

**ACTU Submission**  
*to the*  
**Senate Standing Committee on  
Legal and Constitutional Affairs**  
*on the*  
**Sex and Age Discrimination  
Legislation Amendment Bill 2010**

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**3 November 2010**

## 1. Introduction

The ACTU is the peak body representing 47 unions and almost 2 million working Australians.

We welcome this opportunity to make a submission in response to the *Sex and Age Discrimination Legislation Amendment Bill 2010*.

The ACTU has consistently advocated that effective operation of the *Sex Discrimination Act 1984* (the Act) requires reforms which deliver:

1. A positive approach including the restatement of the objective of the Act to achieve substantive equality between men and women and the introduction of an obligation to take reasonable and appropriate measures to eliminate sex discrimination as far as possible;
2. New regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination and prevent its recurrence, and enforce non-compliance; and
3. Greater synergy between the Sex Discrimination Act and Equal Opportunity legislation.

The ACTU has made a number of recent submissions regarding reform of the *Sex Discrimination Act 1984*, including the 2008 Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality, the 2008 Inquiry into Pay Equity and Female Workforce Participation and the 2009 Review of the Equal Employment Opportunity in the Workplace Act and Agency.<sup>1</sup>

In our submissions we identified the following shortfalls in the *Sex Discrimination Act 1984*:

- The focus of the *Sex Discrimination Act* on individual complaints does not facilitate resolving systemic discrimination;
- The Act does not provide the Australian Human Rights Commission (AHRC) with rights to initiate investigations and claims of systemic discrimination;
- There are insufficient regulatory tools in the Act to encourage and assist organisations to prevent discrimination;
- The Act does not provide for advocacy support and representation of vulnerable and disempowered complainants;

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<sup>1</sup> Full copies of these submissions may be found at [www.actu.org.au](http://www.actu.org.au)

- The complaints process is time consuming, overly legalistic and costly; and
- The enforcement provisions in the Act are insufficient both in terms of regulation and the level of punitive damages, particularly when compared to similar jurisdictions such as occupational health and safety and consumer protection legislation.

We wish to emphasise our view that these broad reform areas must be addressed if we are to genuinely strive to improve the efficacy of the Act to eliminate discrimination and promote gender equality.

The ACTU congratulates the Senate Committee on Legal and Constitutional Affairs on the recommendations contained in its report which substantially addressed the critical reform aspects identified above.

The ACTU also supports the proposed Amendments to the *Sex Discrimination Act 1984* outlined in the Sex and Age Discrimination Legislation Amendment Bill 2010.

However, we note that the majority of the recommendations made by the Senate Committee on Legal and Constitutional Affairs have been referred to the Attorney-General's and Department of Finance and De-regulation, for consideration as part of a project to consolidate and harmonise anti-discrimination legislation.

The project aims to 'remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly.' We have concerns about the capacity of this process to adequately deal with the Senate Committee's recommendations which go to substantial reform of the legislation. We seek assurance that the recommendations of the Senate Committee, so critical to the improvement of the efficacy of the legislation, are dealt with appropriate attention and consideration.

To that end, in addition to commenting on the Amendments proposed by the Bill, the ACTU submission has taken the opportunity to also briefly re-cap the key reform areas represented by the Senate Committee's recommendations which have not been addressed by the Bill, but have been referred to the harmonisation project for consideration.

We hope that in doing so, the opportunity to make meaningful improvements to the operation of the *Sex Discrimination Act*, and the equal opportunity framework in which it operates, remains firmly on the reform agenda.

## 2. Comments on the Amendments proposed by the Bill

### ***Extended protection against discrimination on the grounds of family or caring responsibilities***

We welcome the changes proposed in the Bill to extend the ground of discrimination to include family responsibilities.

The extension of this ground of discrimination aligns the *Sex Discrimination Act* with the General Protections provisions of the *Fair Work Act 2009*, which provide that an employer must not take adverse action against an employee on account of family or carer's responsibilities.<sup>2</sup>

We note, however, that the Bill proposes a more limited ground of 'family responsibilities' than the *Fair Work Act* and various state anti-discrimination legislation which protects those with '*family or caring responsibilities*.'

The *Sex Discrimination Act*, defines 'family responsibilities' as responsibilities of the employee to care for or support (a) a dependent child of the employee, or (b) any other immediate family member who is in need of care and support. "Immediate family member" includes (a) a spouse of the employee, and (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee.

The ACTU supports the adoption of the broader ground of '*family or caring responsibilities*' to protect against discrimination of a broader range of caring responsibilities, such as care for kin and extended family members by Indigenous workers for example.<sup>3</sup>

We also note that the proposed extension of the family responsibilities ground to indirect discrimination continues to be subject to the reasonableness test. We call on the Government ensure, in line with the Senate Committee's **Recommendation 6**, the reasonableness test be replaced with a test that the condition, requirement or practice be legitimate and proportionate.

### ***New protection against discrimination on the grounds of breastfeeding***

We welcome the amendments specifying breastfeeding as a separate and distinct ground of discrimination. We also support the removal of the requirement that the

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<sup>2</sup> Section 351, *Fair Work Act 2009*. This section does not apply, however, in circumstances where the action is 'not unlawful under any federal or state anti-discrimination law in force in the place where the action is taken.' Amending the *Sex Discrimination Act* (and relevant State Anti-discrimination legislation) to include the ground of 'family or caring responsibilities' would ensure the federal Act does not undermine the *Fair Work Act* protections.

<sup>3</sup> The Victorian *Equal Opportunity Act 2010* for example, defines 'carer' as 'a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly on a commercial basis.'

discriminatory action be taken for the sole or dominant reason that a woman is breastfeeding or expressing milk.

### ***Amendments relating to sexual harassment***

We are pleased to see the Bill's proposed amendments to the sexual harassment provisions.

Widening the definition of sexual harassment to ensure that harassment occurs if a reasonable person would anticipate the *possibility* that the person harassed would be offended, humiliated or intimidated by the conduct will assist in more claims meeting the statutory test.

We also support the inclusion of criteria in the Bill outlining the matters to be considered in assessing the possibility a person will be offended, humiliated or intimidated by the conduct.<sup>4</sup>

In addition, we strongly support the amendments providing greater protection to workers being sexually harassed by customers, clients and other persons they come into contact with in the course of their employment. Workers should be entitled to the same protection from sexual harassment as their customers and clients.

### ***Amendments relating to age discrimination***

The ACTU welcomes the additional resource of a separate Age Discrimination Commissioner to the Australian Human Rights Commission. This amendment recognises the anti-discrimination implications of a growing aged population.

### **3. Consideration of Recommendations arising from the Pay Equity Inquiry and the Review of the Equal Employment Opportunity for Women in the Workplace Act and Agency (EOWWA)**

As mentioned earlier, the ACTU has made detailed submissions to these Inquiries. The Government response to the recommendations arising from these inquiries is pending. In some circumstances the recommendations directly propose amendments to the *Sex Discrimination Act*. Other recommendations, should they be adopted, would have an effect on the operation of the Act within the broader anti-discrimination and equal opportunity framework. It would be preferable that the government response to any recommendations which seek to amend the Act, or which relate to operation of Act, be addressed before the consolidation and harmonisation process.

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<sup>4</sup> Amended s.28A, *Sex and Age Discrimination Legislation Amendment Bill 2010*

#### **4. Matters referred to the Harmonisation and Consolidation Project**

The Attorney-General's and the Department of Finance & Deregulation's consolidation process will address some 85% of the recommendations made by the Senate Committee.

As a general comment on the referral of these recommendations to the harmonisation and consolidation project, the ACTU recognises that the government and business are concerned to eliminate duplication of regulation.

Our approach to harmonisation of laws generally has been to argue that harmonisation should not undermine existing rights enjoyed under relevant State or Federal Acts.

In considering harmonisation of anti-discrimination law, the process should be directed to an overall lifting of anti-discrimination standards – standards expected by the community – not a series of trade-offs or, worse, a lowest common denominator approach.

Our overriding concern is that the referral of the law reform process to a 'harmonisation and conciliation' process does not serve to merely decrease regulatory burdens, but to ensure the stated objectives of the initial Inquiry to build on the Sex Discrimination Act's capacity to promote equality is achieved.

We urge the Government to adopt the Senate Committee's recommendations which build on the Act's capacity to achieve gender equality, including:

1. Recognising international obligations;
2. Increasing the scope and coverage of the Act;
3. Removing burden of proof hurdles for claimants;
4. Introducing a positive obligation to accommodate family and carer responsibilities;
5. Addressing systemic discrimination;
6. Extending investigatory and inquiry powers;
7. Increasing advocacy support and representation of complainants;
8. Improving prevention, regulation and effective enforcement provisions;
9. Enhanced community education and awareness;
10. Creating better synergy between anti-discrimination and equal opportunity legislation;
11. Monitoring progress towards gender equality; and

12. Introducing a positive obligation to eliminate discrimination, harassment and victimisation.

### ***Recognising international obligations***

The ACTU is supportive of the Senate Committee's **Recommendations 2 and 3**, to refer to and insert an express requirement that the Act be interpreted in accordance with the international conventions that Australia has ratified which create obligations in relation to gender equality.

The ACTU is of the view that obligations created by Australia's ratification of international conventions ought to be explicitly reflected in legislation. Obligations that flow from the ratification of relevant international instruments should be clearly expressed in the *Sex Discrimination Act* as in all anti-discrimination legislation.

We are pleased to note the Government's acceptance of **Recommendation 7** to ensure that the Act provides equal coverage to men and women.

### ***Increasing the scope and coverage of the Act***

#### ***Definition of marital status***

The ACTU supports **Recommendation 4** that the definition and other references in the Act to marital status be replaced with 'marital or relationship status'.

The ACTU considers that broadening the definition of marital status will provide protection against discrimination across a range of modern relationships.

#### ***Definitions of direct and indirect discrimination***

The ACTU is supportive of **Recommendation 5** to amend the definitions of direct and indirect discrimination to remove the comparator test and replace it with a test relating to unfavorable treatment on account of a prescribed attribute or imposing a condition that has the effect of disadvantaging people with a prescribed attribute.

The current definition of direct discrimination requiring a direct comparison with a male comparator is problematic where there is no evidence available of a male in the same or similar circumstances.<sup>5</sup>

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<sup>5</sup> See *Commonwealth v Evans* [2004] FCA 654, where a case failed on the basis that there was no evidence available of a male comparator who took similar amounts of leave to care for dependents; and *Kelly v TPG Internet Pty Ltd* 2003 176 FLR 214, where it was held that the complainant was not discriminated against when her employer denied her part-time work upon return from parental leave because there was no evidence of other employees in managerial positions employed part-time by the respondent.

The ACTU supports **Recommendation 6** that the ‘reasonableness’ test for indirect discrimination, be altered so that the test is whether the ‘condition, practice or requirement is legitimate or proportionate’.

Should the ‘reasonableness’ test be retained, as a minimum, the Act should clarify the elements of the test for determining the ‘reasonableness’ of a condition, requirement or practice. The test should require an employer to establish that they gave proper consideration to alternatives appropriate to the individual’s circumstances and had a high degree of business necessity in deciding to impose the condition, requirement or practice.<sup>6</sup>

Removing the reasonableness test will bring the Act further in line with the General Protections provisions of the *Fair Work Act* which provides that an employer must not take adverse action, or threaten to take adverse action, against a person who is an employee, or prospective employee, on various discriminatory grounds.<sup>7</sup> Adverse action is defined widely and does not require a comparator to establish discrimination.

#### *Extended protection against sex discrimination and sexual harassment*

The ACTU supports the extension of a general prohibition against sex discrimination and sexual harassment in areas of public life in accordance with **Recommendations 8 and 9**. We support in general terms, legislative change that achieves greater protection for individuals from adverse treatment. Further, widening the areas of life protected from gender based discrimination will assist to combat systemic discrimination.

#### *Extended protection for volunteers, independent contractors and partnerships*

We support the extension and clarification of the coverage of the Act to volunteers, independent contractors and partnerships irrespective of size, in accordance with **Recommendation 10**. It is the ACTU’s firm view that all persons in employment and work related environments be protected from discrimination of all forms, regardless of the form of their employment or the size of the enterprise in which they are employed.

#### *Extended protection of State Government employees*

We support **Recommendation 11** to extend the coverage of the *Sex Discrimination Act* to bind states and state instrumentalities to the Act, ensuring all persons in work have recourse to the Commonwealth Act. We note that the *Sex Discrimination Act* is the only federal anti-discrimination Act not to bind states and state instrumentalities.

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<sup>6</sup> For example, see cl.16 of the *Victorian Equal Opportunity Act 2010*.

<sup>7</sup> Chapter 3, Part 3-1, Division 5 of the *Fair Work Act*, at sections 351 and 342(2),



## Removing burden of proof hurdles for claimants

The ACTU supports **Recommendation 23** for a reversal of the onus of proof where the applicant has proven facts which, in the absence of an adequate explanation, the court could conclude the respondent discriminated against the complainant. The reverse onus of proof affords greater protection to complainants who often experience difficulty in accessing evidentiary proof of an otherwise worthy claim. The reverse onus would be consistent with the *Fair Work Act* which presumes that the discriminatory action was taken for discriminatory reasons or intent, unless the defendant proves otherwise.<sup>8</sup>

## A positive duty on employers to accommodate family or carer responsibilities

The ACTU strongly supports **Recommendation 14** to impose a positive obligation on employers to reasonably accommodate requests by employees for flexible work arrangements to accommodate family or carer responsibilities.

We support the model used in the Victorian *Equal Opportunity Act 2010* which places an obligation on an employer, in relation to an employee, not to 'unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer' and which provides guidance to parties as to the 'reasonableness' of a refusal.<sup>9</sup>

Unlike Victorian *Equal Opportunity Act*, the National Employment Standards, contained within the *Fair Work Act 2009*, do not create a positive duty on employers to accommodate requests by an employee for flexible working arrangements to accommodate family or carer's responsibilities.

The right to request flexible work arrangements under the *Fair Work Act* does not the employer to demonstrate they have given proper consideration to an employee's request. Employers are merely required to state the reasons for their refusal of a request in writing. The refusal must be on reasonable business grounds which are not defined and employees are denied the right to appeal an employer's unreasonable.

Nor is there any mechanism which ensures systematic collection of information as employers are not required to inform Fair Work Australia of employees' requests for flexible working arrangements, the outcome of those requests or the grounds on which those requests were refused.

Despite the requirement that Fair Work Australia conduct research and report on the operation of the right to request flexible arrangements provision, the ACTU holds grave concerns about the statistical validity of data which is not collected in a systematic fashion. Indeed, our anecdotal evidence suggests that many vulnerable

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<sup>8</sup> Section 361 *Fair Work Act 2009*

<sup>9</sup> Clause 17, *Victorian Equal Opportunity Act 2010*.

employees with family and caring responsibilities are experiencing unreasonable refusals of their request and are unable to appeal their employer's refusal.<sup>10</sup>

The inclusion of a positive duty on employers to properly consider an employee's request for flexible work arrangements in the *Sex Discrimination Act* would provide meaningful protection and recourse against discrimination for employee's with family and caring responsibilities.

### **Addressing systemic discrimination**

The *Sex Discrimination Act* is significantly limited in its ability to address systemic discrimination using the individual complaint based model that seeks to compensate an aggrieved person without addressing the underlying causes of discrimination.

For the Act to effectively address substantive inequality between men and women, a framework to address systemic discrimination is required which actively uncovers discrimination and assists organisations and individuals to eliminate discrimination.

The ACTU supports **Recommendations 29 and 37** that the Act be amended to the expand the AHRC's powers to initiate investigations and conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality.

The amendment should empower the AHRC to identify systemic discrimination and address the underlying causes of discriminatory practices experienced by individual complainants.<sup>11</sup>

The ACTU supports **Recommendation 38** to amend the Act to give the AHRC powers to initiate own motion proceedings including in the Federal Court and Federal Magistrates Court.

A more proactive public advocacy role is required to effectively deal with systemic discrimination. It is beyond the capacity of most individuals to identify systemic discrimination let alone find the resources to follow through a group complaint.

The Act should provide a capacity for regulatory agencies to initiate own motion proceedings where it is in the public interest and there is concern that discrimination is occurring or is likely to occur. The agency should be able to initiate an own motion

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<sup>10</sup> The *Fair Work Act* specifically denies employees the right to appeal an employer's unreasonable refusal of a request to change working arrangements or extend unpaid parental leave. Employees may only access appeal rights if they have been able to bargain with their employer to include them in the workplace agreement. This is a pyrrhic right, as it is well known that the greatest users of these right to request provisions are women with young children, who are also the group of employees with the least bargaining power.

<sup>11</sup> For example, an analysis of 2004 complaints to VEOHRC found that the retail industry was an important source of sex discrimination complaints: Sara Charlesworth Submission to the Victorian Equal Opportunity Review, 2007

proceeding on behalf of a group or class of complainants irrespective of whether a complaint has been lodged.<sup>12</sup>

The Act should empower the Sex Discrimination Commissioner to intervene in any proceeding in order to promote the objects of the Act. The ACTU supports **Recommendations 31 and 32** relating to AHRC's existing *amicus curiae* powers.

In addition, we recommend the Government adopt the recommendations of the House of Representatives Committee on Employment and Workplace Relations *Making it Fair* Report in relation the Sex *Discrimination Act*. In particular, we draw the Government's attention to the following recommendations:

*Recommendation 19: That the Sex Discrimination Act 1984 be amended to enable the Sex Discrimination Commissioner to commence self initiated complaints for alleged breaches of the Sex Discrimination Act, without requiring individual complaint...*

*and*

*Recommendation 20: That the Sex Discrimination Act 1984 be amended to enable the Australian Human Rights Commission to commence legal action in the Federal Magistrates Court for a breach of the Sex Discrimination Act.*

We note that the Government has not yet responded to these Recommendations.

### **Support and representation of complainants**

Complainants of sex discrimination are likely to be members of disempowered groups. Expecting them alone to identify discrimination, prosecute claims and enforce outcomes without any public assistance is a fundamental flaw in the current anti-discrimination legislative scheme.

The AHRC should be able to take representative actions, including the capacity to stand in the shoes of a complainant or group of complainants where this is appropriate.

The ACTU supports **Recommendation 20** to amend the Act to provide public interest organisations and trade unions standing to commence legal proceedings on behalf of one or more persons aggrieved by unlawful discrimination.

Public interest organisations and trade unions should be able to pursue representative actions on behalf of vulnerable, disadvantaged people, or groups of people, with limited resources.

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<sup>12</sup> As is the case in Queensland for example where the Commissioner has the power to initiate an investigation into contravention of or possible offence against the Act- s.155

Public interest and trade union organisations are well placed to identify systemic discrimination and pursue class actions as an effective and efficient remedy.

### **Prevention, regulation and effective enforcement**

The *Sex Discrimination Act* remains limited in its ability to address discrimination because the individual complaint based model compensates a victim without necessarily effecting seeking to prevent further discrimination through cultural change or addressing the underlying causes of discrimination.

The ACTU supports **Recommendation 23** to include corrective and preventative orders in the enumerated remedies for discrimination in the AHRC Act and **Recommendation 39** to expand the powers of the AHRC to include the promulgation of legally binding standards under the Act.

For regulation to be most effective there needs to be a full range of powers including the 'pyramid' of self-regulation, enforceable regulations, and punitive sanctions. The Act is deficient in the middle tier of enforceable regulations and in the top tier of punitive sanctions.

The ACTU supports the use of *enforceable undertakings, improvement or unlawful action notices*, to act as corrective and preventative measures, assisting to avoid further costly legal proceedings and allowing for genuine engagement and cultural shift with the person or organisation breaching the Act.

We urge the Government to adopt *Recommendation 19* of the Making It Fair Report that 'the Sex Discrimination Act 1984 be amended to provide the Sex Discrimination Commissioner with powers to enter negotiations, reach settlements, agree enforceable undertakings and issue compliance notices.

Similarly, without adequate punitive mechanisms, the self-regulatory and enforceable regulatory levels of the legislation lack a crucial incentive for organisations to eliminate discrimination.

Punitive mechanisms under the *Sex Discrimination Act* compare unfavourably to similar schemes including anti-discrimination schemes in the US and UK.<sup>13</sup> Larger sums of damages generate significant publicity of sex discrimination cases and the concomitant threat of exposure of the identity of defendants serves as a critical preventative role in encouraging organisations to address discrimination issues.

In contrast, our *Sex Discrimination Act* provides for a very low level of damages inconsistent with modern social expectations. The level of damages should be

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<sup>13</sup> Compared to for example the US the limit is set at \$300,000 for punitive and \$300,000 for compensatory damages. In Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21<sup>st</sup> century" University of Sydney, June 2005, p.16

benchmarked equivalently to other common law amounts such as occupational health and safety and consumer protection jurisdictions in Australia.<sup>14</sup>

In addition, there must be a stronger role for public agencies in enforcing compliance with the Act. The practice of relying on victims to enforce orders is essentially self regulation and is an unacceptable feature of the current anti-discrimination law<sup>15</sup> which in part does not deal effectively with intransigent repeat defendants.

The Act should be amended to provide the AHRC with the right to prosecute and enforce cases comparable to the powers of similar regulatory schemes in Australia such as occupational health and safety, and consumer and competition law and with similar anti-discrimination schemes in the UK and the US where regulatory agencies have the power to initiate claims and publicly prosecute them and to enforce judgments and settle them.<sup>16</sup>

### **Education and community awareness**

The ACTU supports **Recommendation 34** that the AHRC be provided with additional resources to carry out an initial public awareness campaign and to perform the additional roles and broader functions under the Act.

These powers should include issuing best practice strategies, compliance guidelines, and capacity to monitor the effectiveness of the Act in eliminating discrimination.

Evidence suggests that the AHRC's role in promoting an understanding of discrimination, articulating the merits of non-discrimination and disseminating best practice strategies and compliance guidelines have been successful tools in addressing discrimination.<sup>17</sup>

The SDA should be amended to require the Sex Discrimination Commissioner to publish, or otherwise make available, a public register of (de-identified) settlements reached in conciliation. This could be done through a public report or through the AHRC's annual report to Parliament.

### **Synergy between anti-discrimination and equal opportunity legislation**

The ACTU supports **Recommendation 41** that further consideration be given to the relationship between the *Sex Discrimination Act* and the *Equal Employment Opportunity for Women in the Workplace Act 1999* (EEOA) Act.

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<sup>14</sup> For example, breaches of the TPA can attract penalties of up to \$10m for organisations and up to \$750,000 for individuals.

<sup>15</sup> The AHRC does not have the power to enforce judgments or settlement agreements that have been made.

<sup>16</sup> Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21<sup>st</sup> century" University of Sydney, June 2005 P.14

<sup>17</sup> See Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21<sup>st</sup> century" University of Sydney, June 2005, pp.19-27

The legislative history of the *EEOW Act* and the *Sex Discrimination Act* resulted in separate passage and operation of two distinct Acts. The splitting of the two pieces of legislation has resulted in a significant lack of coordination between preventative measures and sanctions for breaches of the *Sex Discrimination Act*. This has severely undermined any capacity for linking affirmative action measures as a means of addressing sex discrimination.

To address systemic inequality, the anti-discrimination legislation needs to do more than prohibit discriminatory behaviour. It needs to encourage organisations to develop policies and practices that address the causes of inequality by operating within a complementary and effective holistic equal opportunity framework.

The terms of reference for the consolidation project should extend to the harmonisation of the EOWW Act with the anti-discrimination legislation.

### **Monitoring progress towards gender equality**

ACTU supports **Recommendation 33** that the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality and to report to Parliament every four years.

The AHRC's monitoring of discrimination inquiries and complaints must be extended to include de-identified details of confidential settlements, with capacity for further investigation into a particular employer, sector or group of people where it is deemed appropriate.<sup>18</sup>

Monitoring should include the capacity to identify repeat offenders problem employers. The AHRC should have the capacity to follow up such employers to enforce further recommendations for change.

Indicators or benchmarks against which the extent of discrimination and the progress towards equality can be measured should be conducted by the AHRC on a regular basis and generate a review of the effectiveness of the anti-discrimination system.<sup>19</sup>

### **Introducing a positive obligation to eliminate discrimination**

ACTU supports **Recommendation 40** to amend the Act to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.

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<sup>18</sup> For example, an analysis of 2004 complaints to VEOHRC found that the retail industry was an important source of sex discrimination complaints: Sara Charlesworth Submission to the Victorian Equal Opportunity Review, 2007

<sup>19</sup> For example, gender statistics provided by the United Nations Economic Commission for Europe on Work and the Economy and the Gender and Work database at York University in Canada. Also the WA Office of Women's policy keeps a modest score card against indicators such as representation of women in public life, labour force participation, health and well being of women in senior positions and so on.

The Act currently does not require any positive duty to eliminate discrimination. The addition of the obligation would help encourage a shift from a complaints driven model to a shared responsibility for the elimination of discrimination. This shared model applies in other areas where the law seeks to promote changed work practices and workplace behaviour, such as occupational health and safety, consumer protection and has most recently been adopted in the Victorian *Equal Opportunity Act 2010*.

A positive approach should include the restatement of the objective of the Act as achieving substantive equality between men and women and the introduction of a general obligation to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.<sup>20</sup>

The ACTU supports **Recommendation 43** to examine the merits of integrating all federal anti-discrimination legislation including those dealing with age, race and disability discrimination and the EEO legislation as a general 'Equality Act'.

Integrating the various Acts properly into a single 'Equality Act' would facilitate a simple, comprehensive anti-discrimination and equal opportunity scheme which would be able to address intersecting forms of discrimination.

The critical factor to improving the efficacy of the anti-discrimination and EEO framework, however, is not the consolidation or harmonisation of the legislation. The critical reform of the Act remains the adoption of the Senate Committee's substantive recommendations which go to improving the capacity of the Act to address discrimination on a preventative, remedial and systemic level as outlined in this submission.

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<sup>20</sup> This wording reflects cl.15 of the *Victorian Equal Opportunity Act 2010*.