence and significance of sexual harassment also highlights the importance of ensuring that the existing provisions under the SDA are as

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<sup>315</sup> Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue Sexual Harassment in the Australian Workplace* (2004) 27.

<sup>316</sup> Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue Sexual Harassment in the Australian Workplace* (2004) 42.

<sup>317</sup> Patricia Hayes, *Taking it Seriously: Contemporary Experiences of Sexual Harassment in the Workplace* (2004) 17.

effective as possible in achieving their intended objective of eliminating sexual harassment in employment and other areas of public activity.<sup>318</sup> With these thoughts in mind, HREOC sets out proposals for improving the capacity of the SDA to redress sexual harassment.

### **Definition of sexual harassment**

370. Sexual harassment is defined under s 28A of the SDA as follows:

- (1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:
  - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
  - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

- (2) In this section:

*conduct of a sexual nature* includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

371. The following section considers particular concerns with the above definition in relation to the reasonable person standard.

### **Reasonable person standard**

372. The definition of sexual harassment includes a ‘reasonable person’ standard for assessing whether the conduct amounted to sexual harassment. The definition

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<sup>318</sup> *Sex Discrimination Act 1984* (Cth) s 3(c).

refers to an unwelcome sexual advance or request for sexual favours, or other unwelcome conduct of a sexual nature:

...in circumstances in which a **reasonable person**, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.<sup>319</sup> (emphasis added)

373. The male gender bias of the reasonable person standard has long been a subject of academic criticism, particularly in the context of sexual harassment.<sup>320</sup> Fiona Pace provides a useful summary of this commentary:

Many commentators also argue that the reasonableness standard is itself gendered; that it is male experiences, views and perspectives that are embodied in the notion of reasonableness and how it is applied. Gender differences dictate that a reasonable woman and a reasonable man are likely to differ in their judgments of what is offensive yet it is assumed that women's experiences are part of everyone's commonsense knowledge. In actual fact, 'common knowledge' about women and the reasonableness of conduct is based on male knowledge. According to Thornton, decision-makers in sexual harassment cases derive as much of their 'knowledge' about what a woman is, what a woman can do and what is reasonable, from 'stereotypes, ideology, folklore, prejudice, and intractable misconceptions' as they do from efforts to understand the complex realities of women's experiences. The conduct of both victims and perpetrators of sexual harassment are measured against male standards and as a result, incidents of sexual harassment are trivialised and stereotypes reinforced by decision-makers.<sup>321</sup>

374. In the United States, attempts to counterbalance the male gender bias of the reasonable person standard in sexual harassment claims has led some courts to

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<sup>319</sup> *Sex Discrimination Act 1984* (Cth) s 28A(1). A reasonable person element also operates under the definitions of sexual harassment in each of the States and Territories: see, eg, *Discrimination Act 1991* (ACT) s 58; *Equal Opportunity Act 1984* (SA) s 87(11); *Anti-Discrimination Act 1991* (Qld) s 119; *Anti-Discrimination Act 1992* (NT) s 22; *Equal Opportunity Act 1995* (Vic) s 85; *Anti-Discrimination Act 1998* (Tas) s 17; *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 1984* (WA) s 24.

<sup>320</sup> See, eg, Fiona Pace, 'Concepts of 'Reasonableness' in Sexual Harassment Legislation: Did Queensland Get it Right?' (2003) 3 *Queensland University of Technology Law and Justice Journal* 189, 191-6 and the sources discussed therein.

<sup>321</sup> Fiona Pace, 'Concepts of 'Reasonableness' in Sexual Harassment Legislation: Did Queensland Get it Right?' (2003) 3 *Queensland University of Technology Law and Justice Journal* 189, 192 (footnotes omitted).

apply a 'reasonable woman' standard.<sup>322</sup> However, this approach has also attracted criticism, particularly on the basis that it is premised on an artificial assumption of sameness amongst women and reinforces stereotypes of women as the 'weaker sex'.<sup>323</sup>

375. An alternate approach is sometimes described as the 'reasonable victim' standard, which requires courts to focus more closely on the particular circumstances of the individual victim when assessing the reasonableness of the impugned conduct.<sup>324</sup> For example, a 'reasonable victim' standard has been applied under the racial hatred provisions of the RDA. The courts have emphasised that in assessing whether particular conduct was 'reasonably likely to offend, insult, humiliate or intimidate', regard should be had to the particular attributes and circumstances of the victim.<sup>325</sup>

376. Similarly, the NSWLRC recommended that the *Anti-Discrimination Act 1977* (NSW) be amended to more clearly direct the court to have regard to the particular circumstances of the victim when applying the reasonable person element of the sexual harassment definition:

The appropriate standard is a reasonable person standard, but one which explicitly and thoroughly addresses the reality of sexual harassment by determining whether the actions are unacceptable from the viewpoint of the victim and a reasonable person sharing the victim's characteristics of race, gender, etc. The Commission is satisfied that the current reasonable person test is adequate and should remain, but that there should be explicit reference to the need to take into account the pertinent characteristics of the victim.<sup>326</sup>

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<sup>322</sup> See, eg, *Ellison v Brady* (9<sup>th</sup> Cir, 1991) 924 F2d 872, 878-9. In Australia, a 'reasonable woman' standard was rejected by the Federal Court in *Hall v A&A Sheiban Pty Ltd* (1989) 20 FCR 217. See further Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review* 422, 429 n 48.

<sup>323</sup> See the discussion in Fiona Pace, 'Concepts of 'Reasonableness' in Sexual Harassment Legislation: Did Queensland Get it Right?' (2003) 3 *Queensland University of Technology Law and Justice Journal* 189, 196; Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review* 422, 429.

<sup>324</sup> See, generally, NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [7.36]-[7.40].

<sup>325</sup> See, eg, *Corunna & Ors v West Australian Newspapers Ltd* (2001) EOC 93-146, 75,456-7; *McLeod v Power* (2003) 173 FLR 31, 45 [65]; *Kelly-Country v Beers* (2004) 207 ALR 421, 441 [87].

<sup>326</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [7.42].

377. This approach has been adopted in Queensland<sup>327</sup> and the Northern Territory.<sup>328</sup> In Queensland, for example, the reasonable person element within the definition of sexual harassment is expressed as follows:

in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.<sup>329</sup>

378. The legislation goes on to provide that:

The circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:

- (a) the sex of the other person; and
- (b) the age of the other person; and
- (c) the race of the other person; and
- (d) any impairment that the other person has; and
- (e) the relationship between the other person and the person engaging in the conduct; and
- (f) any other circumstances of the other person.<sup>330</sup>

379. The relevant provisions in the Northern Territory are expressed in essentially identical terms.<sup>331</sup>

380. The above approach has two main advantages over the SDA. First, by setting out the relevant circumstances of the victim to be taken into account, the Queensland and Northern Territory legislation clearly directs the court to assess the reasonableness of the impugned conduct by reference to the individual circumstances and characteristics of the victim. This takes into account any gender, race, cultural, age or other relevant circumstances or factors that might

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<sup>327</sup> *Discrimination Act 1991* (Qld) ss 119(f), 120.

<sup>328</sup> *Anti-Discrimination Act 1992* (NT) ss 22(1)(f), 22(3).

<sup>329</sup> *Discrimination Act 1991* (Qld) s 119.

<sup>330</sup> *Discrimination Act 1991* (Qld) s 120.

<sup>331</sup> *Anti-Discrimination Act 1992* (NT) ss 22(1)(f), 22(3).

help to explain why the individual victim regarded the conduct as unwelcome and inappropriate. By contrast, the SDA contains only a vague reference to ‘having regard to all the circumstances’.<sup>332</sup>

381. Secondly, the Queensland and Northern Territory definition is broader than the SDA by including circumstances where a reasonable person would have ‘**anticipated the possibility**’ that the other person would be offended, humiliated or intimidated. As Fiona Pace notes:

This broadens the definition of sexual harassment significantly and makes the [Queensland Act] test relatively easy to satisfy.<sup>333</sup>

**Recommendation 30: Amend the reasonable person standard (Stage One)**

Amend the definition of sexual harassment in relation to the reasonable person standard, along the lines of the relevant provisions in Queensland and the Northern Territory.

### ***Extend the coverage of protection***

382. As noted earlier in the Submission, there are several ways in which the coverage of protection from sexual harassment under the SDA is inadequate.

#### **Goods, services and facilities**

383. Section 28G makes it unlawful to sexually harass another person ‘in the course of providing, or offering to provide, goods, services or facilities to that

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<sup>332</sup> Fiona Pace, ‘Concepts of ‘Reasonableness’ in Sexual Harassment Legislation: Did Queensland Get it Right?’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 189, 204-5. See also Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 508-9: ‘To have anticipated the possibility that a person would be offended, humiliated or intimidated by particular conduct is clearly not a particularly difficult threshold to meet.’ See also *Smith v Hehir* [2001] QADT 11.

<sup>333</sup> Fiona Pace, ‘Concepts of ‘Reasonableness’ in Sexual Harassment Legislation: Did Queensland Get it Right?’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 189, 205. The author goes on to show that this has been borne out in the application of the section by Queensland courts and tribunals (at 205-8).

person.’<sup>334</sup> Importantly, the prohibition only applies to the sexual harassment by workers of customers, but not vice versa.

384. HREOC considers that many workers are just as vulnerable to sexual harassment by customers as by fellow employees or supervisors. In response to sexual harassment (or conduct escalating towards sexual harassment) by an important customer or client, many workers may feel reluctant to take assertive action out of fear of the repercussions from the employer. The customer may be in a position to exploit a significance imbalance of power between him or her and the worker, particularly if the client is important to the business or directly impacts on the worker’s salary.
385. Where a person is sexually harassed by a customer (or client, colleague etc), he or she may be able to bring a claim against their employer by relying on ancillary liability under s 105, such as by showing that the employer ‘permitted’ the harassment to occur. However, reliance on s 105 ancillary liability is insufficient. For starters, the applicant will need to show that the employer was aware of the situation and failed to take appropriate steps.<sup>335</sup> This may be very difficult to prove, especially in respect of the first occasion when harassment occurs or when the employee is at a remote location.
386. Furthermore, reliance solely on the employer to take preventative steps may be inadequate. An employer’s resolve in providing a harassment-free workplace for its staff may be weakened by competing commercial imperatives to please the customer. Furthermore, an employer’s capacity to control the conduct of its customers may be limited in some circumstances. Whilst an employer may be able to remove a customer from the premises or cancel a contract, for example, it does not exercise equivalent powers to caution, redistribute, demote or fire a customer as it does with an employee.
387. For the above reasons, as well as the reasons already expressed in relation to making employee’s personally liable for sex discrimination, HREOC considers that the current exclusion of customers from personal liability is unsatisfactory. The prohibition against sexual harassment should not be limited to just the

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<sup>334</sup> *Sex Discrimination Act 1984* (Cth) s 28G.

<sup>335</sup> See, eg, *Elliott v Nanda & Anor* (2001) 111 FCR 240, 292-3 [163].

service-provider, but should also bind customers, clients and any other person who engages or seeks to engage with a person in connection with the provision of goods, services or facilities. This would ensure that a person who is sexually harassed in connection with their employment has a direct right of action against the individual offender, irrespective of his or her status. HREOC also notes that this is already the case in most of the States and Territories.<sup>336</sup>

**Recommendation 31: Extend coverage of sexual harassment to better protect workers (Stage One)**

Amend the SDA to protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment

## Education

388. The SDA makes it unlawful for an ‘adult student’ (defined as a student aged 16 years or over) to sexually harass another adult student at the relevant educational institution.
389. Whilst HREOC can understand the rationale for limiting liability for students aged over 16, it does not understand why the availability of a remedy for the victim is dependent on his or her age. This may yield the unjust result that if a 16 year old student sexually harasses two fellow students, one aged 15 and the other aged 16, only the older student is entitled to a remedy under the SDA.<sup>337</sup> Given that younger students are often at increased vulnerability to sexual harassment by fellow students the greater the age gap, this anomaly is of particular concern. Constitutional power to extend coverage to students under 16 would be available by reason of the United Nations *Convention on the Rights of the Child* (‘CROC’), to which Australia is a party.

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<sup>336</sup> *Equal Opportunity Act 1995* (Vic) s 92(2); *Anti-Discrimination Act 1977* (NSW) s 22F(a), *Anti-Discrimination Act 1998* (Tas) ss 17, 22(1)(c); *Anti-Discrimination Act* (NT) ss 22, 28(d); *Anti-Discrimination Act 1991* (Qld) s 118;

<sup>337</sup> Compare, eg, *Anti-discrimination Act 1977* (NSW) s 22E(2)(a).

390. HREOC also notes that the prohibition against staff is confined to sexual harassment of current and prospective students ‘at the institution’. Likewise, the prohibition against adult students is confined to sexual harassment of adult students and staff ‘at the institution’. This potentially leaves unclear the situation where a staff member or adult student sexually harasses a student of *another* institution.<sup>338</sup>
391. For example, students from different educational institutions often mix at combined events, such as sporting carnivals or to put on theatrical productions. In such circumstances, whilst students from one institution may not be directly answerable to teachers and staff of another institution, there is clearly a relationship of power and authority which makes students vulnerable.
392. Similarly, it is not clear why the prohibition against sexual harassment is confined to members of staff. This potentially leaves unclear the situation of other persons with whom students come into contact in connection with attendance at school and related activities, such as visiting school chaplains, sporting coaches, after class music or drama teachers etc who might not technically be a member of staff.
393. HREOC considers that there is also no logical reason why students who have been sexually harassed in connection with their attendance at school or a school-related activity or event should be deprived a remedy depending on whether or not their harasser was a student or member of staff from their own educational institution.

**Recommendation 32: Extend sexual harassment protection to all students regardless of their age (Stage One)**

Amend s 28F(2)(a) of the SDA by removing the words ‘an adult student’ and replacing with the words ‘a student’.

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<sup>338</sup> The Northern Territory Act appears to apply more broadly in that it states that the sexual harassment provisions are to apply to the areas of activity referred to in Part 4, which includes ‘education’: *Anti-Discrimination Act 1992* (NT) ss 22, 28(1).

**Recommendation 33: Extend sexual harassment to provide protection to students from all staff members and adult students, not just those at their own education institution (Stage One)**

Amend s 28F of the SDA to ensure that students who are sexually harassed in connection with their education or attendance at school-related activities are entitled to bring a claim against the perpetrator, irrespective of whether the harasser is from the same or a different educational institution.

**Free-standing prohibition**

394. Under the SDA, protection from sexual harassment only relates to specified areas of public life. This is the same as the protection from discrimination.
395. As discussed above, HREOC proposes that, in stage two of reforms, consideration be given to amending the SDA to include a free-standing prohibition against discrimination in all areas of public life. For the same reasons, HREOC also recommends that stage two should also consider including a similar free-standing prohibition in relation to sexual harassment.
396. There is merit to extending the coverage of protection from sexual harassment to all aspects of public life, in light of the seriousness of the impact of sexual harassment to people affected.
397. HREOC notes that the legislation in Queensland goes even further, by containing a free-standing prohibition against sexual harassment in all areas of life, including private life.<sup>339</sup> It means that victims of sexual harassment have a remedy under the law regardless of whom their harasser is or the context in which the harassment occurs. However, the Queensland approach raises complex questions over the appropriate reach that human rights laws should have in regulating the private lives and relationships of individual citizens.

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<sup>339</sup> *Discrimination Act 1991* (Qld) ss 117-120.

**Option for Reform F: Enact a free standing prohibition against sexual harassment in public life (Stage Two)**

Consider amending the SDA to include a general prohibition against sexual harassment in any area of public life, along the lines of s 9 of the RDA

***Positive duty to prevent sexual harassment***

398. As noted earlier in this submission, the current model of the SDA has been criticised for being expressed as a negative based standard, rather than imposing obligations to take positive action.

399. In relation to sexual harassment, for example, an employer is vicariously liable for sexual harassment engaged in by its employee in connection with his or her employment. An employer can avoid such liability if it took ‘all reasonable steps’ to prevent the harassment from occurring.<sup>340</sup> The taking of reasonable steps will therefore aid in defending a claim. However, the failure to take such steps is not actionable of itself. Accordingly, an employee in a workplace with a dismal lack of any sexual harassment policies or grievance procedures is arguably a ‘sitting duck’, having to wait until the harassment has occurred before being entitled to commence an action or even to engage HREOC’s investigation and conciliation process.<sup>341</sup>

400. HREOC notes that the Final Report of the Equal Opportunity Review reached a similar conclusion in relation to the *Equal Opportunity Act 1984* (Vic), where it noted:

As currently framed, the Act relies upon a reactive approach to discrimination. The prohibition against unlawful discrimination is mainly enforced via

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<sup>340</sup> *Sex Discrimination Act 1984* (Cth) s 106. See further HREOC, *Federal Discrimination Law* (2008), 158-60.

<sup>341</sup> Pursuant to s 46P (in combination of s 46PD) of the *Human Rights and Equal Opportunity Act 1986* (Cth), HREOC’s investigation and conciliation function is not engaged until receipt of a complaint alleging unlawful discrimination.

complaints about specific acts of discrimination **after they have occurred**.<sup>342</sup>  
(emphasis added)

401. Courts applying the ‘all reasonable steps’ defence in sexual harassment cases under the SDA have emphasised that there is no single standard which must be applied by all employers. Rather, the obligation to take steps is variable depending on the size and circumstances of the employer.<sup>343</sup> However, the cases also indicate that, at a minimum, all employers should have a sexual harassment policy and grievance procedure of some description which is adequately communicated to their staff.<sup>344</sup>
402. Nevertheless, whilst an employer who fails to take any such steps is unlikely to avoid vicarious liability, its liability remains contingent on sexual harassment having occurred. HREOC considers that it is a sensible step to require employers to take all reasonable steps as a positive obligation, with the failure to comply itself an actionable harm. Therefore, an employee who finds him or herself in a working environment without adequate safeguards can legitimately seek the court’s intervention without having to await sexual harassment occurring.
403. This would not involve a substantial burden on employers, but would merely recast the existing implied obligation in clear and positive terms. This would assist employers to understand their obligations, as well as empowering employees to pressure their employers to implement appropriate policies and procedures. HREOC has already prepared a detailed sexual harassment Code of

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<sup>342</sup> State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008), 22 [1.11].

<sup>343</sup> See, eg, *Cooke v Plauen Holdings* [2001] FMCA 91, [37]: ‘Care needs to be taken when considering the meaning of the expression “taking reasonable steps to prevent the sexual harassment occurring”. The *Sex Discrimination Act 1984 (Cth)* does not distinguish between large and small employers, in terms of the availability of a defence under s.106 (2): *Gilroy v Angelov* [2000] FCA 1775 at paragraph 100. As was apparent in that case, however, it would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. This defence has been interpreted in Australia as requiring the employer to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do more than small businesses in order to be held to have acted reasonably. I note, however, that the reasonableness factor applies to the nature of the steps actually taken and not to determine whether it was reasonable not to have taken steps in the first place.’ See also *McAllister v SEQ Aboriginal Corporation & Anor* [2002] FMCA 109, [143].

<sup>344</sup> See, eg, *Aleksovski v AAA Pty Ltd* [2002] FMCA 81, [88]: ‘It is generally accepted that “all reasonable steps” in connection with sexual harassment in the workplace means that the employer is required to have a policy in relation to sexual harassment which should be clear and placed in written form and communicated to all members of the workforce. But in addition to that it is generally considered that continuing education on sexual harassment should be undertaken.’

Practice,<sup>345</sup> to assist employers in meeting such an obligation. HREOC also notes that precedent for such approach exists under the South Australian legislation, which provides:

It is unlawful for an employer to fail to take such steps as may be reasonably practicable to prevent an employee from subjecting a fellow employee, or a person seeking employment, to sexual harassment.<sup>346</sup>

404. Furthermore, a general obligation to take reasonable steps would obviate the current uncertainty around the liability of employers in respect of sexual harassment of its employees by a customer or client. At present, as discussed above, an applicant must bring such a claim against their employer under s 105 as ancillary liability, on the basis that the employer ‘permitted’ the harassment from occurring where the employer was on notice that the employee was at risk and failed to take appropriate steps.<sup>347</sup> Once again, this effectively imposes an indirect obligation to take reasonable steps to avoid sexual harassment of an employee, irrespective of identity or status of the offender. Stating this as a positive obligation to take all reasonable steps would make this obligation clearer.

**Option for Reform G: Positive duty to avoid sexual harassment (Stage Two)**

Consider imposing a positive obligation on employers (and other appropriate respondents) to take all reasonable steps to avoid sexual harassment of or by their employees.

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<sup>345</sup> Human Rights and Equal Opportunity Commission, *Sexual Harassment: A Code of Practice* (2004), available at: [http://www.humanrights.gov.au/sex\\_discrimination/workplace/code\\_practice/index.html](http://www.humanrights.gov.au/sex_discrimination/workplace/code_practice/index.html).

<sup>346</sup> *Equal Opportunity Act 1984* (SA) s 87(7). The Act goes on to provide that damages will not be awarded for failing to take preventative action unless the person instructed, authorised or connived at the sexual harassment: s 87(10).

<sup>347</sup> See, eg, *Elliott v Nanda & Anor* (2001) 111 FCR 240, [163].

## 13. Victimization

This section is relevant to **Terms of Reference A, H, K, M.**

Protection from victimisation is limited under the SDA

The victimisation provisions should apply where the relevant protected action is only a reason (even if not a substantial or the dominant reason) for the victimising conduct.

Employers should also be vicariously liable

405. The SDA creates an offence of victimisation.<sup>348</sup> An act of victimisation also constitutes unlawful discrimination giving rise to a right to seek a civil remedy.<sup>349</sup>

406. An act of victimisation occurs when a person subjects, or threatens to subject, another person to any detriment ‘**on the ground that**’ the other person has done or proposes to do (or the person believes that the other person has done or proposes to do) one of a number of protected acts, including:

- (a) making a complaint under the SDA or the HREOC Act;<sup>350</sup>
- (b) bringing proceedings under the SDA or HREOC Act;<sup>351</sup>
- (c) furnishing information, attending a conciliation conference or appearing as a witness in connection with a complaint or proceeding;<sup>352</sup>
- (d) reasonably asserting any rights of the person or any other person under the SDA or HREOC Act;<sup>353</sup> or

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<sup>348</sup> *Sex Discrimination Act 1984 (Cth)*, s 94(1).

<sup>349</sup> The definition of ‘unlawful discrimination’ in s 3(1) of the *Human Rights and Equal Opportunity Act 1986 (Cth)* includes conduct that is an offence under s 94 of the *Sex Discrimination Act 1984 (Cth)*. See further, in relation to the *Disability Discrimination Act 1992 (Cth)*, *Penhall-Jones v New South Wales* [2007] FCA 925, [10].

<sup>350</sup> *Sex Discrimination Act 1984 (Cth)*, s 94(2)(a).

<sup>351</sup> *Sex Discrimination Act 1984 (Cth)*, s 94(2)(b).

<sup>352</sup> *Sex Discrimination Act 1984 (Cth)*, s 94(2)(c)-(e).

<sup>353</sup> *Sex Discrimination Act 1984 (Cth)*, s 94(2)(f).

- (e) making an allegation that a person has done an act that is unlawful by reason of Part II of the SDA.<sup>354</sup>

(collectively, ‘the protected acts’).

### **Concerns over the victimisation provisions**

407. The courts have repeatedly held that s 8 of the SDA, which provides that a protected attribute or characteristic need only be a reason for particular conduct even if not the dominant or a substantial reason, does not apply to victimisation. Rather, the applicant must establish that the protected act was a ‘substantial or operative factor’ in causing the respondent to inflict the alleged detriment.<sup>355</sup>
408. HREOC considers that fear of reprisal is one of the primary reasons why victims of discrimination and sexual harassment refrain from pursuing a formal complaint. Indeed, in some cases the detriment a person faces from complaining about unlawful conduct out-shadows the original conduct giving rise to the complaint.
409. On the Commissioner’s recent *Listening Tour*, one female focus group participant reflected on her own experience of sexual harassment and why she decided not to bring a formal complaint:

I would not just have been a victim of the incident; I would have become a victim of [the] repercussions of bringing the incident to attention.<sup>356</sup>

410. Other women referred to the idea of bringing a sexual harassment complaint as ‘career death’, fearing that the stigma would impede future promotions and career progression.<sup>357</sup> One woman said that bringing a complaint forward would

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<sup>354</sup> *Sex Discrimination Act 1984* (Cth), s 94(2)(g).

<sup>355</sup> *Obieta v NSW Department of Education & Training* [2007] FCA 86, [240]; *Huang v University of NSW* [2008] FMCA 11, [120]; *Damiano v Wilkinson* [2004] FMCA 891, [22]; *Bailey v Australian National University* (1995) EOC 92-744. The same approach has been taken under the *Disability Discrimination Act 1992* (Cth). See, eg, *Penhall-Jones v NSW* [2007] FCA 925, [85].

<sup>356</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 3* (2007).

<sup>357</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 7* (2008).

mean being known to be a ‘bit unhinged’<sup>358</sup> for the rest of her career while another said:

It absolutely still is an issue and people have a fear of making a complaint because it is a career killer. You try and deal with it informally or you just get out.<sup>359</sup>

411. Effective victimisation provisions are therefore vital to ensuring that the discrimination and harassment provisions are utilised, by providing some measure of protection for victims against reprisal when seeking to vindicate their rights. As Lord Nicholls observed in *Shamoon v Chief Constable of the RUC*:<sup>360</sup>

[The victimisation provisions are] an essential safeguard. Persons who exercise their rights are not to be penalised for doing so.<sup>361</sup>

412. Similarly, his Lordship explained in *Khan v Chief Constable of West Yorkshire Police*:<sup>362</sup>

[T]he primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise under the legislation or are intending to do so.<sup>363</sup>

413. As discussed earlier in this submission, applicants in discrimination claims already face considerable difficulty in establishing that a prohibited ground was even a reason in causing particular treatment. The ‘substantial or operative factor’ test employed by the courts in relation to victimisation claims sets an unacceptably high bar which few applicants would be able to meet. Similar criticisms have been widely made, including by HREOC,<sup>364</sup> in relation to the

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<sup>358</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Women's focus group 3* (2007).

<sup>359</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Commissioner's Listening Tour - Adelaide Business Consultation* (2007).

<sup>360</sup> [2003] 2 All ER 26.

<sup>361</sup> *Ibid* 29 [5].

<sup>362</sup> [2001] 4 All ER 834.

<sup>363</sup> *Ibid* 838 [16] (Lords Hoffman, Hutton and Scott agreeing, 845 and 848).

<sup>364</sup> HREOC, Submission to the Senate Legal and Constitutional Legislation Committee on the Age Discrimination Bill 2003, [2.1]-[2.12], available at: [http://www.humanrights.gov.au/legal/submissions/age\\_discrimination.html](http://www.humanrights.gov.au/legal/submissions/age_discrimination.html).

dominant reason test under the ADA. Likewise, similar criticisms led to the abolition of the (former) dominant reason test under the RDA.<sup>365</sup>

414. By discouraging victims of discrimination and sexual harassment from pursuing their complaints, HREOC considers that the current weakness of the victimisation provisions significantly undermines the effectiveness of the SDA in its entirety. HREOC therefore considers that the SDA requires immediate amendment to introduce an equivalent provision to s 8 in relation to the test for causation in establishing a claim of victimisation.
415. HREOC also reiterates its earlier comments in relation to the need to consider options for alleviating the difficulties faced by applicants in establishing causation, such as by adjusting or reversing the onus or directing the court to draw adverse inferences in particular circumstances. These same observations and recommendations would apply equally in relation to establishing causation in a claim of victimisation.
416. HREOC also notes that vicarious liability under s 106 does not explicitly extend to victimisation.<sup>366</sup> There is no logical rationale for this omission. For an individual to express his or her rights under the SDA within an organisation often comes at great personal cost. Much of the fall out comes not only from the employer, but from fellow employees, particularly where an applicant is seeking to disrupt a status quo that disadvantages a minority within the workplace. To excuse employers from vicarious liability for victimisation which it could reasonably have prevented clearly undermines the effectiveness of the SDA and is contrary to its objects. This is also inconsistent with the approach taken in almost all of the States and Territories, as well as the DDA and ADA, which extend vicarious liability to all of the operative provisions under the relevant Acts.<sup>367</sup>

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<sup>365</sup> *Law and Justice Legislation Amendment Act 1990* (Cth). See further Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 1990, 3766 (Mr Peacock, Member for Kooyong), 3764 and 3768 (Mr Melham, Member for Banks). See also *Ardeshirian v Robe River Iron Associates* (1990) EOC 92-299, 78,032 where the President of HREOC described the dominant purpose test as presenting 'considerable difficulty'. See also *Wahrowski v Australian Maritime College* (1990) EOC 92-306

<sup>366</sup> It is acknowledged, however, that in *Taylor v Morrison* [2005] FMCA 79 held, in the context of an application for summary dismissal, that ordinary common law principles of vicarious liability may still apply.

<sup>367</sup> *Disability Discrimination Act 1992* (Cth) s 123; *Age Discrimination Act 2004* (Cth) s 57; *Anti-Discrimination Act 1977* (NSW) s 53(1), *Equal Opportunity Act 1984* (WA) s 161(1); *Anti-*

**Recommendation 34: Protected action need only be a reason (Stage One)**

Amend s 94 of the SDA to clarify that an applicant need only establish that a protected action was a reason for the victimising conduct even if not the dominant or a substantial reason.

**Recommendation 35: Extend vicarious liability (Stage One)**

Amend s 106(1) to apply to any act that is unlawful under the SDA, including victimisation.

## 14. Exemptions

This section addresses **Term of Reference M.**

Differential treatment may not be unlawful under the SDA, either because it is:

- a ‘special measure’;
- covered by a permanent exemption or exception; or
- covered by a temporary exemption.

The permanent exemptions for religious bodies, educational institutions for religious purposes, sport and voluntary bodies are discussed to highlight some of the debates

All permanent exemptions should be made subject to a three (3) year sunset clause in their current form, and reviewed during stage two of the reform process to see whether they should be retained, narrowed or removed

Permanent exemptions could be replaced by a general reasonable limitations provision which is strictly defined in accordance with human rights principles. This reform should be considered in stage two as well

### ***The permanent and temporary exemptions and ‘special measures’ under the SDA***

417. Part II, Division 4 of the SDA (ss 30 – 47) sets out 15 categories of permanent exemptions from parts of the Act (ss 30 – 43). Section 44 provides the ability to grant temporary ‘exemptions’ from parts of the SDA.

418. Section 7D provides for ‘special measures.’

419. Each of these provisions allows for different treatment on the basis of sex and/or some other protected attribute under the SDA. However, there are important distinctions to be made between different treatment which is beneficial to achieving gender equality, and different treatment which detrimentally affects

gender equality but which may be justified for some other reason ('exemptions or limitations'). The 15 permanent exemptions under the SDA are currently a mixture of both.

420. Some permanent exemptions operate to benefit substantive gender equality and should be removed from Division IV. Other permanent exemptions are truly limitations on the human right to gender equality.

### **Background to 'Special Measures'**

421. Section 7D recognises that some different treatment on the basis of sex or other protected attribute may be necessary to promote substantive gender equality. Section 7D provides that

(1) A person may take special measures for the purpose of achieving substantive equality between:

- (a) men and women; or
- (b) people of different marital status; or
- (c) women who are pregnant and people who are not pregnant;
- (d) women who are potentially pregnant and people who are not potentially pregnant.

(2) A person does not discriminate against another person [on the grounds of sex, marital status or pregnancy or potential pregnancy] by taking special measures authorised by subsection (1)

(3) A measure is to be treated as being taken for a purposes referred to in subsection (1) if it is taken:

- (a) solely for that purpose; or
- (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

422. Section 7D was added to the SDA in 1995<sup>368</sup> to replace s 33 to recognise that special measures to promote substantive gender equality are not discriminatory at all, but are ‘affirmative action’ or ‘positive discrimination’ measures consistent with CEDAW and other international human rights obligations. Section 7D replaced s 33 to the SDA as a response to the recommendations of the Australian Law Reform Commission in *Equality Before The Law (1994)*. *Equality Before the Law (1994)* had reviewed s 33 which allowed for differential treatment to ensure ‘equal opportunity.’ Section 33 provided that:

423. “[n]othing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other person in circumstances in relation to which provision is made by this Act. “

424. *Equality Before the Law (1994)* found that s 33 was inadequate in its formulation of special measures. Firstly, s 33 was cast as an ‘exemption’ from the SDA when, in fact, the SDA should treat special measures as non-discriminatory acts or practices which are beneficial to women’s equality.

special measures should be presented and understood as

‘an expression of equality, rather than an exception to it. Adopting such an approach affirms a primary commitment to the remedying of widespread, deeply entrenched and identifiable group-based patterns of inequality.’<sup>369</sup>

425. Secondly, s 33 was confined to ‘equal opportunity’ measures, a term which is often used to describe measures designed to achieve formal equality only – i.e. equal treatment of women and men or different treatment which may only emphasises differences between women and men to women’s disadvantage.<sup>370</sup> According to *Equality Before the Law (1994)*, a focus on ‘equal opportunity’ ‘ignores historical and structural barriers which impede women’s utilisation of formally equal opportunities.’<sup>371</sup>

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<sup>368</sup> *Sex Discrimination Amendment Bill 1995* (Cth).

<sup>369</sup> Australian Law Reform Commission, ‘Equality Before the Law: Justice for Women’ (69: Part 1, 1994), 61, citing the Ontario Law Reform Commission.

<sup>370</sup> See Reg Graycar and Jenny Morgan, ‘Thinking about Equality’ (2004) 27 *University of New South Wales* 833, 835.

<sup>371</sup> Australian Law Reform Commission, ‘Equality Before the Law: Justice for Women’ (69: Part 1, 1994), 60, citing Office of the Status of Women Cth, *Submission 543*.

426. Accordingly, the new s 7D no longer treats special measures as ‘exemptions’ and is no longer confined to equal opportunity measures.<sup>372</sup>
427. In 1996, HREOC developed guidelines for assessing a special measure.<sup>373</sup>
428. HREOC considers that s 7D is an adequate formulation of special measures for the purposes of CEDAW subject to ensuring that it covers all grounds protected under the SDA, including family and carer responsibilities (see **Family Responsibilities**, above). Section 7D has been appropriately applied by the courts to give effect to CEDAW obligations.<sup>374</sup> CEDAW expressly provides that ‘temporary special measures aimed at accelerating *defacto* equality between men and women shall not be considered discrimination as defined in the present Convention’,<sup>375</sup> whilst emphasising that special measures should ‘in no way entail as a consequence the maintenance of unequal or separate standards’.<sup>376</sup> Special measures are to ‘be discontinued when the objectives of equality of opportunity and treatment have been achieved.’<sup>377</sup>
429. However, as proposed elsewhere in this Submission, HREOC recommends that HREOC have the power to certify acts or practices which are temporary special measures under the SDA and consistent with CEDAW. (See **Powers of HREOC and the Sex Discrimination Commissioner**, below).

### Background to Permanent Exemptions

430. Permanent exemptions under the SDA currently apply in the following areas:
431. Certain discrimination, such as due to a genuine occupation requirement, (s 30)
- Pregnancy or childbirth (s 31)

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<sup>372</sup> Under the *Disability Discrimination Act 1992* (Cth)

<sup>373</sup> Human Rights and Equal Opportunity Commission, ‘*Sex Discrimination Act 1984* Special Measures Guidelines’ (1996). For a discussion of special measures under the *Sex Discrimination Act 1984* (Cth), see Neil Rees and Simon Rice Katherine Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 463-7. See, also, *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, in which a man challenged a 50/50 quota for woman and men on the Union Governing Council. The Sex Discrimination Commissioner appeared as *amicus curiae*. Crennen J upheld the quota as a ‘special measure; under s 7D to address existing gender inequality within the Union.

<sup>374</sup> See, eg, *Jacoms v Australian Municipal Administrative Clerical & Services Union* (2004) 140 FCR 149.

<sup>375</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 4(1).

<sup>376</sup> *Ibid.*

<sup>377</sup> *Ibid.*

- Services for members of one sex (s 32)
- accommodation for employees or students (s 34)
- residential care of children (s 35)
- charities (s 36)
- religious bodies (s 37)
- educational institutions established for religious purposes (s 38)
- voluntary bodies (s 39)
- acts done under statutory authority (s 40)
- insurance (s 41)
- new superannuation fund conditions (s 41A)
- existing superannuation fund conditions (s 41B)
- sport (s 42)
- combat duties (s 43)

432. In addition to these permanent exemptions, the SDA includes a number of ‘exceptions’ to specific areas in which gender-based discrimination is otherwise prohibited. These exceptions are found elsewhere in the SDA, not Division 4. Current ‘exceptions’ include:

- Employment in a household (s 14(3))
- Single sex accommodation (s 23(3))
- Accommodation by a religious body (s23(3)).

433. In practice, there is no conceptual difference between permanent exemptions or exceptions, with both operating to exclude certain categories of conduct, entities or areas of public life from being the subject of a complaint of unlawful gender-based discrimination.<sup>378</sup>

434. Most of the permanent exemptions and exceptions have been in place since the SDA was enacted in 1984. As noted by the ALRC,

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<sup>378</sup> See Neil Rees and Simon Rice Katherine Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 447. In that text, the authors use the term ‘exception’ to apply to both permanent exemptions and exceptions under the *Sex Discrimination Act 1984 (Cth)*. The authors use the term ‘exemptions’ to refer to ‘temporary exemptions’, being ‘permission granted by a tribunal or administrative agency to a particular person or organisation which excuses compliance, for a set period of time, with a statutory obligation not to discriminate on a nominated ground when undertaking a particularly activiton.

[t]he inclusion of many of the exemptions was part of the compromise and negotiation process in having the Act passed. Their continuance, after ten years of the Act's operation, limits the effectiveness of the SDA.<sup>379</sup>

### **Background to Temporary Exemptions**

435. Part II, Division 4, s 44, also empowers HREOC to grant temporary exemptions from the SDA for up to five (5) years.

436. The SDA does not set out the factors that HREOC is to take into account in exercising its discretion to grant a temporary exemption. However, HREOC has developed its own guidelines for the granting of temporary exemptions under the SDA. HREOC will consider:

- the objects of the SDA;
- the reasonableness of the exemption sought – HREOC will weigh up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption;
- whether the circumstances, while not falling precisely within any of the permanent exemptions to the SDA, bear a close resemblance to any of those exemptions so as to be within the spirit or broad scheme of those exemptions;
- whether the exemption could be granted subject to terms and conditions which further the objects of the SDA (see below).<sup>380</sup>

437. Once granted, a temporary exemption operates as a complete defence to a claim of unlawful discrimination.

438. An aggrieved person can seek a review of the decision granting the temporary exemption to the Administrative Appeals Tribunal.<sup>381</sup>

439. From the commencement of the SDA to January 2007, HREOC had granted 27 temporary exemptions under s 44.

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<sup>379</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994), 69.

<sup>380</sup> For a full summary of HREOC's process for dealing with applications for temporary exemptions under the *Sex Discrimination Act 1984 (Cth)*, go to [http://www.hreoc.gov.au/legal/exemptions/sda\\_exemption/sda\\_exemption\\_guidelines.html](http://www.hreoc.gov.au/legal/exemptions/sda_exemption/sda_exemption_guidelines.html).

<sup>381</sup> *Sex Discrimination Act 1984 (Cth)*, s 45.

440. HREOC does not use the power to grant a temporary exemption where the differential treatment is a special measure. This is because s 7D provides that a special measure is not unlawful under the SDA, and therefore a temporary exemption is not necessary.<sup>382</sup>
441. HREOC considers that the existing power to grant temporary exemptions should be retained, on the basis that it is used subject to the objects of the act, the duties of HREOC under the HREOC Act, and exercised in a transparent fashion.
442. However, HREOC supports an amendment to the SDA which would confirm that the power to grant exemptions should be exercised in accordance with the objects of the SDA, to reflect the existing HREOC guidelines. This is not currently specified.

**Recommendation 36: Temporary exemptions only to be granted in accordance with the objects of the SDA (Stage One)**

Amend s 44 of the SDA to make it clear that the power to grant a temporary exemption is to be exercised in accordance with the objects of the SDA.

***Permanent Exemptions which allow differential treatment consistent with substantive gender equality***

443. A number of permanent exemptions under the SDA, whilst still described as ‘exemptions’, are in fact consistent with, and may promote, substantive gender equality.
444. For example, s 31 provides that the unlawful discrimination provisions in Division 1 (Discrimination at Work) and Division 2 (Discrimination in other areas, such as education, goods and services, and accommodation) do not make it unlawful to ‘discriminate against a man on the ground of his sex by reason

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<sup>382</sup> Neil Rees and Simon Rice Katherine Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 488, who propose that the temporary exemptions power may be invoked by a person who wishes to engage in a ‘special measure’ for the benefit of a disadvantaged group of people...

only of the fact that the first-mentioned person grants to a woman rights or privileges in connection with pregnancy or childbirth.’

445. This section is designed to permit different and beneficial treatment for women which is in connection with their unique child-bearing role. For example, it would permit an employer to only offer paid maternity leave to child-bearing women. It accords with CEDAW which provides that the adoption of programs or other acts which meet the test of being special measures ‘aimed at protecting maternity shall not be considered discriminatory.’<sup>383</sup> CEDAW also places an obligation on state parties to, for example, take all appropriate measures to ‘provide special protection to women during pregnancy in types of work proved to be harmful to them’,<sup>384</sup> whilst noting that protective legislation relating to matters should be reviewed periodically ‘in light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.’<sup>385</sup>
446. Similarly, s 32 provides that Division 1 or 2 does not apply where services, by their very nature, can only be provided to members of one sex. This section enables, for example, specialist services for amnio centesis, or for vasectomies, to address health needs which are unique to women, or to men. This section is also consistent with CEDAW and is not an exemption to the obligation to promote gender equality.
447. Recommendation 3.7 of *Equality Before the Law (1994)* proposed that s 32 be amend as follows: ‘The provision of services the nature of which is such that they can only be provided to members of one sex shall not be considered discrimination as defined by Division 1 or 2’. This recommendation has not been implemented.<sup>386</sup>
448. Section 30 also allows for different treatment between men and women where it is a genuine occupational qualification for a person to be of one sex. Section 30 contains some provisions which would be considered categories of special measures. For example, s 30(2)(d) allows only women to be employed to

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<sup>383</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 4(2).

<sup>384</sup> *Ibid*, art 11(2)(d).

<sup>385</sup> *Ibid*, art 11(3).

<sup>386</sup> Australian Law Reform Commission, ‘Equality Before the Law: Justice for Women’ (69: Part 1, 1994), 62.

conduct searches of clothing or bodies of women, and the same for men. (However, in other cases, s 30 may be contrary to promoting substantive equality, but is a permitted exemption on the grounds of ‘reasonableness’. For example, s 30(2)(f) allows employers to discriminate against women or men, when it is not reasonable to expect the employer to provide separate accommodation and sanitary facilities for employees of both sexes. This latter provision operates to limit substantive gender equality on the basis of another competing interest, such as unjustifiable hardship to the employer. These permanent exemptions are discussed further below.)

449. HREOC proposes that the current permanent exemptions in the SDA which promote gender equality, such as ss 31 and 32, be consolidated with s 7D as categories of lawful differential treatment which promote gender equality.

450. Section 7D would retain the general temporary special measures clause which makes it clear that special measures are not to be continued once the gender equality purpose for which they have been adopted has been achieved – for example, special measures to address the gender pay gap. If the gender pay gap is closed, the different treatment may be subject to review to determine if it still needs to be retained. This would be compliant with CEDAW.<sup>387</sup>

**Recommendation 37: Consolidate permanent ‘exemptions’ which are consistent with gender equality with s 7D about temporary special measures (Stage One)**

Remove permanent exemptions, such as 31 and 32 which are consistent with gender equality, from Division 4, and consolidate them with s 7D regarding temporary special measures.

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<sup>387</sup> The importance of the temporary nature of special measures was also highlighted in *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149.

***Permanent exemptions that may be contrary to substantive gender equality but are sought to be justified by competing public policy consideration/s***

451. Other permanent exemptions under the SDA operate to permit gender-based discrimination in specified cases but also appear to address some other public policy considerations apart from promoting gender equality, for example, in relation to religious bodies, or voluntary bodies.

452. There has been long standing criticism of the SDA providing for so many exemptions. As noted in *Equality Before the Law (1994)*, '[t]he number of exemptions from the application of the SDA provisions are seen to limit its effectiveness to achieve its goals.'<sup>388</sup> As noted by Rees et al.,

[i]t is sometimes quite challenging to identify the public policy considerations which may lie behind a particular exception [in anti-discrimination laws generally], or to assert that those considerations still justify the existence of an exception to a general prohibition against discrimination on a particular ground.<sup>389</sup>

453. The SDA is not alone in the number of permanent exemptions. Whilst the RDA has only a limited number of statutory 'exceptions' to the operation of the RDA<sup>390</sup> the DDA provides for a significant number of permanent exemptions<sup>391</sup> and the ADA has the largest number of permanent exemptions.<sup>392</sup> Anti-discrimination laws at state and territory level also include various permanent exemptions.<sup>393</sup>

454. Like most human rights, the right to equality is inherently qualified to the extent necessary to strike an appropriate balance with competing rights and interests. So, for example, the UN Human Rights Committee has stated that:

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<sup>388</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994), 38.

<sup>389</sup> Neil Rees and Simon Rice Katherine Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008)

<sup>390</sup> See ss 8(1) (special measures); 8(2) (instrument conferring charitable benefits); 9(3) and 15(4) (employment on a ship or aircraft if engaged outside Australia); 12(3) and 15(5) (accommodation and employment in private dwelling house or flat).

<sup>391</sup> See Part 2 Division 5.

<sup>392</sup> See Part 4 Division 4. See, also, Neil Rees and Simon Rice Katherine Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 450-1.

<sup>393</sup> See Neil Rees and Simon Rice Katherine Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 451-455.

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>394</sup>

455. Similarly, in *Sporong and Lonroth v Sweden*,<sup>395</sup> the European Court of Human Rights observed:

The Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the [European Convention on Human Rights].<sup>396</sup>

456. As discussed earlier in this submission, the concept of substantive equality also contemplates that a formal equality approach of treating everyone the same can actually reinforce existing inequalities and perpetuate disadvantage.

Accordingly, in certain circumstances *differences* in treatment are required in order to ensure a just outcome and the acceleration of substantive equality or equality of outcome.

457. The search for an appropriate balance between sameness or difference of treatment, and between competing rights and interests, goes to the heart of what anti-discrimination laws seek to achieve. The model adopted under the SDA is one that seeks to resolve many of these tensions in advance. That is, the legislation adopts a formulaic approach that identifies specific criteria for defining whether particular conduct:

- (f) is directly or indirectly discriminatory,
- (g) occurred within a protected area of public life; and, if so,

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<sup>394</sup> HRC, General Comment 18 (Non-discrimination), [13]. This reflects the approach taken under the jurisprudence of the Committee. See, eg, *Broeks v. The Netherlands* (172/1984), ICCPR, A/42/40 (9 April 1987) 139, [13]. See further, Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, 2004), 680-9.

<sup>395</sup> (1982) 5 EHRR 35.

<sup>396</sup> *Ibid* [69]. See further J Coppel and M Supperstone, 'Judicial Review After the Human Rights Act' (1999) 3 *European Human Rights Law Review* 301 at 312: 'In virtually all cases, a measure cannot be 'necessary' unless it is proportionate and proportionality then becomes the battleground on which a great number of Convention cases are won and lost.' See also Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174 at 187, where the author notes that the principle of proportionality is 'endemic' to the jurisprudence of the European Court of Human Rights on Convention rights. See further Lord Walker, 'Problems of human rights legislation: What difference can a human rights charter make?' (2007) 81 *Australian Law Journal* 923 at 929-30; Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in MacDonald et al (eds), *The European System for the Protection of Human Rights* (1993).

- (h) is excused via one of the exemptions (or alternatively because the conduct amounts to a special measure and therefore is not discriminatory at all).

458. This model is consistent with the model adopted under the DDA and ADA, as well as the anti-discrimination legislation in each of the States and Territories. The advantage of this model is that it seeks to provide a degree of clarity and certainty in advance, so that individuals and businesses can adequately regulate their affairs. As Neil Rees, Katherine Lindsay and Simon Rice observe:

In order to be effective anti-discrimination law must stipulate with reasonable clarity the circumstances in which it is impermissible for an attribute possessed by a person, such as his or her race or sex, to influence a decision that is made about that person. That is what the existing law seeks to do, albeit with limited success.<sup>397</sup>

459. The existence of fixed permanent exemptions is also inflexible. Whilst providing a degree of certainty, permanent exemptions also carry the risk of excluding too much or too little depending on the circumstances. Indeed, some commentators have observed that, in circumstances where an appropriate exemption does not apply, the courts have at times adopted an overly restrictive interpretation of the definition of discrimination to avoid unjust or impractical results on the particular facts, although with adverse consequences for discrimination jurisprudence in the longer term.<sup>398</sup> Others have queried whether many of the existing exemptions are unnecessarily broad, or just plain unnecessary.

460. HREOC considers that the removal of permanent exemptions under the SDA also needs proper consideration and consultation.

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<sup>397</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 73.

<sup>398</sup> The decision of the High Court in *Purvis v NSW (Dept of Education and Training)* (2003) 217 CLR 92 is often cited as a prime example, where a drafting deficiency at the time (but since remedied) only gave schools an unjustifiable hardship defence in relation to the enrolment of student, but not once students had been enrolled. Several commentators have suggested that the avoidance of an impractical result on the facts resulted in the majority of the Court adopting a highly restrictive approach to the definition of direct discrimination, with adverse implications for discrimination law as a result. See, eg, Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395, 408; Kate Rattigan, '*Purvis v New South Wales (Department of Education and Training)*; A Case for Amending the *Disability Discrimination Act 1992* (CTH)' (2004) 28 *Melbourne University Law Review* 532, 533-4, 544, 548.

461. The last occasion upon which the permanent exemptions under the SDA were subject to a full public review was the *Equality Before the Law (1994)* by the ALRC. The ALRC took into account the findings of *Half Way to Equal (1992)* which included only limited recommendations to amend some permanent exemptions under the SDA. The ALRC also took into account the Sex Discrimination Commissioner's review of specific permanent exemptions, *A Review of Exemptions (1992)*,<sup>399</sup> which dealt only some exemptions, being: instrumentalities of the state (s 13, dealt with under **Coverage**, in this submission); education institutions established for religious purposes; voluntary bodies; acts done under statutory authority; and sport. In *Equality Before the Law (1994)*, the ALRC did not go so far as recommending the removal of all permanent exemptions, but made a number of recommendations to remove specific provisions.
462. Removal of all permanent exemptions under the SDA would be a significant change to federal equality law. As noted above, permanent exemptions exist in virtually all existing federal, as well as state and territory anti-discrimination legislation in Australia.
463. In light of the short time available for submissions to this Inquiry, and the inability to conduct detailed consultations at this time, HREOC proposes that the removal of permanent exemptions be dealt with in two stages.
464. HREOC proposes that the permanent exemptions be made subject to a three (3) year sunset clause now. In addition, the Committee should recommend that all permanent exemptions be reviewed as part of a stage two inquiry process. The stage two reform could either lead to permanent exemptions being removed, narrowly defined strictly in accordance with human rights principles, or retained in some cases, and inserting a general limitations provision.
465. HREOC notes that a general limitations clause may need to be narrowly crafted to ensure that the right to gender equality is limited strictly in accordance with human rights principles. If a general limitations clause was adopted, the definition of discrimination under the SDA would also need to be reformed to lower the threshold of conduct that may initially engage the right to equality.

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<sup>399</sup> Sex Discrimination Commissioner, 'Sex Discrimination Act 1984: A Review of Exemptions' (1992).

**Recommendation 38: A three (3) year sunset clause on permanent exemptions (Stage One)**

- (1) Place a three (3) year sunset clause on all permanent exemptions and exceptions that limit gender equality
- (2) Refer all permanent exemptions to a second stage of review, with a view to them either being removed, refined on strictly human right grounds or retained in some cases

**Option for Reform H: Process for removing permanent exemptions (Stage Two)**

- (1) Consider removal of all permanent exemptions, or narrowing on strictly human rights grounds
- (2) Consider introducing a general limitations clause which is strictly compliant with human rights principles

466. HREOC has considered several of the permanent exemptions under the SDA to highlight some of the issues that are raised by permanent removal. In this Submission, HREOC sets out some of the debates about the nature and scope of permanent exemptions relating to:

- Religious exemptions
- Voluntary bodies
- Sport

467. The following sections about these three categories of exemptions are provided to give examples of the background to the history and debates about permanent exemptions. They are examples of exemptions which continue to have significant effect. In these sections, HREOC also suggests issues to be dealt with in a second stage of review.

## ***Religious exemptions (s 37 and 38)***

468. There are two permanent exemptions under Division II Part 4 of the SDA which are of a religious nature. Section 37 exempts religious bodies from the operation of the Act and s 38 exempts educational institutions established for religious purposes in some areas of employment from the operation of the Act.
469. These exemptions exist at the intersection of two fundamental human rights, namely the right to practice a religion and belief and the right not to be discriminated against on the basis of sex, marital status, pregnancy or potential pregnancy. These two exemptions are discussed in this section.

### **Religious Bodies (s 37)**

470. Section 37 of the SDA exempts religious bodies from the operation of the Act in relation to:
- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
  - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
  - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
  - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
471. There are no exemptions on religious grounds in the provisions of the RDA or the DDA. The ADA contains an exemption from discrimination provisions for a body established for religious purposes that:
- (e) conforms to the doctrines, tenets or beliefs of that religion; or

(f) is necessary to avoid injury to the religious sensitivities of adherents of that religion.<sup>400</sup>

472. The *Workplace Relations Act 1996* (Cth) prohibits the termination of employment on the ground of sex, marital status, family responsibilities and pregnancy.<sup>401</sup> However there is an exemption to this prohibition in the same terms as that in the SDA.<sup>402</sup>
473. Section 37 of the SDA has not been the subject of inquiry since the Act came into force in 1984 although there has been continued discussion about the role of women within religious institutions up to the present time. There is clearly a strong body of opinion amongst some religious institutions that opposes any change to the religious exemptions. However, the rights to religious freedom and to gender equality must be appropriately balanced in accordance with human rights principles.
474. Due to tight time constraints, HREOC has not been able to consult widely on this issue.
475. The existing permanent exemption provides little incentive for religious bodies to re-examine their beliefs about the role of women and to ensure adequate representation of women in areas that do not conflict with the doctrines, tenets and beliefs of the religion. The permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body.
476. Within many religious bodies, there are now organised groups of women leading discussion about the appropriate balance between religious freedom and gender equality. Groups representing Anglican, Catholic and Muslim women have made submissions to this Inquiry. The Anglican and Catholic women are

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<sup>400</sup> Section 35.

<sup>401</sup> Section 659(2).

<sup>402</sup> Section 659 (4).

recommending the removal of the s 37 exemption<sup>403</sup> while the Islamic women argue that it should be retained.<sup>404</sup>

477. The UN *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* specifically affirms the right to appoint religious personnel as one of the freedoms of belief covered by the Charter.<sup>405</sup> However that principle is narrower than s 37 which, in s 37(d), also exempts from the SDA

any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

478. As noted above, HREOC recommends that s 37, together with other permanent exemptions, be made subject to a three (3) year sunset clause. The question of whether s 37 should be removed, retained or replaced with a more narrowly tailored exemption on strictly human rights grounds should be addressed during the second stage reform process, to be completed within three (3) years.

479. HREOC's view is that the right to religious freedom must be balanced by the right to equality. It considers that, at a minimum, the exemption may be narrowed or alternatively, s 37 could include a mechanism which would allow religious bodies, on request to the Minister, to opt out of the exemption.

480. For example, s 37 could be amended to include that, if a religious body wishes to be removed from the operation of s 37, or parts of it, it could apply to the Minister. Subject to appropriate transparency arrangements, the Minister could then schedule the religious body to the Act. From that date, the named religious body would no longer be exempted from the SDA under s 37 (or the part they nominate) and would be bound by its terms.

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<sup>403</sup> Ordination of Catholic Women Inc, Women Members of the General Synod Standing Committee, Anglican Church of Australia, *Submission to Senate Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (2008).

<sup>404</sup> Muslim Women's National Network of Australia, *Submission to Senate Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (2008).

<sup>405</sup> *UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* UN Doc A/Res/36/55 (25 November 1981), art 6.

481. This option would enable religious bodies to make a public declaration that they are committed to substantive gender equality within their specific areas of religious practice and expressions of faith.

482. These options could be considered during the second stage of the reform process.

### **Educational institutions established for religious purposes (s 38)**

483. An exemption exists under s 38 of the SDA which allows educational institutions established for religious purposes to discriminate on the grounds of sex, marital status and pregnancy in some areas of employment.

484. Section 38 of the SDA states:

(1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's marital status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed

485. The explanatory memorandum accompanying the SDA stated:

Sub-clause (1) of this clause provides an exemption in relation to discrimination on the ground of marital status or pregnancy for the hiring or dismissal of staff for employment at an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion or creed where the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. Sub-clause (2) provides a similar exemption in relation to the hiring or dismissal of contract workers. Sub-clause (3) provides a similar exemption in relation to discrimination on the grounds of marital status or pregnancy for educational institutions with regard to their educational practices.

486. Section 38 therefore permits discrimination if the discrimination occurs in *good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed*. The exemption does not apply to sexual harassment or family responsibilities. Sub-clauses 1 and 2 cover the hiring and dismissal of staff and sub-clause 3 covers discrimination in educational practices.

487. All Australian state and territory legislation includes some form of exemption for educational institutions established for a religious purpose. Details of these state and territory exemptions are included in **Annexure D**.

### **History of the s 38 Exemption**

488. The inclusion of s 38 in its present form was the culmination of extensive consultation between the Federal government and church lobby groups.

489. In the first government Sex Discrimination Bill of 1983, introduced by Senator the Hon Susan Ryan, Minister Assisting the Prime Minister for the Status of Women, into the Senate on 2 June 1983 (and closely resembling her 1981 Private Member's Bill), the provisions extended to the employment of teachers in private schools. When the Bill was circulated, there was strong opposition from the Catholic Bishops and other Catholic and non-Catholic education organisations. Lobbying was strong from private schools, which said they wanted the right to decline to employ, for example, teachers living in de facto relationships or those who become unmarried parents. It was reported at the

time that the Government was under attack about private school funding and was sensitive to the concerns of private schools at the time.<sup>406</sup>

490. The Opposition proposed an amendment to take into account the needs of private schools. At this stage the Government apparently still hoped to secure bipartisan support for the Bill and agreed to consider the amendment.

491. On 16 September 1983, Senator Ryan announced that the Government would consider giving private schools a two-year exemption from the employment provisions pending an inquiry to assess the future of the exemption. Senator Ryan said:

It is not the Government's intention to damage the special character of non-government schools or to interfere with the beliefs and ethical standards of parents and educational authorities ... However, the Government has a general commitment to ensuring that men and women should not be discriminated against in employment because of their sex, marital status or pregnancy.

492. She also said that during the two-year exemption the Attorney-General would ask the Human Rights Commission to inquire into and report on the application of the legislation to non-government schools.<sup>407</sup>

### **Inquiries into the s 38 Exemption**

493. Since the introduction of the SDA, there have been a number of reviews into the exemptions under the Act including *Half Way to Equal* (1992), *The Review Report* (1992) and *Equality Before the Law* (1994). The major conclusions from these reports are discussed below.

494. *Half Way to Equal* (1992) considered the exemption in section 38. A summary of the submissions made in 1992 is set out in **Annexure E**.

495. *Halfway to Equal* (1992) stated that 'the exemption allowing discrimination against teachers in educational institutions established for religious purposes was of great concern',<sup>408</sup> but acknowledged the need to balance the right of religious

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<sup>406</sup> W Bacon, *National Times*, 20 September 1983.

<sup>407</sup> D Snow, *Australian Financial Review*, 17 September 1983.

<sup>408</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992), 266.

schools to set standards of behaviour for students and staff with the right of men and women to be treated equally in their employment when compared to teachers in government schools. *Half Way to Equal (1992)* recommended that s 38 be amended to add the requirement of ‘reasonableness’ so that an employer was required to meet a common law standard which permitted an objective assessment of the circumstances.<sup>409</sup> The minority report of the Committee stated that s 38 should remain unchanged.<sup>410</sup>

496. In 1992, the Sex Discrimination Commissioner conducted a review of the five permanent exemptions under the SDA, including s 38: *A Review of Exemptions (1992)*. *Review of Exemptions (1992)* argued that the wide ranging exemptions were a product of political compromise necessary to secure the passage of the then controversial SDA through parliament and did not reflect changing social acceptance of anti-discrimination law. A summary of the submissions made is contained in **Annexure F**.

497. *Review of Exemptions (1992)* isolated the three main positions in relation to the exemption:

**(1) Retention of the exemption**

Although some church groups argue that the exemption is essential, the evidence suggests that view is not prevalent. Community attitudes change and pressure from these changed community attitudes to review s38 now exists. Increasing numbers of women in the workforce have brought pressure to bear on employers and government to safeguard the rights of working women who, because of bearing children, are more likely than men to experience discrimination because of pregnancy and family responsibility. The section has operated to cover all kinds of employment, even though the arguments about the need to retain it are aimed almost solely at teaching positions. Arguments based on the exemplar role of teachers would be hard to apply to secretarial, gardening and maintenance staff.

**(2) Removal of the exemption**

Arguably other sections of the SDA cover instances where some types of discrimination are countenanced. For instance, sex can be a genuine occupational qualification in some circumstances. Removal would be the best option for

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<sup>409</sup> Recommendation 73.

<sup>410</sup> Minority report prepared by Mr A Cadman MP, Mrs F Bailey MP, Mr Ronaldson MP, and Mr P Costello MP.

delivering social justice for women in their work, and ultimately the best option for children and schools because it would encourage the development of positive anti-discrimination and equal opportunity in schools.

**(3) Amendment of the exemption**

The Lavarch Inquiry believed section 38 should be reworded to avoid ambiguity to meet the common law standard of reasonableness and to allow for an objective assessment of the circumstances. This approach would tighten the exemption to restrict the area of countenanced discrimination thus widening the area where women's right to work is protected. Countenanced discrimination should be 'reasonable having regard to the circumstances of the case as well as being in good faith'. This would allow a standard to be set in the Commission's determinations because reasonableness is a familiar concept in law. Additionally, s38 could be tied to a sunset clause.

498. *Review of Exemptions (1992)* concluded by recommending that the exemption be removed to ensure protection against discrimination to all Australians including the large number of teachers and other staff employed in the non-government school system. *Review of Exemptions (1992)* stated:

This would locate anti-discrimination practices in all Australian schools. Students at non-government schools would be able to see anti-discrimination practices in action. The Australian Government has a commitment and an obligation to protect human rights. That commitment could be expressed by requiring that if Commonwealth funds are accepted by non-government schools, those schools must comply with the expectations of Australian society.<sup>411</sup>

499. *Review of Exemptions (1992)* also suggested a less desirable, but satisfactory solution, to adopt the proposal that any discrimination must be 'reasonable' in addition to being in 'good faith', as suggested by *Half Way to Equal (1992)*.

500. In *Equality Before the Law (1994)*, the ALRC did not receive any submissions on the exemption from religious organisations or schools. However in its Report, it referred to submissions of groups to *Halfway to Equal (1992)*, as well in *Review of Exemptions (1992)* to the Sex Discrimination Commissioner.<sup>412</sup>

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<sup>411</sup> Sex Discrimination Commissioner, 'Sex Discrimination Act 1984: A Review of Exemptions' (1992), 82.

<sup>412</sup> Independent Teachers' Federation of Australia *Submission 7*, Confidential *Submission 190*, Sex Discrimination Commissioner *Submission 338* and Affirmative Action Agency Cth *Submission 349*.

501. The ALRC concluded that the right to religious freedom and the right to enjoy culture and religion must be balanced by the right to equality and the principle of non-discrimination. The ALRC considered that s 38 preferred one right over the other with no consideration of where the balance should be. It stated that ‘women employed in religious educational institutions should have the same right to be free from discrimination as other women.’<sup>413</sup>
502. The ALRC endorsed the recommendation of the *Review of Exemptions (1992)* that the exemption contained in s 38 be removed or, at the very least, the exemption be removed in relation to discrimination on the ground of sex and pregnancy. The ALRC recommended that, if the exemption on the ground of marital status was to be retained, it should be amended to require a test of reasonableness. In *Pregnant and Productive (1999)*, HREOC also recommended that the exemption be removed in relation to pregnancy.<sup>414</sup>
503. Section 38 impacts on a large number of people. In 2006, non-government schools alone employed 112,027 staff which is about a third of Australia's school staff.<sup>415</sup> This exemption is wider than non-government schools and covers all educational institutions established for a religious purpose including primary, secondary and tertiary education.
504. As noted above, HREOC recommends that s 38, together with other permanent exemptions, be made subject to a three (3) year sunset clause. The question of whether s 38 should be removed, retained or replaced with a more narrowly tailored exemption on strictly human rights grounds should be addressed during the second stage reform process, to be completed within three (3) years.

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<sup>413</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994), 77.

<sup>414</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), Recommendation 11.

<sup>415</sup> National Report on Schooling in Australia 2006 produced by the Ministerial Council on Education, Employment, Training and Youth Affairs.

## ***Voluntary Bodies (s 39)***

505. Section 39 of the SDA provides for an exemption for ‘voluntary bodies’ from Division 1 and 2, in connection with the admission of persons as members, or the provision of benefits, facilities and services to members.<sup>416</sup> Voluntary bodies are defined to include non-profit associations or bodies, *not* including ‘clubs, registered organisations, bodies established by a law of the Commonwealth, state or territory, or a body that provides grants or loans.’<sup>417</sup> The effect of the permanent exemption of voluntary body is therefore linked to the definition of a club. A club - not a voluntary body for the purposes of the SDA - is defined in s 4 as an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that: (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and (b) sells or supplies liquor for consumption on its premises. Note that persons engaged in paid work for voluntary bodies are covered by the employment provisions of the SDA.

506. In her *Review of Exemptions (1992)*, the Sex Discrimination Commissioner noted that the voluntary body exemption arose because of concern expressed at the time of Cabinet consideration of the *Sex Discrimination Bill (1984)* that the legislation should not affect the activities of organisations such as Rotary and Lions clubs.

507. The Commissioner recommended that the exemption be removed. Arising from her inquiry, the Commissioner found that

Voluntary bodies have had sufficient time to debate fully the membership and benefits issues [arising under s 39], and justify any discrimination that occurs. Responsible organisations have chosen to remove discriminatory requirements

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<sup>416</sup> *Sex Discrimination Act 1984* (Cth), s 39, provides that ‘Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person’s sex, marital status or pregnancy, in connection with:

(a) the admission of persons as members of the body; or  
(b) the provision of benefits, facilities or services to members of the body.

<sup>417</sup> *Sex Discrimination Act 1984* (Cth), s 4, defines a voluntary body as an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include: (a) a club; (b) a registered organisation; (c) a body established by a law of the Commonwealth, of a State or of a Territory; or (d) an association that provides grants, loans, credit or finance to its members.

from their rules. Those which have not reflected the spirit of the SDA in their rules, are permitting the denial of many benefits to women and girls.<sup>418</sup>

508. This recommendation was not adopted by the Commonwealth at that time.
509. The Australian Law Reform Commission in *Equality Before the Law (1994)* also recommended that this permanent exemption be removed.
510. HREOC has since, in its role as *amicus curiae* in proceedings before the Federal Magistrates Court, made further submissions in relation to how s 39 should be interpreted. In these submissions, HREOC has recommended a narrow interpretation be adopted.<sup>419</sup>
511. The extent to which voluntary bodies are exempt from discrimination and equality laws in other federal, state and territory acts varies considerably at the present time.
512. For example, the *Anti-Discrimination Act 1977* (NSW) makes it unlawful for registered clubs to discriminate on the ground of sex in relation to membership and access. Registered clubs with membership available to one sex are exempted and it is not unlawful to discriminate in relation to use and enjoyment of a benefit provided by a club, where it is not practicable for the benefit to be enjoyed simultaneously by both sexes. In Queensland, clubs which function for the purpose of profit are covered by the *Anti-Discrimination Act 1991* (QLD). Under the *Equal Opportunity Act 1984* (SA), membership of voluntary bodies is not exempt from the prohibition against discrimination on the ground of sex.
513. Under the *Anti Discrimination Act 1998* (Tas), membership and activities of clubs are covered by the Act. The Act does not mention voluntary associations specifically, but there is a competitive sport exemption which permits

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<sup>418</sup> Sex Discrimination Commissioner, 'Sex Discrimination Act 1984: A Review of Exemptions' (1992), 95.

<sup>419</sup> See *Trudy Ann Gardner v. All Australian Netball Association Limited* FMC AZ154 of 2002, where HREOC outlined its reasons why a narrow interpretation of the exemption was to be preferred, including that: (a) In construing legislation designed to protect human rights, the courts have a special responsibility to take account of and give effect to the purposes and objects of the legislation; (b) Further, in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object; s.15AA *Acts Interpretation Act 1901* (Cth). This approach does not only apply in circumstances where there is an ambiguity or inconsistency in the Act. In accordance with this principle, exemptions and other provisions which restrict rights should be construed narrowly. For HREOC's *amicus curiae* submissions in this case in full, go to <[http://www.hreoc.gov.au/legal/submissions\\_court/amicus/netball.htm](http://www.hreoc.gov.au/legal/submissions_court/amicus/netball.htm)>.

discrimination against persons eleven years of age or more on the basis of gender. Services are to be provided without discrimination (see **Sport**, below). Under s 59 of the *Equal Opportunity Act 1995* (Vic), a social, recreational, sporting or community service club, or a community service organisation cannot discriminate against people in relation to an application for membership and in the terms on which they are prepared to admit people to membership. Club is defined as a club or community service organisation which occupies Crown land or receives financial assistance from State or local government. A group that is a club under the *Equal Opportunity Act 1995* (Vic) would be a voluntary body under the SDA. There is no separate definition of voluntary bodies in Victoria. There are exemptions within the Victorian Act for separate access to benefits for men and women if: (1) it is not practicable for men and women to enjoy the benefits at the same time and either access to the same or equivalent benefit is provided for men and women separately; or (2) men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit.

514. The provisions of the *Equal Opportunity Act 1984* (WA) in relation to clubs and associations are similar to those in the SDA. A club is not a voluntary body in terms of the Western Australian Act. Section 71(1) provides an exemption to unlawful discrimination a voluntary body in the admission of persons as members or the provision of benefits, facilities or services. Section 31 of the *Discrimination Act 1991* (ACT) exempts voluntary bodies in relation to the admission of members and the provision of benefits and services.

515. As noted above, HREOC recommends that s 39, together with other permanent exemptions, be made subject to a three (3) year sunset clause. The question of whether s 39 should be removed, retained or replaced with a more narrowly tailored exemption on strictly human rights grounds should be addressed during the second stage reform process, to be completed within three (3) years.

### **Sport (s 42)**

516. Section 42 of the SDA provides that it is not unlawful to exclude persons of one sex from participation in any competitive sporting activity ‘in which strength, stamina or physique of competitors is relevant.’ The exemption does not apply

to coaching, umpiring or refereeing, administration, any prescribed sporting activity, or sporting activities by children under the age of twelve.

517. The Sex Discrimination Commissioner reviewed this exemption during her *Review of Exemptions (1992)*. She noted that

...the present section is not easy to apply. There are few areas where strength, stamina and endurance is not relevant and there is difficulty in determining the relevance of physical strength in an objective manner.<sup>420</sup>

518. The Commissioner recommended that the exemption be removed. In her view.

Section 42 has been relied upon to prevent women and girls gaining access to sporting competitions when, on merit and skill, some women are well able to compete with men and boys.

When used in conjunction with s 39, s 42 can result in elite male standards being applied to women's sporting activities especially where competitions are controlled by organisations which fall within the definition of 'voluntary bodies' in s 4 of the SDA.<sup>421</sup>

519. This recommendation was not adopted by the Commonwealth at that time.

520. The Australian Law Reform Commission in *Equality Before the Law (1994)* also recommended that this permanent exemption be removed.<sup>422</sup>

521. The extent to which sporting activities are exempt from discrimination and equality laws in other federal, state and territory acts varies at the present time.

522. For example, in New South Wales, s 38 of the *Anti-Discrimination Act 1977* (NSW) provides for an exemption for sport, not including coaching, administration or any proscribed sporting activity. Section 11 of the *Anti-Discrimination Act 1991* (Qld) permits restrictions on participation if the restriction is reasonable having regard to strength, stamina or physique, or is confined to people who can compete effectively, or to certain age groups or persons with specific impairments. It does not apply to children under twelve

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<sup>420</sup> Sex Discrimination Commissioner, 'Sex Discrimination Act 1984: A Review of Exemptions' (1992), 126.

<sup>421</sup> *Ibid*, 95.

<sup>422</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994), 81.

years of age, coaching, umpiring, administration or activities prescribed by regulation.

523. In the *Equal Opportunity Act 1984* (SA), there is a general exemption to the provisions prohibiting discrimination on the ground of sex in relation to competitive sporting activity. Section 48 permits discrimination in competitive sport where strength, stamina or physique of the competitor is relevant. The *Anti Discrimination Act 1998* (Tas) contains an exemption for competitive sporting for persons of one gender of 12 years of age or more. In Victoria, there is a general exemption for competitive sporting activities, not including coaching, umpiring, refereeing, sporting administration and the non-competitive practice of a sport.<sup>423</sup> Section 35 of the *Equal Opportunity Act 1984* (WA) includes an exemption in terms identical to section 42 of the SDA. In May 2007, the WA Commissioner for Equal Opportunity released the results of the *Review of the Equal Opportunity Act* along with recommendations for amendment to the Act. The sporting exemption under s 35 of the Act was not identified in the *Review* as a provision requiring amendment. The Northern Territory also has a general exemption for competitive sport.<sup>424</sup> Section 41 of the *Discrimination Act 1991* (ACT) is similar to the SDA provision except that it also exempts sporting activities by children who have not yet attained 12 years of age.
524. Gender inequality in sporting activities remains an ongoing concern. In September 2006, the Senate Environment, Communications, Information Technology and Arts Reference Committee Report released its report, *About Time! Women in Sport and Recreation in Australia* ('*About Time!* (2006)'). The report contained several welcome recommendations regarding increased funding for the promotion of women and girls in sporting activities, including Recommendations 2, 9, 12 and 14.

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<sup>423</sup> *Equal Opportunity Act 1995* (Vic), s 64.

<sup>424</sup> *Anti-Discrimination Act* (NT), s 56 provides that (1) A person may restrict participation in a competitive sporting activity – (a) to either men or women, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity; (b) to people who can effectively compete; (c) to people of a specified age or age group; or (d) to people with a general or specific impairment. (2) Subsection (1)(a) does not apply to a sporting activity for children who have not attained 12 years of age. (3) In this section, "competitive sporting activity" does not include – (a) the coaching of people engaged in a sporting activity; (b) the umpiring or refereeing of a sporting activity; (c) the administration of a sporting activity; or (d) a prescribed sporting activity.

525. Following the release of *About Time!* (2006), Commissioner Broderick raised with the Australian Government additional issues of gender inequality in relation to the funding of sport for girls and women. The Commissioner understands that current Commonwealth funding arrangements for sport do not enable assessment of the extent to which public funds are provided to girls and women on an equal basis with boys and men.
526. The Commissioner encourages the Australian Government to monitor the proportion of public funds provided to sporting activities at all levels, in order to ensure that funding is available to girls and women on an equal basis with boys and men. One of the primary tools for the promotion of gender equality is the monitoring of budgeting and expenditure of public funds to ensure that women and men equally benefit from government support. The United Nations Commission on the Status of Women ('CSW') urges governments to improve financing for gender equality. The Agreed Conclusions of CSW, adopted by member states in New York in March 2008, recommend that governments should:

Develop and implement, where appropriate, methodologies and tools, including national indicators, for gender-responsive planning and budgeting, in order to systematically incorporate gender perspectives into budgetary policies at all levels, with a view to promoting gender equality in all policy areas.<sup>425</sup>

527. As noted above, HREOC recommends that s 42, together with other permanent exemptions, be made subject to a three (3) year sunset clause. The question of whether s 42 should be removed, retained or replaced with a more narrowly tailored exemption on strictly human rights grounds should be addressed during the second stage reform process, to be completed within three (3) years.

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<sup>425</sup> UN Commission on the Status of Women, *Agreed Conclusions on Financing for Gender Equality and the Empowerment of Women*, para 21(p), UN Doc E/CN.6/2008/L.8, available at: [http://www.un.org/womenwatch/daw/csw/csw52/AC\\_resolutions/L.8\\_Advance%20unedited\\_as%20corrected.pdf](http://www.un.org/womenwatch/daw/csw/csw52/AC_resolutions/L.8_Advance%20unedited_as%20corrected.pdf).

## 13. Complaint Handling

This section addresses **Term of Reference H**

The section provides a description of the complaint handling process under the SDA

It sets out key statistical information<sup>426</sup>

It also provides evaluative information on the efficiency and effectiveness of the complaint process regarding key performance standards, customer satisfaction, and the accessibility of the service

Additional funding is needed to support the complaint handling function of HREOC to sustain an efficient, effective and accessible service

Funding is also needed to expand access to legal aid, and low cost specialist legal help, including working women's centres, and community legal centres

The time limit for making an application to the court should be extended

Standing to bring discrimination and related proceedings should also be available to public interest organisations

### **Introduction**

528. A recognised function of HREOC, as a National Human Rights Institution ('NHRI'), as noted in the Paris Principles<sup>427</sup> and by the United Nations<sup>428</sup>, is receipt and action on complaints regarding alleged violations of human rights.

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<sup>426</sup> All 2007-08 data provided in this section is provisional data.

<sup>427</sup> The operations of NHRIs are guided by the 'Paris Principles' which were endorsed by the United Nations Commission on Human Rights in 1992 (Commission on Human Rights Resolution 1992/54).

<sup>428</sup> United Nations Centre for Human Rights, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights (1995).

Handling complaints is central to the role of NHRIs in protecting and promoting human rights and complements other NHRI functions, such as providing advice to government in relation to law and policy and conducting public education. The complaint handling role of NHRIs, with its focus on Alternative Dispute Resolution (ADR), also complements processes for the protection of human rights offered by judicial institutions. In considering the complaint function of NHRIs, the United Nations has noted that complaint mechanisms should offer something that the judiciary cannot and has referred positively to the role of NHRIs in providing an accessible, quick and inexpensive means to resolve human rights disputes.<sup>429</sup>

529. The federal anti-discrimination legislation administered by HREOC, including the SDA, provides a complaint process through which individuals and groups can voice and seek redress for alleged breaches of rights stipulated in the law. Where complaints cannot be resolved, complainants can pursue their allegations to the Federal Court of Australia or the Federal Magistrates Court. In comparison with judicial determination, the HREOC complaint process with its focus on informal dispute resolution, provides an accessible, timely and cost efficient way for parties to deal with discrimination related disputes. While the complaint process has a necessary focus on individual remedy, it also operates as a significant educative force and a means to achieve outcomes that contribute to the broader social change objectives of anti-discrimination law<sup>430</sup>. As such, the HREOC complaint process complements and assists the broader policy, education and inquiry powers granted to HREOC under the HREOC Act and the SDA.

530. The HREOC complaint process has been utilised by thousands of women since the SDA came into effect in 1984. The following sections provide information about HREOC's complaint process, detailed statistics on complaints lodged under the SDA, data on the efficiency and effectiveness of the complaint process and data from HREOC's research projects which address concerns that have been raised about complaint processes in this legal context.

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<sup>429</sup> Ibid.

<sup>430</sup> See discussion of provisional findings of HREOC's current research project on systemic outcomes from complaints and the educative impact of involvement in the complaint process in **Annexure G**.

531. The information provided in the following sections demonstrates that HREOC's complaint process is well respected by users of the service<sup>431</sup> and provides an accessible<sup>432</sup>, timely<sup>433</sup> and effective means of addressing disputes regarding sex discrimination. It is noted however, that while the number of complaints being brought to HREOC under federal anti-discrimination law has continued to increase over recent years<sup>434</sup>, additional funds that had been provided to HREOC to manage this increase in demand, have been cut. This decrease in funding will impact on HREOC's ability to continue to provide an efficient and effective complaint service. It will also limit the work HREOC can undertake to educate the public about the law and the complaint process. This issue is addressed in the recommendations, below.

### **Overview of the Complaint Process**

532. The president of HREOC with the assistance of the Complaint Handling Section (CHS), is responsible for the management of complaints lodged under federal human rights and anti-discrimination law. The legislative directions for handling complaints of unlawful discrimination, including complaints under the SDA, are detailed in Part IIB of the HREOC Act. HREOC has developed detailed complaint handling procedures which build on the legislative directions and these are documented in HREOC's Complaint Procedures Manual. These procedures aim to ensure that the process is accessible, flexible, timely and effective.

533. A flow chart of the process for handling complaints of unlawful discrimination, including complaints under the SDA, is provided below.

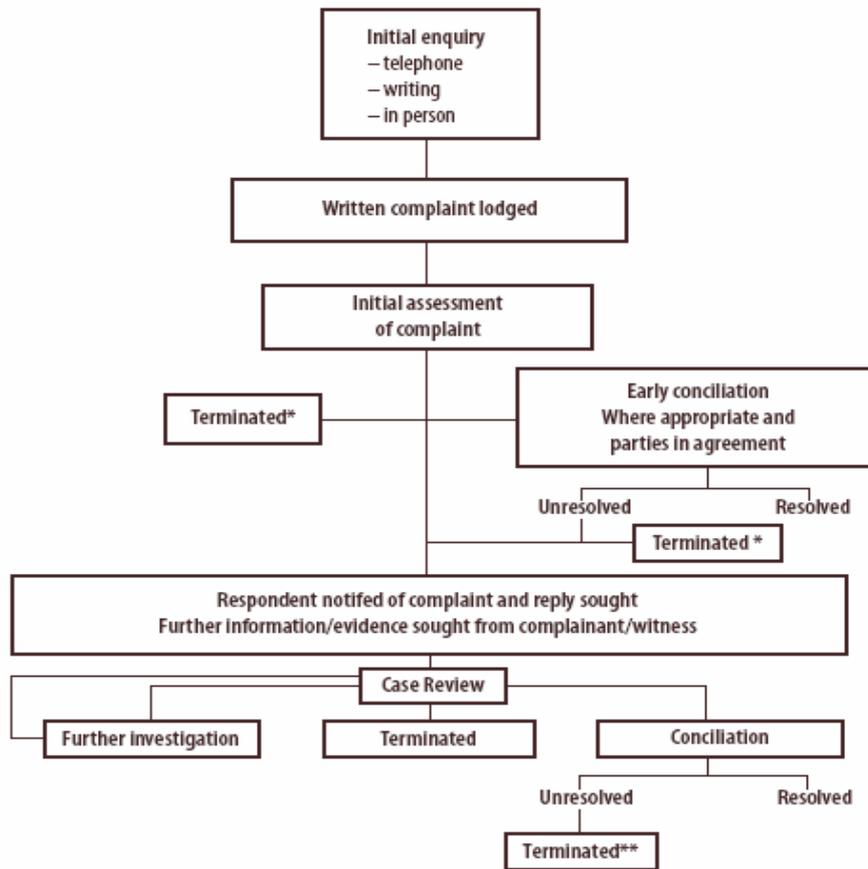
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<sup>431</sup> For the last four reporting years more than 90% of surveyed parties have indicated that they were satisfied with HREOC complaint service. In 2007-08 93% of parties reported that they were satisfied with HREOC's complaint process and 64% rated the service they received as 'very good' or 'excellent'.

<sup>432</sup> HREOC is committed to providing an accessible complaint handling service to everyone in Australia. Measures undertaken to ensure accessibility of the service are outline below.

<sup>433</sup> Data for 2007-08 indicates that the average time from receipt to finalisation of a complaint was 6 months. Data on timeframes for complaints under the *Sex Discrimination Act 1984 (Cth)* is provided below.

<sup>434</sup> Over the past four years, HREOC has experienced a 67% increase in the number of complaints received. Data on the number of complaints received under the *Sex Discrimination Act 1984 (Cth)* over past years in provided below. See Table CH1.



\* When complaints under the Age, Racial, Sex and Disability Discrimination Acts are terminated, the complainant may apply to have the allegations heard and determined by the Federal Court or the Federal Magistrates Court

534. Key features of HREOC’s complaint process are summarised below and an expanded account of the process, including information about the legislative and theoretical framework, is provided at **Annexure G**.

### Complaint lodgement and assessment

535. Complaints can be lodged by individuals on their own behalf, or by individuals or organisations on behalf of others; including on behalf of a class of people. Complaints can be lodged in any written form including by letter, fax or e-mail. On-line and hard copy complaint forms are available. CHS Officers will assist a person put their complaint in writing if necessary and complaints can be made in any language.

536. All incoming correspondence is assessed by the Director of Complaint Handling generally within two days of receipt. This ensures quality assessment of issues and enables matters to be allocated for priority handling and fast-tracked to resolution, where this is appropriate. Complaints assessed for priority action, such as those where the person is in ongoing employment, are generally allocated to an officer within a few days of receipt<sup>435</sup>.

### **Complaint Inquiry**

537. In many cases, the first step in the complaint process involves the President issuing a customised letter of inquiry to the respondent. The letter requests a reply to the complaint. The complaint process is, however, flexible and when respondents are advised of complaints either verbally or in writing, they are also provided with the opportunity to proceed to conciliation prior to the provision of any formal reply<sup>436</sup>.

538. It is HREOC's view that anti-discrimination complaint processes should include provision for the investigation of complaints, rather than requiring that all complaints proceed directly to conciliation. This is because in many cases, some level of investigation assists with successful and appropriate resolution of a complaint as it enables the parties and their advocates to have a clearer understanding of how the allegations fit within the law and to assess the relative strengths and weakness of the claim.<sup>437</sup>

539. Where investigation is undertaken, respondents are generally very cooperative with the process and there are few instances where a respondent does not reply to HREOC or comply with specific requests for information.

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<sup>435</sup> The types of *Sex Discrimination Act 1984* (Cth) complaints assessed as suitable for priority allocation include where: a person is in an ongoing employment relationship and alleging sexual harassment or discrimination; or a person is negotiating working arrangements for example in relation to family responsibilities or return to work after maternity leave. Priority allocation will also be considered where it appears that the issues in the dispute may be able to be resolved through telephone calls to the parties or the provision of information about the law.

<sup>436</sup> HREOC will also suggest that parties consider resolution prior to formal investigation in certain situations. For example, situations where the parties are in an ongoing employment or service provision relationship and/or the complaint is relatively straightforward.

<sup>437</sup> Advocates have also indicated to HREOC that some level of complaint investigation can be important in assisting complainants and respondents consider the relative merits of pursuing or defending the matter in a more formal determination process.

540. On receipt of the respondent's reply to the complaint, the information provided by both parties is assessed and a recommendation is made that either conciliation should be attempted, or the President should terminate the complaint. It is HREOC's general practice to provide complainant's with a copy of a respondent's written reply.
541. Prior to any decision that a complaint is to be terminated, for example on the ground that it is lacking in substance, complainants are given an opportunity to provide further information or submissions. Where a complaint is terminated, detailed reasons for the decision are provided.

## Conciliation

542. HREOC has detailed practice guidelines for officers undertaking conciliation<sup>438</sup> which reflect best practice principles for ADR practitioners and specific knowledge and skills relevant to ADR in the anti-discrimination and human rights law context.<sup>439</sup>
543. HREOC's approach to conciliation accords with the ADR process of 'statutory conciliation'<sup>440</sup> and HREOC conciliators are seen to have a legitimate role to: provide information to parties regarding the law and HREOC's assessment of the complaint; assist parties consider and explore possible terms of resolution; and intervene with a view to enabling substantive equality of process.<sup>441</sup>
- The appropriateness of attempting conciliation is assessed on a case by case basis and conciliation is not required to be undertaken with every complaint.<sup>442</sup>

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<sup>438</sup> These are provided in HREOC's Complaint Procedures Manual and in material provided as part of HREOC's Statutory Conciliation Training Course.

<sup>439</sup> Specific knowledge and skills for this area of ADR are discussed in "*Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on Theory, Practice and Skills* - [http://www.humanrights.gov.au/complaints\\_information/publications/ADR\\_2006.html](http://www.humanrights.gov.au/complaints_information/publications/ADR_2006.html)

<sup>440</sup> Statutory conciliation is defined in the Australian National Advisory Dispute Resolution Council's - ADR Definitions Paper 1997 – Full definition is provided in **Annexure G**.

<sup>441</sup> Papers which provide detailed information about HREOC's approach to conciliation and the conciliation process are available on HREOC's website at [http://www.humanrights.gov.au/complaints\\_information/papers.html](http://www.humanrights.gov.au/complaints_information/papers.html).

<sup>442</sup> Section 46PH of the *Human Rights and Equal Opportunity Act 1986* (Cth) provides that the President may terminate a complaint for a number of reasons including where satisfied that the complaint is lacking

544. Conciliation may be attempted at any time during the complaint process and as noted above, this can take place very early in the process.
545. Most parties to complaints assessed as suitable for conciliation are willing to participate in a conciliation process, and therefore the legislative power to compel parties to attend conciliation is rarely used.
546. HREOC aims to hold conciliation conferences in locations that are convenient and accessible to the parties and CHS officers regularly travel to conduct conferences interstate and in regional and remote areas<sup>443</sup>.
547. The conciliation process may take many forms depending on the circumstances of the complaint. However, the majority of HREOC's conciliation processes are conducted in the form of a face-to-meeting between the parties.
548. HREOC cannot include anything that is said or done in the course of conciliation proceedings in any report that may be provided to the court if the complaint is not resolved. Where a complaint is resolved through a HREOC conciliation process, this is usually documented in a conciliation agreement which is signed by the parties. Parties can seek a wide range of outcomes in conciliation. HREOC does not require the terms of conciliation agreements to be confidential and this is a matter that is negotiated between the parties.
549. HREOC is not a party to conciliation agreements nor does it have a legislative role to monitor or enforce agreements. However, it is HREOC's experience that there is high compliance with the terms of conciliation agreements.<sup>444</sup>

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in substance or misconceived, where the alleged discrimination is not unlawful, where the subject matter of the complaint involves issues of public importance that should be considered by the court or where it is clearly evident in the early stages of the process that there is no reasonable prospect of the matter being resolved by conciliation.

<sup>443</sup> In 2007-08, 316 conciliation conferences were conducted in states other than NSW and in regional areas of NSW.

<sup>444</sup> In research HREOC conducted in 2001, which involved surveying 231 complainants and 228 respondents, 90% of parties reported that there had been full compliance with conciliation settlement terms and a further 7% reported part compliance. The research project is summarised in **Annexure G**.

## Complaint Handling Statistics

### Complaints received under the SDA

Table CH1 - Sex Discrimination Act - complaints received

	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
<b>Received SDA</b>	380	353	348	347	472	438
<b>Total complaints received by HREOC</b>	1 236	1 113	1 241	1 397	1779	2077
<b>SDA complaints as a total of complaints received by HREOC</b>	31%	32%	28%	25%	27%	21%

<sup>550</sup>. Complaints received under the SDA have remained consistent at around 350 complaints a year since 2002-03, increasing by 36% in the 2006-07 reporting year and remaining at this increased level in the current year. These figures are consistent with findings of research undertaken by HREOC in 2001 and 2004-05 which indicated that legislative changes in 2000, which transferred the hearing and determination of complaints to the Federal Court and then the Federal Magistrates Court, had not deterred complainants from bringing complaints to HREOC.<sup>445</sup>

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<sup>445</sup> See details of this research in **Annexure G**.

*Table CH2 - Sex Discrimination Act - complaints received by sex of complainant*

	<b>2002-03</b>	<b>2003-04</b>	<b>2004-05</b>	<b>2005-06</b>	<b>2006-07</b>	<b>2007-08</b>
<b>Female</b>	331 (87%)	305 (86%)	288 (83%)	284 (82%)	412 (87%)	369 (84%)
<b>Male</b>	49 (13%)	47 (13%)	60 (17%)	60 (17%)	60 (13%)	66 (15%)
<b>Joint/multiple</b>	-	1 (1%)	-	3 (1%)	-	3 (1%)
<b>Total</b>	<b>380</b>	<b>353</b>	<b>348</b>	<b>347</b>	<b>472</b>	<b>438 (100%)</b>

551. It is predominantly women who make complaints of discrimination and harassment under the SDA. Since 2002-03, women have represented at least 82% of complainants.

*Table CH3 - Sex Discrimination Act - complaints received by ground*

	<b>2002-03</b>	<b>2003-04</b>	<b>2004-05</b>	<b>2005-06</b>	<b>2006-07</b>	<b>2007-08</b>
<b>Sex discrimination</b>	184 (28%)	216 (34%)	218 (36%)	418 (51%)	449 (45%)	399 (47%)
<b>Marital status</b>	25 (4%)	28 (5%)	22 (4%)	34 (4%)	30 (3%)	43 (5%)
<b>Pregnancy</b>	230 (35%)	177 (28%)	158 (26%)	165 (20%)	170 (17%)	185 (22%)
<b>Sexual harassment</b>	172 (27%)	179 (28%)	167 (28%)	155 (19%)	186 (19%)	157 (18%)
<b>Family responsibility</b>	19 (3%)	14 (2%)	20 (3%)	25 (3%)	39 (4%)	56 (6%)
<b>Victimisation</b>	21 (3%)	19 (3%)	17 (3%)	15 (2%)	118 (12%)	17 (2%)
<b>Aids, permits, instructs (s.105)</b>			2	3 (1%)	3	-
<b>Total*</b>	<b>651</b>	<b>633</b>	<b>604</b>	<b>815</b>	<b>995</b>	<b>857 (100%)</b>

\* One complaint may have multiple grounds.

*Table CH4 - Sex Discrimination Act – complaints received by area*

	<b>2002-03</b>	<b>2003-04</b>	<b>2004-05</b>	<b>2005-06</b>	<b>2006-07</b>	<b>2007-08</b>
<b>Employment</b>	568 (87%)	556 (88%)	516 (85%)	697 (85%)	805 (81%)	746 (87%)
<b>Goods, services and facilities</b>	39 (6%)	41 (6%)	40 (7%)	67 (8%)	95 (9%)	75 (9%)
<b>Land</b>	-	-	-	-		-
<b>Accommodation</b>	1	1	1	4	11 (1%)	2 (-)
<b>Superannuation, insurance</b>	-	4 (1%)	3 (1%)	-	6 (1%)	-
<b>Education</b>	9 (1%)	8 (1%)	12 (2%)	13 (2%)	6 (1%)	7 (1%)
<b>Clubs</b>	7 (1%)	5 (1%)	2	5 (1%)	-	10 (1%)
<b>Administration of Commonwealth laws and programs</b>	17 (3%)	17 (3%)	24 (4%)	23 (3%)	72 (7%)	16 (2%)
<b>Application forms etc</b>	4 (1%)	-	2	-	-	1 (-)
<b>Trade unions, accrediting bodies</b>	6 (1%)	1	4 (1%)	6 (1%)	-	-
<b>Total*</b>	<b>651</b>	<b>633</b>	<b>604</b>	<b>815</b>	<b>995</b>	<b>857</b> <b>(100%)</b>

\* An area is recorded for each ground, so one complaint may have multiple and different areas.

552. The above tables reveal that the vast majority of complaints made under the SDA relate to the area of employment. The next main area of complaint is the provision of goods and services. The largest ground of complaint is sex discrimination and this has increased over the past three years.<sup>446</sup> The next most frequent ground of complaint is pregnancy discrimination followed by sexual harassment. The types of complaints HREOC receives about pregnancy discrimination include allegations that a woman has been dismissed after she advises her manager about her pregnancy, given fewer shifts or less demanding work because of her pregnancy, and /or made redundant because she is on maternity leave.
553. Sexual harassment remains a persistent area of complaint under the SDA. The most common scenario is a woman alleging sexual harassment in employment by either co-workers or a manager. Over the past few years HREOC has seen an increase in complaints alleging sexual harassment through the use of new technologies such as emails, SMS, digital imaging and internet sites (see, further, **Sexual harassment**, above).
554. HREOC receives a low number of complaints alleging discrimination on the ground of family responsibilities, as the SDA only covers discrimination based on family responsibilities if a person is dismissed from employment (see, further, **Family responsibilities**, above).<sup>447</sup>
555. This table also indicates that generally HREOC receives low levels of complaints alleging that a person has been victimised for making a complaint to HREOC or asserting their rights under the SDA.

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<sup>446</sup> A reason for this increase is the rise in complaints of indirect sex discrimination which relate to alleged refusal of requests for flexible work arrangements and complaints regarding return to a comparable role after maternity leave.

<sup>447</sup> However, allegations that an employer has not accommodated a person's family responsibilities are covered by the *Sex Discrimination Act 1984* (Cth) and, as outlined above, are usually handled as a complaint of indirect sex discrimination.

*Table CH5 – SDA Complaints received by geographical location of complainant*

	<b>2002/03</b>	<b>2003/04</b>	<b>2004/05</b>	<b>2005/06</b>	<b>2006/07</b>	<b>2007/08</b>
<b>NSW</b>	202	183	163	154	249	185
<b>VIC</b>	57	60	58	68	74	78
<b>QLD</b>	34	34	49	39	49	63
<b>SA</b>	49	43	49	47	50	58
<b>WA</b>	23	18	18	20	29	20
<b>TAS</b>	-	4	8	5	1	5
<b>NT</b>	8	2	3	3	6	4
<b>ACT</b>	6	8	-	7	14	20
<b>Unknown/ OS</b>	1	1	-	4	-	5
<b>Total rec'd</b>	<b>380</b>	<b>353</b>	<b>348</b>	<b>347</b>	<b>472</b>	<b>438</b>

## Outcomes of complaints under the SDA

Table CH6 - SDA Outcomes of finalised complaints

	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
<b>Finalised</b>	395	382	375	314	452	421
<b>Conciliated*</b>	43% (32%)	47%(38%)	47% (38%)	44% (39%)	46% (38%)	53% (48%)
<b>Terminated – no reasonable prospect of conciliation</b>	27%	27%	26%	29%	20%	20%
<b>Terminated – other reason<sup>448</sup></b>	19%	18%	14%	13%	22%	16%
<b>Withdrawn</b>	11%	8%	13%	14%	12%	11%

\* The figures in brackets are the conciliation rates for finalised complaints across all jurisdictions.

556. Complaints under the SDA have a consistently high rate of conciliation which has increased to 53% in the last reporting year. Each year the SDA conciliation

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<sup>448</sup> The grounds for termination of a complaint are contained in s 46PH of the *Human Rights and Equal Opportunity Act 1986* (Cth) and include the alleged unlawful conduct is not unlawful, the complaint was lodged more than 12 months after the alleged events, the complaint is trivial, vexatious, misconceived or lacking in substance, where the subject matter has or could be dealt with through an alternative remedy, and where the subject matter involves issues of public importance that should be considered by the Courts.

rate exceeds the section average. This suggests that complaints under the SDA may be more amenable to resolution through a conciliation process. For complaints under the SDA there has been a 23% increase in the conciliation rate since 2002-03.

557. In the 2007-08 reporting year, of those matters under the SDA where conciliation was attempted, 72% were able to be resolved. The conciliation success rate in the previous year was 69%.
558. Research undertaken by HREOC indicates that the move to a court determination process for federal anti-discrimination complaints<sup>449</sup> has not negatively impacted on the willingness of respondents to participate in conciliation. The possibility of enforceable determinations and the fact that the new process provides complainants with access to court regardless of the reason for termination, can be seen as providing incentives for respondents to resolve complaints through HREOC's conciliation process.<sup>450</sup>
559. The settlements which have been agreed upon by parties involved in complaints under the SDA are many and varied. Outcomes have included:
- payment of financial compensation for such things as economic loss or hurt feelings and humiliation
  - written and verbal apologies
  - provision of flexible working conditions
  - provision of part-time work and/or maintenance of a comparable work role on return from maternity leave
  - development or review of anti-discrimination policies
  - training for staff in discrimination and harassment
560. As the above list suggests, outcomes achieved through conciliation extend beyond those likely to be awarded in a judicial process. Outcomes can include training and/or changes to policy and procedures which have benefits for similarly situated individuals and groups and contribute to furthering the social

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<sup>449</sup> This change was implemented in the *Human Rights Legislation Amendments Act (No.1) 1999 (Cth)* which commenced operation on 13 April 2000.

<sup>450</sup> Details of HREOC's 2001 and 2005 research projects are provided at **Annexure G**.

change objectives of the SDA.<sup>451</sup> Additionally, conciliation allows for early intervention in disputes which means that employment relationships can be restored or maintained and effective, practical remedies can be achieved without the need for formal and often lengthy legal proceedings.

561. Some examples of complaints under the SDA that have been successfully resolved are provided at **Annexure G**.

### **Applications to the Federal Court and the Federal Magistrates Court**

562. In relation to statistics on applications to the court, HREOC relies on information from complainants and the Federal Court or the Federal Magistrates Court registries. Therefore HREOC can not guarantee the accuracy of this information.

563. It should be noted that where a complaint has been terminated by HREOC, irrespective of the reason for termination, the affected person can make an application to the court for the allegations in their complaint to be heard and determined. A person has 28 days to make an application, from the date of the issue of a termination by HREOC.<sup>452</sup> The time can be extended by the court. The court has a broad discretion to do so.<sup>453</sup> HREOC considers that the time limit for lodging an application the court could be extended to 60 days, in light of the fact that applicants may be experiencing disadvantage, and may require additional time to make arrangements for preparation of their case.

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<sup>451</sup> See also discussion of provisional findings of HREOC's current research project on systemic outcomes from complaints and the educative impact of involvement in the complaint process in **Annexure G**.

<sup>452</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46PO(2).

<sup>453</sup> Human Rights and Equal Opportunity Commission, 'Federal Discrimination Law' (2008), 287.

*Table CH7 - Complaints terminated and the number of applications made to the Federal Court and the Federal Magistrates Court*

	<b>2002-03</b>	<b>2003-04</b>	<b>2004-05</b>	<b>2005-06</b>	<b>2006-07</b>	<b>2007-08</b>
<b>Complaints terminated - all grounds<sup>454</sup></b>	173	163	141	124	181	142
<b>Complaints terminated - nrpc<sup>455</sup></b>	103	98	92	86	88	80
<b>Applications</b>	54	55	45	35	34	30

564. Over the past six reporting years, on average, 28% of terminated complaints under the SDA were pursued to court. The SDA has the highest number of applications to the courts as a proportion of terminated complaints.

565. Over the past six reporting years, on average, 46% of complaints under the SDA that were terminated because the President was of the view that there was no reasonable prospect of conciliation, were pursued to court.

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<sup>454</sup> This includes complaints that are terminated on the basis that they are not unlawful, trivial, vexatious, misconceived or lacking in substance, out of time or some other remedy has been pursued.

<sup>455</sup> Generally, complaints are terminated on the basis of there being no reasonable prospect of conciliation (NRPC) where a complaint has been assessed as having an arguable case, that is the matter is not lacking in substance, and conciliation has been attempted but was not successful.

## ***The efficiency and effectiveness of the complaint handling service***

### **Key performance indicators and standards**

566. HREOC is committed to providing a timely, fair, efficient and consistent complaint service. HREOC has developed key performance indicators and standards which provide the basis for ongoing assessment of the complaint service. These are summarised below.

- **Timeliness** - the HREOC performance standard is for 80% of complaints to be finalised within 12 months of receipt. In 2007-08 93% of complaints were finalised within 12 months. For complaints under the SDA over this period, 94% of complaints were finalised within 12 months. A detailed breakdown of the timeliness for the handling of complaints under the SDA is contained in Table CH8 below.
- **Conciliation rate** – the HREOC performance standard is for 30% of finalised complaints to be conciliated. In 2007-08, 48% of finalised complaints were conciliated which is 10% higher than the conciliation rate for the previous year. In 2007-08, 53% of complaints under the SDA were successfully conciliated.
- **Customer satisfaction** – the HREOC performance standard is for 80% of parties to be satisfied with the complaint handling process. Data for the 2007-08 year indicates that 93% of parties were satisfied with the service they received and 64% rated the service as ‘very good’ or ‘excellent’. More details on the Customer Satisfaction Survey including specific breakdowns for complaints under the SDA is provided below.

## Customer satisfaction survey

567. HREOC seeks feedback on aspects of the complaint service from both complainants and respondents. This feedback is obtained by means of a customer satisfaction survey which was first implemented in 1997 with assistance from the Australia Bureau of Statistics<sup>456</sup>. Data from the survey is recorded in HREOC's Annual Report and overall, feedback on the complaint service has been very positive with satisfaction ratings of over 90% for the past four years.

568. Since 02-03, it has generally been the case the SDA customer satisfaction ratings have been equal to or above the overall complaint service figures. Survey results for the SDA in the 2007-08 reporting year are as follows:

- 97% of parties felt that staff explained things in a way that was easy for them to understand
- 92% of parties felt that the forms and correspondence from HREOC were easy to understand
- 78% of parties felt that HREOC dealt with the complaint in a timely manner
- 94% of parties did not consider staff to be biased.
- 93% of parties were satisfied with the service they received.
- 64% of parties rated the service they received as very good or excellent.

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<sup>456</sup> The survey process is as follows. At the beginning of each month a specified sample of complaint files is randomly drawn from files closed in the previous month. The survey is primarily undertaken by means of telephone interviews conducted by Administrative Officers who are not directly involved in handling complaints. Participation in the survey is voluntary and confidential. In 2007-08, 56% of those who could be contacted (173 complainants and 216 respondents) agreed to participate in the survey

## Timeliness of the service

Table CH8 - Time from receipt to finalisation for finalised SDA complaints

	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
0 - 3 months	16% (16)*	19% (19)	23%(23)	19% (19)	20% (20)	21% (21)
3 – 6 months	25% (41)	31% (50)	34%(57)	38%(57)	35% (55%)	27% (48)
6 – 9 months	31%(72)	25% (75)	22%(79)	28%(85)	25% (80)	28% (76)
9 – 12 months	17% (89)	14% (89)	13% (92)	10.5%(95.5)	15% (95%)	18% (94)
More than 12 months	11%(100)	11% (100)	8%(100)	4.5%(100)	5% (100%)	6% (100)

\* Figures in brackets are cumulative totals

569. HREOC's timeliness calculations are based on the time from receipt to finalisation of a complaint as this provides a true 'customer perspective' of the timeliness of the process. Over the past years there has been improvement in the timeliness for handling complaints under the SDA.

## Charter of Service

570. HREOC's complaint service operates in accordance with a Charter of Service. This Charter outlines the level of service that will be provided and the mechanisms available to people who have concerns about how their complaint has been handled. A copy of the Charter is at **Annexure G**. No complaints have

been received under the Charter regarding the handling of any complaint under the SDA in recent years.

### **Accessibility of the service**

571. HREOC has a national complaint handling responsibility and is located in Sydney. HREOC is committed to providing an accessible complaint handling service to everyone in Australia who wants to use it. Processes and practices are in place to ensure the accessibility of all aspects of the service.
572. HREOC's Complaint Information Service ('CIS') provides information about the legislation and the complaint handling process to people from all over Australia. The CIS can be contacted by telephone (including local call cost), e-mail, office visit, fax and TTY (also local call cost). In the 2007-08 reporting year the CIS handled 18 765 telephone/TTY calls, e-mails and office visits. Of the 27,943 issues raised by enquirers, 3,279 raised issues relating to sex discrimination and sexual harassment.
573. A large amount of information about the law and the complaint process is available on HREOC's webpage –  
[http://www.hreoc.gov.au/complaints\\_information/index.html](http://www.hreoc.gov.au/complaints_information/index.html).
574. The complaint section of HREOC's webpage received 299,631 page views during the 2007-08 reporting year. Information available on the webpage includes:
- Information on what people can complain to HREOC about
  - Information on how to make a complaint
  - A complaint form that can be downloaded or completed online
  - Information on conciliation and how it works including clips from HREOC's DVD on the conciliation process
  - A conciliation register that provides de-identified summaries of complaints that have been resolved through conciliation
  - A detailed guide to the complaint process

575. Information about the law and the complaint process is also provided in alternative accessible formats where required.
576. HREOC has a Concise Complaint Guide and an information poster that is available in 14 community languages. During 2007-08 the multilingual poster was sent to over 3,000 organisations around Australia who work with people from culturally and linguistically diverse communities. These publications can also be ordered from the Complaint Information Service or downloaded from the HREOC webpage at <http://www.humanrights.gov.au/languages/index.html> and [http://www.humanrights.gov.au/pdf/complaints/translations\\_posterA3.pdf](http://www.humanrights.gov.au/pdf/complaints/translations_posterA3.pdf)
577. HREOC also has a community education strategy in relation to the complaint service which aims to ensure that people: understand about HREOC and the SDA; understand their responsibilities under the law; recognise when they may have been discriminated against or sexually harassed and understand how to make a complaint. The community education strategy includes:
- Conducting presentations and information sessions for community organisations, advocacy groups, professional associations, advisory bodies, industrial organisations and legal centres
  - Coordinating mail outs of information kits
  - Undertaking complaint related research and delivering papers at conferences relating to investigation, Alternative Dispute Resolution, industrial relations and anti-discrimination and human rights law.
578. In the 2006-07 reporting year, over 100 organisations throughout all states and territories either attended information sessions on the law and the complaint process run by CHS staff or were visited by CHS staff. These organisations included: community legal centres; professional associations and unions; Aboriginal legal centres; working women's centres and other women's advocacy organisations, multicultural organisations; youth organisations and legal centres; neighbourhood centres and disability advocacy bodies and legal centres.<sup>457</sup>

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<sup>457</sup> Locations visited included: Perth and Kalgoorlie in Western Australia; Melbourne, Ballarat, Bendigo and Geelong in Victoria; Sydney, Taree, Lismore, Bathurst and Wollongong in New South Wales; and Brisbane, Darwin, Adelaide and Canberra. A similar range of organisations and locations were visited in 2007-08.

579. HREOC has concerns however, that whilst the number of complaints being brought to HREOC under federal anti-discrimination law has continued to increase over recent years, additional funds that had been provided to HREOC to manage this increase in demand have been cut. This decrease in funding will impact on HREOC's ability to continue to provide an efficient and effective complaint service and limit the work HREOC can undertake to educate the public about the law and the complaint process.

**Recommendation 39: Increase funding for complaint handling service (Stage One)**

Increase funding to ensure that HREOC is adequately resourced to (i) continue to provide information to ensure people understand the law and rights and responsibilities under the law and (ii) ensure the ongoing provision of an efficient and effective complaint service.

580. It is HREOC's experience that women workers benefit from being able to access government funded specialist advocacy and legal centres, such as the Working Women's Centre. These organisations are an important point of contact and support for people wanting to make complaints to HREOC. HREOC is aware that submissions are being made to the Committee from legal aid organisations, community legal centres and working women's centres which will address the issue for funding support in these areas.

**Recommendation 40: Increase funding for free and low cost legal services (Stage One)**

Increase funding provided to Working Women's Centres, Community Legal Centres, specialist low cost legal services and Legal Aid to assist people make complaints under federal anti-discrimination law. This may also require changes to Legal Aid funding guidelines.

581. HREOC also supports extending the time limit for applicants to commence proceedings in the Federal Court or Federal Magistrates Court to support access for people who are financially disadvantaged or experience other difficulties in securing assistance. At present, an applicant who wishes to pursue his or her complaint through the Federal Court or Federal Magistrates Court has 28 days to lodge with the court from the date on which the complaint is terminated by the President of HREOC.<sup>458</sup>

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<sup>458</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46PO(2).

582. HREOC considers that 28 days is an insufficient period for applicants to seek appropriate advice as to whether to commence court proceedings, and to arrange legal assistance, especially given that:

- victims of discrimination and sexual harassment are typically from socially disadvantaged groups;
- a significant portion of complainants who lodge complaints under the SDA with HREOC are not legally represented;
- access to free legal advice and representation in relation to discrimination matters is limited; and
- once proceedings are commenced, applicants face an inherent risk of an adverse costs order;<sup>459</sup>

583. HREOC therefore recommends that the current 28 day period for commencing proceedings be extended to 60 days. HREOC considers that this would not impose a disproportionate burden on respondents.

**Recommendation 41: Extend time limit for taking court action (Stage One)**

Amend the HREOC Act to extend the time limit for taking court action from 28 to 60 days.

### ***Standing to bring complaints***

584. Standing to lodge a complaint under the SDA with HREOC and, subsequently, to commence proceedings in the Federal Court or Federal Magistrates Court derives not from the SDA, but the HREOC Act. The standing provisions are therefore the same for all of the federal discrimination acts.

585. Pursuant to s 46P(2) of the HREOC Act, a complaint may be lodged with HREOC:

- (g) by a person aggrieved by the alleged unlawful discrimination:

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<sup>459</sup> See further Human Rights and Equal Opportunity Commission, *Federal Discrimination Law* (2008), 385-6.

- (i) on that person's own behalf; or
  - (ii) on behalf of that person and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or
- (h) by 2 or more persons aggrieved by the alleged unlawful discrimination:
- (i) on their own behalf; or
  - (ii) on behalf of themselves and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or
- (i) by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.

586. However, the standing provisions then narrow when seeking to commence proceedings in the court. Standing is limited to a 'person affected', which is defined to mean a person on behalf of whom the complaint was lodged with HREOC.<sup>460</sup> The upshot of this distinction is that, whilst a person or organisation may lodge a complaint with HREOC on behalf of a person (or persons) aggrieved by the offending conduct, it is then up to the aggrieved person (or persons) to pursue their claim through the courts on their own.

587. In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*<sup>461</sup> ('*Access for All*'), for example, Collier J held that an incorporated disability rights organisation lacked standing to commence proceedings in relation to a number of bus stops that allegedly contravened the *Disability Standards for Accessible Public Transport 2002*.<sup>462</sup> The court held that, whilst the organisation's individual members may have been aggrieved by the inaccessible bus stops, the organisation itself was not so aggrieved because it did not use bus stops.<sup>463</sup>

588. The decision in *Access for All* has highlighted an unfortunate barrier in the legislation which prevents public interest-based organisations from pursuing complaints in the courts in the vast majority of cases, even if the very purpose of

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<sup>460</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 4(1).

<sup>461</sup> (2007) 162 FCR 313..

<sup>462</sup> A contravention of the Transport Standards amounts to unlawful discrimination under the *Disability Discrimination Act 1992* (Cth), s 32.

<sup>463</sup> For criticism of the court's approach in this case, see further Brook Hely, 'Access Denied: Limited standing of a human rights organisation to commence discrimination proceedings' (2007) 45(9) *Law Society Journal* 46.

the organisation's existence is to tackle such issues. In light of the widely reported difficulties, costs and pressures for an individual to pursue a claim of discrimination or sexual harassment through the courts, often against well resourced respondents, this significantly undermines the capacity of the SDA to bring about systemic change. For example, as the Public Interest Law Clearing House noted in its submission to the Equality Opportunity Review in Victoria:

Given the very nature of discrimination and the difficulties that victims face in bringing claims, in order to be effective it is imperative that representative bodies have the power to bring complaints on behalf of victims who are often disadvantaged and may not have the means to commence costly litigation.<sup>464</sup>

589. The important role of civil society, NGOs and other public interest organisations in contributing to systemic outcomes has been widely proclaimed on the international stage. For example, the Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations, Fernando Henrique Cardoso, has stated that:

The rise of civil society is indeed one of the landmark events of our times. Global governance is no longer the sole domain of Governments. The growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism. Civil society organizations are also the prime movers of some of the most innovative initiatives to deal with emerging global threats.<sup>465</sup>

590. HREOC acknowledges that there are already provisions to enable the lodging and commencing of representative complaints and court proceedings. However, the rules are technical and complex, compounded by the fact that the

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<sup>464</sup> Public Interest Law Clearing House, *Submission to the Department of Justice regarding the Review of the Equal Opportunity Act 1995 (Vic)* (January 2008) 34 [8.4.3].

<sup>465</sup> Fernando Henrique Cardoso, *Transmittal letter dated 7 June 2004 from the Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations addressed to the Secretary-General*, UN GAOR 58th Session, 3, UN Doc A/58/81 (2004). See also Kofi A Annan, *Report of the Secretary-General in response to the report of the Panel of Eminent Persons on United Nations–Civil Society Relations*, UN Doc A/59/354 (2004); B K Woodward, 'Global Civil Society and International Law in Global Governance: Some Contemporary Issues' (2006) 8 *International Community Law Review* 247, 296-7; Lesley C Hodgson, 'Helping the Salmon: The Role of Civil Society in the Development of Human Rights' (2005) 5 *Journal of the Institute of Justice and International Studies* 11, 13.

requirements at the HREOC and Federal Court stages are not consistent.<sup>466</sup> The provisions also require that court proceedings be commenced by one or more persons aggrieved by the relevant conduct, which raises the same difficulties encountered in *Access for All*.<sup>467</sup> Furthermore, the Federal Magistrates Court does not permit representative proceedings, which limits such proceedings to the more expensive Federal Court jurisdiction. Indeed, to date very few representative proceedings have been commenced under any of the Federal discrimination Acts.<sup>468</sup>

591. HREOC considers that there are sound reasons of public policy to enable appropriate organisations with a legitimate interest in a particular subject-matter to commence discrimination proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons. HREOC notes that a similar conclusion was reached by the ALRC in its two comprehensive reviews of the rules of standing, where it recommended a significant overhaul to facilitate the bringing of public interest-based litigation by individuals and organisations.<sup>469</sup>

592. HREOC also notes that there is precedent for such an approach in other legislative contexts. For example, under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), review of a classification decision by the Classification Board may be sought by a ‘person aggrieved’,<sup>470</sup> which is defined to include (in most cases<sup>471</sup>):

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<sup>466</sup> Compare *Human Rights and Equal Opportunity Act 1986* (Cth) s 46PB(1) with *Federal Court of Australia Act 1976* (Cth) s 33C(1)(a)-(b). See further HREOC, *Federal Discrimination Law* (2008) 270-1, 279-80.

<sup>467</sup> See further HREOC, *Federal Discrimination Law* (2008) 279-80.

<sup>468</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) 618.

<sup>469</sup> Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, Report No 87 (1996), see especially Recommendation 2: ‘Any person should be able to commence and maintain public law proceedings unless:

- the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
- in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.’

See also Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985).

<sup>470</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 42(1)(d).

<sup>471</sup> Section 42(3) explicitly extends the definition of ‘person aggrieved’ in relation to particular decisions by the Classification Board at the more serious end of the classification spectrum. The extension is also

- (a) a person who has engaged in a series of activities relating to, or research into, the contentious aspects of the theme or subject matter of the publication, film or computer game concerned;<sup>472</sup> and/or
- (b) an organisation or association, whether incorporated or not, whose objects or purposes include, and whose activities relate to, the contentious aspects of that theme or subject matter.<sup>473</sup>

593. HREOC considers that the above approach provides a suitable model for amending the standing provisions under the HREOC Act. It provides greater flexibility for the courts in assessing whether an applicant has a legitimate interest in bringing the claim, even if their interest is indirect, vicarious or simply as a matter of principle. Given that discrimination laws protect fundamental human rights, HREOC considers that there is a broad public interest in facilitating, rather than limiting, the bringing of appropriate claims. To the extent that courts or respondents may have concerns over wasting of resources by ‘busybody’ complaints, these concerns could be addressed by the proposals discussed above, together with the existing powers of the court to control their own proceedings, including by summarily dismissing vexatious or hopeless claims or in requiring security for costs.

594. HREOC notes that commencement of an action by a public interest organisation should not affect the remedies which are available for an individual who is alleging a breach of the SDA.

595. HREOC also notes that the above approach would also extend standing to include HREOC. As discussed further below, one option for reform to the SDA is to create a power for HREOC to be able to initiate proceedings for enforcement of the SDA in the Federal Court or Federal Magistrates Court, without requiring an individual complaint to be lodged with HREOC.

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stated to not limit the generality of s 42(1)(d), leaving open the possibility of such persons and organisations seeking standing in other less serious classification decisions as well.

<sup>472</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 42(3)(a).

<sup>473</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 42(3)(b).

**Recommendation 42: Extend standing to public interest organisations to bring proceedings (Stage One)**

Review the provisions under the HREOC Act relating to standing to bring claims under the SDA (and other federal discrimination Acts) to widen the scope for proceedings to be brought by public interest-based organisations.

## 14. Powers and Capacity of HREOC and the Sex Discrimination Commissioner

This section addresses **Terms of Reference C and G** of the Inquiry.

The powers of HREOC and the Commissioner to carry out policy development, education, research, submissions, and public awareness are adequate

The capacity to carry out these functions is limited by funding

Powers could be extended to be more effective in promote gender equality and addressing systemic discrimination, including:

Broadening the formal inquiry function

Initiating complaint and enforcement action, without an individual complaint

Certifying special measures

Expanding *amicus curiae* and intervention powers

Independent monitoring and reporting on gender equality

Further powers could be considered in stage two of the reform process

Additional resources would be essential to make powers effective

596. This section addresses the powers and capacity of HREOC and the Sex Discrimination Commissioner ('the Commissioner'), **not including the complaint handling functions**. For discussion of the complaint handling functions, see above, **Complaint handling**.

597. This section is divided into three parts. The first part summarises the existing statutory functions and powers of HREOC and the Commissioner under the SDA and the HREOC Act, not including the complaint handling function. The

second part describes the existing capacity – that is, funding and resources – available to perform these functions and powers. The third section presents to the Inquiry proposals which could strengthen the functions, powers and capacity of HREOC/the Commissioner to eliminate discrimination and promote gender equality.

598. Some proposals are recommendations for immediate reform under the SDA, as well as further options which could be addressed in stage two of an inquiry process, including into a potential Equality Act.

599. HREOC highlights that, if new functions are to be supported for HREOC or the Commissioner, additional funding will be required in order for those functions to be exercised effectively.

### ***Existing functions and powers of HREOC and the Commissioner***

600. The importance of HREOC and the role of the Commissioner as the independent statutory officer responsible for eliminating discrimination and promoting gender equality in Australia has been widely recognised and supported.

601. The office of the Commissioner is created by s 96 of the SDA. The Commissioner is appointed by the Governor-General,<sup>474</sup> and, by convention, the appointment is made on the advice of the Federal Attorney General. The appointment is to be for a specified period, not exceeding 7 years, and the Commissioner is eligible for re-appointment at the end of her or his term.<sup>475</sup> The gender of the person is not specified.

602. Since the enactment of the SDA, the federal government has appointed six Sex Discrimination Commissioners for a full term, and two acting Commissioners:

- Ms Pam O'Neill: 1984 - 1988
- Ms Quentin Bryce: 1988 – 1993
- Ms Susan Walpole: 1993 - 1996
- Ms Moira Scollay: 1996 - 1998 (Acting)

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<sup>474</sup> *Sex Discrimination Act 1984* (Cth), s 96.

<sup>475</sup> *Sex Discrimination Act 1984* (Cth), s 97.

- Ms Susan Halliday: 1998 - 2001
- Ms Pru Goward: 2001 - 2006
- The Hon John von Doussa 2006- 2007 (Acting)
- Ms Elizabeth Broderick 2007 – Present

603. Under the current SDA and HREOC Act, the majority of the functions and powers relevant to the SDA (and CEDAW) are not given to the Sex Discrimination Commissioner but to HREOC or the ‘Commission’. This is not necessarily well understood in the public arena.

604. The ‘Commission’ is defined in the SDA and HREOC Act as ‘the Human Rights and Equal Opportunity Commission established under the *Human Rights and Equal Opportunity Act 1986*,<sup>476</sup> which consists of the President and all the federal special purpose commissioners, being the Human Rights Commissioner, the Race Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Sex Discrimination Commissioner and the Disability Discrimination Commissioner.<sup>477</sup> A separate Age Discrimination Commissioner is not appointed under the ADA. Within HREOC, primary responsibility for age discrimination has been allocated to the Sex Discrimination Commissioner.<sup>478</sup>

605. The Sex Discrimination Commissioner has the following functions that may be exercised acting alone, as follows:

- To appear as *amicus curiae* in the Federal Court and Federal Magistrates Court, with leave of the court concerned (introduced in 1999);<sup>479</sup>

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<sup>476</sup> *Sex Discrimination Act 1984* (Cth), s 4.

<sup>477</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 8A(2).

<sup>478</sup> When the role of the Sex Discrimination Commissioner was first established in 1984, the exercise of functions by the Commissioner under the *Sex Discrimination Act 1984* (Cth) was subject to the direction of the former Human Rights Commission.<sup>478</sup> In 1986, the Human Rights Commission was reconstituted as HREOC,<sup>478</sup> and the Commissioner was no longer subject to the direction of the Commission in the performance of her functions under the *Sex Discrimination Act 1984* (Cth). See *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth). See, also, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992), 214. In 2000, this situation was reversed and the majority of functions under the *Sex Discrimination Act 1984* (Cth) now vest again in HREOC.

<sup>479</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46PV(2).

- To intervene in a matter referred by HREOC to the Australian Industrial Relations Commission under s46PW of the HREOC Act. Under s 46PW, a person, group of persons, or trade union may lodge a complaint to HREOC about a discriminatory act under an industrial agreement. If the President of HREOC forms the view that the act appears to be discriminatory, the President must refer the complaint to the Australian Industrial Relations Commission. The AIRC may then convene a hearing to consider if the award is discriminatory. Section 554 of the *Workplace Relations Act 1996* (Cth) empowers the Sex Discrimination Commissioner to intervene in those proceedings as a party to the proceedings.<sup>480</sup>
- To make an application to the Australian Industrial Relations Commission for an order to ensure that employees covered by an order of that Commission receive equal remuneration for work of equal value.<sup>481</sup>

606. The individual *amicus curiae* function vested in the Sex Discrimination Commissioner is similar to most of the other special-purpose commissioners, being the Disability Discrimination Commissioner under the DDA, the Race Discrimination Commissioner under the RDA, and the Human Rights Commissioner under the HREOC Act. The Aboriginal and Torres Strait Islander Social Justice Commissioner exercises additional functions ‘on behalf of the Commission’ in a range areas, including public awareness, research and education, examination of laws and proposed laws, and submitting an annual report to the Minister.<sup>482</sup>

607. The SDA sets out a range of functions to be carried out by HREOC as a whole, including:

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<sup>480</sup> This power was introduced as part of phase one of implementing the recommendations of *Halfway to Equal* ((1992) and is designed to enable the Commissioner to address systemic discrimination in industrial awards. Upon application by the Commissioner, the AIRC is required to reconvene the parties to the award with a view to redressing any discrimination. See Krysti Guest, 'The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act' (Parliament of Australia 1999). See, also, Sex Discrimination Commissioner, 'Sex Discrimination Act 1984: Future Directions and Strategies' (Human Rights and Equal Opportunity Commission, 1993), 32-4.

<sup>481</sup> *Workplace Relations Act 1996* (Cth), ss 624-5. See, also, Human Rights and Equal Opportunity Commission, 'Equal Pay Handbook' (1998), esp 8-10.

<sup>482</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), Part IIA.

- Granting temporary exemptions;<sup>483</sup>
- Promoting understanding and acceptance of, and compliance with, the SDA;<sup>484</sup>
- Conducting research and education, and others programs on behalf of the Commonwealth.
- Promoting the objects of the SDA;<sup>485</sup>
- Examining laws or (where requested by the Minister) proposed laws and reporting to the Minister;<sup>486</sup>
- Reporting to the Minister on new laws or action that should be taken by the Commonwealth about unlawful discrimination or sexual harassment;
- Preparing non-legally binding guidelines;<sup>487</sup>
- Intervening in any court proceedings, with leave of the court;<sup>488</sup>
- Doing anything ‘incidental or conducive to’ the performance of the above functions.<sup>489</sup>

608. In addition to these functions under the SDA, HREOC also has general duties, functions and powers under the HREOC Act which may be used to promote ‘human rights’. ‘Human rights are defined to include ‘the rights and freedoms recognised in...any relevant international instrument [including CEDAW]’.<sup>490</sup>

609. HREOC is under a general **duty** to use its functions under the SDA and HREOC Act:

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<sup>483</sup> *Sex Discrimination Act 1984* (Cth), ss 48(c) and 44.

<sup>484</sup> *Sex Discrimination Act 1984* (Cth), s 48(d).

<sup>485</sup> *Sex Discrimination Act 1984* (Cth), 48(e).

<sup>486</sup> *Sex Discrimination Act 1984* (Cth), s 48(f).

<sup>487</sup> *Sex Discrimination Act 1984* (Cth), s 48 (ga).

<sup>488</sup> *Sex Discrimination Act 1984* (Cth), s 48 (gb).

<sup>489</sup> *Sex Discrimination Act 1984* (Cth), s 48(h).

<sup>490</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 3(1).

- ‘with regard for the indivisibility of human rights’ and ‘the principle that every person is free and equal in dignity and rights’;<sup>491</sup>
- ‘efficiently and with the greatest possible benefit to the people of Australia.’<sup>492</sup>

610. HREOC has a wide range of general **functions**, outside of the handling of complaints, under HREOCA,<sup>493</sup> including:

- To examine laws which may be inconsistent with human rights and report to the Minister;<sup>494</sup>
- To report to the Minister about action that needs to be taken by Australia in order to comply with human rights;<sup>495</sup> and
- To inquire into any act or practice that may be inconsistent with or contrary to any human right, and, where appropriate, to attempt conciliation to effect a settlement, and, in the absence of a settlement, to report to the Minister (although this function does not apply to an intelligence agency, such as ASIO).<sup>496</sup>

611. HREOC has the following **powers** in relation to the exercise of its functions:

- to do all things necessary or convenient to be done for or in connection with its functions; and
- To report to the Minister at its discretion on ‘any matter arising in the course of the performance of its functions’ and an obligation to report to the Minister if requested by the Minister to do so;<sup>497</sup>
- To work with and consult appropriate persons, governmental organisations and non-governmental organisations;<sup>498</sup> and

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<sup>491</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 10A(1)(a).

<sup>492</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 10A(1)(b).

<sup>493</sup> For a list of all the general functions of HREOC, see *Human Rights and Equal Opportunity Act 1986* (Cth), s 11.

<sup>494</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(1)(e)

<sup>495</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(k).

<sup>496</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(f). For discussion of the formal inquiry function, see further below, under **Initiating Inquiries**.

<sup>497</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 13.

<sup>498</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 15.

- In relation to its formal inquiry function, to require a person to give information or produce documents and to examine witnesses. Failure to comply constitutes an offence.<sup>499</sup>

612. The President is the senior member of HREOC and is solely responsible for a number of matters, including:

- managing the administrative affairs of the Commission, such as employment of staff and financial matters;<sup>500</sup> and
- the handling of complaints under the SDA.<sup>501</sup>

613. Examples of some of the major work conducted by HREOC and the Commissioners under the SDA and the HREOC Act using these functions and powers is annexed to this Submission, particularly in relation to:

- Policy development, education, research, and submissions
- Inquiries
- Guidelines
- *Amicus curiae* and interventions

614. See **Annexure H** for a non-exhaustive Table of major non-Complaint work under the SDA.

615. The next section describes the existing resources available to HREOC and the Commissioner to carry out its functions, beyond the complaint handling role.

### ***Existing Capacity of HREOC and the Commissioner***

616. HREOC and the Commissioner have endeavoured to use their existing functions and powers to be as effective as possible in eliminating discrimination and promoting gender equality.

617. The capacity of HREOC and the Commissioner to eliminate discrimination and promote gender equality through complaint handling, policy development,

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<sup>499</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 21-30. These powers are discussed further below.

<sup>500</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 8A(3).

<sup>501</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), ss 8(6) and 11(1)(aa).

education, research, submissions, public awareness and inquiries is dependent upon HREOC being adequately resourced.

### **HREOC's budget**

618. HREOC's appropriation revenue in 2008-09 is \$13.55 million. This is approximately 12.5% less than the budget appropriation for 2007-08.<sup>502</sup> This is the greatest decrease in HREOC's budget since 1996 when HREOC's total funding base was reduced by 40% over four years. The effect of the decrease in 1996 was that staffing across HREOC had to be reduced by approximately 60%.<sup>503</sup>

619. By way of background, HREOC has received the following 'new money' over 2006-07 and 2007-08:<sup>504</sup>

- Following the commencement of the *Age Discrimination Act 2004* (Cth) (ADA), government allocated additional funding of approximately \$250,000 per year to HREOC to undertake non-complaint handling functions, such as research and education, under the ADA. HREOC allocated these funds to the Sex Discrimination Unit, which became the Sex and Age Discrimination Unit.<sup>505</sup>
- \$4.34 million over four years under the National Action Plan to Build on Social Cohesion, Harmony and Security led to the HREOC Community Partnerships for Human Rights Program to help build community capacity and social cohesion with Muslim communities and the wider community.
- \$1.8 million per year to manage the increase in complaints to HREOC as a result of the introduction by the former government of the Workchoices reforms.

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<sup>502</sup> Budget appropriation for 2007-08 was \$15.5m reduced to \$14,981m at additional estimates with the withdrawal of funding for workplace relations reform and the application of the additional 2% efficiency dividend.

<sup>503</sup> Human Rights and Equal Opportunity Commission, Annual Report (1996-97), 7.

<sup>504</sup> In the period 2001-2008, 7% of HREOC's total appropriated revenue was from new policy proposal funding.

<sup>505</sup> This enabled the Unit to expand its staffing levels by two positions, as well as assuming new roles under the *Age Discrimination Act 2004* (Cth). The Sex Discrimination Commissioner assumed a non-statutory role as Commissioner responsible for Age Discrimination.

620. In Additional Estimates in 2007-08, the \$1.8 million for the increase in complaints was reversed (despite HREOC continuing to experience a significant increase in complaints – 67% since 2004-5) when the relevant Workchoices reforms were repealed.
621. This reversal of funding together with an additional efficiency dividend of 2% has reduced HREOC's appropriate revenue in 2008-09 by 12.5% compared to its appropriation revenue in 2007-08.
622. To accommodate the reduction in HREOC's appropriation in 2008-09, all of HREOC's business units<sup>506</sup> (including the Sex and Age Discrimination Unit) have had their operating budgets reduced by 14.5%.

### **Sex and Age Discrimination Unit**

623. The Sex and Age Discrimination Unit ('the Unit') is the dedicated policy unit within HREOC which supports the work of HREOC and the Commissioner to conduct the policy development, education, research, submission, public advocacy and inquiry functions related to gender equality issues.<sup>507</sup><sup>508</sup>
624. As a result of the factors referred to above, the Sex and Age Discrimination Unit has experienced a reduction in its budget in 2008-09 of 14.5%. The Unit employs five full-time equivalent permanent staff, including management and administration, to carry out policy development, education, research, submissions, public awareness and inquiry functions under both the SDA and ADA.
625. On 22 July 2008, Elizabeth Broderick, the current Sex Discrimination Commissioner launched her *Plan of Action towards Gender Equality* arising out of her national *Listening Tour*. The *Plan of Action* identifies five key areas for strategic positive action to address gender inequalities.

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<sup>506</sup> For further background to this funding reduction, see Human Rights and Equal Opportunity Commission, 'Submission to the Joint Committee of Public Accounts and Audit Inquiry on the Effects of the Ongoing Efficiency Dividend on Smaller Public Sector Agencies' (2008).

<sup>507</sup> Note that HREOC also has a Public Affairs Unit, Legal Section and other Units which also contribute to the delivery of these functions under the *Sex Discrimination Act 1984 (Cth)*.

626. In order to progress significant work in these five areas, the Commissioner and HREOC will be dependent upon success in securing additional funding, partnership opportunities, and pro bono assistance, in light of the limited resources currently available to carry out their functions.
627. The work of HREOC and the Commissioner to address systemic discrimination and to progress gender equality is therefore significantly constrained due to available resources.
628. HREOC notes that, if amendments to the SDA arise from this inquiry, the Australian Government will need to consider additional resources for an education strategy regarding the reforms. An education strategy will need to be accessible and appropriate to the needs of the range of groups affected by the changes.

**Recommendation 43: Impact of Reduction in Funding (Stage One)**

Increase funding to HREOC to perform its policy development, education, research, submissions, public awareness and inquiry functions to eliminate discrimination and promote gender equality.

***Strengthening the functions, powers and capacity to address systemic discrimination and promote gender equality***

629. HREOC is aware that past reviews of the SDA and external commentators have acknowledged the positive role of the Commissioner and HREOC. However, HREOC is also aware that recommendations have been made over an extended period of time about how to strengthen the statutory functions of HREOC and the Commissioner to increase effectiveness in promoting substantive gender equality and eliminating discrimination. As noted at the commencement of the Submission, whilst the SDA has been successful in contributing to reducing direct discrimination (except in the areas of exemptions, discussed elsewhere in this Submission), there has been less progress on addressing systemic

discrimination or achieving substantive gender equality. There is clearly much more that could be done.

630. This section sets out a range of options for reform to strengthen the role of HREOC and beyond its complaint handling function.
631. HREOC notes that the recommendations and options for reform set out in this section have not been developed through recent external consultation, due to the short time-frame available for preparation of this Submission. Consultation and participation are central to a human-rights based approach to policy formulation.
632. Accordingly, HREOC puts forward both recommendations and options for future reform, during a stage two inquiry process. HREOC does not have a concluded view in relation to which options may be a priority at this stage. The options for reform are presented to the Committee for consideration in light of other submissions to this inquiry, and for any further appropriate consultation with governments, and the Australian public.

### ***Policy Development, Education, Research, Submissions and Public Awareness***

633. HREOC considers that the statutory functions to enable policy development, education, research, submissions and public awareness activities to be conducted are adequately set out in the SDA and HREOC Act and are vital to achieving gender equality. However, as noted above, the Commissioner and HREOC are constrained in their ability to carry out activities in these areas due to limited resources and competing priorities.

### ***Initiating Inquiries***

634. The SDA and HREOC Act currently include statutory functions which enable HREOC to undertake formal inquiries or to carry out 'inquiry-like' functions, such as detailed research and analysis, to eliminate discrimination and promote gender equality. HREOC has used these functions to build public awareness of the nature and extent of discrimination and gender inequality in Australia, and to

develop recommendations for reform. However, the existing inquiry functions should be strengthened.

635. As noted above, HREOC has a statutory function under s 11(1)(f) of the HREOC Act to initiate formal inquiries into ‘acts or practices’ in Australia which may be contrary to ‘human rights’ including human rights under *CEDAW*. Section 11(1)(f) provides that HREOC can:

Inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

- (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that give rise to the inquiry; and
- (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that give rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.<sup>509</sup>

636. This function may be exercised when requested by the Minister, when a written complaint is received, or when ‘it appears to the Commission desirable to do so’<sup>510</sup> i.e. HREOC does not need a complaint in order to exercise this function.

637. On a first reading, this appears to be a broad and flexible statutory function which would enable HREOC to initiate inquiries into human rights, including systemic discrimination and gender inequalities.

638. However, an ‘act’ or ‘practice’ is defined under the HREOC Act to be limited to acts or practices done:

- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth
- (b) under an enactment (being a Commonwealth enactment);
- (c) wholly within a Territory (not including the ACT or the Northern Territory);

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<sup>509</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(f).

<sup>510</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 20.

- (d) partly within a Territory, to the extent to which the act or practice was done within the Territory.<sup>511</sup>

639. The inquiry function under s 11(1)(f) of the HREOC Act is therefore limited to Commonwealth laws or actions done by the Commonwealth or its Territories, and does not extend to employers, or other bodies which may be acting in breach of the SDA or failing to take reasonable steps to progress substantive gender equality.

640. HREOC has a similar inquiry function in s 31(b) of the HREOC Act to conduct inquiries into discrimination in employment, including systemic discrimination, which applies also to acts or practices within a state, or under state laws.

641. When the formal inquiry functions under s 11(1)(f) of the HREOC Act can be used, HREOC has the power to require the giving of information, or the production of documents, or the examination of witnesses, with penalties applying for non-compliance.<sup>512</sup> These powers are particularly useful when engaging with difficult or sensitive issues when persons or organisations may not be willing to volunteer information. HREOC has the ability to receive information on an anonymous basis if necessary,<sup>513</sup> and must ensure that a person against whom adverse findings may be made is given the opportunity to respond to the allegations either through written submissions or orally.<sup>514</sup> HREOC is under an obligation to report to the Minister in relation to the inquiry, when it cannot be settled,<sup>515</sup> and must include any recommendations regarding the law or proposed law, act or practice, including proposed compensation or other remedial action.<sup>516</sup> However, no enforcement mechanism is available and the Minister is not required to act on the recommendations. Formal inquiries under s 31(b) do not have the extending powers to compel production of

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<sup>511</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 3(1).

<sup>512</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), ss 21-26.

<sup>513</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 14(2). This power applies to all HREOC functions under the *Human Rights and Equal Opportunity Act 1986* (Cth).

<sup>514</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 27.

<sup>515</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(1)(f)(ii).

<sup>516</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 29(2).

information and documents which attach to the formal inquiry function under s 11(1)(f).<sup>517</sup>

642. In addition to these formal inquiry functions, HREOC already has a number of ‘inquiry-like’ functions under the SDA and HREOC Act which are available to address systemic discrimination and promote gender equality.

643. HREOC can conduct research to promote the objects of the SDA or human rights including CEDAW obligations.<sup>518</sup> It can examine federal laws or proposed laws and report to the Minister as to whether those laws are against the objects of the SDA or human rights.<sup>519</sup> It can also report to the Minister on laws required or action which should be taken by the Commonwealth ‘on matters relating to discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or to discrimination involving sexual harassment’ or to comply with Australia’s human rights obligations, including CEDAW.<sup>520</sup> HREOC can make recommendations but, once again, no enforcement mechanism is available.

644. The existing inquiry functions under the SDA and HREOC Act are important in efforts to bring about cultural changes and action through education and awareness-raising. HREOC inquiries have been influential in fostering public debate and public action, for example, in the area of paid maternity leave, the right to request flexible work arrangements, and amendments to the SDA to increase legal protection from discrimination, for example, in the areas of potential pregnancy, family responsibilities and breastfeeding. However, the current inquiry functions are limited, due to the confined nature of the formal inquiry functions under the HREOC Act.

### **Broaden the formal inquiry function and insert in the SDA**

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<sup>517</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 29(2), s 31(c).

<sup>518</sup> *Sex Discrimination Act 1984* (Cth), s 48(1)(e); *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(1)(f).

<sup>519</sup> *Sex Discrimination Act 1984* (Cth), s 48(1)(f); *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(1)(e).

<sup>520</sup> *Sex Discrimination Act 1984* (Cth) s 48(g); *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(1)(j) and ((k).

645. In order to extend the functions of HREOC to cover the matters dealt with under the SDA, HREOC considers that the SDA and HREOC Act should be amended to provide for a broad formal inquiry function, similar to s 11(1)(f) of the HREOC Act, but which applies generally to issues relevant to eliminating discrimination and promoting gender equality. The benefits of this amendment would be that HREOC would be able to investigate a wide range of gender equality issues which do not directly involve acts or practices by the Commonwealth government or its territories, or which are confined to employment-related discrimination.
646. For example, HREOC could undertake a formal inquiry into a specific accommodation service if it identified that systemic gender inequality appeared to be extensive. This statutory function could be drafted to set out the range of factors that HREOC was to take into account in making the decision to initiate a formal inquiry. Ideally, the formal inquiry would be done with the consent of the industry or body concerned, but would not be dependent upon such consent.
647. The creation of a broad formal inquiry function for breaches of the SDA or international legal obligations is similar to Recommendation 67 in the *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report (2008)* regarding the Victorian Equal Opportunity and Human Rights Commission.<sup>521</sup>

**Recommendation 44: Broad inquiry function (Stage One)**

Amend the SDA to include a broad formal inquiry function in relation to the elimination of discrimination and the promotion of gender equality in Australia.

**Ensure adequate resources are available for formal inquiries**

648. HREOC notes that, when it undertakes a major formal inquiry or inquiry-like activity, significant resources are required. This may impact on the ability of the

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<sup>521</sup> Department of Justice, Victoria *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008), [18]. Available at <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebe62e407b4f289/Final%20Version%20-%20Final%20Report.pdf>.

Commissioner and HREOC to undertake other functions to eliminate discrimination and promote gender equality.

649.

**Recommendation 45: Dedicated funding to be made available for formal inquiries, particularly on referral from the Minister (Stage One)**

Where the HREOC undertakes a formal inquiry, particularly when undertaken on referral from the Minister, adequate resources should be made available, in order to preserve the capacity of HREOC to undertake other ongoing functions relevant to addressing systemic discrimination and promoting gender equality.

### ***Self-Initiated investigations***

650. Under the SDA and the HREOC Act, neither HREOC nor the Commissioner currently has power to take compliance action for an alleged breach of the SDA. Enforcement of the SDA is dependent upon an individual or their representative lodging a complaint.

651. In the previous section, HREOC recommended extending the standing to commence a complaint to public interest organisations. In addition, HREOC considers that the use of the SDA as an effective tool for eliminating discrimination would be strengthened by providing HREOC and the Commissioner with the power to commence an investigation regarding an alleged breach of the SDA, without requiring an individual to lodge a complaint.

652. This was a recommendation of the ALRC in *Equality Before the Law (1994)*.<sup>522</sup>

653. This power would be similar to the power of the Commission for Equality and Human Rights ('CEHR') in the United Kingdom. The CEHR may investigate whether an unlawful act of discrimination or harassment has occurred.<sup>523</sup> The CEHR need only suspect that an unlawful act of discrimination or harassment has taken place in order to commence the investigation.<sup>524</sup> The CEHR has the

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<sup>522</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994), 51-3.

<sup>523</sup> *Equality Act 2006* (UK), s 20(1)(a)

<sup>524</sup> *Equality Act 2006* (UK), s 20(2)

power to compel evidence for investigations.<sup>525</sup> Similarly, the New Zealand Human Rights Commission may inquire into any matter including any law, practice or procedure (governmental or non-governmental) where it thinks human rights might be, or have been, infringed.<sup>526</sup> The Canadian Human Rights Commission also has the ability to initiate a complaint if it has reasonable grounds for believing a discriminatory practice has occurred.<sup>527</sup>

654. HREOC proposes that the Commissioner have the power to commence an investigation. The Commissioner may identify a potential breach of the SDA either through an inquiry, or upon notification from third parties. The Commissioner would be given to power to:

- investigate the allegations
- carry out negotiations
- enter into settlement arrangements
- agree enforceable undertakings
- issue compliance notices

655. A Compliance Notice would place the body on formal notice that HREOC is of the view that their conduct is unlawful under the SDA.

656. If a complaint cannot be satisfactorily resolved through the use of these new powers of the Commissioner, HREOC proposes that the Commissioner could refer the matter to HREOC as a whole. HREOC would then decide whether to commence legal action in the Federal Court or Federal Magistrates Court, and have the power to do so.

657. HREOC considers that the decision to commence legal action should be a collegiate decision in order to enable HREOC to appropriately balance the potential costs implications of legal action with the duties of HREOC under the HREOC Act. Legal action would be exercised only as a last resort but would

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<sup>525</sup> Schedule 2 to the *Equality Act 2006* (UK), para 9

<sup>526</sup> *Human Rights Act 1993* (NZ), s 5(2)(h)

<sup>527</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 40 (3)

provide an important additional mechanism of enforcement for addressing substantial or wide-spread non-compliance with the SDA.

658. HREOC notes that commencement of an action by HREOC should not affect the remedies which are available for an individual who is alleging a breach of the SDA. HREOC also notes that the power to self-initiate an investigation would be reserved for allegations of wide-spread breaches of the SDA or systemic discrimination, rather than for individual breaches of the SDA.
659. It would not be appropriate for HREOC to exercise any conciliation functions in relation to a self-initiated complaint. Formal conciliation or mediation would be undertaken through the court process or could be undertaken by an independent third party conciliator or mediator in appropriate cases.
660. This enforcement mechanism would be similar to the existing power of the Commissioner under the *Workplace Relations Act 1986* (Cth) in relation to pay equity. Under ss 624-5 of the *Workplace Relations Act 1986* (Cth), the Commissioner has the power to make an application to the Australian Industrial Relations Commission for an order to ensure that employees covered by an order of that Commission receive equal remuneration for work of equal value. In *Pregnant and Productive (1999)*, HREOC has previously recommended that the Commissioner also be given the power to refer discriminatory awards or agreements to the AIRC of her own initiative without the requirement to receive a written complaint.<sup>528</sup> HREOC repeats that recommendation.
661. A power to initiate legal action would also be similar to the powers of the ACCC. As an independent statutory authority, the ACCC has primary responsibility for ensuring compliance with the Trade Practices Act 1974 (Cth). The ACCC has the ability to investigate potential breaches of the TPA and is able to enter into administrative settlements and secure undertakings to take action in order to avoid enforcement proceedings. Where necessary, the ACCC is able to commence enforcement action in the Federal Court, which is able to make orders including imposing penalties, and requiring remedial action to be

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<sup>528</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), Recommendation 19.

taken. The ACCC monitors compliance with court orders, and takes further court action if orders are ignored.

662. The power would be similar to the function which has been proposed by HREOC to the Productivity Commission Inquiry into the DDA.<sup>529</sup>
663. The power would also be similar to the power vested in the CEHR in the United Kingdom to enforce the Gender Equality Duty. If the CEHR finds a public authority in breach of the Duty, it can issue a 'Compliance Notice'. If the authority fails to comply with the Compliance Notice, the CEHR may take enforcement action in the court.
664. The NZHRC is also empowered to bring civil proceedings before the Human Rights Review Tribunal.<sup>530</sup>
665. In Canada, if the CHRC is unable to mediate a settlement of an own-motion investigation, and it considers that further inquiry is warranted, it may refer the complaint to the Human Rights Tribunal for hearing.<sup>531</sup> The Tribunal is independent of the CHRC. Any interested party can intervene in a Tribunal inquiry.<sup>532</sup> If the complaint is found to be substantiated, the Tribunal can make an order that a person take measures to redress the discrimination or prevent its continuation.<sup>533</sup> For example, the order may require a person to compensate the victim or to adopt a special program, plan or arrangement to improve opportunities to a particular group of people such as people with disability or women.<sup>534</sup> The Tribunal's order may also require the payment of additional compensation if the act is found to have been made wilfully or recklessly.<sup>535</sup> The Tribunal's order can be made an order of the Federal Court and enforced as such.<sup>536</sup> The Tribunal's final report on a complaint (which may include recommendations) is submitted to the Minister of Justice.<sup>537</sup>

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<sup>529</sup> Human Rights and Equal Opportunity Commission, 'Productivity Commission review of the Disability Discrimination Act: Initial submission' (2003).

<sup>530</sup> *Human Rights Act 1993* (NZ) s 92E.

<sup>531</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 49 (1).

<sup>532</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 48.3 (10).

<sup>533</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 53 (2).

<sup>534</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 53 (2).

<sup>535</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 53 (3).

<sup>536</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 57.

<sup>537</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 48.3 (12).

666. If the Commissioner and HREOC are given these functions, additional resources would be required.

**Recommendation 46: Self-initiated complaints (Stage One)**

(1) Insert a function for the Sex Discrimination Commissioner to commence self-initiated complaints for alleged breaches of the SDA, without requiring an individual complaint. The new function would include the ability to enter into negotiations, reach settlements, agree enforceable undertakings, and issue compliance notices.

(2) Insert a function for HREOC to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the SDA.

***Certification of Special Measures***

667. As noted earlier in this Submission, s 7D of the SDA permits acts which are ‘special measures’ for the purposes of achieving ‘substantive equality’ between ‘men and women; people of different marital status; women who are pregnant and people who are not pregnant; or women who are potentially pregnant and people who are not potentially pregnant.’

668. Special measures are a form of ‘affirmative action’ or ‘positive discrimination’ which should be encouraged and facilitated when they promote the objects of the SDA, consistent with Australia’s international obligations under CEDAW and other international human rights instruments. As Neil et al note:

[M]easures which aim to achieve equality between a disadvantaged group and those who are not disadvantaged do not constitute discrimination, but rather are a crucial means of preventing and eliminating it.<sup>538</sup>

669. Special measures are a key tool for promoting substantive gender equality in Australia. However, at the present time, persons and organisations are not able

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<sup>538</sup> Rees, Neil, Lindsay, Katherine and Rice, Simon, *Australian Anti-Discrimination Law* (2008), 479.

to obtain certification that their differential treatment, for example, between women and men, complies with the SDA as a special measure.

670. The current regulatory environment under the SDA does not actively promote or facilitate special measures as positive actions to promote gender equality.

### **Certifying a Special Measure**

671. HREOC could be given the power to certify that a program, practice or act is a 'special measure' and therefore lawful under the SDA. Certification would be for a set period of time, up to a maximum of five (5) years, to ensure that special measures remain subject to review over time to ensure that the purpose remains relevant. Certification would not be necessary for the act to *be* a special measure for the purposes of the SDA. However, upon application, certification by HREOC would provide certainty and clarity for applicants. Certification as a special measure would be a defence to a complaint of unlawful discrimination.

672. The process of certification would also generate greater awareness and understanding of what constitutes a special measure through the consultation process following application. Persons intended to benefit from a special measure would have the opportunity to make submissions to HREOC, as well as persons who might be aggrieved by the differential treatment. Applications and decisions would be public educative processes.

673. A person aggrieved by a decision regarding certification or non-certification of a program, practice or act as a special measure could apply for review of the decision to the Administrative Appeals Tribunal.

674. If granted this power, HREOC would need adequate resources to engage in appropriate consultation and submissions processes, in accordance with administrative decision-making standards, to ensure that the proposed special measure indeed met the necessary requirements.

### **Recommendation 47: Certification of special measures (Stage One)**

Amend s 7D of the SDA to give HREOC power to certify temporary special measures for up to five (5) years.

## ***Amicus curiae and intervention functions***

### ***Amicus curiae* function**

675. Under the HREOC Act, special-purpose commissioners, including the SDC,<sup>539</sup> have the specific function of assisting the Federal Court and Federal Magistrates Court as *amicus curiae*,<sup>540</sup> with leave of the court concerned.<sup>541</sup> The HREOC Act provides guidance as to the types of proceedings in which this function should be exercised,<sup>542</sup> which has been supplemented by additional, publicly available guidelines prepared by HREOC.<sup>543</sup>

676. The *amicus curiae* function was conferred on the special-purpose Commissioners in 1999 by the same amending Act<sup>544</sup> that established the present regime for the hearing and determination of allegations of unlawful discrimination by the Federal Court and Federal Magistrates Court.

677. The *amicus curiae* function also recognises that special-purpose Commissioners may play an important role in assisting the Court in relation to broader policy implications of the issues which arise in a particular matter. That was made clear in the Attorney-General's Second Reading speech to the *Human Rights Law Amendment Bill 1998* (Cth) which inserted s 46PV into the HREOC Act:

The president will assume responsibility for all complaint handling under the new uniform scheme while commissioners are to be given an *amicus curiae*

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<sup>539</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46PV(3)(e).

<sup>540</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46PV(1).

<sup>541</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46PV(2).

<sup>542</sup> The types of proceedings are described in s 46PV(1)(a)-(c).

<sup>543</sup> Available at:

<[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/amicus\\_guidelines.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/amicus_guidelines.html)>.

<sup>544</sup> *Human Rights Law Amendment Act 1999* (Cth).

function to argue the policy imperatives of their legislation before the Federal Court.<sup>545</sup>

678. In that context, the conferring of the *amicus curiae* function may be seen as legislative recognition of the important role of the special-purpose Commissioners in assisting the Federal Court and Federal Magistrates Court in the interpretation and application of Federal anti-discrimination legislation.<sup>546</sup>

### Intervention function

679. In addition to the *amicus curiae* function, a wider function is conferred on HREOC under the HREOC Act<sup>547</sup> and each of the Federal discrimination Acts<sup>548</sup> to intervene in proceedings raising various human rights and/or discrimination issues. Under s 48(1)(gb) of the SDA, for example, HREOC has the function of intervening in ‘proceedings that involve issues of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment.’ Under s 11(1)(o), HREOC can intervene in any proceedings ‘that involve human rights.’ This power is therefore very wide and enables HREOC to intervene in any court or tribunal involving human rights issues, including issues related to CEDAW or other relevant international instrument. The major constraint on the use of this function is the capacity of HREOC.

680. As with the *amicus curiae* function, the intervention function must also be exercised with leave of the court. HREOC has also prepared publicly available guidelines for the exercise of its intervention function.<sup>549</sup>

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<sup>545</sup> Attorney-General (Mr Williams), House of Representatives *Hansard*, 3 December 1998, 1276.

<sup>546</sup> *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2006] FCA 1214, [6].

<sup>547</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 11(1)(o).

<sup>548</sup> *Sex Discrimination Act 1984* (Cth), s 48(1)(gb); *Disability Discrimination Act 1992* (Cth), s 67; *Racial Discrimination Act 1975* (Cth) s 20; *Age Discrimination Act 2004* (Cth) s 53.

<sup>549</sup> Available at:

<[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/interventions\\_in\\_court\\_proc.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/interventions_in_court_proc.html)>.

## Differences between the relevant *amicus curiae* and intervention functions

681. Aside from the common law differences between an *amicus curiae* and intervener,<sup>550</sup> the main differences between the two respective functions are as follows:

- (a) the *amicus curiae* function is conferred on special-purpose Commissioners in their personal capacity, whereas the intervention function is conferred on HREOC as an entity; and
- (b) the *amicus curiae* function is limited to unlawful discrimination proceedings before the Federal Court or Federal Magistrates Court, whereas the intervention function is unlimited as to jurisdiction or type of proceeding.

682. To date, the Sex Discrimination Commissioner (including past Commissioners) has appeared as *amicus curiae* in 5 unlawful discrimination proceedings under the SDA and HREOC has intervened in 53 proceedings, many of which involved issues relating to gender equality and sex discrimination.<sup>551</sup>

683. The useful assistance provided by special-purpose Commissioners and HREOC appearing as *amicus curiae* or intervener has been acknowledged by the courts on numerous occasions.<sup>552</sup>

684. This Review provides an opportunity consider possible ways of facilitating the exercise of the *amicus curiae* and intervention functions in the interests of further assisting the courts and advancing the policy objectives of the SDA.

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<sup>550</sup> See, eg, *Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 1663 [87]-[105]; *Sharman Networks Ltd v Universal Music Australia Pty Limited* [2006] FCAFC 178. See further HREOC, *The intervention and amicus curiae function of the Human Rights and Equal Opportunity Commissioner and its Commissioners* (2001), available at:

<[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/amicus\\_discussion.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/amicus_discussion.html)>.

<sup>551</sup> For a complete list of proceedings in which HREOC (or its Commissioners) has been involved as *amicus curiae* and intervener, as well as a copy of the submissions filed, go to:

<[http://www.humanrights.gov.au/legal/submissions\\_court/index.html](http://www.humanrights.gov.au/legal/submissions_court/index.html)>.

<sup>552</sup> For example, in *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2006] FCA 1214, Collier J said: The *amicus curiae* function conferred on the special purpose Commissioners under the *Human Rights and Equal Opportunity Act 1986 (Cth)*, in my view indicates acknowledgment by Parliament that the Court can obtain useful assistance from the Commissioners as statutory *amicus curiae*. In the *Human Rights and Equal Opportunity Act 1986 (Cth)*, Parliament also recognised the position, expertise and knowledge of the Commissioners, and I note the duties and functions of the Commission as set out in s 10A and s 11 of the *Human Rights and Equal Opportunity Act 1986 (Cth)* to that effect. See, also, *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, [72] (Kirby J); *Bropho v State of Western Australia* [2008] FCAFC 100, [61] (Ryan, Moore and Tamberlin JJ); *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232, [56].

685. HREOC notes that the exercise of either the *amicus curiae* or intervention function is subject to the granting of leave by the court. This has often required the expenditure of considerable time and resources, for both HREOC and the parties, in contesting such applications. For example, in a recent matter in which the Acting Disability Discrimination Commissioner was granted leave to appear as *amicus curiae*, the substantive proceeding (which had been listed for one day) had to be adjourned to another day due to the time lost in dealing with the Commissioner's application which was contested by one of the parties.<sup>553</sup>
686. HREOC therefore recommends that consideration be given to granting HREOC and the Sex Discrimination Commissioner (and other special-purpose Commissioners) the function of appearing as *amicus curiae* and intervener as of right, or subject to a direction that leave should not be refused except in particular circumstances.
687. HREOC notes that, to date, no special-purpose Commissioner has been refused leave to appear in a proceeding as *amicus curiae*. HREOC has only been refused leave on one occasion to intervene in a proceeding, compared with 53 occasions in which leave has been granted. This illustrates that HREOC and its Commissioners have been careful to limit the making of such applications to appropriate matters that fall within the relevant statutory provisions and HREOC's own guidelines.
688. HREOC notes that under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the Victorian Equal Opportunity and Human Rights Commission has been given the right to intervene in any court or tribunal proceeding involving the application of the Charter or the interpretation of a statutory provision in accordance with the Charter.<sup>554</sup> The Final Report of the recent Equal Opportunity Review has recommended that a similar power be conferred on the Commission under the *Equal Opportunity Act 1984* (Vic) as well.
689. HREOC also recommends that the existing *amicus curiae* function be expanded to include any consequent appeals. At present, whilst a Commissioner may appear as *amicus curiae* at first instance before the Federal Court or Federal

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<sup>553</sup> *Vijayakumar v Qantas Airways Limited* [2008] FMCA 339, [12].

<sup>554</sup> Section 40(1). The scope of this right was discussed recently in *Kortel v Mirik Mirik* [2008] VSC 103.

Magistrates Court, the function does not extend to appeals from that proceeding to the Full Federal Court or High Court. This adds costs and confusion as HREOC must bring a separate application to ‘take the reins’ as intervener when a matter goes on appeal.

690. HREOC also considers that the intervention function under existing s 48(1)(gb) of the SDA is unnecessarily selective. For example, it does not explicitly include claims relating to family responsibilities or victimization. Rather, HREOC recommends that the section be broadened, such as along the following lines:

...to intervene in proceedings that involve issues relevant to this Act and its operation, including discrimination on the ground of sex, marital status, pregnancy, potential pregnancy or family responsibilities or sexual harassment, victimization or any other matters made unlawful under this Act.’

**Recommendation 48: Extend the *Amicus curiae* function (Stage One)**

Amend s 46PV of the HREOC Act to include appeals from discrimination decisions in the Federal Court and Federal Magistrates Court.

**Recommendation 49: Intervening or appearing as *amicus curiae* as of Right (Stage One)**

Consider empowering HREOC to intervene, and the Sex Discrimination Commissioner to appear as *amicus curiae*, as of right.

**Recommendation 50: Broadening the intervention power (Stage One)**

Consider redrafting s 48(1)(gb) of the SDA to operate more broadly.

## ***Independent Monitoring and Reporting of National Gender Equality Benchmarks and Indicators***

691. In Australia, regular independent monitoring and reporting on progress in achieving gender equality does not occur. Data collection is conducted, although there are gaps. There are also many excellent examples of high quality research on specific issues.<sup>555</sup>
692. However, there is no institutional arrangement in place for an agency independent of government to report to Parliament and the Australian public, providing a considered evidence-based assessment of progress against an integrated set of national gender equality indicators and to benchmark progress against those indicators over time.
693. HREOC already has existing functions, such as its education and research function, which would enable ongoing monitoring and reporting on gender equality benchmarks and indicators at a national level. However, with one exception, the Commissioner and HREOC has assessed that it is not in a position to assume this important national role under existing funding arrangements.
694. The one exception is in the area of sexual harassment.

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<sup>555</sup> See, for eg, Australian Bureau of Statistics, *Average Weekly Earnings, Australia, May 2008, Cat no. 6302.0* (2008); Australian Bureau of Statistics, *How Australians Use Their Time, 2006, Cat no. 4153.0*, (2008); Australian Bureau of Statistics, *Personal Safety, Australia, 2005, Cat no. 4906.0* (2005); Australian Bureau of Statistics, 'Australian Social Trends' (Cat No 4153, 2007); Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly, May 2008 Cat no. 6291.0.55.003* (2008); Australian Institute of Family Studies, *Growing Up in Australia: Longitudinal Study of Australian Children* (2005); Marian Baird and Sara Charlesworth, 'After the baby-A Qualitative Study of Working Time Arrangements Following Maternity Leave' (2007) 17(3) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 97; Ross Clare, *Are retirement savings on track?* (2007); Equal Opportunity for Women in the Workplace Agency, *Gender Income Distribution of Top Earners in ASX200 Companies*, 2006 EOWA Census of Women in Leadership, 25 January 2007; S Kelly, 'Entering Retirement: the Financial Aspects' (Paper presented at the Communicating the Gendered Impact of Economic Policies: The Case of Women's Retirement Incomes, Perth, 12-13 December 2006); Jenny Mouzou and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004); VicHealth, *The health costs of violence: Measuring the burden of disease caused by intimate partner violence* (2004); Gillian Whitehouse et al, *The Parental Leave in Australia Survey: November 2006 Report* (2006); Barbara Pocock, 'Work-Life 'Balance' in Australia: Limited Progress, Dim Prospects' (2005) 43(2) *Asia Pacific Journal of Human Resources* 198; Gillian Whitehouse et al, 'Parental Leave in Australia: Beyond the Statistical Gap' (2007) 49(1) *Journal of Industrial Relations* 103.

695. In 2003, the former Commissioner, Pru Goward undertook the first national survey about the nature and extent of sexual harassment in Australia. Commissioner Broderick is in the process of conducting the second national survey, the results of which will be used to track progress, and identify improvements to monitoring this key indicator of gender equality at a national level.
696. It is intended that the national survey on sexual harassment will be undertaken into the future. However, at the present time, it is not known whether future Commissioners may consider this initiative a priority in light of other competing demands, and available resources.
697. In 2007, HREOC recommended to the Australian Government's 2020 Summit that comprehensive gender equality benchmarks be established, which should be independently monitored to track progress on key indicators of equality between men and women.<sup>556</sup> HREOC could be the agency to perform this role.
698. In the United Kingdom, the CEHR is charged with defining (in consultation with interested parties) and monitoring progress on equality and human rights in the United Kingdom.<sup>557</sup> Every three years it must publish a report which is laid before Parliament outlining the extent of progress towards equality.<sup>558</sup>
699. HREOC could perform a similar role regarding gender equality.
700. Independent monitoring and reporting of national gender equality indicators would involve close collaboration with the Australian Government, the Australian Bureau of Statistics, EOWA and other key research institutes and gender equality organisations. Collaboration would lead to design of an appropriate set of key gender equality indicators which are durable for the long term future, relevant to the Australian context, and consistent with Australia's international reporting obligations under CEDAW and other international instruments. The design process would identify existing data sources, and data gaps that may need to be addressed over time. It would also enable protocols to

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<sup>556</sup> Human Rights and Equal Opportunity Commission, 'Submission to the Australia 2020 Summit' (2007).

<sup>557</sup> *Equality Act 2006* (UK) subs 12 (1),(2) and (3)

<sup>558</sup> *Equality Act 2006* (UK) subs 12 (4) and (5)

be put in place with key government agencies and other bodies relevant to data collection and related information sources.

701. The Commissioner may need to commission some research to be undertaken but would ideally support governments and external agencies, such as the ABS or the Australian Institute of Family Studies, and other researchers to progressively develop a national research base.

702. The benefits of an independent regular, high-quality assessment of progress on gender equality are numerous. The process would, for example:

- act as a public educational resource to inform ongoing debates about the state of gender equality in Australia
- support Australian governments, particularly the Federal and State Ministers for Women and Offices for Women in their role of activating and maintaining gender equality strategies within government both as employers and in across-government policy development and program delivery
- stimulate and support progressive improvement in data collection and research initiatives which are durable and complementary
- provide a valuable resource for a wide range of groups needing reliable data to inform their own policy, planning and advocacy efforts.
- provide an accountability mechanism for governments
- enable international and comparative analysis with other countries, such as New Zealand, the United Kingdom and Canada which all already undertake this function in some form.
- Generate recommendations from HREOC on priorities for Australia to progress gender equality in light of the results of the monitoring process

703. HREOC notes that the Victorian Equal Opportunity Review declined to recommend that the Victorian Equal Opportunity Commission perform a regular independent monitoring role. It was of the view that 'a requirement to produce a

report on the state of equality in Victoria would require very considerable resource allocation over an extended period of time. This would unjustifiably inhibit the capacity of the Commission to undertake other responsibilities.<sup>559</sup>

704. HREOC agrees with this view, whilst noting that the function may be a higher priority for Australian governments if conducted at the national level. HREOC and the Commissioner would have the ability to monitor substantive progress on key indicators for the country as a whole. The national monitoring function would be a resource for State and Territory equality and human rights statutory authorities given that national monitoring could enable trends between states and territories on key indicators to also be tracked.
705. However, if the Committee supports a role for HREOC and the Commissioner to independently monitor and report to the Australian Parliament on national gender equality indicators and benchmarks, additional and dedicated resources would be required. It is essential that the function is performed in a rigorous and high quality manner and does not impact on the other functions of HREOC and the Commissioner.
706. HREOC notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner, has an existing statutory duty to table an annual report on behalf of HREOC in relation to progress on human rights for Aboriginal and Torres Strait Islander peoples.<sup>560</sup>
707. HREOC considers that the SDA could be amended to insert a specific function in the SDA to perform this role. However, HREOC does not express a view at this time as to whether that role should be a statutory duty. HREOC recognises the potential national importance of inserting the role as a statutory duty to ensure the accountability mechanism is maintained over time, placing an obligation on HREOC to undertake the function, and the Australian government to respond to the reporting process. However, HREOC also acknowledges that the performance of the role would necessarily be contingent upon appropriate funding being made available and maintained.

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<sup>559</sup> Julian Gardner, 'An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report' (2008), 123.

<sup>560</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 46C(1)(9). For past reports, go to <[http://www.hreoc.gov.au/social\\_justice/sj\\_report/index.html](http://www.hreoc.gov.au/social_justice/sj_report/index.html)>.

**Recommendation 51: Independent monitoring of national gender equality indicators and benchmarks (Stage One)**

(1) Insert into the SDA a specific function for the Commissioner, on behalf of HREOC, to undertake periodic, independent monitoring of gender equality indicators and benchmarks and report to the Australian Parliament, subject to appropriate and specific funding being made available.

(2) Consider the merits of inserting this function as a statutory duty, taking into account the concerns of HREOC about the need for tied funding.

***Standards, Codes of Practice and Guidelines***

708. HREOC has an existing power to develop and publish non-legally binding guidelines regarding compliance with the SDA. Section 48(1)(ga) provides that the following function is given to HREOC:

To prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy and discrimination involving sexual harassment.

709. This power is similar to the power of the NZHRC which may prepare and publish guidelines and voluntary codes of practice to explain legal rights and responsibilities under the *Human Rights Act 1993* (NZ) and to promote best practice in equal employment opportunities.<sup>561</sup>

710. HREOC has issued guidelines in relation to a number of areas of public life, including:

- *Women, Sport and Sex Discrimination Guidelines (1992)*: produced to guide the public about unlawful discrimination in sport and the exemption under the SDA may apply.<sup>562</sup>

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<sup>561</sup> *Human Rights Act 1993* (NZ) ss 5(2)(e) and 17(d)

<sup>562</sup> Human Rights and Equal Opportunity Commission, 'Women, Sport and Sex Discrimination: Guidelines on the Provisions of the *Sex Discrimination Act 1984*' (1992).

- *Superannuation Guidelines (1993)*: produced to assist those responsible for the provision of superannuation schemes about complying with the SDA.<sup>563</sup>
- *Special Measures Guidelines (1996)*: published following amendments to the special measures provisions in the SDA.<sup>564</sup>
- *Sexual Harassment and Educational Institutions (1996)*: produced to provide guidance to education institutions about their obligations as both employers and as educators.<sup>565</sup>
- *Pregnancy Guidelines (2001)*: published following HREOC's Report of the National Inquiry into Pregnancy and Work, *Pregnant and Productive: It's a Right not a privilege to work while pregnant* on referral from the federal Attorney-General in August 1998.<sup>566</sup>
- *Sexual Harassment Code of Practice (2004)*: first published in 1996 and updated in 1997 and 2004. Whilst described as a 'code of practice', the publication was produced under s 48(1)(ga) of the SDA.<sup>567</sup>

711. However, guidelines under s 48(1)(ga) are not legally binding nor do they have any specific legal significance in complaints proceedings in determining whether a person or organization is in breach of the SDA. Neither the Commissioner nor HREOC has any existing power to enforce compliance with guidelines which have been published nor do employers or others who comply with guidelines have no explicit assurance that following a guideline will protect them from or assist them in responding to a complaint of unlawful discrimination.

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<sup>563</sup> Human Rights and Equal Opportunity Commission, 'Superannuation Guidelines: Guidelines for the Avoidance of Discrimination on the Grounds of Sex, Marital Status, or Pregnancy in relation to Superannuation' (1993).

<sup>564</sup> Human Rights and Equal Opportunity Commission, '*Sex Discrimination Act 1984* Special Measures Guidelines' (1996).

<sup>565</sup> Human Rights and Equal Opportunity Commission, '*Sexual Harassment and Educational Institutions: A Guide to the Federal Sex Discrimination Act*' (1996).

<sup>566</sup> Human Rights and Equal Opportunity Commission, 'Pregnancy Guidelines' (2001).

<sup>567</sup> Human Rights and Equal Opportunity Commission, '*Sexual Harassment: A Code of Practice*' (2004).

## Implement legally-binding standards

712. Various commentators and past inquiries, both by HREOC and others, have recommended that the SDA be amended to empower HREOC to develop and issue enforceable standards in specific areas of discrimination and public life. Standards would be legally binding and would set out minimum obligations which must be in place in order to comply with the SDA.
713. In *Equality Before the Law (2004)*, the Australian Law Reform Commission, recommended that the SDA include a provision allowing the introduction of enforceable standards to deal with systemic issues, similar to those present in the DDA.
714. The DDA enables the Minister to formulate disability standards in various areas such as the employment of persons with disabilities. It is unlawful to contravene such a standard.<sup>568</sup> A breach may be the subject of a complaint to HREOC.
715. Guidelines in Canada are published in the *Canada Gazette* and are also legally binding.<sup>569</sup>
716. Such a power in the SDA would be beneficial in that it would allow HREOC to simplify the plethora of precedents developed on sex discrimination law to provide clarity for both employers and other bodies, and potential applicants under the SDA about how to implement gender equality rights and responsibilities.<sup>570</sup> It would also be an additional tool available to address entrenched inequalities or poor practices to protect vulnerable persons.
717. While enforceable standards may not be suitable for all aspects of discrimination, areas such as pregnancy and potential pregnancy discrimination, and sexual harassment could benefit from such a power. For example, in *Pregnant and Productive (1999)*, HREOC recommended that the SDA be

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<sup>568</sup> *Disability Discrimination Act 1992 (Cth)*, s 32.

<sup>569</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 27 (3) and (4)

<sup>570</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), 5.

amended to empower HREOC to publish enforceable standards in relation to pregnancy and potential pregnancy.<sup>571</sup>

718. In addition, HREOC would be able to receive proposed standards from a specific industry or other body. HREOC would have the ability to certify the standards as compliant with the SDA.
719. Once a standard became law, breach of the standard could be the basis for a complaint under the SDA. This would be similar to the legal effect of guidelines which can be published by the Canadian Human Rights Commissioner, either on its own initiative or on application.<sup>572</sup>
720. Compliance with the standard could operate as a defence to a claim of unlawful discrimination, at least in certain circumstances, such as vicarious liability.
721. Alternatively, the standard could operate in a manner similar to the codes of practice in the United Kingdom. In the UK, the CEHR may issue statutory codes of practice in relation to any aspect of pay equity, unlawful sex discrimination and the Gender Equality Duty (discussed in further detail below).<sup>573</sup> Failure to comply with a code of practice does not itself give rise to criminal or civil proceedings, but may be admissible in such proceedings.<sup>574</sup> Courts and tribunals are required to take relevant codes of practice into account when determining if unlawful discrimination has occurred.<sup>575</sup>
722. The benefit of a legally-enforceable standard is that it would provide an additional mechanism for promoting substantive equality, through addressing systemic discrimination, such as the failure to have specific policies in place, or to follow minimum procedures to provide protection from unlawful discrimination under the SDA. A standard would also provide greater clarity for employers and other bodies about their obligations under the SDA. Compliance with a standard could also be of positive benefit to employers and others if it was to operate as either a defence to a complaint, or as evidence in favour of having complied with the SDA.

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<sup>571</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), 5.

<sup>572</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 27 (2)

<sup>573</sup> *Equality Act 2006* (UK) s 14 (1)

<sup>574</sup> *Equality Act 2006* (UK) s 15 (4)(a)

<sup>575</sup> *Equality Act 2006* (UK) s 15(4) (b)

723. If the SDA is amended to create an expanded formal inquiry function (an option for reform set out above), the Commissioner could also use that function to investigate allegations of persistent breach of the standards. If the inquiry found that the standards have been breached, the inquiry may lead to a settlement with the respondent, for example by adopting a ‘Gender Equality Action Plan,’ discussed further below. Failing settlement, HREOC could commence enforcement action in the Federal Court or Federal Magistrates Court if a breach operates as a breach of the SDA.
724. Further, if the standing provisions were broadened (see **Complaint handling**, above), it would also be possible for a public interest organisation to bring an action for breach of a standard.
725. If a power to create legally-binding standards was included, the Committee would need to consider the effect of standards on state and territory anti-discrimination laws, and whether compliance with a federal SDA standard would also operate as a defence to a complaint of unlawful discrimination under state and territory laws.
726. HREOC notes that the Victorian Equal Opportunity Review recommends that the VEORC not take on the power to publish binding standards. The Review took the view that the creation of standards can be ‘lengthy and ridden with obstacles as has happened with the draft “Access to Premises Standard” [under the DDA’]. The introduction of these standards has been delayed for several years due to disagreements about their final form. A further disadvantage of standards is that they freeze the nature of compliance to a minimum standard and may not encourage best practice.’<sup>576</sup>
727. HREOC acknowledges these concerns. However, on balance, in light of experience with the DDA, HREOC considers that a function to enable standards to be made would be a useful addition to the range of options available to eliminate discrimination and promote gender equality.
728. HREOC would retain the ability to assess the usefulness of developing standards in any given case, in light of the likely resources required, and would exercise

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<sup>576</sup> Julian Gardner, 'An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report' (2008), 122.

this function in accordance with its duty to ‘ensure that the functions of the Commission...are performed...efficiently and with the greatest benefit to the people of Australia.’<sup>577</sup>

729. HREOC considers that, in some cases, it may be a priority to create a binding minimum standard to protect very vulnerable classes of persons. HREOC considers that many organisations are already committed to achieve best practice irrespective of whether they are obliged to do so. EOWA also has an important role in fostering ‘best practice’ through its relationships with major employers.

**Option for Reform I: Implement legally-binding standards (Stage Two)**

Consider inserting into the SDA the ability to adopt legally-binding standards.

### ***Positive Duties and Action Plans***

730. At the present time, the SDA makes no provision for a general positive duty on employers or other bodies to prevent discrimination or promote gender equality.

731. This submission has recommended amending the SDA to insert a positive obligation on persons or organisations covered by the SDA to make reasonable adjustments to accommodate the needs of a person arising from attributes related to their gender, marital status or other protected ground under the SDA. The question of whether this obligation has been met would be tested on a case by case basis in light of facts arising in an individual case.

732. However, whilst this amendment would contribute to the effectiveness of the SDA in eliminating discrimination and promoting gender equality, it would still rely upon a complaint being made and would not necessarily lead to employers and others being under a duty to introduce systemic changes that may be required.

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<sup>577</sup> *Human Rights and Equal Opportunity Act 1986* (Cth), s 10A(1)(b).

733. Failure to comply with these obligations may lead to the employer being the subject of a report to the Minister, with the report being tabled in Parliament.<sup>578</sup> There is no other enforcement mechanism for non-compliance.

734. Outside of the EOWW Act, there is no provision for imposing general positive duties on employers or other organisations.

## **A Gender Equality Duty**

735. One option would be to implement a positive duty such as the Gender Equality Duty ('GED') introduced in the United Kingdom in 2007<sup>579</sup> which currently applies to all public authorities. Under the GED public authorities are subject to two duties – the 'general duty' and 'specific duties'.

736. The general duty requires all public authorities, in carrying out all of their functions (including policy making, service provision, employment and statutory decision-making) to have due regard to the need to eliminate unlawful sex discrimination and harassment, and to promote equality of opportunity between women and men.<sup>580</sup>

737. To support progress in delivering the general duty, many public bodies<sup>581</sup> are also required to undertake specific duties including obligations to:

- prepare (in consultation with stakeholders) and publish a gender equality scheme setting out its gender equality objectives and showing how it will meet its general and specific duties
- implement the actions in its gender equality scheme within three years unless it is unreasonable or impracticable to do so
- report against the gender equality scheme every year and review the scheme at least every three years, and

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<sup>578</sup> *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 12.

<sup>579</sup> *Equality Act 2006* (UK), inserting ss 76A and 76B into the *Sex Discrimination Act 1975* (UK).

<sup>580</sup> *Sex Discrimination Act 1975* (UK) s 76A.

<sup>581</sup> A list of public bodies currently required to undertake these duties can be found in the Schedule to the *Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006* (UK).

- assess the impact of its current and proposed policies and practices on gender equality in the workforce and in the delivery of services.<sup>582</sup>
738. These obligations are similar to those under the EOWWA Act. However, in contrast to EOWA, the CEHR may assess a public authority's compliance with their positive duties<sup>583</sup> and issue a 'compliance notice' to any authority it considers has failed to comply. Compliance notices may require the recipient to comply with their positive duties or to supply information on how they did, or intend to, comply with their duties.<sup>584</sup> The CEHR may enforce compliance notices in court.<sup>585</sup>
739. There are a number of options for strengthening the existing provisions under the EOWW Act and/or the SDA to implement this kind of gender equality duty in the Australian context. The Committee would need to consider the appropriate institutional and funding arrangements in light of the existing functions of EOWA and the Commissioner/HREOC.

### **Provide for Gender Equality Action Plans**

740. Either the EOWW Act or the SDA could be amended to enable employers not currently covered by the EOWA Act to register voluntary 'Gender Equality Action Plans', similar to the Disability Action Plans which are available under the DDA. A Gender Equality Action Plan would be a plan which sets out specific actions that are to be taken by the employer to promote gender equality in their organisation, with tangible objectives, roles, strategies, roles and responsibilities, targets or other measures, and evaluative mechanisms.
741. Under Part 3 of the DDA, 'service providers' may prepare and implement an action plan, which must include provisions relating to, amongst other things, programs and policies to achieve the objects of the DDA, the setting of goals

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<sup>582</sup> *Sex Discrimination Act 1975* (UK) s 76B and *Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006* (UK).

<sup>583</sup> *Equality Act 2006* (UK) s 31.

<sup>584</sup> *Equality Act 2006* (UK) s 32.

<sup>585</sup> *Equality Act 2006* (UK) s 32 (8)

and targets, and the means for evaluating the plan. The service provider may register the action plan with HREOC.<sup>586</sup>

742. Extending the scope for voluntary participation in Gender Equality Action Plans through EOWA or HREOC would enable not-for-profit organisations and smaller employers to demonstrate their commitment to gender equality.
743. If HREOC was to be given the power to certify special measures under the SDA, in some cases, a Gender Equality Action Plan could be certified on that basis, if it included differential treatment on the basis of gender or other protected attribute.
744. In addition, the preparation of a Gender Equality Action Plans could be a requirement arising out of a HREOC or Commissioner inquiry into the breach of the SDA. Preparation of such a plan could be a settlement term reached with the body concerned.

#### **Option for Reform J: Gender Equality Action Plans (Stage Two)**

Consider introducing the ability for EOWA and/or HREOC to receive Gender Equality Action Plans, from bodies other than employers currently covered by the EOWW Act.

#### **Create and Resource an Independent Auditing Function**

745. HREOC acknowledges however that the current action plan system under the DDA is a relatively weak mechanism as HREOC has no role in certifying the action plan, or auditing its implementation or effectiveness.
746. One option to strengthen a system of Gender Equality Action Plans would be to provide the receiving agency, either EOWA or HREOC, with the power and resources to independently audit the implementation and effectiveness of Gender Equality Action Plans for compliance with the SDA, particularly if it includes a general positive duty provision. In the case of EOWA, this would

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<sup>586</sup> *Disability Discrimination Act 1992* (Cth)

extend to workplace programs. This would bring the function more into line with the role of the CEHR in the UK, as described above.

**Option for Reform K: Auditing function (Stage Two)**

Consider amending the EOWW Act or the SDA Act to provide for an auditing function of Gender Equality Action Plans which is properly resourced.

**Provide an enforcement mechanism**

747. One further option to strengthen the Gender Equality Action Plan process could be to give to EOWA the power to refer to HREOC breaches of the Plan for potential enforcement action, if EOWA formed the view that the body was acting in breach of the SDA.

748. The Commissioner could commence an investigation, potentially leading to the issuing of a Compliance Notice.

749.

**Funding for new functions**

750. HREOC highlighted at the beginning of this section that new functions will need additional funding in order for those functions to be used effectively.

**Recommendation 52: New functions will require new funding (Stage One)**

If new functions are created for HREOC or the Commissioner, provide new funding reasonably necessary for the effective use of that function.

***Procurement Standards***

751. HREOC notes that a number of commentators have proposed that employers that receive government contracts should be required to certify that they are complying with positive gender equality duties. This could be a useful way for

the Australian Government to exercise its purchasing power to promote gender equality with employers who are providing services using public funds. It would also prevent potential providers from competing with each other by trading off employment conditions and workplace arrangements to save costs which are contrary to the goal of gender equality.

752. One option is for the Federal government to require providers to develop and implement Gender Equality Action Plans which would be registered and supervised by EOWA, as a condition of contracting.

**Recommendation 53: Purchasing power of the Australian Government  
(Stage One)**

Consider how the Australian Government can best use its purchasing power to promote gender equality and address systemic discrimination.

## 15. Impact on the economy, productivity and employment

This section addresses **Term of Reference J**.

Strengthening the SDA would make a positive contribution to the economy and to productivity, including through:

- Supporting women's workforce participation
- Supporting the balance of paid work and family and carer responsibilities
- Reducing the financial and other costs to society of disadvantage and inequality

753. The SDA has made a substantial contribution to Australia's increasing productivity and economic prosperity in the last 24 years. In particular, legal protection from discrimination in the workplace, implemented through access to complaints mechanisms, and through HREOC's education and awareness-raising activities, has assisted in removing barriers to workforce participation for women.

754. Since the SDA was introduced, women's labour market participation has steadily increased.<sup>587</sup> At the same time men's participation in the labour market has steadily declined (although stabilising somewhat in recent years<sup>588</sup>), with both participation rates likely to converge by around 2025.<sup>589</sup>

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<sup>587</sup> According to Census data, between 1986 and 2006 the labour force participation rate among women aged 15 years and over in Australia increased from 48 per cent to 58 per cent: ABS, *Australian Social Trends 2008* Cat No 4102.0 (2008).

<sup>588</sup> Business Council of Australia, *Engaging our Potential: The Economic and Social Necessity of Increasing Workforce Participation* (2007) 56.

<sup>589</sup> Barbara Pocock, *The Labour Market Ate My Babies* (2006) 49-51.

755. Women workers now constitute an essential part of the labour market, particularly given the growth in service sector (a sector where women are more likely to be employed) and in knowledge work (bearing in mind the increasing number of women entering and exiting higher education).
756. Women now make up 64 per cent of bachelor degree commencements,<sup>590</sup> and 47.5 per cent of students in the public vocational education and training sector.<sup>591</sup> Enabling skilled women workers to participate in and retain labour force attachment – particularly following childbirth – is essential in order to get a maximum return on Australia’s significant public and private investment in women’s education and training.
757. The OECD has noted that workforce participation of women is a key economic issue for Australia.<sup>592</sup> As well as boosting Australia’s overall labour market participation rate, women’s increased workforce participation has boosted family living standards and, by driving up the demand for goods and services and expanding the size of the domestic market, enabled the Australian economy to continue to grow.
758. In the last two decades employers have benefitted from being able to draw on a much larger pool of potential recruits. At a time of skills shortages across a number of industries, women workers are invaluable to the current labour market.
759. Despite these trends, women and mothers in particular continue to be underutilised in the labour market. The OECD has described motherhood as having a particularly marked ‘dampening effect’ on women’s employment in Australia – a 10 per cent effect for mothers of one child under 15 years in 2000, while those with two children under 15 years had a dampening effect of over 20 per cent.<sup>593</sup>

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<sup>590</sup> ABS, *Education and Work* (May 2007).

<sup>591</sup> National Centre for Vocational Education Research, *Australian vocational education and training: Students and courses 2006 – Summary* (2007).

<sup>592</sup> Organisation for Economic Co-operation and Development, *Economic Survey of Australia 2004 Policy Brief* (2005).

<sup>593</sup> Organisation for Economic Co-operation and Development, *Employment Outlook 2002* (2002), 77-78. See also Iain Campbell and Sara Charlesworth, *Key Work and Family Trends in Australia* (2004), A2-11.

760. The Business Council of Australia ('BCA') has argued that women of childbearing age (25-44 years) are a key group whom policy makers should target in order to lift overall participation in the labour force.<sup>594</sup> The BCA note that Australia performs poorly in this area by comparison with our OECD counterparts. Australia ranks 20<sup>th</sup> in the OECD with rates well below those of Canada, the United States and the UK.<sup>595</sup>
761. However, despite the role of anti-discrimination laws, including the SDA, to removing formal barriers to women's participation in paid work, there remain significant impediments to increasing women's contribution to the formal economy. For example, a recent survey on attitudes towards equality in the workplace showed nearly a quarter of women and men do not believe that women are treated equally to men in their workplace.<sup>596</sup> The same survey showed that over half of respondents believed that promotions and job opportunities are not always based on merit and around a third said that men often progress and are promoted more quickly than women. Twenty-seven per cent of women reported that men are generally paid more than women for the same job.<sup>597</sup> Interestingly, nearly a third (31 per cent) of men in this survey said – unprompted – that women struggle against 'boys' clubs' and male-dominated working environments.<sup>598</sup>
762. Overt sex discrimination in recruitment processes has largely been addressed since the SDA came into operation. However HREOC still receives complaints in this area, particularly regarding inappropriate lines of questioning by employers such as asking whether a candidate is married or what they feel about children. Recent Victorian research on pregnancy discrimination has also

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<sup>594</sup> Business Council of Australia, *Engaging our Potential: The Economic and Social Necessity of Increasing Workforce Participation* (2007) 57. The BCA also identifies other groups with low labour market participation rates: indigenous adults, school leavers, sole parents, immigrants from non-English speaking backgrounds, people with disability and mature aged workers.

<sup>595</sup> Business Council of Australia, *Engaging our Potential: The Economic and Social Necessity of Increasing Workforce Participation* (2007) 57.

<sup>596</sup> Equal Opportunity for Women in the Workplace Agency, *Generation F: Attract, Engage, Retain* (2008), 17.

<sup>597</sup> Ibid.

<sup>598</sup> Ibid, 21.

identified that pregnancy discrimination in recruitment processes is still an issue for women in the workplace.<sup>599</sup>

763. Perhaps the most fundamental barrier to women's full participation in paid work is the struggle to balance paid work and family responsibilities, which prevents many women from participating in the labour market to the degree that they would like, thus representing a significant productivity loss.<sup>600</sup>
764. Strengthening efforts to eliminate both direct and indirect forms of discrimination against women are vital to maintaining Australia's economic progress.
765. Closing the gender pay gap, addressing the labour market segregation which sees women clustered in low paid, undervalued industries and occupations, introducing a national scheme of paid leave for parents and a range of other policy supports<sup>601</sup> are a central part of this effort, and HREOC is pleased to see the government's current focus on these areas.<sup>602</sup>
766. Although not counted in terms of the Gross Domestic Product (GDP) measure,<sup>603</sup> it is also important that women's contribution to economic prosperity through performing the unpaid work of caring is recognised and adequately valued. The economic value of informal (unpaid) care for adults alone to the annual gross domestic product is estimated to be \$18.3 billion.<sup>604</sup> Unpaid caring work reduces the pressure on Australian governments to divert resources to paid caring programs and in this sense, assists Australia's economic prosperity.
767. The protection afforded by anti-discrimination legislation and policies that assist women to reconcile work and family life provide a tangible means of valuing this work. However it is also important to recognise that not all women with

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<sup>599</sup> See the case study described in Sara Charlesworth and Fiona Macdonald, *Hard Labour? Pregnancy, Discrimination and Workplace Rights* (2007) 18.

<sup>600</sup> This was a key finding of HREOC, *It's About Time* (2007).

<sup>601</sup> These are identified and discussed at length in HREOC, *It's About Time* (2007).

<sup>602</sup> See the House of Representatives Standing Committee on Employment and Workplace Relations Committee's *Inquiry into pay equity and associated issues related to increasing female participation in the workforce* at <<http://www.aph.gov.au/house/committee/ewr/payequity/index.htm>> at 24 July 2008 and the Productivity Commission's *Inquiry into Paid Maternity, Paternity and Parental Leave* at <<http://www.pc.gov.au/projects/inquiry/parentalsupport>> at 24 July 2008.

<sup>603</sup> Marilyn Waring, *Counting for Nothing: What men value and what women are worth* (1988).

<sup>604</sup> Carers Australia, *Pre Budget Submission 2004-05* (2003), 1. The value of all unpaid work (not just caring) was estimated in 2004 to be between \$244 and \$408 billion: James Doughney et al, *Lifelong Economic Wellbeing for Women: Obstacles and opportunities* (2004), 62.

primary responsibility for caring work (including the care of children and dependent adults) are able to undertake paid work in addition to their caring role.

768. Further, it is important to recognise that women's care responsibilities differ across the life course and this means that the traditional approach to employment as a continuous, unbroken pattern of full time work must be challenged as a cultural norm.

## 16. Harmonisation of discrimination and equality laws

This section addresses **Term of Reference D**.

HREOC supports ongoing harmonisation of discrimination and equality laws

Any process of harmonisation should meet clear objectives, including:

- Ensuring laws comply with international human rights standards
- Promoting ‘best practice’ models rather than the ‘lowest common denominator’ from each jurisdiction
- Providing greater clarity about the practical application of equality rights and responsibilities in specific contexts
- Reducing the transactional costs for both applicants and respondents
- Promoting access to justice, with particular focus on improving access for people who are mostly intensely affected by inequality and violation of other human rights in Australia

769. HREOC supports the principle of harmonising discrimination and equality laws. As noted in this submission, there are anomalies between the SDA and other federal discrimination laws, due in part to historical circumstances at the time of each law being enacted. Further, there are anomalies between the SDA, and corresponding state and territory laws that prohibit sex discrimination.

770. The benefits to be gained from the harmonisation of equality and discrimination laws are, in many respects, obvious. Under the existing state of affairs, whilst the various laws are largely similar, some significant differences exist. Accordingly, individuals face a difficult decision as to where to commence their action without prejudicing their prospects of success, which is complicated

further by restrictions against swapping between jurisdictions mid-stream.<sup>605</sup> Likewise, respondent organisations and bodies, particular those that operate in more than one State or Territory, face the complex task of ensuring that their actions, policies and operations comply with overlapping obligations under multiple pieces of legislation that all seek to address the same social wrong.<sup>606</sup>

771. However, as a political process involving negotiations between Federal, State and Territory governments, there is the inevitable risk that a process aimed at achieving harmonisation will adopt a ‘lowest common denominator’ approach. HREOC is concerned that harmonisation not be seen as an end of itself that outweighs the benefits of strong Federal discrimination laws. Harmonisation must not come at the cost of dilution. To the extent that would-be respondents benefit from harmonisation, it should be through simplification and streamlining of their compliance obligations, not through a weakening of those obligations.
772. HREOC considers that harmonisation is best advanced under the current Review by moving the SDA towards ‘best practice’ within Australia’s legal system for prohibiting discrimination through a two stage reform process. This review provides an opportunity to propose a road map for first class reform of equality laws in Australia.
773. The two stage reform process set out in this Submission could be a suitable model to lead the harmonisation process, which draws on all of the best features of existing discrimination laws, both within Australia and internationally.
774. This submission has therefore endeavoured to draw on positive features of other anti-discrimination statutes in the making of Recommendations, such as dealing with improving the coverage of the SDA in relevant areas of public life (see **Coverage**, above). Its Options for Reform, to be considered in stage two of the

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<sup>605</sup> Pursuant to s 10(4) of the *Sex Discrimination Act 1984* (Cth), as well as s 6A(2) of the *Racial Discrimination Act 1975* (Cth), s 13(4) of the *Disability Discrimination Act 1992* (Cth) and s 12(4) of the *Age Discrimination Act 2004* (Cth), a person who has ‘made a complaint’, ‘initiated a proceeding’ or (in the case of the *Sex Discrimination Act 1984* (Cth) and *Racial Discrimination Act 1975* (Cth) ‘taken any other action’ under an analogous State or Territory law is prevented from lodging a complaint or bringing a proceeding under the *Human Rights and Equal Opportunity Act 1986* (Cth). See further HREOC, *Federal Discrimination Law* (2008), 275-7.

<sup>606</sup> See further Peter Anderson, ‘The Sex Discrimination Act: An Employer Perspective – Twenty Years on’ (2004) 27 (3) *University of New South Wales Law Journal* 905, 911.

reform process also draw on best practice and move towards a human rights framework to the protection of equality in Australia.

775. HREOC notes also that some of the current difficulties and confusion arising from non-uniform discrimination legislation will be helped through enhanced funding of free legal advice and education materials to assist individuals and organisations in understanding their rights and obligations under the various pieces of anti-discrimination legislation.

776. HREOC notes that the Standing Committee of Attorneys General has commenced a process for harmonising the federal and state anti-discrimination jurisdictions, generally. HREOC considers that any harmonisation process should fulfil a number of specific objectives, including to:

- Ensure laws comply with international human rights standards;
- Promote ‘best practice’ models rather than the ‘lowest common denominator’ from each jurisdiction;
- Provide greater clarity about the practical application of equality rights and responsibilities in specific contexts;
- Reduce the transactional costs for both applicants and respondents; and
- Promote access to justice, with particularly focus on improving access for people who are mostly intensely affected by inequality and other violations of human rights in Australia.

**Recommendation 54: Harmonisation should promote ‘best practice’ in equality law and ensure compliance with international legal standards (Stage One)**

Any process of harmonisation should: (a) Ensure laws comply with international human rights standards; (b) Promote ‘best practice’ models rather than the ‘lowest common denominator’ from each jurisdiction; (c) Provide greater clarity about the practical application of equality rights and responsibilities in specific contexts; (d) Reduce the transactional costs for both applicants and respondents; and (e) Promote access to justice, with particular focus on improving access for people who are mostly intensely affected by inequality and violation of other human rights in Australia.

## 17. Merits of an *Equality Act* for Australia

This section is relevant to **Terms of Reference B and D**.

HREOC would welcome an inquiry which would consider the merits of a comprehensive *Equality Act* for Australia.

777. In 1994, the ALRC conducted a national inquiry into the SDA. One of its key recommendations in *Equality Before the Law (1994)* was that an *Equality Act* should be enacted which would:

- Define ‘equality in law’ to include equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal protection of the law, and the full and equal enjoyment of human rights and fundamental freedoms;
- Provide that any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of gender should be inoperative to the extent of the inconsistency;
- Set out the factors to be taken into account in assessing inconsistency, including the historical and current social, economic, and legal inequities;
- Apply equality to women and men;
- Recognise that violence is an integral part of the inequality of women.<sup>607</sup>

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<sup>607</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994).

778. HREOC considers that there is merit in revisiting the question of merits of an *Equality Act* for Australia. This could be done in a second stage of the reform process commenced by this Inquiry.
779. An inquiry into an *Equality Act* would present an opportunity to consider fully implementing Australia's obligations to provide domestic protection from discrimination, including in relation to gender equality, and to promote substantive equality in accordance with the ICCPR, ICESCR and other international legal obligations.
780. An *Equality Act* could incorporate existing equality legislation, including the SDA, whilst retaining distinct features regarding specific grounds as required. It could also consider the merits of incorporating protection from discrimination on other grounds including family and carer responsibilities, sexuality, sex and gender identity or other status.

### **The role of specialised discrimination laws**

781. However, there are important questions to be resolved about the merits of moving away from the current approach in Australia of specialised federal discrimination laws covering particular attributes. Laws such as the ADA, DDA, RDA, SDA and the HREOC Act have represented important national statements of the right to non-discrimination for particular groups within society, including women, older people, young people, people with disability, Aboriginal and Torres Strait Islander peoples, and people from other diverse racial groups.
782. The role of special-purpose Commissioners has also been widely recognised as important statutory roles at national level to publically advocate for the protection of the human rights of particular groups. If an *Equality Act* was to emerge, the role of special purpose Commissioners would be particularly important in ensuring that national attention continues to be given to the human rights of people who face specific challenges of inequality in society.
783. An inquiry would provide an opportunity for these important debates to be had amongst all parties concerned.

## A human rights framework for equality protection

784. An inquiry into an *Equality Act* would also provide an opportunity to consider the merits of moving to a human rights framework for the protection of equality at federal level.
785. As this Submission has demonstrated, there is a real debate as to whether the current model for prohibiting discrimination under the SDA strikes an appropriate balance between the often competing virtues of certainty, flexibility, clarity, practicality and fairness.
786. The current definition of discrimination in the SDA seeks to filter out forms of differential treatment that are not prohibited. So, for example, in a direct discrimination claim the applicant must establish a causal link between a protected attribute and the alleged detrimental treatment. (See **Definitions of discrimination**, above).
787. Furthermore, the absence of a general defence to direct discrimination is balanced against competing interests via the permanent exemptions within the legislation.<sup>608</sup> (Alternatively, in an indirect discrimination claim the legislation provides a reasonableness defence for respondents at which point competing interests can be assessed.)
788. To the extent that it is necessary to accommodate differential treatment to achieve substantive equality, this is primarily addressed through the definition of indirect discrimination (which targets facially neutral barriers that disadvantage protected groups), the exclusion of special measures from the definitions of discrimination and, to a lesser extent, the inclusion of characteristics within the definition of direct discrimination (the limitation of this characteristics extension in achieving substantive equality is discussed above, under **Definitions of Discrimination**).

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<sup>608</sup> See further Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 8: 'Anti-discrimination laws have a patchwork of such exceptions designed to make workable the general prohibition on direct discrimination.'

789. The trade-off of this more prescriptive approach, however, is its comparative lack of flexibility. For example, in respect of direct discrimination, a notable feature of the current model is that conduct falling within the definition is prohibited unless an exception applies even if it is manifestly reasonable.<sup>609</sup> Conversely, conduct falling outside the definition is not prohibited, even if it is manifestly unjust. For example, in *IW v City of Perth*,<sup>610</sup> Brennan CJ and McHugh J observed:

[I]t must be kept in mind that the [*Equal Opportunity Act 1984 (WA)*], like many anti-discrimination statutes, defines discrimination and the activities which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner. As a result, conduct that would be regarded as discrimination in its ordinary meaning may fall outside the Act.<sup>611</sup>

790. As discussed earlier in this submission, the existence of permanent exemptions also emphasises this inflexibility. If the conduct falls within an exempted area, the conduct will not be unlawful. There is no scope within the law to assess whether the lack of protection of gender equality is appropriate in light of the competing other interests that may be involved in that specific context.

791. An alternate approach to the current model is that taken to discrimination in international human rights jurisprudence. Consistent with the definitions of discrimination under CEDAW<sup>612</sup> and ICERD,<sup>613</sup> the Human Rights Committee has defined discrimination as follows:

[T]he term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

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<sup>609</sup> See further Robert Dubler, ‘Direct Discrimination and a Defence of Reasonable Justification’ (2003) 77 *Australian Law Journal* 514.

<sup>610</sup> (1997) 191 CLR 1.

<sup>611</sup> *Ibid* 12.

<sup>612</sup> Article 1.

<sup>613</sup> Article 1(1).

792. This definition is similar to the definition adopted under s 9(1) of the RDA.

Whilst relatively convoluted, the Human Rights Committee has simplified the definition by clarifying (as noted earlier) that:

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>614</sup>

793. Accordingly, the definition itself invites a balancing approach, which looks at whether relevant criteria for differential treatment are legitimate. To the extent that competing interests need to be taken into consideration, this is relevant to the question of whether the person's rights have in fact been impaired, rather than through the use of blanket exemptions. Similarly, to the extent that differences in treatment may be required in order to achieve substantive equality, this may be accommodated on the basis that differential treatment that is proportionate to a legitimate objective does not impair a person's rights.<sup>615</sup>

794. The above approach to defining discrimination is also reflective of the approach taken in international human rights jurisprudence generally, which is to consider first whether a particular act or practice has the purpose or effect of restricting or impairing a person's rights and then ask whether that restriction or impairment is necessary in the circumstances. The question of 'necessity' involves a proportionality assessment as to whether the restriction is pursuant to a legitimate aim and is reasonable and proportionate in the circumstances for the achievement of that aim.<sup>616</sup>

795. This approach is now reflected in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). The operative provisions setting out the rights

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<sup>614</sup> Human Rights Committee, General Comment 18 (Non-discrimination), [13]. This reflects the approach taken under the jurisprudence of the Committee. See, eg, *Broeks v. The Netherlands* (172/1984), ICCPR, A/42/40 (9 April 1987) 139, [13]. See further, Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, 2004), 680-9.

<sup>615</sup> See, further, Human Rights Committee, General Comment 18, Non-discrimination, [13]; Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against non-citizens, [4].

<sup>616</sup> For further discussion of the application of proportionality principles under the ICCPR, see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> ed, 2005) at, inter alia, pp 274-89 (re freedom of movement), 381-4 (re right to privacy), 393-9 (re freedom from interference with family), 424-31 (re freedom of religion), 458-67 (re freedom of expression) and 490-4 (re freedom of assembly).

protected under the Charter are free-standing and open-ended.<sup>617</sup> However, the enjoyment of those rights is subject to a reasonable limitations provision in s 7(2) which introduces a proportionality based assessment,<sup>618</sup> as follows:

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose

that the limitation seeks to achieve.

796. In Canada, a similar approach has been taken in respect of discrimination. The Supreme Court has abolished the distinction between direct and indirect discrimination.<sup>619</sup> Rather, an applicant need only establish a prima facie case of discrimination, namely that there is a 'link between group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its

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<sup>617</sup> Sections 8-27.

<sup>618</sup> Whilst s 7 does not mention the word 'proportionality', it is clear that a proportionality test is required by the very nature of the exercise under the section. Indeed, the Attorney-General, in his second reading speech for the Charter Bill, confirmed that 'the general limitations clause embodies what is known as the 'proportionality test'.' (Rob Hulls, Second Reading Speech, *Charter of Human Rights and Responsibilities Bill*, *Victorian Hansard*, Legislative Assembly, 4 May 2006, 1291). Likewise, the Consultation Report that preceded the Charter confirmed that s 7 was designed to incorporate the proportionality test developed in Canada in *R v Oakes*: Victoria, Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), 47. It is also widely accepted that a proportionality test is central to a court's assessment of whether a limitation of a person's human rights can be justified. See further P Hettiarachi, 'Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation Under the Charter of Human Rights and Responsibilities' (2007) 7 *Oxford University Law Journal* 61, 72; George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 899.

<sup>619</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (also known as the *Meiorin* case) [1999] 3 SCR 3; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (also known as the *Grismer* case) [1999] 3 SCR 868.

impact'.<sup>620</sup> Once this relatively low threshold for a prima facie case of discrimination has been met, the onus then shifts to the respondent to establish that the relevant act or condition was a 'bona fide occupational requirement'. This has been interpreted to involve a proportionality based approach, as follows:

An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.<sup>621</sup>

797. Under the Canadian approach, the balancing of competing rights and interests therefore occurs at the stage of assessing whether the restriction or impairment can be justified in light of other factors, rather than through resort to exemptions or a stricter approach at the definitional stage.

798. The main benefit of this approach, as well as a human rights based approach generally, is that it is sufficiently flexible to accommodate any matrix of facts and competing considerations. It also contains a wider funnel for determining whether conduct is prima facie discriminatory or inconsistent with a person's rights, which allows the focus to more readily shift to a consideration of whether

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<sup>620</sup> *McGill University Health Centre v Syndicat des employés de l'Hôpital général de Montréal* [2007] 1 SCR 161 (Abella J).

<sup>621</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (also known as the *Meiorin* case) [1999] 3 SCR 3, [54]; see further [56]-[68] for elaboration on these elements. The Supreme Court has also confirmed that the above approach is not confined to employment related discrimination, but applies in all cases of alleged discrimination: *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (also known as the *Grismer* case) [1999] 3 SCR 868, [19].

the impugned conduct or condition can be justified as being proportionate to a legitimate aim.

799. The benefit of such a flexible approach to assessing discrimination has at times been recognised by the Australian courts. For example, in *Waters v Public Transport Corporation*,<sup>622</sup> McHugh J expressed a preference for a simpler approach that focused on whether differences in treatment could be justified as ‘appropriate and adapted’.<sup>623</sup> Similarly, in discussing discrimination in the context of the Constitution, Gaudron, Gummow and Hayne JJ in *Austin v Commonwealth*<sup>624</sup> referred to discrimination as involving differential treatment or unequal outcome that ‘is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.’<sup>625</sup>

800. Conversely, however, the more flexible human rights based approach lacks the same degree of certainty that the SDA model provides. For example, Neil Rees, Katherine Lindsay and Simon Rice argue, in relation to the approach to discrimination taken in a Constitutional context such as in *Austin v Commonwealth*:

Whilst such an approach to the concept of discrimination may be appropriate in a constitutional context when considering whether a particular law should be characterised as being discriminatory, this description of conduct which is unacceptable discrimination is far too sophisticated to be of any practical use in an anti-discrimination statute which regulates the daily activities of people such as employers and providers of goods and services.<sup>626</sup>

801. This more flexible approach also arguably shifts greater discretion to the judiciary in balancing the competing considerations in the particular circumstances of the case.

802. These debates need to be fully considered within an adequate time frame. An inquiry into an *Equality Act* would provide such an opportunity.

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<sup>622</sup> (1991) 173 CLR 349.

<sup>623</sup> Ibid 408-9, applying *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 2..

<sup>624</sup> (2003) 215 CLR 185.

<sup>625</sup> Ibid [118].

<sup>626</sup> Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), 73.

## An inquiry process

803. HREOC proposes that a second stage of inquiry into an *Equality Act* would provide an appropriate mechanism through which to assess the merits of adopting a comprehensive *Equality Act* which provides greater coverage of protection from discrimination and the right to substantive equality at the federal level. The inquiry could also assess the merits of:
804. A general prohibition on discrimination;
- A general right to equality before the law;
  - A general positive duty to eliminate discrimination, and promote equality;
  - Removal of all permanent exemptions under current federal discrimination laws; and
  - A general limitations clause, which permits differential treatment strictly in accordance with human rights principles.
805. HREOC does not express a view at this time about a preferred outcome of any future inquiry into an *Equality Act* and would welcome the support from this Inquiry to progress this second stage of reform.
806. An inquiry into an *Equality Act* could take place as a stage of reform arising out of the forthcoming Australia-wide consultation to determine how best to recognise and protect human rights and responsibilities. HREOC also expresses support for the national consultation into human rights.
807. There are many improvements that can be made to the SDA now arising out of the present Inquiry. HREOC urges the Committee to recommend, in stage one, specific amendments to the SDA. This Submission contains HREOC's recommendations for such amendments.
808. Amendments to the SDA now, drawing on best practice, would positively contribute to the ongoing process of improving human rights protection at the national level.

## ***Annexure A: Background to the SDA and subsequent amendments***

### **Background to the SDA**

809. This section is **for information**.

810. This section provides background to the enactment of the *Sex Discrimination Act 1984* (Cth) ('SDA') in 1984 and subsequent amendments leading up to this Inquiry. It includes:

- (c) Background on the enactment of the SDA
- (d) Amendments to the SDA 1984-2008
- (e) Unsuccessful amendments to the SDA 1984-2008

### **Background on the enactment of the SDA**

811. The enactment of the SDA at federal level in Australia was a result of both domestic advocacy and international developments promoting women's rights and gender equality. The original *Sex Discrimination Bill 1983* (Cth) was introduced into the federal parliament in 1983. It was amended in a number of respects prior to its adoption by the Federal parliament in 1984.

812. The impetus for the enactment of the SDA was the signing, then ratification by Australia of the United Nations Convention of the Elimination of Discrimination Against Women ('CEDAW'). Australia's ratification of CEDAW was expressed to be subject to two primary reservations in respect of Article 11: that it would not institute paid maternity leave under Article 11(2)(b) and would continue to exclude women from combat and combat-related duties.

813. The first draft of the *Sex Discrimination Bill 1983* (Cth) was introduced into the Senate by the Labor Government on 2 June 1983. Much of the content of the Bill was drawn from a private members bill introduced by Senator Susan Ryan (whilst in Opposition) into the Senate in 1981.

814. In 1983, Senator Susan Ryan held the position of Minister Assisting the Prime Minister for the Status of Women. In the Second Reading Speech, the Minister confirmed the purpose of the Bill was threefold:

- (a) To give effect to 'certain provisions' of CEDAW;
- (b) To eliminate, so far as it is possible, discrimination on the ground of sex, marital status or pregnancy in the areas of employment, education, accommodation, the provision of goods and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs, and discrimination involving sexual harassment and discrimination in the workplace and in education institutions; and
- (c) To promote recognition and acceptance within the community of the principles of the equality of men and women.

815. The original Bill was subject to 53 amendments from the government prior to debate. Aspects of this version of the Bill which are of note include:

- (a) The removal of the restriction in the original Bill on a complainant's right to seek review by the Human Rights Commission of certain findings of the Sex Discrimination Commissioner.
- (b) The inclusion of an exemption permitting discrimination on the grounds of sex, marital status or pregnancy in relation to discrimination in connection with employment at a school established for the provision of education in accordance with the doctrines of a religion or creed if the discrimination is done in good faith in accordance with the doctrines of the particular religion or creed. (now s38 of the SDA).
- (c) The inclusion of an exemption permitting discrimination against students or prospective students on the grounds of marital status or pregnancy by schools established in accordance with the doctrines of religion or creed if the discrimination is done in good faith in accordance with those doctrines.
- (d) A presumption that Human Rights Commission proceedings would be held in public, however providing for proceedings to be held in private if so ordered.

- (e) The extension of the original Bill's provisions in relation to discrimination by educational institutions, to provide that the section will not apply to a refusal for admission to an educational institution where education is provided only or mainly for students of the opposite sex (now s21(3) of the SDA).
- (f) The extension of the original Bill's exemption in relation to sport beyond sporting facilities to include participation in sporting activities where strength, stamina or physique was important but not concerning coaching, umpiring and administration of a sporting activity.
- (g) The temporary exemption for superannuation funds (originally for 2 years) to cover all superannuation funds or schemes, existing or future, for an unlimited time, subject to providing that the provision could be repealed by regulation.

816. A number of amendments were moved at the Committee stage, the only successful one being the introduction of s42(2)(e) by the Australian Democrats, adding to an exclusion from the sport exemption (sporting activities by children under 12 years of age).

817. The Bill passed the Senate on 16 December 1983. It was introduced to the House of Representatives on the first day of sitting in 1984 and read for the first time on 28 February 1984, with the second reading on 28 February 1984. It passed swiftly through the House and was assented to on 21 March 1984, coming into effect on 1 August 1984.

## **Amendments to the SDA 1984 – 2008**

818. Since 1984, significant legislative amendments have been made to the SDA. The amendments have largely followed major inquiries by Parliament into the position of women in society and the effectiveness of the Act, or judicial rulings on the operation of the Act.

819. There have been major amendments to the SDA in 1992 and 1995 with minor amendments in 1984, 1986, 1988, 1990, 1991, 1992, 1999, 2000, 2001, 2002 and 2003. This section summarises the features and background to the major amendments to the SDA.

820. The first major review of the SDA was a two year inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs (Lavarch Committee). *Halfway to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia (1992)* ('*Halfway to Equal (1992)*')<sup>627</sup> was released in 1992 and received more than 600 submissions and held numerous public hearings.

### **1992 Amendments: industrial awards, sexual harassment, determinations and family responsibilities**

821. The Government's legislative response to the *Halfway to Equal (1992)* was a staged implementation of amendments to the SDA. The first phase was the passage of the *Sex Discrimination and Other Legislative Amendment Bill 1992* and the *Human Rights and Equal Opportunity Bill (No 2) 1992*.

### **Summary of amendments passed**

822. The Sex Discrimination and Other Legislation Amendment Act 1992 and Human Rights and Equal Opportunity Act (No 2) 1992 were passed in Parliament and commenced on 16 December 1992. The Sex Discrimination and Other Legislation Amendment Act 1992 amended the SDA in the following areas:

- (a) Sexual harassment was extended to registered organisations, employment agencies, educational institutions, provision of goods, service and facilities, provision of accommodation and clubs. The requirement of disadvantage was removed;
- (b) Provisions for representative complaints were introduced;
- (c) Industrial awards were brought under the Act;
- (d) Provision for representative complaints; and
- (e) Victimisation to be dealt with by conciliation.

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<sup>627</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992)

823. The *Human Rights and Equal Opportunity Act (No 2) 1992* introduced dismissal on the ground of family responsibilities as prohibited discrimination.

### **1995 Amendments: potential pregnancy, indirect discrimination test, special measures**

824. The second phase of the Government's response to the *Halfway to Equal (1992)* was in 1995. The 1995 amendments were also influenced by the Australian Law Reform Commission Inquiry into Equality before the Law Justice for Women (1994). Findings from this inquiry are published in *Equality Before the Law: Justice for Women (1994)* ('*Equality Before the Law (1994)*').<sup>628</sup>

825. *Equality Before the Law (1994)* recommended comprehensive legislation in the form of an Equality Act be introduced to provide that any law, policy, program, practice or decision which is inconsistent with equality before the law, on the grounds of gender, would be inoperative to the extent of the inconsistency (Recommendations 4.1-6.1) The *Sex Discrimination Amendment Bill 1995* aimed to amend the Act in five ways.

### **Summary of 1995 amendments**

826. The *Sex Discrimination Amendment Act 1995* was passed by Parliament and commenced on 16 December 1995. In summary the SDA was amended to include:

827. A preamble that recognises the need to prohibit discrimination and a statement on equality;

828. Potential pregnancy as a ground of discrimination;

829. A definition of indirect discrimination for sex, marital status and pregnancy or potential pregnancy in the terms of " a person ( the "discriminator") discriminate against another person (the "aggrieved person") on the ground of the sex of the aggrieved person in the discriminator imposes, or proposes to

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<sup>628</sup> Australian Law Reform Commission, 'Equality Before the Law: Justice for Women' (69: Part 1, 1994).

impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person";

830. Inclusion of a reasonableness defence to indirect discrimination and factors to be considered in deciding if a condition, requirement or practice is reasonable; and

831. Inclusion of special measures for the purpose of achieving substantive equality as not constituting discrimination.

### **1999 Amendments: repeal of functions of the HREOC**

832. Major changes were made to the functions and procedures of the HREOC in the *Human Rights Legislation Amendment Act 1999*. The Act was a result of the decision of the High Court in *Brandy v The Human Rights and Equal Opportunity Commission*<sup>629</sup> where the Court held that the enforcement mechanism in the *Racial Discrimination Act 1975* was unconstitutional on the basis that the HREOC, as an administrative body, could not make a final determination as to the rights of the parties in a dispute. This decision required changes to the SDA.

833. The Human Rights Legislation Amendment Act 1999 provided for direct access to the Federal Court should conciliation with the Commission prove unsuccessful. The Human Rights Legislation Amendment Act 1999 also consolidated the complaint handling procedures, whereby the President of the Commission assumed responsibility for all complaint handling, while the Sex Discrimination Commissioner was given an amicus curiae function to argue policy imperatives before the Federal Court.

### **2002 Amendments: breastfeeding**

834. In response to the HREOC report *Pregnant and Productive: it's a Right not a Privilege to Work while Pregnant* ('*Pregnant and Productive (1999)*')<sup>630</sup> the Sex Discrimination Amendments (Pregnancy and Work) Bill 2002 was passed

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<sup>629</sup> *Brandy v The Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

<sup>630</sup> Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999)

by Parliament and commenced operation on 15 October 2003. The Bill implemented three of the recommendations of Pregnant and Productive (1999) clarifying the asking of questions about pregnancy or potential pregnancy, the use of pregnancy related medical information and whether breast feeding is a ground of discrimination. The Bill was prepared in consultation with the HREOC, the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions.

835. The Bill introduced a new subsection to the definition of sex discrimination to include breastfeeding as a characteristic that pertains generally to women. This removed any doubt that existed about whether discrimination on the grounds of breastfeeding was prohibited in the SDA.

836. The Bill amended section 27 of the Act to make it unlawful to request information about pregnancy or potential pregnancy. It also introduced a general prohibition on section 27 which permits requests for medical information about pregnancy or potential pregnancy, providing the information is sought for legitimate reasons, for example occupation health and safety purposes.

### **Unsuccessful attempts to amend the SDA**

837. There have been some unsuccessful attempts by governments to amend the SDA.

### **2000: Access to assisted reproductive technology**

838. In 2000, the *Sex Discrimination Amendment Bill (No 1) 2000* was introduced in Parliament to allow States and Territories to enact legislation to restrict access to assisted reproductive technology (ART) services on the basis of a person's marital status.

839. The Senate's Legal and Constitutional Affairs Committee held an inquiry into the Bill.

840. HREOC made a submission to the Inquiry recommending that the Bill be rejected in its entirety. The basis for the submission was that:

- (a) The bill as drafted erodes basic international guarantees of non-discrimination;
- (b) The bill is extremely broad in scope and will affect men and women, including those in de facto relationships;
- (c) The bill would allow differential treatment between women; and
- (d) That the SDA is consistent with the rights of children.

841. The Senate Committee concluded that the Amendment Bill would diminish the rights of some women and that the amendment would bring the SDA into conflict with CEDAW. It concluded that the amendment would erode existing rights and establish a precedent for future attacks on rights protected in the Act. The Bill did not pass the Senate and lapsed on 8 October 2001.

#### **2002: Access to Assisted Reproductive Technology**

842. In the new Parliament in 2002 there was another attempt to amend s 22 of the SDA with the *Sex Discrimination Bill 2002* on the issue of assisted reproductive technologies. The terms of the 2002 Bill were similar to the 2000 Bill. The Bill was not introduced into the Senate and lapsed.

#### **2004: Teaching Profession**

843. Following the House of Representatives Inquiry *Boys: Getting it Right*, the Government introduced the *Sex Discrimination Amendments (Teaching Profession) Bill 2004* to Parliament in March 2004. The aim of the Bill was to address the number of male teachers in Australian schools by allowing educational authorities to provide scholarships to men to undertake teaching related courses to encourage male teachers into the profession. The provisions of the Bill were in gender neutral language. The amendments to the Act would provide an exemption to the offer of scholarships to persons of a particular gender, providing the scholarships were aimed to address a gender imbalance in teaching.

844. The Bill was in response to a decision by HREOC to refuse to grant an exemption from the SDA to the Catholic Education Office of the Archdiocese

of Sydney to offer male-only scholarships to student teachers for a period of five years.

845. The Bill was referred to the Senate Legal and Constitutional Committee for consideration. HREOC made two submissions to the Senate Inquiry opposing the Bill on three grounds:

- (a) It was unlikely that the Bill would achieve its stated purpose, to address the imbalance of the number of male and female teachers and the assumed effect of that imbalance on the education of male school students.
- (b) The Bill was inconsistent with the purpose and objectives of the SDA.
- (c) The Bill would put Australia at risk of breaching the important obligations under the CEDAW.

846. The Senate Committee recommended that the Bill be supported subject to review as to its effectiveness in two years. The Bill was defeated in the Senate.

## **Annexure B: Comparison of the SDA with the RDA, DDA, ADA and HREOC Act**

### **The Racial Discrimination Act 1975 (Cth)**

847. The RDA was the first Commonwealth unlawful discrimination statute to be enacted and is different in a number of ways from the SDA, DDA and ADA.<sup>631</sup> This is because it is based to a large extent on, and takes important parts of its statutory language from, the *International Convention on the Elimination of all Forms of Racial Discrimination*<sup>632</sup> ('ICERD').
848. Unlike the SDA, DDA and ADA, the RDA does not provide a discrete definition of discrimination<sup>633</sup> and then identify the specific areas of public life in which that discrimination is unlawful.<sup>634</sup> Also unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions<sup>635</sup> and a process for applying for a temporary exemption,<sup>636</sup> there are only a limited number of statutory 'exceptions' to the operation of the RDA.<sup>637</sup>
849. The RDA does, however, have a range of features similar to the SDA, including making victimisation an offence<sup>638</sup> and providing for ancillary and vicarious liability.<sup>639</sup>

### **The prohibition on 'direct' discrimination in s 9**

850. Section 9(1) contains a uniquely broad prohibition against what is generally known as 'direct' race discrimination:

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<sup>631</sup> For a comprehensive overview of the introduction of the *Racial Discrimination Act 1975 (Cth)* see Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, (1995).

<sup>632</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and in Australia 30 September 1975), scheduled to the *Racial Discrimination Act 1975 (Cth)*.

<sup>633</sup> For example, ss 5-7A of the *Sex Discrimination Act 1984 (Cth)*; ss 5-9 of the *Disability Discrimination Act 1992 (Cth)*; ss 14-15 of the *Age Discrimination Act 2004 (Cth)*.

<sup>634</sup> For example, pt II of the *Sex Discrimination Act 1984 (Cth)*; pt 2 of the *Disability Discrimination Act 1992 (Cth)*; pt 4 of the *Age Discrimination Act 2004 (Cth)*.

<sup>635</sup> See pt II, div 4, *Sex Discrimination Act 1984 (Cth)*; pt 2, div 5 *Disability Discrimination Act 1992 (Cth)*; pt 4, div 5 *Age Discrimination Act 2004 (Cth)*.

<sup>636</sup> See s 44 of the *Sex Discrimination Act 1984 (Cth)*; s 55 of the *Disability Discrimination Act 1992 (Cth)*; s 44 of the *Age Discrimination Act 2004 (Cth)*.

<sup>637</sup> See ss 8(1) (special measures); 8(2) (instrument conferring charitable benefits); 9(3) and 15(4) (employment on a ship or aircraft if engaged outside Australia); 12(3) and 15(5) (accommodation and employment in private dwelling house or flat).

<sup>638</sup> Section 27(2).

<sup>639</sup> See ss 17, 18A.

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

851. Section 9 makes unlawful a wide range of acts ('any act' involving a relevant distinction etc which has a relevant purpose or effect) in a wide range of situations ('the political, economic, social, cultural or any other field of public life').

### **The prohibition on 'indirect' discrimination in s 9(1A)**

852. Section 9(1A), which was inserted into the RDA in 1990, has the effect of prohibiting 'indirect' race discrimination. By contrast to the simpler formulation contained in the SDA, the RDA provides:

(1)(1A) Where:

a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

the other person does not or cannot comply with the term, condition or requirement; and

the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

853. The onus is on the applicant to make out each of the elements, including that the requirement or condition is 'not reasonable'.<sup>640</sup>

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<sup>640</sup> *Australian Medical Council v Wilson* (1996) 68 FCR 46, 62 (Heerey J with whom Black CJ agreed on this issue, 47), 79 (Sackville J).

## Specific areas of public life protected

854. In addition to the general prohibition on race discrimination in s 9, ss 11-15 of the RDA also specifically prohibit discrimination in the following areas of public life:<sup>641</sup>

- access to places and facilities;<sup>642</sup>
- land, housing and other accommodation;<sup>643</sup>
- provision of goods and services;<sup>644</sup>
- right to join trade unions;<sup>645</sup> and
- employment.<sup>646</sup>

855. Discrimination for the purposes of these specific prohibitions will be unlawful when a person is treated less favourably than another ‘by reason of the first person’s race, colour or national or ethnic origin’. These sections do not limit the generality of s 9<sup>647</sup> and have been described as ‘amplifying and applying to particular cases the provisions of s 9’.<sup>648</sup>

## The right to equality before the law in s 10

856. Section 10 of the RDA provides for a general right to equality before the law.<sup>649</sup> There is no equivalent to s 10 in other State or Commonwealth anti-discrimination legislation. Section 10(1) provides:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then,

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<sup>641</sup> Note that the *Racial Discrimination Act 1975 (Cth)* has been held *not* to have extra-territorial operation: *Brannigan v Commonwealth* (2000) 110 FCR 566.

<sup>642</sup> Section 11.

<sup>643</sup> Section 12.

<sup>644</sup> Section 13.

<sup>645</sup> Section 14.

<sup>646</sup> Section 15.

<sup>647</sup> Section 9(4).

<sup>648</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ).

<sup>649</sup> Section 10 implements the obligation imposed by article 5 of ICERD to ‘guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law’.

notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

857. Section 10 does not make unlawful any acts, omissions or practices. It is ‘concerned with the operation and effect of laws’<sup>650</sup> rather than with proscribing the acts or conduct of individuals.

### **Racial vilification**

858. The RDA prohibits ‘offensive behaviour based on racial hatred’ (commonly referred to as ‘racial vilification’), being public acts done because of race that are offensive, insulting, humiliating or intimidating.<sup>651</sup>

859. There are exemptions to the prohibition on racial hatred designed to protect freedom of expression. The exemptions apply to things done ‘reasonably and in good faith’ for a range of purposes including artistic works, discussion, debate, the making of fair comment and fair and accurate reporting.<sup>652</sup>

### **The Disability Discrimination Act 1992 (Cth)**

860. The general structure of the DDA is similar to that of the SDA. The DDA:

- defines discrimination in terms that cover both ‘direct’ and ‘indirect’ discrimination;<sup>653</sup>
- prohibits discrimination in particular areas of public life;<sup>654</sup>
- provides for general<sup>655</sup> and temporary<sup>656</sup> exemptions;
- contains offences including victimisation;<sup>657</sup> and
- provides for ancillary and vicarious liability.<sup>658</sup>

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<sup>650</sup> *Mabo v Queensland* (1988) 166 CLR 186, 230 (Deane J).

<sup>651</sup> Section 18C *Racial Discrimination Act 1975 (Cth)*; see exemptions in s 18D.

<sup>652</sup> Section 18D.

<sup>653</sup> Sections 5-9.

<sup>654</sup> See Part 2.

<sup>655</sup> See Part 2 Division 5.

<sup>656</sup> Section 55.

<sup>657</sup> See Part 3 Division 4 and Part 5.

<sup>658</sup> See ss 122-3.

861. Some of the unique features of the DDA include the provision for disability standards and action plans. These are discussed below.

### **‘Direct’ discrimination**

862. Section 5 of the DDA defines ‘direct’ discrimination as follows:

- (a) For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if, because of the aggrieved person’s disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.
- (b) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

863. One of the ways in which the DDA approach to ‘direct’ discrimination differs from that in the SDA is that it does not include the ‘characteristics’ extension contained in the SDA.

### **‘Indirect’ discrimination**

864. By contrast to the simpler formulation contained in the SDA, the DDA adopts a more technical approach to ‘indirect discrimination’:

#### **6 Indirect disability discrimination**

For the purposes of this Act a person (‘discriminator’) discriminates against another person (‘aggrieved person’) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

with which a substantially higher proportion of persons without the disability comply or are able to comply;

which is not reasonable having regard to the circumstances of the case;  
and

with which the aggrieved person does not or is not able to comply.

865. Also by contrast to the SDA, the onus of proving that the impugned requirement or condition is not reasonable rests on the applicant.<sup>659</sup>

### **Disability standards**

866. The DDA provides that the Minister may formulate ‘disability standards’ in relation to a range of areas of public life including the employment,<sup>660</sup> education,<sup>661</sup> provision of public transportation services and facilities<sup>662</sup> to, and access to or use of premises<sup>663</sup> by, persons with a disability.

867. It is unlawful for a person to contravene a disability standard.<sup>664</sup> The exemption provisions (Part II Division 5) generally do not apply in relation to a disability standard.<sup>665</sup> However, if a person acts in accordance with a disability standard the unlawful discrimination provisions in Part II do not apply to the person’s act: in this respect, they operate as a defence.<sup>666</sup>

### **Action plans**

868. Under Part 3 of the DDA, ‘service providers’<sup>667</sup> may prepare and implement an action plan.<sup>668</sup> An action plan is a way for an organisation to plan the

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<sup>659</sup> *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J, with whom Davies and Beaumont JJ agreed).

<sup>660</sup> Section 31(1)(a).

<sup>661</sup> Section 31(1)(b).

<sup>662</sup> Section 31(1)(d).

<sup>663</sup> Section 31(1)(f).

<sup>664</sup> Section 32.

<sup>665</sup> Section 33.

<sup>666</sup> Section 34. Note, however, that a Disability Standard on one of the general topics on which standards can be made under the *Disability Discrimination Act 1992 (Cth)* - public transport, access to premises, education, employment, or administration of Commonwealth laws and programs - will not necessarily provide a complete code which displaces all application of the existing *Disability Discrimination Act 1992 (Cth)* provisions on that subject. How far it displaces the existing *Disability Discrimination Act 1992 (Cth)* provisions will depend on the terms of the particular standard. See further: <[http://www.humanrights.gov.au/disability\\_rights/faq/stanfaq/stanfaq.html#gap](http://www.humanrights.gov.au/disability_rights/faq/stanfaq/stanfaq.html#gap)>.

<sup>667</sup> Defined in s 59.

<sup>668</sup> Section 60.

elimination, as far as possible, of disability discrimination from the provision of its goods, services and facilities.

869. Once developed, an action plan can be given to HREOC.<sup>669</sup> An action plan is to be taken into account when considering the defence of ‘unjustifiable hardship’.<sup>670</sup>

## **The Age Discrimination Act 2004 (Cth)**

870. As with the DDA, the general structure of the ADA is similar to that of the SDA. The ADA:

- defines discrimination in terms that cover both ‘direct’ and ‘indirect’ discrimination;<sup>671</sup>
- prohibits discrimination in particular areas of public life;<sup>672</sup>
- provides for general<sup>673</sup> and temporary<sup>674</sup> exemptions;
- contains offences including victimisation;<sup>675</sup> and
- provides for ancillary and vicarious liability.<sup>676</sup>

871. Some of the unique features of the ADA include the existence of the ‘dominant reason’ test and the breadth of the exemptions made available, particularly the exemption for ‘positive discrimination’ – discussed below. These differences appear to make the protection offered by the ADA weaker than that of the SDA.

872. Part of the reason for this difference is that the ADA is intended to act as a catalyst for attitudinal change. The stated objects of the ADA are to, amongst other things, raise community awareness that people of all ages have the same fundamental rights and equality before the law, and eliminate discrimination

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<sup>669</sup> Section 64.

<sup>670</sup> Section 11.

<sup>671</sup> Sections 14-5.

<sup>672</sup> See Part 4 Division 2-3.

<sup>673</sup> See Part 4 Division 4.

<sup>674</sup> Section 44.

<sup>675</sup> See Part 5.

<sup>676</sup> See ss 56-7.

on the basis of age as far as is possible in the areas of public life specified in the Act.<sup>677</sup>

## **Direct discrimination**

873. The definition of direct discrimination in the ADA is as follows:

### **14 Discrimination on the ground of age – direct discrimination**

For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of age of the aggrieved person if:

the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person of a different age; and

the discriminator does so because of:

- (i) the age of the aggrieved person; or
- (ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or
- (iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.

## **The ‘dominant reason test’**

874. The ADA includes a dominant reason test in determining whether or not an act has been done ‘because of’ the age of a person. Section 16 provides:

### **16 Act done because of age and for other reason**

If an act is done for 2 or more reasons, then, for the purposes of this Act, the act is taken to be done for the reason of the age of a person only if:

one of the reasons is the age of the person; and

that reason is the dominant reason for the doing of the act.

875. The dominant reason test in the ADA represents a departure from the position in other federal unlawful discrimination laws.<sup>678</sup>

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<sup>677</sup> Section 3.

876. Practical difficulties in applying a ‘dominant reason’ test, especially when a court is faced with dual purposes, have been noted in cases concerning legal professional privilege.<sup>679</sup> The ‘dominant reason’ test was also a feature of the RDA until 1990 when it was removed in light of concerns about its practical application.<sup>680</sup>

### **Indirect discrimination**

877. Section 15 of the ADA defines indirect discrimination as follows:

#### **15 Discrimination on the ground of age – indirect discrimination**

For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of age of the aggrieved person if:

the discriminator imposes, or proposes to impose, a condition, requirement or practice; and

the condition, requirement or practice is not reasonable in the circumstances; and

the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.

For the purposes of paragraph 1(b), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.

878. Section 15 is similar in substance to the indirect discrimination provisions in the SDA. However, unlike s 7B(2) of the SDA, the ADA does not contain any reference to the factors to be taken into account when determining whether a condition, requirement or practice is reasonable in the circumstances.

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<sup>678</sup> See s 8 *Sex Discrimination Act 1984 (Cth)*; s 18 *Racial Discrimination Act 1975 (Cth)*; s 10 *Disability Discrimination Act 1992 (Cth)*.

<sup>679</sup> See, for example, *Esso Australian Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Sparnon v Apand* (1996) 68 FCR 322. HREOC’s concerns about the application of a ‘dominant reason’ test, amongst other things, were raised in its submissions to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003: see

<[www.humanrights.gov.au/legal/submissions/age\\_discrimination.html](http://www.humanrights.gov.au/legal/submissions/age_discrimination.html)>.

<sup>680</sup> See, for example, *Ardeshirian v Robe River Iron Associates* (1990) EOC 92-299.

## ‘Positive discrimination’

879. The ADA provides an exemption allowing positive measures to be taken (or ‘positive discrimination’) on the basis of age, as follows:

### 33 Positive Discrimination

This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person’s age, by an act that is consistent with the purposes of this Act, if:

the act provides a bona fide benefit to a person of a particular age; or

Example 1: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.

Example 2: This paragraph would cover the provision to a particular age group of a scholarship program, competition or similar opportunity to win a prize or benefit.<sup>681</sup>

the act is intended to meet a need that arises out of the age of the persons of a particular age; or

Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.

the act is intended to reduce a disadvantage experienced by persons of a particular age.

Example: Older people are often more disadvantaged by retrenchment than other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.

880. The concept of positive discrimination extends beyond the current understanding of ‘special measures’ in other federal unlawful discrimination laws. Under the SDA,<sup>682</sup> RDA<sup>683</sup> and DDA,<sup>684</sup> special measures are essentially

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<sup>681</sup> Example 2 was introduced by the *Age Discrimination Amendment Act 2006* (Cth) commencing on 22 June 2006.

<sup>682</sup> See s 7D of the *Sex Discrimination Act 1984* (Cth).

<sup>683</sup> See s 8 of the *Racial Discrimination Act 1975* (Cth).

confined to those actions taken in order to achieve substantive equality, or to meet the special needs of a particular group. Under the SDA and RDA, the taking of special measures ceases to be authorised once the purpose for which they were implemented has been achieved.<sup>685</sup> The DDA limits special measures to those ‘reasonably intended’ to address a special need or disadvantage.<sup>686</sup>

881. Section 33 of the ADA is broader in its scope than these other ‘special measures’ provisions because it authorises positive measures to be taken for purposes other than achieving substantive equality or meeting special needs. It extends to any ‘bona fide benefit’ (an expression which is not defined). Section 33 of the ADA also does not contain any temporal limitation such that the measure is no longer protected once its purposes have been achieved, although this may be implicit in ss 33(b) and (c) which require reference to be made to an existing need or disadvantage.

## **‘Discrimination’ under the Human Rights and Equal Opportunity Commission Act 1986 (Cth)**

882. HREOC has a range of functions in relation to equal opportunity in employment,<sup>687</sup> based on the ILO *Convention concerning Discrimination in respect of Employment and Occupation* (‘ILO 111’).<sup>688</sup> These functions include inquiring into alleged acts of workplace ‘discrimination’.<sup>689</sup>

883. ‘Discrimination’ in this context needs to be distinguished from ‘unlawful discrimination’. ‘Unlawful discrimination’ refers to acts, omissions and practices that are unlawful under the RDA, SDA, DDA and ADA.<sup>690</sup>

‘Discrimination’ is defined under the HREOC Act to mean:

- any distinction, exclusion or preference;

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<sup>684</sup> See s 45 of the *Disability Discrimination Act 1992 (Cth)*.

<sup>685</sup> See s 7D(4) of the *Sex Discrimination Act 1984 (Cth)*; Article 1(4) of the *International Convention for the Elimination of all Form of Racial Discrimination*, to which s 8(1) of the *Racial Discrimination Act 1975 (Cth)* refers and *Gerhardy v Brown* (1985) 159 CLR 70, 139-40.

<sup>686</sup> See s 45 of the *Disability Discrimination Act 1992 (Cth)*.

<sup>687</sup> See Division 4 of Part II and Part IIC of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

<sup>688</sup> Opened for signature 25 June 1958, 362 UNTS 31 (entered into force for Australia 15 June 1974).

<sup>689</sup> HREOC also has similar powers in relation to alleged breaches of ‘human rights’ by the Commonwealth (or persons acting on its behalf) contained in s 11(1)(f) and Part II Division 3.

<sup>690</sup> See *Human Rights and Equal Opportunity Act 1986 (Cth)* s 3.

- made on the basis of
  - race, colour, national extraction, social origin, nationality;
  - sex, marital status;
  - religion, political opinion, trade union activity;
  - age;
  - criminal record;
  - disability, impairment, medical record; or
  - sexual preference;
  - that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
  - but not including a distinction, exclusion or preference
  - in respect of the inherent requirements of a particular job; or
  - made in good faith in accordance with the doctrines and beliefs of a particular religion or creed necessary to avoid injury to religious susceptibilities.<sup>691</sup>

884. It is therefore convenient to refer to this type of ‘discrimination’ as ‘ILO 111 discrimination’ to distinguish it from ‘unlawful discrimination’.

885. While ILO 111 discrimination overlaps with unlawful discrimination, it is also significantly different in the following respects.

- Unlawful discrimination applies to a range of non-employment situations (such as education, the provision of goods and services) but is narrower in the discriminatory grounds that it covers (unlawful discrimination does not cover areas such as sexual preference, criminal record, political opinion).
- There are also different complaints mechanisms for unlawful discrimination complaints and ILO 111 discrimination complaints:
- In both cases, complaints are investigated by HREOC with a view to conciliation;
- In unlawful discrimination matters, if the complaint cannot be resolved by conciliation, or is not appropriate for conciliation, it is terminated by the President of HREOC and the complainant can bring an action in the Federal

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<sup>691</sup> See s 3 *Human Rights and Equal Opportunity Act 1986 (Cth)*. Note that additional grounds of ‘discrimination’ were added in accordance with para (b) of the definition in s 3 by the Human Rights and Equal Opportunity Commission Regulations 1989, which commenced on 1 January 1990.

Magistrates Court or Federal Court.<sup>692</sup> A successful applicant can seek a range of enforceable remedies, including monetary compensation.<sup>693</sup>

- In ILO 111 discrimination matters, if the complaint cannot be resolved by conciliation, or is not appropriate for conciliation and the President forms the view that discrimination has occurred, s/he prepares a report to the Attorney-General that is tabled in federal parliament.<sup>694</sup> Reports can include recommendations for preventing a repetition of the act or continuation of the practice as well as the payment of compensation or other remedies.<sup>695</sup> These recommendations are not, however, enforceable remedies.

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<sup>692</sup> See generally Part IIB of the *Human Rights and Equal Opportunity Act 1986 (Cth)*.

<sup>693</sup> Section 46PO(4) *Human Rights and Equal Opportunity Act 1986 (Cth)*.

<sup>694</sup> Sections 11(1)(f)(ii), 46 *Human Rights and Equal Opportunity Act 1986 (Cth)*.

<sup>695</sup> Section 29(2)(b),(c)

## **Annexure C: Comparisons with the United Kingdom, New Zealand and Canada**

886. This section provides an overview of the legal and institutional arrangements in comparable overseas jurisdictions to eliminate sex discrimination and promote gender equality.

### **United Kingdom**

887. There are three key pieces of national legislation relevant to sex discrimination and gender equality in the United Kingdom: the *Equal Pay Act 1970*; *Sex Discrimination Act 1975*; and *Equality Act 2006*. The national human rights institution has a role in the country's anti-discrimination framework, pay equity framework, proactive duties framework and a role in monitoring progress towards equality, preparing codes of practice and conducting inquiries.

### **The National Human Rights Institution**

888. The Commission for Equality and Human Rights ('CEHR') was established by the *Equality Act 2006* (UK) and commenced operation on 1 October 2007.

889. The CEHR continues the work of the three previous equality commissions in the United Kingdom, (the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission) as well as taking on responsibility for promoting human rights and equality, and combating unlawful discrimination in three new strands: age, sexual orientation and religion or belief.

890. The CEHR describes itself as 'the independent advocate for equality and human rights in Britain'.<sup>696</sup> It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights.<sup>697</sup> The CEHR enforces equality legislation on age, disability, gender, gender assignment, race, religion or belief, and sexual orientation, and

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<sup>696</sup> Commission for Equality and Human Rights, *Vision, Mission and Priorities* <<http://www.equalityhumanrights.com/en/aboutus/mission/pages/visionmissionandpriorities.aspx>> at 29 July 2008.

<sup>697</sup> *ibid.*

encourages compliance with the Human Rights Act. It also gives advice and guidance to businesses, the voluntary and public sectors, and to individuals.<sup>698</sup>

891. The CEHR is a non-departmental public body. It is accountable for its public funds, but independent of government. It has a range of powers to support its promotional work, as well as specific powers relating to the enforcement of discrimination (but not human rights) legislation.

### **Anti-discrimination Framework**

892. The CEHR may investigate whether an unlawful act of discrimination or harassment has occurred.<sup>699</sup> It need only suspect that an unlawful act of discrimination or harassment has taken place in order to commence the investigation.<sup>700</sup> The CEHR has the power to compel evidence for investigations.<sup>701</sup>

893. Following an investigation, if the CEHR concludes that unlawful discrimination or harassment has taken place, it may issue an ‘unlawful act notice’.<sup>702</sup> This notice can require the recipient to prepare an action plan setting out the steps they will take to stop or rectify the discrimination and may include recommended action.<sup>703</sup> If the person does not comply with the action plan, the CEHR may then apply to the courts to enforce it.<sup>704</sup>

894. Alternatively, where a person is willing to work with the CEHR to achieve improvement, they can enter into a binding agreement with it.<sup>705</sup> An agreement may be made before, during or after an investigation if the CEHR thinks unlawful discrimination or harassment has occurred.<sup>706</sup> In exchange for the CEHR’s agreement not to investigate the matter further, the agreement may include a commitment to take, or refrain from taking, a specified action such as

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<sup>698</sup> *ibid.*

<sup>699</sup> *Equality Act 2006 (UK) s 20(1)(a)*

<sup>700</sup> *Equality Act 2006 (UK) s 20(2)*

<sup>701</sup> *Schedule 2 to the Equality Act 2006 (UK) para 9*

<sup>702</sup> *Equality Act 2006 (UK) s 21(1)*

<sup>703</sup> *Equality Act 2006 (UK) s 21(4)*

<sup>704</sup> *Equality Act 2006 (UK) s 22(6)(c)*

<sup>705</sup> *Equality Act 2006 (UK) s 23*

<sup>706</sup> *Equality Act 2006 (UK) s 23(2)*

best practice audits.<sup>707</sup> If the CEHR thinks the person may not comply or has not complied with any part of the agreement, it can apply to the courts to enforce the agreement.<sup>708</sup>

895. The CEHR also has the power to investigate whether or not an unlawful act notice or binding agreement is being complied with and it can compel evidence to this investigation.<sup>709</sup>

### **Legal proceedings**

896. In addition to the CEHR powers to investigate and enforce anti-discrimination laws, individuals also have the power to institute legal proceedings for breaches of anti-discrimination laws. Claims of unlawful discrimination in employment may be lodged with an employment tribunal<sup>710</sup> and proceedings for unlawful discrimination in education and training, housing, public administration and the provision of goods, facilities and services, may be instituted in court.<sup>711</sup>

897. However, complaints of discrimination in education must first be made to the Secretary of State for Education and complaints of discrimination in employment must also comply with the grievance procedure outlined in the Employment Act 2002 (UK). This procedure requires complainants to send a written complaint to their employer and allow 28 days for response before submitting a claim to an employment tribunal.

898. Only the CEHR can institute legal proceedings against a person for discriminatory advertisements and for pressuring or instructing another to undertake unlawful discrimination.<sup>712</sup>

### **Conciliation**

899. While conciliation is not a compulsory step in resolving complaints of unlawful discrimination, the CEHR is empowered to arrange conciliation services in

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<sup>707</sup> *Equality Act 2006* (UK) s 23(1)(a)

<sup>708</sup> *Equality Act 2006* (UK) subs 24(2) and (3)

<sup>709</sup> *Equality Act 2006* (UK) s 20(1) and Schedule 2, para 9

<sup>710</sup> *Sex Discrimination Act 1975* (UK) s 63

<sup>711</sup> *Sex Discrimination Act 1975* (UK) s 66

<sup>712</sup> *Equality Act 2006* (UK) s 25

disputes related to discrimination in education and training, housing, public administration and the provision of goods, facilities and services.<sup>713</sup> Conciliation is delivered by an independent provider to ensure that information about the case does not become available to CEHR, which could potentially be involved in supporting a case where conciliation broke down or in formal enforcement proceedings against a discriminator.<sup>714</sup>

900. The Advisory, Conciliation and Arbitration Service (an independent body that is accountable for its public funds) provides free conciliation for discrimination in employment matters.<sup>715</sup>

### **Injunctions**

901. If the CEHR thinks that a person is likely to commit an act of unlawful discrimination, it may apply to the court for an injunction to prevent them.<sup>716</sup>

### **Supporting complainants**

902. The CEHR has the power to provide any form of assistance to individuals bringing legal proceedings under anti-discrimination legislation (but not the *Human Rights Act 1998* (UK)).<sup>717</sup> There are no statutory criteria limiting the CEHR's support for individual complainants. This support may include financial assistance or legal advice or representation.<sup>718</sup>

### **Third Party Interventions**

903. The CEHR is able to seek leave to intervene in court cases which may have an equality or human rights dimension to provide the court with expert knowledge.<sup>719</sup>

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<sup>713</sup> *Equality Act 2006* (UK) s 27

<sup>714</sup> Commission for Equality and Human Rights, *Powers* <<http://www.equalities.gov.uk/cehr/powers.htm>> at 29 July 2008

<sup>715</sup> For more information on this service see Advisory, Conciliation and Arbitration Service, *Conciliation* <<http://www.acas.org.uk/index.aspx?articleid=2010>> at 29 July 2008

<sup>716</sup> *Equality Act 2006* (UK) s 24(1)

<sup>717</sup> *Equality Act 2006* (UK) ss 28(1) and 29

<sup>718</sup> *Equality Act 2006* (UK) s 28 (4)

<sup>719</sup> *Equality Act 2006* (UK) s 30 (1)

## **Pay Equity Framework**

904. The *Equal Pay Act 1970* (UK) makes it unlawful for employers to discriminate between male and female employees in terms of pay and conditions where they are doing the same or similar work, work rated as equivalent, or work of equal value.<sup>720</sup> This legislation covers not just wages and salaries, but bonuses, overtime, holiday pay, sick pay, performance related pay, travel concessions and occupational pensions.
905. Complaints of unequal pay may be brought before an employment tribunal.<sup>721</sup> In most cases a complainant must also comply with the grievance procedures outlined in the *Employment Act 2002* (UK). This procedure requires complainants to send a written complaint to their employer and allow 28 days for response before submitting a claim to an employment tribunal.

## **Positive Duties**

906. The Gender Equality Duty ('GED') came into force in the United Kingdom in April 2007.<sup>722</sup> It places a legal obligation on all public authorities to identify and eliminate discrimination and harassment, and to proactively promote equality of opportunity. The GED is discussed later in this submission.

## **Additional Commission Powers**

### **Independent Monitoring**

907. The CEHR is charged with defining (in consultation with interested parties) and monitoring progress on equality and human rights in the United Kingdom.<sup>723</sup> Every three years it must publish a report which is laid before Parliament outlining the extent of extent of progress towards equality.<sup>724</sup>

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<sup>720</sup> *Equal Pay Act 1970* (UK) subs 1(2)(a),(b) and (c)

<sup>721</sup> *Equal Pay Act 1970* (UK) s 2(1)

<sup>722</sup> The *Equality Act 2006* (UK) inserted sections 76A and 76B into the *Sex Discrimination Act 1975* (UK)

<sup>723</sup> *Equality Act 2006* (UK) subs 12 (1),(2) and (3)

<sup>724</sup> *Equality Act 2006* (UK) subs 12 (4) and (5)

## Codes of Practice

908. The CEHR may issue statutory codes of practice in relation to any aspect of pay equity, unlawful sex discrimination and the GED.<sup>725</sup> Codes of practice explain the requirements of the law and are designed to assist business and the public sector to understand their legal responsibilities and recommended good practice.

909. The CEHR can prepare new codes either on its own initiative or at the request of the relevant Secretary of State.<sup>726</sup> It must consult with interested parties before it issues a code and must publish proposals for a code so that members of the public can provide input on those proposals.<sup>727</sup> The code must be approved in draft by the Secretary of State and laid before the Parliament.<sup>728</sup> If neither House of Parliament passes a resolution disapproving the draft code within 40 days, the code comes into force.<sup>729</sup>

910. Failure to comply with a code of practice does not itself give rise to criminal or civil proceedings, but may be admissible in such proceedings.<sup>730</sup> Courts and tribunals are required to take relevant codes of practice into account when determining if unlawful discrimination has occurred.<sup>731</sup>

## Inquiries

911. The CEHR is able to conduct inquiries into any matter relating to its duties.<sup>732</sup> Inquiries may be thematic or in relation to one or more named parties. It is able to initiate inquiries independently or at the request of the Secretary of State. It is required to publish terms of reference before launching an inquiry, and to publish reports at the end of the inquiry process, which may include recommendations for change.<sup>733</sup> The CEHR may compel evidence relevant to

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<sup>725</sup> *Equality Act 2006* (UK) s 14 (1)

<sup>726</sup> *Equality Act 2006* (UK) subs 14 (1) and (5)

<sup>727</sup> *Equality Act 2006* (UK) s 14 (6)

<sup>728</sup> *Equality Act 2006* (UK) s 14 (7)

<sup>729</sup> *Equality Act 2006* (UK) s 14 (8)

<sup>730</sup> *Equality Act 2006* (UK) s 15 (4)(a)

<sup>731</sup> *Equality Act 2006* (UK) s 15(4) (b)

<sup>732</sup> *Equality Act 2006* (UK) s 16 (1)

<sup>733</sup> Schedule 2 to the *Equality Act 2006* (UK) cl 2, 15 and 16

an inquiry.<sup>734</sup> The CEHR can use the information acquired in the course of an inquiry to launch an investigation.<sup>735</sup>

## New Zealand

912. There are two key pieces of national legislation relevant to gender equality and sex discrimination in New Zealand: the *Human Rights Act 1993* (NZ) and the *Equal Pay Act 1972* (NZ). The national human rights institution has a role in the country's anti-discrimination framework, pay equity framework and a role in monitoring progress towards equality, preparing guidelines and voluntary codes of practice, and conducting inquiries.

### National Human Rights Institution

913. New Zealand's Human Rights Commission ('NZHRC') was established by the *Human Rights Commission Act 1977* (NZ). It is independent of government but accountable for its public funds.

914. The NZHRC's primary functions are:

- to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society, and
- to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.<sup>736</sup>

915. The Human Rights Amendment Act 2001 (NZ) established the position of the Equal Employment Opportunities Commissioner within the NZHRC. **The role of the Equal Employment Opportunities Commissioner includes** monitoring and analysing progress in improving equal employment opportunities, and leading discussions about equal employment opportunities (including pay equity).<sup>737</sup>

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<sup>734</sup> Schedule 2 to the *Equality Act 2006* (UK) cl 9 and 10

<sup>735</sup> *Equality Act 2006* (UK) s 16 (2)

<sup>736</sup> *Human Rights Act 1993* (NZ) s 5 (1)

<sup>737</sup> *Human Rights Act 1993* (NZ) s 17

## Anti-discrimination Framework

916. The NZHRC receives, investigates, and seeks to provide a mediated settlement for complaints of unlawful discrimination. If a settlement cannot be reached, the complainant or the NZHRC may institute legal proceedings in the Human Rights Review Tribunal.<sup>738</sup>
917. The Office of Human Rights Proceedings is an independent part of the Human Rights Commission. In certain circumstances, it provides free legal representation before the Human Rights Review Tribunal for people who have complained of unlawful discrimination.<sup>739</sup>
918. Where an individual alleges unlawful discrimination in employment, as an alternative<sup>740</sup> to lodging a complaint with the NZHRC, they may pursue the matter as a ‘personal grievance’ under the Employment Relations Act 2000 (NZ).<sup>741</sup> That is, the individual must first send a written complaint to their employer then, if unsatisfied with the response, they may lodge their complaint with the Employment Relations Authority and undergo mediation. If still unresolved, the complaint is then investigated by the Authority.

### *Third Party Interventions*

919. The NZHRC has the power to apply to a court or tribunal to be appointed as intervener or as counsel assisting the court or tribunal, or to take part in proceedings before the court or tribunal.<sup>742</sup> The NZHRC may exercise this power if it thinks taking part in those proceedings will facilitate its role in advocating for human rights and the promotion and protection, respect for, and observance of, human rights.<sup>743</sup>

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<sup>738</sup> The Human Rights Review Tribunal is a judicial authority independent of the NZHRC which was established by the *Human Rights Commission Act 1977* (NZ)

<sup>739</sup> Section 92 of the *Human Rights Act 1993* (NZ) sets out the matters which the Director of the Office for Human Rights Proceedings must consider in determining whether to provide legal representation to a particular complainant.

<sup>740</sup> Section 112 of the *Employment Relations Act 2000* (NZ) and section 79A of the *Human Rights Act 1993* (NZ) provide that a person must choose to either lodge a complaint with the NZHRC or pursue the matter as a personal grievance.

<sup>741</sup> *Employment Relations Act 2000* (NZ) ss 102 and 103

<sup>742</sup> *Human Rights Act 1993* (NZ) s 5 (2) (j)

<sup>743</sup> *Human Rights Act 1993* (NZ) s 5 (2) (j)

## **Pay Equity Framework**

920. The *Equal Pay Act 1972* (NZ) provides that employers must afford employees the same terms and conditions of employment including pay and fringe benefits, as are made available to people of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description regardless of sex.<sup>744</sup>

921. Complaints of unequal employment conditions or pay may be lodged with the Employment Relations Authority for resolution. Alternatively, the complaint can be brought to the NZHRC as an allegation of unlawful discrimination in employment under the *Human Rights Act 1993*. The complainant may only undertake one of these two options.

## **Additional Commission Powers**

### ***Independent Monitoring***

922. Every two years the New Zealand Human Rights Commission publishes a report on the representation and status of women in leadership and decision-making roles in the public sector, corporate, legal, academia, politics and other fields.

### ***Guidelines and Voluntary Codes of Practice***

923. The NZHRC may prepare and publish guidelines and voluntary codes of practice to explain legal rights and responsibilities under the *Human Rights Act 1993* (NZ) and to promote best practice in equal employment opportunities.<sup>745</sup>

### ***Inquiries***

924. The NZHRC may inquire into any matter including any law, practice or procedure (governmental or non-governmental) where it thinks human rights might be, or have been, infringed.<sup>746</sup> The NZHRC may apply to the court to compel evidence to relevant to the inquiry.<sup>747</sup> If such an inquiry discloses or

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<sup>744</sup> *Equal Pay Act 1972* (NZ) s 2A

<sup>745</sup> *Human Rights Act 1993* (NZ) ss 5(2)(e) and 17(d)

<sup>746</sup> *Human Rights Act 1993* (NZ) s 5(2)(h)

<sup>747</sup> *Human Rights Act 1993* (NZ) s 126A and 127

may have disclosed a breach of human rights, the NZHRC is empowered to bring civil proceedings before the Human Rights Review Tribunal.<sup>748</sup>

## Canada

925. There are two key pieces of national legislation relevant to sex discrimination and gender equality in Canada: the Canadian Human Rights Act, RS 1985, c H-6 and the Employment Equity Act, 1995, c 44. The national human rights institution has a role in the country's anti-discrimination framework, pay equity framework, proactive duties framework and a role in preparing guidelines.

### The National Human Rights Institution

926. The Canadian Human Rights Commission ('CHRC') was established by the *Canadian Human Rights Act 1985*.<sup>749</sup>

927. The CHRC investigates and attempts to settle complaints of discriminatory practices in employment and in the provision of services. It is also responsible for ensuring that employers provide equal opportunities for employment to women, Aboriginal people, people with disabilities, and members of visible minorities. Further, the CHRC is mandated to develop and conduct information programs and discrimination prevention programs.

### Anti-discrimination Framework

928. The CHRC receives, investigates, and seeks to provide a mediated settlement for complaints of alleged discriminatory practices<sup>750</sup> by federally regulated organisations (including government agencies, unions, banks and airlines).<sup>751</sup> Complaints against other organisations must be dealt with by provincial and territory human rights commissions. If the CHRC has reasonable grounds for

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<sup>748</sup> *Human Rights Act 1993* (NZ) s 92E

<sup>749</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 26

<sup>750</sup> 'Discriminatory practices' are set out in *Canadian Human Rights Act*, RS 1985, c H-6, ss 5-14.1 (which should be read in conjunction with *Canadian Human Rights Act*, RS 1985, c H-6, s 3 (1))

<sup>751</sup> A more detailed list of federally regulated organisations is available at Canadian Human Rights Commission, *Overview: Resolving Disputes* <[http://www.chrc-ccdp.ca/discrimination/federally\\_regulated-en.asp](http://www.chrc-ccdp.ca/discrimination/federally_regulated-en.asp)> at 29 July 2008

believing a discriminatory practice has occurred, it may initiate a complaint itself.<sup>752</sup>

929. The CHRC may apply for a warrant to search premises for evidence relevant to an investigation of a complaint.<sup>753</sup>

930. A complaint can only be settled if the CHRC approves the terms of the settlement.<sup>754</sup> If the CHRC is unable to mediate a settlement and it considers that further inquiry is warranted, it may refer the complaint to the Human Rights Tribunal for hearing.<sup>755</sup> The Tribunal is independent of the CHRC. Any interested party can intervene in a Tribunal inquiry.<sup>756</sup>

931. If the complaint is found to be substantiated, the Tribunal can make an order that a person take measures to redress the discrimination or prevent its continuation.<sup>757</sup> For example, the order may require a person to compensate the victim or to adopt a special program, plan or arrangement to improve opportunities to a particular group of people such as people with disability or women.<sup>758</sup> The Tribunal's order may also require the payment of additional compensation if the act is found to have been made wilfully or recklessly.<sup>759</sup> The Tribunal's order can be made an order of the Federal Court and enforced as such.<sup>760</sup> The Tribunal's final report on a complaint (which may include recommendations) is submitted to the Minister of Justice.<sup>761</sup>

## **Pay equity framework**

932. The Canadian Human Rights Act provides for equal pay between male and female employees in the same establishment performing work of equal value.<sup>762</sup> This protection extends to commissions, vacation pay, bonuses and any other

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<sup>752</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 40 (3)

<sup>753</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 43 (2.1)

<sup>754</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 48 (1)

<sup>755</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 49 (1)

<sup>756</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 48.3 (10)

<sup>757</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 53 (2)

<sup>758</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 53 (2)

<sup>759</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 53 (3)

<sup>760</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 57

<sup>761</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 48.3 (12)

<sup>762</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 11 (1)

advantage received directly or indirectly from an employer.<sup>763</sup> The Equal Wages Guidelines 1986 set out the criterion to be applied to determine whether work is ‘of equal value’.

933. Complaints of unequal pay by federally regulated organisations may be made to the CHRC.<sup>764</sup> The CHRC and the Human Rights Tribunal deal with these complaints in the same way as complaints of discriminatory practices.

### **Positive Duties**

934. The Employment Equity Act 1986 requires employers in the public sector and federally regulated private sector<sup>765</sup> to proactively implement employment equity by:

- identifying and eliminating employment systems, policies and practices which act as barriers to women, Aboriginal people, people with disability and members of visible minorities, and
- instituting positive policies and practices and make reasonable accommodations to ensure women, Aboriginal people, people with disability and members of visible minorities are represented to the same degree in their workforce, as they are represented in the wider, national workforce.<sup>766</sup>

935. Specifically, employers are required to:

- analyse the degree of representation of women, Aboriginal people, people with disability and visible minorities in their workforce<sup>767</sup>
- analyse and review their employment systems, policies and practices<sup>768</sup>
- prepare, implement, monitor and periodically review and revise an employment equity plan to progress towards greater equity in the workforce<sup>769</sup>
- provide information to their employees explaining the purpose of employment equity and the measures the employer is taking to progress towards employment equity, and<sup>770</sup>

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<sup>763</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 11 (7)

<sup>764</sup> *Canadian Human Rights Act*, RS 1985, c H-6, ss 11 (1), 39 and 40 (1)

<sup>765</sup> *Employment Equity Act*, 1995, c 44, s 4 (1)

<sup>766</sup> *Employment Equity Act*, 1995, c 44, s 5

<sup>767</sup> *Employment Equity Act*, 1995, c 44, s 9 (1) (a)

<sup>768</sup> *Employment Equity Act*, 1995, c 44, s 9 (1) (b)

<sup>769</sup> *Employment Equity Act*, 1995, c 44, ss 12 and 13

- establish and maintain records regarding employment equity.<sup>771</sup>
936. Every year employers must report on their progress in achieving a truly representative workforce.<sup>772</sup> Reports are consolidated and tabled in Parliament.<sup>773</sup>
937. The CHRC is responsible for monitoring, enforcing and reporting on the performance of employers' obligations under the Employment Equity Act. The Commission conducts employment equity audits to assess whether employers are meeting their positive duties.<sup>774</sup> If an employer cannot demonstrate compliance with their legislation obligations, the CHRC attempts to negotiate a written undertaking that they will remedy the situation.<sup>775</sup> If this approach fails, the CHRC may issue a Direction.<sup>776</sup> If an employer fails to comply with a Direction, the CHRC may refer the matter to the Employment Equity Review Tribunal for determination.<sup>777</sup>

## Guidelines

938. The CHRC has the power to issue guidelines “on application” or by its own initiative.<sup>778</sup> Guidelines are published in the Canada Gazette and binding.<sup>779</sup>

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<sup>770</sup> *Employment Equity Act*, 1995, c 44, s 14

<sup>771</sup> *Employment Equity Act*, 1995, c 44, s 17

<sup>772</sup> See *Employment Equity Act*, 1995, c 44, ss 18 (1) and 21(1). In practice, private sector employers report to the Department of Human Resources and Social Development Canada and public sector employers report to the Public Service Human Resources Management Agency of Canada

<sup>773</sup> *Employment Equity Act*, 1995, c 44, ss 20 and 21(5)

<sup>774</sup> *Employment Equity Act*, 1995, c 44, s 23 (1)

<sup>775</sup> *Employment Equity Act*, 1995, c 44, s 25 (1)

<sup>776</sup> *Employment Equity Act*, 1995, c 44, s 25 (2) and (3)

<sup>777</sup> *Employment Equity Act*, 1995, c 44, s 27 (2)

<sup>778</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 27 (2)

<sup>779</sup> *Canadian Human Rights Act*, RS 1985, c H-6, s 27 (3) and (4)

## ***Annexure D: Australian State and Territory Religious Exemptions for Educational Institutions***

939. This section is **for information**. It sets out exemptions for educational institutions established for a religious purpose under state and territory anti-discrimination legislation.

### **New South Wales**

940. The Anti- Discrimination Act 1977 (NSW) exempts private educational authorities from the part of the Act proscribing discrimination in employment and education on the ground of sex or marital status.<sup>780</sup> A private educational authority is a person or body administering a school, college, university or other institution at which education is provided which is not a state run institution. There is no requirement that the discriminatory act be justified by reference to doctrine, philosophy or creed.

### **Queensland**

941. The Queensland Anti- Discrimination Act 1991 (Qld) was amended in 2002 to narrow the exemption provided to religious groups operating schools or hospitals. Prior to the amendments religious groups had the right to discriminate in decisions about employing staff if their religious group's doctrines and sensitivities directed such discrimination.<sup>781</sup> The exemption did not cover age, race or impairment discrimination. Non-state schools could also discriminate in educational decisions on any ground other than race or impairment, providing the discrimination was in accordance with the doctrine of a religion and in addition, the discrimination must have been necessary to avoid offending the religious sensibilities of people in that religion.<sup>782</sup>

942. The 2002 amendments allows an educational institution to impose genuine occupational requirements, for example employing persons of a particular religion to teach in a school established for students of the particular religion.

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<sup>780</sup> *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 40(3)(c), 31A(3)(a), 46A(3).

<sup>781</sup> *Anti- Discrimination Act 1991 (Qld)* s 29.

<sup>782</sup> *Anti- Discrimination Act 1991 (Qld)* ss 29, 42.

It also allows discrimination in employment if the person openly acts in a way that the person knows or ought reasonably know is contrary to the employer's religious beliefs, providing that it is reasonable. This could extend to discrimination on the ground of sexuality or marital status.

### **South Australia**

943. In the Equal Opportunity Act 1984 (SA) ('SAEOA') deference to religious bodies is confined to the ground of sexuality and there is a very limited exemption relating to an educational institution established for a religious purpose. Section 50(2) states:

Where an educational or other institution is administered in accordance with the precepts of a particular religion, discrimination on the ground of sexuality, or cohabitation with another person of the same sex as a couple on a genuine domestic basis, that arises in the course of the administration of that institution and is founded on the precepts of that religion is not rendered unlawful by this Part.

944. The *Sex Discrimination Act 1984* (Cth) does not cover discrimination on the ground of sexuality, and the s38 exemption applies only to sex, marital status and pregnancy. The SAEOA does not apply an exemption in these latter circumstances.<sup>783</sup> The South Australian Commissioner for Equal Opportunity noted that in South Australia employees in private schools have had protection in the area of sex discrimination since the former Act came into force in 1975. Some Australian residents are benefiting from legislation while others remain unprotected.

### **Tasmania**

945. Tasmania was the last state to introduce anti-discrimination laws and the Tasmanian laws are the narrowest in the country. Section 27(1) of the *Anti-Discrimination Act 1998* (Tas) allows a person to discriminate against another person on the ground of gender in a religious institution if the discrimination is required by the doctrines of the religion of the institution.

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## Victoria

946. The *Equal Opportunity Act 1995* (Vic) ('VEOA') allows discrimination on any ground in employment decisions.<sup>784</sup> The section allows religious schools exemption from discrimination in:
- the course of establishing, directing, controlling or administering the educational institution (including the employment of people in the institution) that is in accordance with the relevant religious beliefs or principle.
947. In the view of the Victorian Commissioner for Equal Opportunity, the exemption appears to exempt a wider range of sex and marital discrimination than the SDA because employment may include working conditions and terms of employment. That section does not distinguish between hiring, dismissal and other aspects of discrimination in employment.
948. The VEOA provision was scrutinised in the only reported case in a State equal opportunity jurisdiction to consider the issue of what was necessary to avoid injury to the religious susceptibilities of the adherents of a particular religion. In *Hazan v Victorian Jewish Board of Deputies & Ors*, the Equal Opportunity Board found that it was clear on the evidence that the North Eastern Jewish Memorial Centre came within the terms of the exemption and could lawfully expel the complainant from its premises because the expulsion was necessary to avoid injuring religious susceptibilities.<sup>785</sup>
949. The *Charter of Human Rights and Responsibilities Act 2006* (Vic), the first Australian State human rights legislation, also provides an exemption for educational institutions established for religious purposes. Section 38(4) provides an exemption to a public authority's obligation to give proper consideration to human rights in their decision making where such an act or decision would have the:
- effect of impeding or preventing a religious body (including itself in the case of a public body that is a religious body) from acting in conformity with the religious

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<sup>784</sup> *Equal Opportunity Act 1995* (Vic) s 76

<sup>785</sup> *Hazan v Victorian Jewish Board of Deputies & Ors* (1990) EOC 92-298

doctrines, beliefs or principles in accordance with which the religious body operates.<sup>786</sup>

950. The Charter defines "religious body" to include an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.<sup>787</sup>

### **Western Australia**

951. In the Western Australian *Equal Opportunity Act 1984* (WA) there is an exemption similar to the SDA exemption, but with wider scope. It states:

Nothing in this Act renders it unlawful for a person to discriminate against another person on any one or more of the grounds of discrimination referred to in this Act in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.<sup>788</sup>

952. The exemption is not limited to sex, marital status and pregnancy but includes age, race and impairment.

### **Australian Capital Territory**

953. Section 33 of the *Discrimination Act 1991* (ACT) provides that it is not unlawful to discriminate in employment against a member of staff or a contract worker in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

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<sup>786</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(4)

<sup>787</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(5)(b)

<sup>788</sup> *Equal Opportunity Act 1984* (WA) s 73(1)

## **Northern Territory**

954. The *Anti-Discrimination Act* (NT) was amended in 2004 to include a new section, s37A to allow religious educational institutions to discriminate on the ground of sexuality, providing such discrimination is in good faith to avoid offending the religious sensitivities of people of a particular religion. There is no provision which allows discrimination in religious education institutions on the ground of sex, marital status or pregnancy.

## ***Annexure E: A summary of the submissions made in Half Way to Equal (1992)***

955. This section is **for information**.

956. The first major review of the SDA was a two year inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs (Lavarch Committee). The report of the inquiry, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* ('*Half Way to Equal Report (1992)*') was released in 1992.<sup>789</sup> The inquiry received more than 600 submissions and held numerous public hearings.

957. A number of issues were considered in submissions to the Inquiry and at hearings, these included the:

- (a) concept of equality in the Act and the alternative model that defines inequality in terms of women's subordination to men;
- (b) conciliation model and whether the benefits of efficiency and flexibility are out weighed by the private nature of proceedings and the consequent lack of publicity of matters;
- (c) absence of a general provision proscribing discrimination as unlawful, as in the Racial Discrimination Act;
- (d) absence of discrimination on the ground of family responsibilities;
- (e) absence of provisions on the ground of sexuality;
- (f) inadequacy of the pregnancy ground, not including potential or perceived likelihood of pregnancy, and the defence of reasonableness;
- (g) definition of marital status not including discrimination against a person because of the identity of the partner of the person;
- (h) limitation of sexual harassment provisions to employment and some forms of harassment in educational institutions and the requirement that the complainant show detriment;

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<sup>789</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia' (1992)

- (i) restricted use of representative complaints and in particular class actions and trade union involvement;
- (j) the difficulties complainants face in making complaints against a powerful respondent;
- (k) the difficulties in enforcing decisions and the disadvantages and uncertainty created by de novo hearings in the Federal Court;
- (l) impediments to actions for victimisation given the public nature of such proceedings;
- (m) the difficulty in proving indirect discrimination and in particular the requirement to show that the condition is able to be complied with by a substantially higher proportion of persons of the opposite sex to the aggrieved person, also the evidential burden in making out such a claim;
- (n) review of the numerous exemptions under the Act, including in particular, the exemption for genuine occupational qualifications, educational institutions established for religious purposes, voluntary bodies, acts done under statutory authority, industrial awards, the Income Tax Assessment Act and Social Security Act; and
- (o) review of activities specifically exempted from the prohibition on discrimination, including superannuation and insurance, combat and combat related duties, the exclusion of State Government and statutory employees.

## ***Annexure F: A summary of the submissions made Review of Exemptions (1992)***

958. This section is for information.

959. Between 1990 and 1992 the Sex Discrimination Commissioner conducted a review of five permanent exemptions under the SDA being instrumentality of a state; educational institutions established for religious purposes; voluntary bodies; acts done under statutory authority; and sport.<sup>790</sup>

960. The report, *Sex Discrimination Act 1984: Review of Exemptions* ('Review of Exemptions (1992)') argued that the wide ranging exemptions were a product of political compromise necessary to secure the passage of the then controversial Sex Discrimination Act 1984 (Cth) through parliament and did not reflect changing social acceptance of anti-discrimination law.

961. The review received 95 submissions.<sup>791</sup> A summary of the submissions for each of the five permanent exemptions is set out below.

### **Instrumentality of the state**

962. *Review of Exemptions (1992)* recommended that the exemption in section 13 of the SDA relating to employment by an instrumentality of a State be removed. The report summarized the submissions received as follows:

The majority of submissions to this Inquiry argued in favour of removal of the exemption. The main reason given was...that people living in jurisdictions without the benefit of redress for discrimination and harassment are deprived of certain rights compares to citizens living in other parts of Australia...Many argued that there is a real need for legislation to cover employees of State governments and their instrumentalities, and applicants for jobs in those sectors, including TAFE, hospitals and local government. This would provide broader protection against discrimination for large numbers of people employed in the public sector in States as Victoria.<sup>792</sup>

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<sup>790</sup> Human Rights and Equal Opportunity Commission, *Sex Discrimination Act 1984: A Review of Exemptions* (1992).

<sup>791</sup> *Ibid* 141.

<sup>792</sup> *Ibid* 51-2.

## **Educational institutions established for religious purposes**

963. Review of Exemptions (1992) recommended that the exemption in section 38 of the SDA relating to educational institutions be removed. The report summarized the submissions received in favour of retaining the exemption as follows:

In general there was support from religious schools to retain the exemption to give appropriate recognition and protection to members of organisations which practice particular religions of creeds...Supporters of the exemption also argue that experience has indicated that there is room to doubt the effectiveness of the exemptions in their present form. They suggest that they be tightened and made more effective in order to achieve their original purpose.

In its submission the Australian Catholic Bishops Conference argues that if the general 'spirit' of the Act is to promote and affirm human rights, the omission of this exemption would be contrary to the general spirit of the Act because it would involve a serious attack on freedom of religion...Others agree that it is impossible for teachers to separate private values from teaching.<sup>793</sup>

964. Some submissions argued that it is necessary to consider gender in some instances for particular positions, for example relating to the education of boys. Other raised that point that the exemption recognises the "distinctive nature of educational institutions established by religious communities" and the wishes of parents who "expect the school to act in accordance with religious values."<sup>794</sup>

965. A number of arguments were made opposing the retention of the exemption<sup>795</sup>:

- (p) It is not equitable to have employment practices for these institutions that are inconsistent with other educational institutions in Australia.
- (q) Removal would broaden the protection afforded to employees of religious schools who should have the same entitlement to access legislation to complain and seek redress for discrimination.

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<sup>793</sup> Ibid 76.

<sup>794</sup> Ibid.

<sup>795</sup> Ibid 78-79.

- (r) There can be no justification for discriminatory employment practices and the legislation must reflect changed community attitudes.
- (s) Teachers are entitled to privacy in relation to their private lives which are not relevant to work.
- (t) The exemption should be removed to ensure Australia's compliance with the Convention on the Elimination of All forms of Discrimination Against Women.

966. Many submissions discussed the right of freedom of religion versus the right to equality:

The ADB [NSW Anti-Discrimination Board] argued the right to freedom of religion is not absolute. It must be balanced against the fundamental rights and freedoms of others, as stated in formulated clauses in international human rights instruments...<sup>796</sup>

967. There were a range of views around how this exemption should operate if it was retained:

One submission suggested that discrimination on the basis of sex be allowed but not on the basis of marital status or pregnancy. Others did not object to the exemption being retained for single sex schools. Another suggestion was that the exemption be removed and the Sex Discrimination Commissioner grant an exemption if a compelling case is made...The ADB recommended amending s38 to introduce the concept of 'reasonableness in the circumstances' and to countenance discriminatory practices for a period to two years only, at the expiry of which period the section would go out of existence.<sup>797</sup>

### **Voluntary bodies**

968. *Review of Exemptions (1992)* recommended that the exemption in section 39 of the SDA relating to voluntary bodies be removed. The submissions in relation to this issue were summarized as follows:

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<sup>796</sup> Ibid 79.

<sup>797</sup> Ibid 80.

While some submissions on this section recommended the removal of the exemption, many argued for a modification of it...Some argued that membership of voluntary bodies should be subject to the SDA but a more narrowly defined exemption should be devised. There was a general view that the exemption may be too broad and some submissions said the exemption should be removed in relation to marital status or pregnancy. Others said the special measures clause that enables organisations to provide services should be defined more narrowly. One suggestion was to require each voluntary body to apply to HREOC for an individual exemption and HREOC could assess, grant or deny depending on the merits of each case. While this would encourage the body to focus on what it was doing, it would increase the workload for HREOC.

The other side was put in a Northern Territory submission that as a matter of practice and principle, governments should not intrude into the affairs of voluntary community based organisations. It was suggested that these bodies conform with the spirit of the legislation through the education of members. Others felt impatient with the time it would take for such programs to take effect...

...The ADB was concerned to ensure that bodies which confine their membership to women be allowed to continue their programs. The ADB suggested the broad exemption should be replaced with a more narrowly defined one. It also noted the alternative of retaining the exemption but providing that if a voluntary body occupies Crown land or receives financial assistance from the Commonwealth, it cannot discriminate.

Some of the most vehement supporters of removal were sporting associations. Others acknowledged the problem that sporting clubs may not fall within the statutory definition of club, and thus remain covered by the exemption. The Queensland Teachers Union was concerned about school students' access to sporting associations...Many submissions expressed concern about the operation of this provision in limiting women's opportunities in sport.<sup>798</sup>

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<sup>798</sup> Ibid 93-4.

## **Acts done under statutory authority**

969. *Review of Exemptions (1992)* recommended that the exemption in section 40 of the SDA relating to awards be removed with regard to all prospective awards. The submissions in relation to this issue were summarized as follows:

It was generally agreed that in principle laws, Acts, orders and awards should not contain discriminatory clauses. It was argued that paragraphs (c) and (d) of section 40 should remain in force so that the Commission or a court can make an order which protects or compensates a person who has suffered discrimination...

...The general view is that any legislation impacting on employment or workplace reform should be consistent with principles of the SDA.<sup>799</sup>

## **Sport**

970. *Review of the Exemptions (1992)* recommended that the exemption in section 42 of the SDA relating to sport be removed in its entirety. The submissions in relation to this issue were summarized as follows:

... 'participation of women and girls into various sporting areas is happening now. The exemptions maintain the sexual division of women from men in sport and the promotion of one activity over another. The exemption is now irrelevant.'

On the other hand the NT Chief Minister asks for it to be retained pending the outcome of the National Inquiry into Women in Sport. Others argue specifically for the retention of the provision in competitive sports for people over twelve. They argue it is open for any sports club or association to have teams comprising both men and women, and this is occurring with increasing frequency but should be at the option of the club concerned.

The VCEO [Victorian Commission for Equal Opportunity] argued for retention because repeal would restrict the remedies available to people

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<sup>799</sup>Ibid 114-5.

who want to participate regardless of sex. The Commissioner saw this as particularly important in relation to children.

The Australian Association of Women's Sport and Recreation suggested, "The same range and levels of competition should be offered to both sexes on the basis of demand."

Another suggestion was that a narrower definition be made or a definitive list of sports where the criteria of strength, stamina and physique are relevant be provided.

The SACEO suggested redrafting the exemption to allow single sex sporting competitions without reinforcing the stereotyping which is inferred from the words 'strength, stamina and physique'.<sup>800</sup>

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<sup>800</sup> Ibid 129.

## ***Annexure G: Additional Information on the Background on Complaint Handling Function***

971. This section provides background on the Complaint Handling function of the Human Rights and Equal Opportunity Commission (HREOC).
972. The section includes:
- (a) an overview of the complaint process;
  - (b) examples of complaints under the SDA that have been successfully resolved;
  - (c) the text of the Charter for customers of the Human Rights and Equal Opportunity Commission's complaint service; and
  - (d) an overview of HREOC's research on the complaints service.

### **An overview of the complaint process**

973. The President of HREOC with the assistance of the Complaint Handling Section (CHS) is responsible for the management of complaints lodged under federal human rights and anti-discrimination law.
974. The legislative directions for handling complaints of sex, marital status, pregnancy and family responsibility discrimination and sexual harassment are detailed in Part IIB of the HREOC Act. These basic procedures are standard for all complaints of unlawful race, sex, disability and age discrimination received by HREOC.
975. HREOC has developed detailed complaint handling procedures which build on these legislative directions and these are documented in HREOC's Complaint Procedures Manual. The complaint handling process needs to be flexible and responsive to individual complaints. Accordingly, the procedures documented in the manual are designed to provide guidance for staff rather than be strict rules of practice. The manual is reviewed regularly and is supplemented by other material including case precedent, internal policy and staff training packages.

## Complaint information

976. Many complaints to HREOC start with a telephone call or an e-mail to HREOC's Complaint Information Service. An initial telephone conversation with a Complaint Information Officer will usually help clarify whether or not the person's concerns may be covered by federal law. If the enquirer's concern appears to be covered, the Complaint Information Officer will provide them with information about how they may lodge a complaint. Officers can also refer callers to community advocacy and legal centres where they may be able to obtain assistance to pursue a complaint. Where the issue appears to be outside HREOC's jurisdiction, enquirers are provided with contact details for other organisations that may be able to assist.<sup>801</sup>
977. The legislation administered by HREOC stipulates that there is no statutory basis for action by HREOC unless a written complaint is received.<sup>802</sup> However, a complaint can take any written form. HREOC has a standard complaint form that sets out the information required. Complaints can also take the form of a simple letter or e-mail. An online complaint form is also available. If a person needs help with putting their complaint in writing, HREOC Complaint Information Officers will assist them with this.<sup>803</sup>

## Complaint assessment

978. All incoming correspondence is assessed by the Director of Complaint Handling. If the correspondence meets the requirements of a complaint as detailed in section 46P of the HREOC Act, that is, it alleges unlawful discrimination and is lodged by an aggrieved person or on behalf of an aggrieved person<sup>804</sup>, it will be accepted as a complaint. This early assessment of all matters builds flexibility into the process and helps to make sure that the

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<sup>801</sup> In the 2006-07 reporting year the Complaint Information Service handled 16606 inquiries and this figure increased to 18765 in the 2007-08 year.

<sup>802</sup> See s 46P of the *Human Rights and Equal Opportunity Act 1986 (Cth)*

<sup>803</sup> Section 46P(4) of the *Human Rights and Equal Opportunity Act 1986 (Cth)* provides that if the person requires assistance to formulate the complaint the Commission must take reasonable steps to provide appropriate assistance to the person.

<sup>804</sup> Complaints can be lodged by a person on their own behalf, on behalf of themselves and other aggrieved persons, by a person or trade union on behalf of one or more aggrieved persons, or as a representative complaint on behalf of a class of aggrieved persons.

dispute resolution service offered by HREOC is both appropriate to the circumstances of the case and timely. Complaints are then referred to the President or his delegate. This process is generally completed within two days of receipt of the initial correspondence.

979. A letter of acknowledgement is then sent to the complainant confirming the matter has been accepted and advising them that they will be contacted when the matter is allocated to an Investigation/Conciliation Officer (ICO). Complaints are generally allocated in the order in which they were received by HREOC except where there is a need for priority allocation. Complaints that are assessed as priority matters are generally allocated within a few days of receipt. The types of complaints under the SDA that will be assessed as suitable for priority allocation include:

- where a person is still in an employment relationship and alleging that they are
- being subjected to ongoing sexual harassment, discrimination or victimisation;
- where a woman is in the process of negotiating her return to work after a period
- of maternity leave to either a part-time role or one that is comparable to the
- position held before going on leave;
- where a woman is about to be dismissed and it is alleged that this is due to her
- pregnancy or is negotiating changes to her role to accommodate the effects of
- her pregnancy.

980. Complaints will also receive priority allocation if it appears that the issues at the centre of the dispute could be resolved through telephone calls to the parties or the provision of information about the law.

### **Complaint inquiry**

981. All investigations by HREOC are conducted in accordance with the administrative law principles of natural justice and procedural fairness.

982. Generally, when a complaint is allocated to an ICO, contact is made with the complainant or their advocate/representative and the respondent to advise who is handling the file and provide information about the complaint process.

983. It is usually the case that the President or his Delegate will then issue a customised letter of inquiry to the respondent. This letter outlines the allegations in the complaint, provides a copy of the complaint and requests particular information and documents relevant to the allegations.
984. In some cases, when a respondent is verbally advised of a complaint they may indicate that they wish to try to resolve the matter straight away. The President's letter of inquiry also provides an opportunity for a respondent to request that the matter proceed to conciliation prior to provision of any formal written response. Where both parties indicate that they wish to attempt early resolution, this is facilitated. HREOC may also suggest that parties consider conciliation very early in the process in situations where, for example, the parties are in an ongoing relationship and/or the complaint is relatively straightforward. It is noted however, that it is HREOC's view that in many cases, some level of investigation assists with successful and appropriate resolution of the complaint as it enables the parties to have a clearer understanding of how the allegations fit within the law and to assess the relative strengths and weakness of the claim. Advocates for complainants often stress the importance of having some level of investigation prior to attempting conciliation to assist them assess the strengths of the case and advise their clients on what might be a reasonable settlement proposal and what might happen at court if the matter does not settle.
985. The President's letter of inquiry to a respondent requests a written reply within twenty one days of receipt. In some situations, a respondent may ask for additional time to prepare a response. Such requests are considered on a case by case basis with a view to balancing the need for timely handling of the complaint with the benefit of obtaining a complete and comprehensive response to the allegations. Respondents are generally very cooperative with the inquiry process and there are few instances where a respondent does not reply to HREOC or comply with specific requests for information. Section 46PI of the HREOC Act provides the President with power to compel the production of information or documents. There are, however, very few occasions when the President has been required to exercise this power.

986. It is HREOC's general practice to provide the complainant with a copy of the respondent's written reply to the complaint and to engage in discussions with both parties regarding HREOC's assessment of the matter to date and the proposed next steps.
987. If assessment of a matter supports a recommendation that the complaint be terminated, for example because it appears to be lacking in substance or it appears that the subject matter of the complaint has already been adequately dealt with, this will be discussed with the complainant and/or their advocate. The reasons for the proposed recommendation will also be outlined in writing and the complainant will be given an opportunity to provide further information or submissions. When the President issues a notice of termination pursuant to section 46PH of the HREOCA, the complainant is provided with detailed reasons for the decision and advised of the Federal Court/Federal Magistrates Court application process and contact details for the nearest court registry.

## **Conciliation**

### ***The legislative and theoretical framework for HREOC's conciliation process***

988. Section 46PF of HREOC Act confirms the President's role to attempt to conciliate complaints. The appropriateness of attempting conciliation is assessed on a case by case basis and it is not undertaken with every complaint.<sup>805</sup>
989. While there is no definition of conciliation in the legislation, the law provides some parameters for the process. For example, sections 46PJ and 46PK provide that compulsory conciliation conferences can be called and outline some requirements in relation to compulsory conference proceedings.<sup>806</sup>

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<sup>805</sup> Section 46PH of the *Human Rights and Equal Opportunity Act 1986 (Cth)* provides that the President may terminate a complaint for a number of reasons including where he is satisfied that the complaint is lacking in substance or misconceived, where the alleged discrimination is not unlawful, where the subject matter of the complaint involves issues of public importance that should be considered by the court or where it is clearly evident in the early stages of the process that there is no reasonable prospect of the matter being resolved by conciliation.

<sup>806</sup> These requirements include that the person presiding at the conference must ensure that the conduct of the conference does not disadvantage either the complainant or the respondent and that people with disabilities may have assistance at a conference.

990. HREOC has detailed practice guidelines for officers undertaking conciliation duties in its Complaint Procedures Manual. Guidelines for practice are also provided in HREOC's Statutory Conciliation Training Course material. This training course is undertaken by all HREOC conciliators and the course is also run for officers from state and territory anti-discrimination bodies in Australia and staff of NHRIs in the Asia Pacific region. These guidelines reflect best practice principles for ADR practitioners and specific knowledge and skills relevant to ADR in the anti-discrimination and human rights law context<sup>807</sup>.
991. HREOC's approach to complaint resolution accords with the ADR process of 'statutory conciliation' as defined by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC)<sup>808</sup>. In light of the legislative framework in which resolution takes place and the public interest objectives of human rights and anti-discrimination law, HREOC conciliators are not merely 'facilitative' ADR practitioners<sup>809</sup>. Rather, HREOC conciliators are seen to have a legitimate role to provide information to parties regarding the law and HREOC's assessment of the complaint and to assist parties consider and explore possible terms of resolution. Conciliators also have a legitimate role to attend to power differentials between parties with a view to enabling substantive equality of process. Strategies employed by HREOC conciliators to enable substantive equality of process include: provision of a range of audio-visual and written information to promote equal understanding of the process; provision of information about external resources that may assist parties; control of attendance and process; adaptation of the process including use of alternative formats; and the provision of interpreters or other aids.

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<sup>807</sup> Specific knowledge and skills for this area of ADR are discussed in "*Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on Theory, Practice and Skills*" - [http://www.humanrights.gov.au/complaints\\_information/publications/ADR\\_2006.html](http://www.humanrights.gov.au/complaints_information/publications/ADR_2006.html)

<sup>808</sup> "Statutory conciliation is a process in which the parties to a dispute which has resulted in a complaint under a statute, with the assistance of a neutral third party (the conciliator) identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted and may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the participants to reach an agreement which accords with the requirements of that statute" - *NADRAC ADR Definitions Paper, 1997*.

<sup>809</sup> Facilitative processes are those in which the ADR practitioner's intervention focuses on the process of resolution rather than the content of the dispute or the terms of its resolution.

992. Papers which provide detailed information about HREOC's approach to conciliation and the conciliation process are available on HREOC's website at [http://www.humanrights.gov.au/complaints\\_information/papers.html](http://www.humanrights.gov.au/complaints_information/papers.html).

### ***When and where conciliation occurs***

993. Conciliation may be attempted at any time during the complaint process, including very early in the process. An early conciliation model is frequently used in complaints lodged under the SDA which raise issues about negotiation of flexible work arrangements, returning to work after a period of maternity leave or where parties are in an ongoing relationship or have already tried to resolve the matter directly.
994. Most parties to complaints assessed as suitable for conciliation are willing to participate in a conciliation process. Accordingly, the legislative authority to compel parties to attend conciliation in section 46PJ of the HREOC Act is very rarely invoked.
995. HREOC aims to hold conciliation conferences in locations that are convenient and accessible to the parties and officers regularly travel to conduct conferences interstate and in regional and remote areas<sup>810</sup>.

### ***The format of the conciliation process***

996. The conciliation process may take many forms depending on the circumstances of the complaint. While the majority of HREOC's conciliation processes are conducted in the form of a face-to-face meeting between the parties<sup>811</sup>, it will not always be necessary or appropriate to bring the parties together and in some cases, this may be inappropriate and will frustrate resolution. For example, where there is a significant power imbalance between the parties, where one of the parties is emotionally vulnerable or where a face-to-face meeting may exacerbate feelings of distress and anxiety, alternative conciliation formats are employed. These alternative formats include in-person shuttle, which involves the parties being at the same location and the

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<sup>810</sup> In 2007-08, 316 conciliation conferences were conducted in states other than NSW and in regional areas of NSW.

<sup>811</sup> Data from 2001 research project conducted by HREOC indicated that the majority of survey participants (63%) participated in a face to face conciliation meeting.

conciliator conveying messages between the parties, telephone shuttle negotiations and teleconferences.

### ***Confidentiality***

997. There are confidentiality requirements on HREOC in relation to the facilitation of conciliation. Specifically, section 46PS(2) of the HREOC Act states that HREOC cannot include anything that is said or done in the course of conciliation proceedings in any report that the President may provide to the Federal Court or the Federal Magistrates Court if the complaint is not conciliated.
998. Parties involved in a HREOC conciliation process participate on the basis of general agreement between them that what is discussed in the process will remain confidential, in that it will not be used in any subsequent proceedings. Confidentiality is a fundamental basis of ADR processes and is not unique to conciliation in an anti-discrimination law context. It is HREOC's experience that the confidentiality of conciliation discussions assists in the resolution of matters, as it allows the parties to have an open and frank discussion about the complaint and ways in which it can be resolved, without fearing that what is said will be introduced into future litigation. Additionally, many complainants value the confidential nature of the conciliation process, this is particularly the case in sexual harassment matters which may contain allegations of a very personal and sexually intimate nature.
999. HREOC does not require the terms of conciliation agreements to be confidential and this is a matter that is negotiated between the parties. In some cases parties may see benefit in the terms of agreement not being confidential. For example, in cases where terms of agreement include undertakings to modify policies or procedures or make practical changes to services, both parties may see value in the outcome being publicised.
1000. However, the general confidentiality of the conciliation process or any terms of agreement that may be entered into by the parties does not prevent HREOC from providing public information in a de-identified form about issues raised in complaints and outcomes obtained through conciliation. HREOC has developed a conciliation register that provides de-identified summaries of

conciliated complaints.<sup>812</sup> HREOC also publishes de-identified case studies in its annual report, on its webpage and in policy documents.

### ***Conciliation agreements***

1001. Where a complaint is resolved through a HREOC conciliation process it is usual for this to be documented in conciliation agreement which is signed by both the complainant and respondent. Complaints under the SDA can resolve on the basis of a wide variety of outcomes: including, the payment of financial compensation, providing an apology, providing work arrangements that accommodate family responsibilities or pregnancy, developing policies and procedures or implementing staff training. A clear benefit of conciliation is that outcomes can be achieved that go beyond what can be awarded through judicial remedies.

1002. Additionally, conciliation, as with other forms of ADR, can be empowering for the parties as they can have a say in and control over how a dispute is resolved. While the basis on which complaints are resolved reflects the needs and interests of the parties, HREOC officers are also seen as having a legitimate role in ensuring that outcomes are consistent with human rights and the substance and objectives of federal anti-discrimination law.

1003. HREOC is not a party to conciliation agreements nor does HREOC have a legislative role to monitor or enforce agreements. It is HREOC's experience that there is high compliance with the terms of conciliation agreements. This would appear to be due to a genuine desire by both parties to resolve the dispute and avoid court action, respondent concerns about potential further actions that may occur if terms are not complied with<sup>813</sup> and the efforts of HREOC conciliators to ensure that both parties have fully considered and are satisfied with the terms of agreement prior to finalisation of the process.

1004. In research that HREOC conducted in 2001, which involved surveying 231 complainants and 228 respondents to complaints, 90% of parties reported that

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<sup>812</sup> This conciliation register can be found on the Complaints' page of HREOC's website.

<sup>813</sup> The complainant may lodge a further complaint with HREOC or a complainant may pursue legal action to enforce the terms of the agreement.

there had been full compliance with conciliation settlement terms and a further 7% reported part compliance<sup>814</sup>.

## **Examples of complaints under the SDA that have been successfully resolved**

### **Complaint of sex and pregnancy discrimination in employment**

1005. The complainant was employed as a driver with a large private transport company. After taking maternity leave, the complainant sought to return to work on a part-time basis to accommodate her family responsibilities. The complainant alleged that her employer told her that she must return to full-time work or resign.

1006. The respondent company did not provide a formal response to the complaint but agreed to participate in conciliation discussions. The complaint was resolved within six weeks of being lodged with an agreement that the complainant would return to work on a part-time basis.

### **Alleged family responsibilities and sex discrimination**

1007. The complainant claimed that she was selected for a redundancy by the large financial institution where she worked because she required flexibility around her working hours to accommodate her family and carers responsibilities to care for her son with a disability. The complainant alleged that she was the most senior and experienced employee in her section.

1008. The respondent agreed to participate in a conciliation conference prior to providing a written response. The complaint was resolved at a conciliation conference within a month of the complaint being made by the respondent offering the complainant a position that was comparable in pay and status to her former position. It also agreed to accommodate the complainant's request for flexible working hours to care for her son.

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<sup>814</sup> See "*Dispute resolution in the changing shadow of the law: A Study of parties' views of the conciliation process in federal anti-discrimination law*" - [http://www.humanrights.gov.au/complaints\\_information/publications/shadow\\_paper.html](http://www.humanrights.gov.au/complaints_information/publications/shadow_paper.html)

### **Alleged sexual harassment in employment**

1009. The complainant, who was employed as a receptionist with the respondent real estate company, alleged that she was sexually harassed by the general manager of the company. She claimed that the general manager would send her pornographic and sexually suggestive e-mails and make comments of a sexual nature. The complainant also claimed that the general manager put his hand up her skirt and touched her thighs, kissed her and exposed his penis to her.

1010. The general manager denied the allegations. However, he acknowledged that he had sent the complainant e-mails. He claimed that the e-mails were not unwelcome as she was flirtatious in some of her replies. The company claimed that the complainant did not raise any allegations during her employment. The company advised that it has a sexual harassment policy in place and that the policy is discussed at monthly staff meetings.

1011. A conciliation conference was held and the complaint was resolved with the respondent agreeing to pay the complainant \$18 000 compensation.

### **Complaint of discrimination in employment after return from maternity leave**

1012. The complainant was employed as a planning manager in an advertising agency. She claimed that while she was on maternity leave, there was a restructure of management positions and when she returned to work, she was advised that her former position had been filled on a permanent basis. The complainant said she was offered a new position in the same department which was fundamentally different from and not comparable to the position she held prior to going on leave. She alleged that while she kept her job title, she did not maintain any of her management responsibilities. She claimed that this amounted to sex and pregnancy discrimination and constructive dismissal and she advised that she subsequently accepted a position with another employer. The complainant also alleged that the work environment at the respondent agency was hostile to working mothers.

1013. The respondent agency denied that it had discriminated against the complainant on the basis of her sex and/or pregnancy and claimed that the work role the complainant returned to after her maternity leave was essentially

the same as the role she held before going on leave. The agency also denied that the work environment was hostile to working mothers.

1014. The parties agreed to resolve the complaint at a conciliation conference with the respondent agreeing to pay the complainant \$15 000 general damages and \$20 000 as a termination payment.

### **Alleged sex, pregnancy and family responsibilities discrimination in employment**

1015. The complainant was employed on a permanent basis as a pre-school teacher at a private school. The complainant said there was an agreement that she would return to work part-time in her former position after taking 12 months maternity leave. The complainant claimed she returned to work part-time for one term on a temporary basis but was advised that her position would not be available on a part-time basis in the following school year.

1016. As the parties were in a continuing employment relationship, conciliation was attempted within a few days of HREOC receiving the complaint. The complaint resolved at a conciliation conference. The respondent school agreed that the complainant would return to a comparable position on a permanent part-time basis. The complainant was able to return to work in the 2007 school year and retain her leave and other entitlements.

### **Complaint of sex and family responsibilities discrimination in casual employment**

1017. The complainant worked in a winery as a food and beverage attendant. The complainant was employed on a casual basis and worked both weekday and weekend shifts. The complainant's family responsibilities changed and she advised the company that while she could still work weekday shifts, she could only work every second weekend. The complainant claimed that the number of shifts she was allocated was then reduced and she was ultimately dismissed. She said that when she was dismissed, her employer told her that her unavailability to work weekends meant that she was unsuitable to work in the hospitality industry.

1018. In reply, the respondent company denied the allegations and advised that the hours worked by casual employees are at its discretion. The company stated that its inability to offer continuing work to the complainant was due to its financial position.

1019. The complaint was resolved through a conciliation process. The company agreed to develop and implement an anti-discrimination policy and train managers in this policy. It also agreed to provide the complainant with a letter of apology and \$6000 compensation.

# **CHARTER OF SERVICES TO CUSTOMERS**

## **Charter for customers of the Human Rights and Equal Opportunity Commission's complaints service**

### **About the Commission**

The Human Rights and Equal Opportunity Commission is an independent body which investigates and conciliates complaints of discrimination and breaches of human rights.

The Commission aims to provide a high quality complaint handling service which is prompt, clear and fair.

### **Our customers**

Customers of the complaint handling service include complainants, respondents and others who have an interest in, or who may become involved in, the complaints process.

### **The service**

Under the law administered by the Commission, people can complain about unlawful discrimination on the basis of sex, race, age and disability. Complaints can also be made about discrimination in employment on additional grounds (such as age, sexual preference, criminal record) and against Commonwealth government authorities about breaches of human rights.

Complaints which are covered by the law will be inquired into and the Commission will try to conciliate them, where appropriate. If a complaint cannot be resolved, the matter may be taken to the Federal Court for determination.

### **Service charter**

This Charter sets out the Commission's commitments about the service we will provide to you. It also sets out your rights and your responsibilities. The Commission is committed to continuous improvement of its complaint handling service and values your comments on how its service can be improved.

## **Our service standards**

When you are dealing with the Commission we will

- a. Treat you with dignity and respect - staff will be helpful and courteous
- b. Ensure that you understand how the process works by
  - providing information about the process from the start
  - identifying the officer responsible for the complaint and
  - clearly answering any questions that you have during the process.
- c. Be prompt and efficient in dealing with complaints by
  - assessing complaints upon receipt and giving priority where necessary
  - answering letters and phone calls quickly and clearly and
  - keeping you informed about the status and progress of a complaint.
- d. Be professional and objective in handling all complaints by
  - providing accurate information
  - taking a balanced approach to all persons involved and
  - ensuring that complaint procedures are fair to everybody involved.
- e. Make our service accessible to all by
  - providing trained, culturally sensitive staff
  - providing translation and interpreting services
  - ensuring access and availability of the service for persons with disabilities
  - accommodating a support person when needed
  - providing a national toll free telephone number and
  - providing local conciliation services when appropriate.
- f. Give full reasons for our decisions.

## **How you can help**

You can help the Commission to deliver the best complaints service it can by:

- providing full and accurate information at all times;
- keeping appointments or advising us if you cannot;
- advising us of any change in your circumstances or contact details; and
- complying with reasonable requests during the complaints process.

## **Complaints About Our Service Standards**

The Commission welcomes your suggestions on how our service can be improved and will thoroughly investigate any complaints about **our service**. Any problem you have with the service should first be raised with the officer handling your complaint or their supervisor. If you are not satisfied with the response you can complain to:

The Executive Director  
Human Rights and Equal Opportunity Commission  
GPO Box 5218  
Sydney NSW 2001

This will not affect the way the complaint of discrimination is handled. Please note concerns about a decision of the President or his delegate regarding a complaint of discrimination cannot be dealt with under this Charter.

## **HREOC's research on the complaint service**

1020.HREOC undertakes specific research projects with the dual aims of providing further information on the complaint process for the general public and obtaining data to enable HREOC to reflect on, and improve, its complaint service. HREOC obtains expert external advice on research design and methodology in relation to these projects. Recent projects and associated findings are summarised below.

### **Research on the impact of the move to a court determination process**

#### ***Background to the research***

1021.On 13 April 2000, the Human Rights Legislation Amendment Act (No.1) 1999 (Cth) (HRLA Act) commenced operation. A key change arising from this legislation was the removal of HREOC's function to hear and determine complaints. The new regime implemented by the HRLA Act, provides complainants with the option of pursuing their allegations of discrimination to the Federal Court/Federal Magistrates Court in situations where their complaint to HREOC cannot be conciliated or is terminated for some other statutory reason.

1022.When this new complaint determination regime was proposed, some sections of the community raised concerns about the potential negative impact of this change on HREOC's complaint process. For example, there was concern that the formality and potential costs of court action would discourage complainants, who are very often members of disadvantaged groups, from lodging complaints and from pursuing matters to determination<sup>815</sup>. Concern was also expressed that the move to a 'costs follow the event' court process would have a potentially negative impact on conciliation. Specifically, there was concern that as respondents to complaints are likely to be better resourced than complainants, they would be less worried about court action and therefore

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<sup>815</sup> See for example Submission by National Federation of Blind Citizens of Australia, *Consideration of Legislation Referred to the Committee: Human Rights Legislation Amendments Bill 1996* (June 1997) [4.41]

less willing to participate in conciliation and complainants would have less bargaining power when conciliation was undertaken<sup>816</sup>.

1023. In 2001, HREOC undertook a research project to consider the initial impact of the legislative changes, including an assessment of any impact on HREOC's complaint service. The project involved the comparison of specific complaint data from a two year period prior to the legislative amendments and the calendar year after the changes were implemented. The project also included a survey of 459 people who participated in HREOC's conciliation process in 2001. HREOC undertook a follow-up project in 2005 which involved the collation and assessment of complaint data from an additional three year after the implementation of the court determination process.

### ***Project findings***

1024. Full findings of the 2001 project are contained in HREOC's publication, "Review of Changes to the Administration of Federal Anti-discrimination Law: Reflections on the initial period of operation of the Human Rights Legislation Amendment Act (No.1) 1999 (Cth)" which is available from HREOC.

1025. Findings of the 2005 project are documented in HREOC's publication "Five Years On: An update on the complaint handling work of the Human Rights and Equal Opportunity Commission", which is available online at [http://www.hreoc.gov.au/complaints\\_information/publications/five\\_years\\_on.html](http://www.hreoc.gov.au/complaints_information/publications/five_years_on.html)

1026. Key findings of the projects can be summarised as follows:

- Statistics on complaints received in the four years after the introduction of the HRLA Act do not reveal any trend of decreasing complaint numbers that could be attributed to the move to a court based determination process.
- In the relevant periods after the implementation of the HRLA Act:
- there was a general increase in the conciliation rate and a decrease in the complaint withdrawal rate;

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<sup>816</sup> See for example Offenberger, S. & Banks, R., "Wind out of the sails – new federal structure for the administration of human rights legislation" **Australian Journal of Human Rights** Vol 6(1) 2000 and Gaze, B, "The costs of Equal Opportunity" (2000) 25(3) **Alternative Law Journal**, 125, 129.

- there was no apparent trend of decreasing financial compensation in conciliation; and
- parties who participated in conciliation reported high levels of satisfaction with conciliation settlement terms and complainants and respondents reported similar levels of concern about proceeding to court determination.

1027. Accordingly, the available data does not support a view that the move to a court determination process has resulted in increased respondent resistance to conciliation, decreased bargaining power for complainants in conciliation or complainants being more dissatisfied with the complaint process and withdrawing their complaints.

## **Research on HREOC's conciliation process**

### ***Background to the research***

1028. Most of the external published research on conciliation in the anti-discrimination law context is quite dated and involves relatively small samples. Therefore, in 2001, as part of the research project outlined above, HREOC undertook a survey regarding its conciliation process. One objective of this survey was to obtain information from complainants and respondents on their experience of the conciliation process. In particular, the survey sought to obtain data relevant to theoretical concerns previously raised by some writers, about access and equity issues in conciliation and potential comparative disadvantage for complainants in the process.<sup>817</sup>

1029. The survey was conducted with 231 complainants and 228 respondents who agreed to participate and who had been involved in a HREOC conciliation process during 2001. The survey was conducted by a person employed specifically for this purpose with no previous involvement with HREOC's complaint process.

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<sup>817</sup> For example, see Thornton's discussion of Kessel, K and Pruitt, D.G: Thornton, M., "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 **Modern Law Review** 733 at 743. See also Scutt, J.A., "The Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation" in Mugford J (editor), **Alternative Dispute Resolution Proceedings** (Australian Institute of Criminology, Canberra, 1996), p 195. op. cit.

### *Findings of the project*

1030. Findings of this project are outlined in “Dispute resolution in the changing shadow of the law: A study of parties’ views on the conciliation process in federal anti-discrimination law”, which is available on line at [http://www.hreoc.gov.au/complaints\\_information/publications/shadow\\_paper.html](http://www.hreoc.gov.au/complaints_information/publications/shadow_paper.html)

1031. Some key findings in relation to the process and parties’ experience of the process are summarised below:

- The majority of participants (59%) had no legal representation in the conciliation process. Complainants had higher levels of overall representation (that is both legal and non legal advocacy) than respondents (51% - 44%) and complainants and respondents had the same level of legal representation (41%).
- The majority of survey participants (63%) participated in a face-to-face conciliation meeting with some 36% participating in telephone shuttle process.
- The vast majority of survey participants (95%) indicated that they understood what was happening in the conciliation process. In relation to resolved matters, both complainants and respondents reported similar high levels of understanding of the process (98% - 96%).
- Very few survey participants (4%) felt that the conciliator was biased against them. Where matters were resolved, complainants and respondents had similar low levels of reported bias (2-3%).
- Where complaints were resolved, the vast majority of survey participants (82%) reported that they were satisfied with the terms on which the complaint was resolved and 41% indicated they were highly satisfied. Complainants and respondents reported the same high levels of satisfaction.
- Ninety percent of parties reported that there had been full compliance with conciliation settlement terms. A further 7 percent reported part compliance.

### **Research on the potential for HREOC’s complaint process to contribute to broader social change**

#### *Background to the research*

1032. HREOC, like other National Human Rights Institutions with functions to promote and protect human rights, has the dual responsibility to work on

broader policy and education issues and also to deal with complaints from members of the public about alleged discrimination and violation of human rights.

1033. Some writers have expressed concern that the complaint process of agencies such as HREOC, do not further the broader social change objectives of the law. This view is based on concerns that in the complaint process, patterns and practices of discrimination will be dealt with as exceptional individual incidents and therefore remedy will only focus on individual redress with no identified need or incentive for common respondents, such as government and corporations, to address systemic causes. Additionally, the general confidential nature of complaint resolution is said to detract from the development of legal rights for disadvantaged groups and prevent public declarations that will impact on social change<sup>818</sup>

1034. While the complaint process has a necessary focus on individual redress, ADR practitioners working in the human rights and anti-discrimination law context often refer to the potential for the complaint process to contribute to the broader social change objectives of the law. The complaint process is seen to have potential to contribute to attitudinal change, to educate about the law and thus encourage self-initiated compliance, and to stimulate broader systemic change. Practitioners also refer to the fact that terms of conciliation agreements are not always confidential and even where they are; implementation of the terms may involve changes to practices and procedures which will have a systemic impact regardless of any confidentiality provisions. Additionally, the confidentiality of the conciliation process does not preclude de-identified general information about issues raised in complaints and terms of resolution being provided to the public.

1035. In 2007, the CHS commenced a research project to obtain information about the level to which: involvement in the complaint process may increase knowledge and understanding of the law; conciliation agreements include elements which are likely to have systemic impact; and respondents may undertake systemic change because of involvement in the complaint process.

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<sup>818</sup> Ibid.

This project is due to be finalised in the second half of 2008 but preliminary data has been collated and assessed.

1036. The research project has two separate components. The first component which commenced in mid 2007, involves a review of conciliation agreements relating to finalised complaints of unlawful discrimination against companies and organisations. The second component of the project involves a telephone survey with companies/organisations who were respondents to unlawful discrimination complaints finalised by HREOC since 1 September 2007. The data discussed at 4.3.2 below relates to 220 conciliated complaints finalised by HREOC in the period 1 July 2006 – 31 December 2006 and to 150 completed telephone surveys. File reviews and surveys are conducted by staff with no direct involvement in the investigation or conciliation of complaints.

### *Preliminary findings*<sup>819</sup>

1037. The preliminary findings of this research project support anecdotal claims that the HREOC complaint process can increase knowledge and awareness of rights and responsibilities under the law. Further, the data indicates that even where complaints are raised by individuals and may be resolved on confidential terms, terms of resolution are not limited to individual remedy but in many cases, include outcomes which are likely to have broader benefits for similarly situated individuals and groups. A summary of the preliminary data is provided below:

- Many conciliation agreements in the initial sample included terms of resolution that extended beyond individual remedy. Of the conciliation agreements where the terms were known to HREOC (192 complaints), many had components which were categorised as ‘systemic’ in that they were likely to have benefits beyond the specific complainant(s). The types of outcomes in this category included:
  - changes to practices and procedures - external/customers (15%);
  - changes to practices and procedures - internal/staff (8%);
  - modification of facilities/premises (11%);

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<sup>819</sup> These are provisional findings

- conduct of anti-discrimination/anti-harassment training (12%); and
- the introduction or review of anti-discrimination /anti-harassment policies (8%).
- More than half of the respondents surveyed (54%) reported that as a result of involvement in the complaint process they had gained a better understanding of anti-discrimination law and responsibilities under the law. The reported educative impact of the complaint process was relatively consistent, regardless of the outcome of the complaint.
- A significant number of respondents reported that as a result of involvement in the complaint process, they undertook actions which could be categorised as ‘systemic’ in that they were likely to have benefits beyond the specific complainant(s). For example:
  - 46% of respondents reported that as a result of the complaint, they had introduced or revised anti-discrimination/anti-harassment or Equal Employment Opportunity (EEO) policies;
  - 51% of respondents reported that they had introduced or revised anti-discrimination/anti-harassment or EEO training.
  - 43% of respondents reported that they had made ‘other changes’. Information on these ‘other changes’ indicates that they would generally be classified as positive actions to prevent discrimination and ensure equality of opportunity. Examples of these changes included: review and amendment of a flexible work policy, introduction of a specific class to assist children with forms of autism; and revision of recruitment procedures to ensure a merit-based process
  - 7% of respondents reported that they had made changes to their facilities or premises and examples of these reported changes included modification of premises to allow space and facilities for guide dogs and modifications to premises to ensure access for people who use wheelchairs.

**Annexure H: Table of Major Non-Complaint Work by HREOC under the SDA**

**Education, Research, and Submissions**

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
2008	<i>What matters to Australian women and men: Gender equality in 2008</i> Report of the Sex Discrimination Commissioner's Listening Tour and Plan of Action Towards Gender Equality	Elizabeth Broderick
2008	Submission to Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave	Elizabeth Broderick
2008	Submission to Department of Education, Employment and Workplace Relations - Discussion Paper, National Employment Standards Exposure Draft	Elizabeth Broderick
2007	Submission in response to the NSW Attorney-General's Department's discussion paper on The Law of Consent and Sexual Assault	John von Doussa
2007	Submission to the Queensland Industrial Relations Commission's (QIRC) Inquiry into Pay Equity	John von Doussa
2006	<i>Get the Facts: Know your Rights</i> Culturally-specific education materials on pregnancy, potential pregnancy and breastfeeding	Pru Goward

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
	discrimination in the workplace for Indigenous women	
2006	Submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005	Pru Goward
2006	Submission to the Australian Government Award Review Taskforce (the Taskforce) in relation to its discussion papers Award Rationalisation and Rationalisation of Award Wage and Classification Structures	Pru Goward
2006	Submission to the Senate Legal and Constitutional Committee's Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2006	Pru Goward
2006	Submission to the Senate Community Affairs Legislation Committee Inquiry on the Employment and Workplace Relations Legislation Amendment (Welfare to Work and other Measures) Bill 2005 and the Family and Community Services Amendment (Welfare to Work) Bill 2005 (together "the Bills") of 16 November 2005	Pru Goward
2006	Submissions to the Australian Industrial Relations Commission (AIRC) during the hearing of the Family Provisions Test Case.	Pru Goward
2005	Submission to the Legal and Constitutional Committee's Inquiry into the Criminal Code (Trafficking in Persons Offences) Bill 2004 on 18 February 2005	Pru Goward

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
2004	<i>Guide to the Sex Discrimination Act</i>	Pru Goward
2004	<i>Sexual Harassment: Knowing Your Rights</i>	Pru Goward
2004	<i>20 Years On: The Challenges Continue: Sexual Harassment in the Australian Workplace</i> Report on the findings of a national household telephone survey of 1,006 Australians between the ages of 18 and 64 years on the nature and extent of sexual harassment	Pru Goward
2004	Written contentions filed to the AIRC Family Provisions Test Case	Pru Goward
2003	<i>A Bad Business: Review of Sexual Harassment in Employment Complaints 2002</i>	Pru Goward
2003	Submission to the House of Representatives' Standing Committee on Family and Community Affairs' inquiry into child custody arrangements in the event of family separation	Pru Goward
2003	Submission to the Northern Territory Law Reform Committee Inquiry into the Recognition of Aboriginal Customary Law in the Northern Territory.	Pru Goward
2002	<i>Getting to know the Sex Discrimination Act: A guide for young women</i>	Pru Goward
2001	<i>The Sterilisation of Girls and Women in Australia: Issues and Progress</i>	Susan Halliday
2000	<i>Harsh Realities 2</i> Analysis of 17 conciliated complaints under the <i>Sex Discrimination Act 1984</i> (Cth).	Susan Halliday
2000	<i>Woman of the World: Know your international human rights and how to use them</i> Package providing information about the international human rights framework for women	Susan Halliday

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
	and the importance of human rights for women.	
2000	Submission to the Senate Inquiry into the proposed amendment to the Sex Discrimination Act regarding access to IVF services.	Susan Halliday
2000	Submission to the House of Representatives Standing Committee on Employment, Education and Workplace Relations' Inquiry into the Education of Boys.	Susan Halliday
2000	Submission to the NSW Government Task Force set up to inquire into the Labour Hire Industry.	Susan Halliday
1999	<i>Harsh Realities: Case Studies of Sex Discrimination in the Workplace</i>	Susan Halliday
1999	Submission to the Victorian WorkCover Authority on its review of the Occupational Health and Safety (Lead Control) Regulations 1988	Susan Halliday
1999	Submission to the Model Criminal Code Officers' Committee on the sexual servitude provisions of Committee's Discussion Paper on Slavery	Susan Halliday
1998	Submission into the Review of Policy and Procedures to deal with Sexual Harassment and Sexual Offences at the Australian Defence Force Academy	Susan Halliday
1998	Submission to the Independent Review of the <i>Affirmative Action (Equal Employment Opportunity for Women) Act 1986</i>	Susan Halliday
1998	Submission on the Australian Subscription Television and Radio Association (ASTRA) draft	Susan Halliday

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
	advertising code	
1997	<i>Enterprise Bargaining: Manual for Women in the Workplace</i>	Moira Scollay
1997	<i>Glass Ceiling and Sticky Floors: Barriers to the careers of women in the Australian finance industry</i>	Moira Scollay
1997	<i>Sex Discrimination Act 1984 - Which Way?(Video)</i>  Educational resource targeted to Aboriginal and Torres Strait Islander people to raise awareness of rights under the SDA.	Moira Scollay
1996	<i>Stretching Flexibility: Enterprise Bargaining, Women Workers and Changes to Working Hours</i>	Sue Walpole
1995	<i>Sex Discrimination: A Guide for Unions</i>	Sue Walpole
1995	Submission to the Senate Standing Committee on Superannuation & Intermittent Working Patterns	Sue Walpole
1995	Submission to the Australian Law Reform Commission's Reference on <i>Equality Before the Law</i>	Sue Walpole
1995	Submission to Senate Inquiry into Workplace Relations Bill	Sue Walpole

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
1994	<i>Superannuation and the Sex Discrimination Act: Current Status and Future Directions</i>	Sue Walpole
1994	Submissions to the AIRC Personal/Carer's Leave Test Case	Sue Walpole
1994	Submission to the Industry Commission Inquiry into the Meat Processing Industry	Sue Walpole
1994	Submission to the National Wage case, on equal pay, enterprise bargaining, work value and proposals for S.150A reviews	Sue Walpole
1993	<i>Future Directions and Strategies: Sex Discrimination Act 1984</i>	Sue Walpole
1993	Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Sexual Harassment in the Australian Defence Force	Sue Walpole
1992	<i>Sexual Harassment at Work in Australia</i>	Quentin Bryce
1992	Submission to the Senate Select Committee Inquiry into Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies	Quentin Bryce
1992	Submission to the Review of the Effectiveness of the Affirmative Action Legislation	Quentin Bryce
1992	Submission into the NSW Inquiry into Pregnancy Discrimination	Quentin Bryce
1990	<i>Discrimination against Women in the Lead Industry</i>	Quentin Bryce
1989-1992	<i>Occasional papers from the Sex Discrimination Commissioner</i>	Quentin Bryce

## Inquiries

Year	Title	Responsible Sex Discrimination Commissioner
2005-2007	<p><b>Women, men work and family project</b></p> <p><i>It's About Time: Women, men, work and family</i></p> <p>Report containing 45 recommendations and findings from a major national consultation on the experiences of Australians balancing paid work and family responsibilities.</p> <p><i>Striking the Balance: Women, men, work and family Discussion Paper 2005</i></p>	Pru Goward and John von Doussa
2002	<p><b>Paid Maternity Leave Inquiry</b></p> <p><i>A Time to Value - Proposal for a National Paid Maternity Leave Scheme</i></p> <p>The final paper on paid maternity leave, based upon national consultations and submissions.</p> <p><i>Valuing Parenthood: Options for Paid Maternity Leave</i></p>	Pru Goward

Year	Title	Responsible Sex Discrimination Commissioner
1998 - 1999	<p data-bbox="371 360 779 392"><b>Pregnancy and Work Inquiry</b></p> <p data-bbox="371 472 1346 504"><i>Pregnant and Productive: It's a right not a privilege to work while pregnant</i></p> <p data-bbox="371 584 1330 616">Report of the Pregnancy and Work Inquiry including 46 recommendations.</p> <p data-bbox="371 695 792 727"><i>Pregnancy Inquiry: Issues paper</i></p>	Susan Halliday
1992	<p data-bbox="371 807 1205 839"><b>Review of exemptions under the Sex Discrimination Act 1984</b></p> <p data-bbox="371 919 1066 951"><i>Sex Discrimination Act 1984: A Review of Exemptions</i></p> <p data-bbox="371 1031 1480 1062">Report on the review of the permanent exemptions in the Sex Discrimination Act 1984</p>	Quentin Bryce

Year	Title	Responsible Sex Discrimination Commissioner
1992	<p data-bbox="367 360 1171 392"><b>Inquiry into Sex Discrimination and Overaward payments</b></p> <p data-bbox="367 472 1491 504"><i>Just Rewards: A Report of the Inquiry into Sex Discrimination in Overaward Payments</i></p> <p data-bbox="367 584 1590 671">Report containing recommendations and findings from a national inquiry into overaward payments.</p>	Quentin Bryce
1990	<p data-bbox="367 751 1155 783"><b>Review of the Sex Discrimination Act 1984 and insurance</b></p> <p data-bbox="367 863 981 895"><i>Insurance and the Sex Discrimination Act 1984</i></p> <p data-bbox="367 975 1211 1007">Report with recommendations from a review by the Commission.</p>	Quentin Bryce

## Guidelines

<b>Year</b>	<b>Title</b>	<b>Responsible Sex Discrimination Commissioner</b>
2004	<i>Sexual Harassment in the Workplace: A Code of Practice for Employers (revised)</i>	Pru Goward
2001	<i>Pregnancy Guidelines</i>	Susan Halliday
1998	<i>Guidelines for Writing and Publishing Recruitment Advertisements</i>	Sue Walpole
1998	<i>The Equal Pay Handbook</i>	Moira Scollay
1996	<i>Sexual harassment and educational institutions: A guide to the federal Sex Discrimination Act</i>	Sue Walpole
1996	<i>Sexual Harassment – A Code of Practice</i>	Moira Scollay
1996	<i>Guidelines for Special Measures under the Sex Discrimination Act 1984</i>	Sue Walpole
1995	<i>Further Guidance for Employers and Trustees with Regard to the 1993 Superannuation Amendments</i>	Sue Walpole
1993	<i>Sex Discrimination Act 1984: Guidelines for the avoidance of discrimination on the grounds of sex, marital status or pregnancy in superannuation</i>	Sue Walpole
1993	<i>A Guide to the 1992 Amendments to the Sex Discrimination Act 1984</i>	Sue Walpole
1992	<i>Women, Sport and Sex Discrimination</i>	Quentin Bryce

## Amicus Curiae and Intervention Matters

Please click on the following links to view a list of finalised *Amicus Curiae* and Intervention matters the Human Rights and Equal Opportunity Commission has been involved in to date.

### *Amicus Curiae* matters

#### *Marital Status Discrimination*

- **AB v Registrar of Births, Deaths and Marriages [2006] FCA 1071**
  - Decision - [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2006/1071.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1071.html) - [Outline of submissions of the Sex Discrimination Commissioner](#) (August 2006)
  - Appeal decision: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/140.html>

#### *Special Measures under the SDA*

- **Jacomb v Australian Municipal, Administrative, Clerical and Services Union [2004] FCA 1250**
  - Decision [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2004/1250.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1250.html) - [Outline of submissions of the Sex Discrimination Commissioner](#) (April 2004)

#### *Part-time work and family responsibilities*

- **Howe v Qantas Airways Limited [2004] FMCA 242**
  - Decision: <http://www.austlii.edu.au/au/cases/cth/FMCA/2004/242.html>
  - Decision on costs and damages <http://www.austlii.edu.au/au/cases/cth/FMCA/2004/934.html> - [Outline of submissions by the Sex Discrimination Commissioner](#) (April 2004)
  - [Supplementary submissions of the Sex Discrimination Commissioner](#) (June 2004)

### *Pregnancy Discrimination and voluntary bodies*

- **Gardner v AANA Ltd [2003] FMCA 81**
  - Decision: <http://www.austlii.edu.au/au/cases/cth/FMCA/2003/81.html> - [Outline of submissions of the Sex Discrimination Commissioner](#) (February 2003)

### *'Sporting Activity'*

- **Ferneley v The Boxing Authority of New South Wales [2001] FCA 1740**
  - Decision : [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/1740.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1740.html) - [Submission on Leave to Appear as Amicus Curiae](#) (October 2001)
    - [Submissions on substantive application](#) (October 2001)

### **Intervention matters**

- **Sex-based insults and sexual harassment**
  - [Graincorp Operations Ltd v Stephen Markham \(C2002/3380\) AIRC \(Heard 19 August 2002\)](#)
    - [Outline of HREOC's submission](#)
- **Access to IVF treatment**
  - [Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attor \[2002\] HCA 16 \(18 April 2002\)](#)
    - [HREOC's submission](#)

- **Pay Equity for casual employees**
  - [AMWU v Gunn & Taylor \(2002\) EOC 93-22](#)
    - [HREOC's submission](#)
  
- **Parental Leave**
  - [Federated Miscellaneous Workers Union of austral & Angus Nugent and Son Pty Ltd & Ors, Shop, Distributive and Allied Employees Association and Retail and Wholesale Shop Employees \(ACT\) Award 1983 \(AIRC 773/1990 26 July 1990\)](#)
    - [HREOC's submission](#)
  
- **ACTU Family Provisions Test Case**
  - [ACTU Family Provisions Test Case \[2005\] AIRC PR082005](#)
  - [Statement by the AIRC full bench](#)
    - [HREOC Final Submissions](#)
      - [HREOC Final Contentions](#)
      - [Submissions in Procedural Matters](#)