



Submission

on the

Effectiveness of the Commonwealth Sex Discrimination Act 1984

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 26 June 2008, the Senate referred the following matter to the Legal and Constitutional Affairs Committee for inquiry and report by 12 November 2008:

The effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality, with particular reference to:

- a. the scope of the Act, and the manner in which key terms and concepts are defined;*
- b. the extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organization or under other international instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;*
- c. the powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality;*
- d. consistency of the Act with other Commonwealth and state and territory discrimination legislation, including options for harmonisation;*
- e. significant judicial rulings on the interpretation of the Act and their consequences;*
- f. impact on state and territory laws;*
- g. preventing discrimination, including by educative means;*
- h. providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;*
- i. addressing discrimination on the ground of family responsibilities;*
- j. impact on the economy, productivity and employment (including recruitment processes);*
- k. sexual harassment;*
- l. effectiveness in addressing intersecting forms of discrimination;*
- m. any procedural or technical issues;*
- n. scope of existing exemptions; and*
- o. other matters relating and incidental to the Act.*

The Committee has invited written submissions which are due by 1 August 2008.

2. Laws governing access to reproductive technology and adoption

[Terms of reference (e) and (f)]

The Sex Discrimination Act 1984 makes it unlawful to discriminate on the grounds of marital status in the provision of a “service”.

A decision of the Federal Court (*McBain v State of Victoria* [2000] FCA 1009) found that provisions of the Victorian *Infertility Treatment Act 1995* which restricted access to assisted reproductive services to women who are married or in a heterosexual de facto relationship were invalid because they conflicted with the Sex Discrimination Act 1984.

Although there has been no similar court case regarding access to adoption or surrogacy services it is possible that the same reasoning would apply.¹

This is very important judicial decision affecting the interpretation of the Sex Discrimination Act 1984 and impacting on the validity not just of the Victorian *Infertility Treatment Act 1995* but potentially on all State laws dealing with reproductive technology, surrogacy, adoption or foster placement.

The *Sex Discrimination Act 1984* should be amended so that it will not apply to assisted reproductive services, surrogacy, adoption or foster placement of children.

This would ensure that State laws restricting access to foster placement, adoption, assisted reproductive services or surrogacy on the basis of marital status would not be invalidated because they conflict with the *Sex Discrimination Act 1984*. It would also mean that a medical practitioner would not be violating the *Sex Discrimination Act 1984* by refusing to provide assisted reproductive services or surrogacy services to single women, women in a lesbian relationship or men in a same-sex relationship and that agencies engaged in foster placement would not be violating the Act by placing children only with married couples.

Children have the right to come into the world with the expectation of having a father as well as a mother. Children who cannot be cared for by their own parents and are placed for adoption or fostering are entitled to a mum and a dad, who are married to one another, to care for them. Commonwealth law should not make it unlawful for those involved in providing adoption, fostering or assisted reproductive services to take the best interests of children, especially their need for a father as well as a mother, into account when providing these services.

3. Children need a mum and a dad

Research confirms what most Australians recognise by commonsense: men and women are different, and consequently make different contributions to parenting. Children do best when they have both a mum and a dad.

Fatherhood is irreplaceable, and is premised on being a man. Research demonstrates that fathers play a unique role in protecting, defending and guiding children. Children growing up fatherless are at higher risk of various problems, including:

- a greater likelihood of developing mental health problems;
- an increased risk of sexual promiscuity and other sexual problems, including, gender confusion issues;

- an increased risk of becoming a victim of child sexual abuse;
- a greater chance of growing up in poverty;
- an increased risk of being involved in criminal activities;
- a greater likelihood of involvement in illicit drug use, excessive alcohol consumption and tobacco use, and
- a greater chance of committing suicide.

There are several book-length summaries of all the data.²

Australian data backs up this international research.³

Research comparing children raised in single mother households with households headed by married couples shows the negative outcomes for children in fatherless families.⁴ Again Australian data replicates the findings from overseas.⁵

One example of the unique contribution of fathers is the way they play with their children, especially boys, in what is known as rough and tumble play. This enables boys to sublimate their excess energy and use their muscles in a socially acceptable way. One of the reasons for so much anti-social behaviour by boys - vandalism, street fighting, gangs, etc. - is because of father-absence. In single mother families, the mothers do their best, but cannot substitute for the absent father.⁶

John Smith who has counselled many hundreds of delinquent young males has noted that the reason they tend to gravitate toward gangs and violence and drugs is precisely because of being brought up in father-absent households. He says that “almost 100 per cent” of these kids are from “single parent families or blended families”.⁷

Thus fathers are indispensable to the healthy development of children. Commonwealth law should not act in any way to contribute to more fatherless children.

The *Sex Discrimination Act 1984* as interpreted in the McBain decision operates to facilitate the creation of more fatherless children.

3.1 Marriage provides the best environment for raising children.

A large body of social science research confirms the near universal belief, across times and cultures, that marriage is the best environment for raising children.

Children flourish best, on a range of indicators, (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes), when they are raised by a mother and a father in a publicly committed, lifelong relationship.⁸

A few examples of particular research findings illustrate this general conclusion.

Three- and four-year-old children with two biological parents are three times less likely than those in any other type of families to have emotional or behavioural problems such as attention deficit disorder or autism.⁹

Girls whose fathers left the family early (before age 5) were five times more likely in the U.S. and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.¹⁰

Male adolescents in all types of families without a biological father (mother only, mother and step-father, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.¹¹

Children's well being is adversely affected by being deprived of either a mother or a father. Fathers and mothers make different contributions to a child's upbringing. Neither can adequately substitute for the other.¹²

State laws dealing with adoption, fostering, and access to assisted reproductive technology should be able to positively discriminate in children's best interests by favouring married couples.

3.2 Same-sex relationships are not equal to marriage

No matter how intense they may appear to be, same-sex relationships cannot be considered the equivalent of marriage. They confer none of the unique benefits of marriage and family on Australian society.

Both male homosexual and lesbian relationships are significantly more unstable than marriage, with lesbian relationships breaking up within the first 8 years at *over three times* the rate of marriages.¹³

Same-sex relationships are naturally sterile. Same-sex relationships are not capable of producing children. Society has no valid interest in encouraging those in such relationships to procure children through either adoption or reproductive technologies, because these processes necessarily involve a third party biological parent. Whatever means are used to procure a child, the child is intentionally deprived of a genuine parental relationship with either a father or a mother.

A key Australian study has shown significant detrimental outcomes from homosexual parenting. Dr Sotirios Sarantakos, when Associate Professor of Sociology at Charles Sturt University, Wagga Wagga, NSW, has done a number of studies on heterosexual and homosexual couples. In 1996 he published a paper, *Children in three contexts*, where he explored the relationship between family environment and behaviour of primary school children living in three family contexts - married heterosexual couples, cohabiting heterosexual couples and homosexual partners.¹⁴

The major finding of the study was that family type did make a significant difference to the children's school achievements. Children in families where their biological parents were married to each other scored best of the three groups in language ability (7.7), mathematics (7.9) and sport (8.9). Children of cohabiting heterosexual couple families generally did next best in these areas (6.8, 7.0 and 8.3), while children of homosexual partners scored lowest (5.5, 5.5, 5.9). In class behaviour more children of homosexual partners were reported to be timid and reserved, unwilling to work in a team or talk about family life and holidays. In general they felt "uncomfortable when having to work with students of a sex different from the parent they lived with". Sex identity was reported by teachers to be a problem area for some children of homosexual families. Sarantakos cautiously concludes that "married couples seem to offer the best environment for a child's social and educational development".

Advocates of parenting by homosexual partners frequently claim that about 50 studies have been done "proving" no difference in outcome between children raised by married couples or by homosexual partners. Any social science study depends for its validity on following rigorous statistical and research procedures. Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, after dissecting each of 49 of such studies found at least one fatal research flaw in each study.¹⁵ These studies are therefore no basis for good science or good public policy.

Professor Lynn D Wardle shows that even studies which conclude in favour of homosexual parenting include data showing that homosexual parenting may be harmful.¹⁶ There is a greater incidence of

homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).

In the light of this research data there is no justification for the Sex Discrimination Act 1984 to be allowed to continue to operate in a way that prevents State laws from favouring marriage in relation to the best interests of children being placed for fostering or adoption, or conceived using assisted reproductive technology.

The Commonwealth should not be doing anything to encourage or give apparent approval to means of bringing children into existence that deny them their fundamental right expressed in Principle 6 of the *Declaration on the Rights of the Child* which states that:

“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”¹⁷

Recommendation 1:

That the Sex Discrimination Act 1984 be amended by inserting after section 8 the following:

8B No application to human reproductive technology, surrogacy or adoption of children

Nothing in this Act renders it unlawful for a person to discriminate against another person on any one or more grounds of discrimination referred to in this Act in connection with the provision of any service, including any procedure, or in the making of any decision, including the exercise of a discretion under any law of the Commonwealth, a State or a Territory, dealing with assisted reproductive services, surrogacy, the adoption of children or the placement of children in foster care.

4. Boys education

[Terms of reference (n)]

The 2002 Report on the inquiry into the education of boys by the House of Representatives Standing Committee on Education and Training “Boys: getting it right” found that “Boys are not achieving as well as girls across a broad spectrum of measures of educational attainment” including early literacy achievement; retention rates for Year 12; subject results including tertiary entrance scores; admissions to higher education and rates of suspensions and expulsions.¹⁸

One key factor identified by the Committee was a marked shortage of male teachers, particularly in primary schools where the proportion is down to 21 per cent and some teacher education campuses reported a proportion of male students in primary education as low as 10 per cent.¹⁹

One means of attracting more men into teaching is to offer scholarships particularly to male students.

The *Sex Discrimination Act 1984* presents a legal barrier to educational authorities wishing to use this means to attract more male teachers.

The *Sex Discrimination Amendment (Teaching Profession) Bill 2004*²⁰ was introduced by the Howard Government in 2004. The Bill was designed to overcome this legal barrier by providing that “a person may offer scholarships for persons of a particular gender in respect of participation in a teaching

course. The section would apply only if the purpose of doing so is to redress a gender imbalance in teaching—that is, an imbalance in the ratio of male to female teachers in schools in Australia or in a category of schools or in a particular school.”²¹

The Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry. In its report the Committee recommended that “the Bill proceed subject to being evaluated and reviewed after two years as to its effectiveness in addressing the gender imbalance in the teaching profession.”²²

The Bill stalled due to opposition from Labor and the minor parties which would have prevented its passage through the Senate. The Labor position stated that “there is no evidence which suggests that increasing the number of male teachers will enhance educational outcomes for boys, nor that the perceived lack of role models for boys in schools is in any way linked to their educational outcomes.”²³

Despite the Coalition gaining control of the Senate from 1 July 2005 the Bill was never progressed.

It seems that the preservation of the *Sex Discrimination Act 1984* has become a ‘sacred cow’ to such an extent that a measure that could make a significant contribution to the educational performance and flourishing of boys is being impeded.

This stultifying political correctness should be abandoned and the Sex Discrimination Amendment (Teaching Profession) Bill 2004 should be revived and supported.

Recommendation 2:

The Sex Discrimination Amendment (Teaching Profession) Bill 2004 should be revived and supported.

5. Religious exemptions

The Sex Discrimination Act 1984 provides exemptions for certain acts of religious bodies (Section 37) and educational institutions established for religious purposes (Section 38) from some of the prohibitions on discrimination set out in the Act.

These exemptions are well-founded as they are firmly grounded in the right to freedom of thought, conscience, religion and belief of the person or persons who may engage in such “discrimination” on behalf of a religious body or educational institution established for a religious purpose.

Any suggestion that religious bodies or educational institutions established for religious purposes should be forced to act against their own religious beliefs or principles should be rejected as an unwarranted attack on the right to freedom of religion.

Recommendation 3:

As the exemptions for religious bodies and educational institutions established for religious purposes contained in Section 37 and Section 38 of the Sex Discrimination Act 1984 are each necessary to ensure that the Act complies with the right to freedom of thought, conscience, religion and belief these exemptions should be retained and not curtailed in any way.

6. Women in combat

Some lobby groups are calling for the removal of exemptions in the Act for women soldiers in front line combat roles – but there is strong evidence that such a move would be contrary to the national interest. Proposals to treat women soldiers exactly the same as men and to place them in combat positions fly in the face of obvious physiological differences and millennia of human experience in dealing with male/female relationships in early adult life.

The Australian Defence Force suggested women be allowed on the front line back in May 2001 – possibly motivated by recruitment problems. *The Australian* editorialised: “The defence forces face serious recruitment and retention problems, and putting women on an equal footing with men may broaden the recruitment base.”²⁴

However other commentators disagreed, mentioning problems such as women’s special hygiene requirements and a greater risk that female soldiers could be raped if captured.²⁵ A woman soldier interviewed by *The Age* said: “It would take an exceptional woman to cope with army combat. They would have to match it with the men for strength, and they would have to shed any softer sensibilities. But then, so would the men fighting alongside them - a far bigger problem to overcome. Men are taught to protect women, and they would not easily overcome that.”²⁶

The female soldier said that any concessions to gender can create resentment. The current requirement that women in the field be given the chance to bathe every four days recognises that women are more prone to hygiene-related ailments such as urinary tract infections. Even during field exercises, this creates ill-feeling among men who receive no such luxuries.²⁷

Military requirements are unique. Those who sign up for military service in Australia know that in doing so, they are forfeiting some rights which civilians take for granted. The Australian Defence Force is in the business of defending Australia by winning wars, and has special requirements not needed by other employers.

The Army expects its soldiers to be available for action 365 days a year, 24 hours a day. In a national emergency, soldiers have to drop everything, including family responsibilities, and go to where they are posted. For single parents, particularly mothers, this can create enormous tensions and conflicts of loyalty. The situations of pregnant women, breastfeeding mothers or mothers with young children are fundamentally incompatible with combat requirements during wartime.

Moreover army morale is of vital importance. High morale depends, among other things, on mutual trust and mateship. Sexual tensions and rivalries can destroy team spirit and loyalty, seriously undermining morale.²⁸

Anti-discrimination laws cannot apply to a defence force which aims to win rather than lose wars. Just as fire departments need to discriminate against would-be firepeople who do not have the physical strength to carry heavy weights up and down ladders, so defence forces need to discriminate against those whose personal attributes could lower the team’s morale in a combat or combat-related situation, thereby endangering the safety of their colleagues and the security of the nation.

7. Endnotes

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