

**SUBMISSION TO THE
INQUIRY INTO THE *SEX AND AGE DISCRIMINATION AMENDMENT BILL 2010 (BILL)* –
submissions relating to the *Sex Discrimination Act 1984***

Introduction

We make this submission as legal practitioners who have significant experience working with discrimination law over many years. Our work is primarily in the context of employment and other work situations, but we also work with discrimination law in the context of other prescribed areas of activity, including education and the provision of goods and services.

Our submission follows the structure set out by the Attorney General in his Second Reading Speech, where he identified the four key aspects of the proposed amendments to be made by the Bill to the *Sex Discrimination Act 1984 (SDA)*. The Attorney General identified those key amendments as being:

- 1 Ensuring the Act provides equal protection to men and women.
- 2 Broadening the prohibition on discrimination on the ground of family responsibilities.
- 3 Establishing breastfeeding as a separate ground of discrimination.
- 4 Strengthening the protection against sexual harassment in workplaces and schools.

As a preliminary comment, we note that significant complication and sometimes confusion is created by the existence in the federal jurisdiction of separate Acts dealing with discrimination on the grounds of race, sex, disability and age. We welcomed the announcement made by the Attorney General along with the Minister for Finance and Deregulation on 21 April 2010 of 'the Government's intention to streamline federal anti-discrimination legislation into one single comprehensive law', and we endorse the recommendation made in the Senate Committee Report that this proposal be progressed¹. With this in mind as an ultimate policy goal, some of our recommendations set out below would be equally applicable to that comprehensive law when it is made.

1. PROVIDING EQUAL PROTECTION TO MEN AND WOMEN

- 1.1 We welcome the proposal to broaden the constitutional foundations of the SDA by, amongst other things, broadening the international instruments which the SDA seeks to implement. This of course has the effect of providing better protection for men as well as women.
- 1.2 We submit that the intention to create equal protection for men and women will be incomplete unless the SDA is also amended to include a prohibition on discrimination against a person on the ground that the person's 'associate' is pregnant, is breastfeeding or has family responsibilities.
- 1.3 The inclusion of the 'associate' concept – which would be consistent with, for example, section 7 of the *Disability Discrimination Act 1992 (Cth)* – would allow a complaint to be lodged by individuals including:
 - (a) a man whose partner is pregnant – who might be discriminated against by an employer who assumes that the birth of the expected child will interfere with the man's commitment to work

¹ *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Standing Committee on Legal and Constitutional Affairs, 12 December 2008: Recommendation 111.

- (b) a man whose partner is breastfeeding – who might be discriminated against by an employer who assumes that this will impose new family responsibilities on the man, and
-
- (c) a person of either gender whose partner has family responsibilities (whether to care for children, or for an aged relative or someone with a disability) – who might be discriminated against by an employer who:
- (i) assumes that the employee will ultimately take on some of those responsibilities, or
 - (ii) assumes that the family responsibilities of the partner will interfere with that partner's ability to provide support for the employee.

2. **DISCRIMINATION ON THE GROUND OF FAMILY RESPONSIBILITIES**

- 2.1 We submit that the Bill offers an ideal opportunity for the Government to achieve greater consistency between the protections offered to employees, and the responsibilities of employers, under both the SDA and the *Fair Work Act 2009* (Cth) (**FWA**). As the Committee will be aware, Part 2-2 of the FWA creates a right for employees to request flexible working arrangements (see Division 4), a right to request extended parental leave (see Division 5), and an entitlement to carer's leave (see Division 7). Division 5 of Part 3-1 of the FWA also offers protection against discrimination on the grounds of family or carer's responsibilities.
- 2.2 We consider that it would be of practical assistance to both employers and employees – who also need to work within the framework of the FWA – for the SDA to clarify the circumstances in which it requires an employer to modify working arrangements to accommodate the needs of an employee with family responsibilities. The proposed provisions will not do this. By contrast, such guidance has been given in section 14A of the *Equal Opportunity Act 1995* (Vic), which imposes an obligation on an employer to reasonably accommodate alternative flexible working arrangements. Section 14A also specifies the considerations which are to apply in determining when it is reasonable for an employer to do so. This approach was recommended by the Senate Committee Report². The inclusion of a similar provision in the SDA would complement existing FWA arrangements concerning requests for flexible working arrangements. Noting the ultimate aim of creating a unified federal system, this would also have the effect in the interim of creating greater consistency between the different pieces of federal discrimination legislation – given that a similar obligation exists in section 5(2) of the *Disability Discrimination Act 1992* (Cth).
- 2.3 We also note that there appears to be an error in the drafting of section 4A(1) of the SDA, which will not be corrected by the Bill as currently proposed. This section, in defining 'family responsibilities', first refers to an obligation to 'care for **or** support', and then immediately refers to a family member being in need of 'care **and** support' (emphasis added). We suggest that this inconsistency was unintended, and submit that the inconsistency should be corrected through the mechanism of the Bill. Correction would also align the SDA more closely with the FWA.

3. **BREASTFEEDING AS A SEPARATE GROUND OF DISCRIMINATION**

- 3.1 We support the proposal that breastfeeding being included as a separate ground.
- 3.2 In our experience, it has been confusing for employers and employees to need to rely

² *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Standing Committee on Legal and Constitutional Affairs, 12 December 2008: Recommendation 14.

on the concept of 'characteristics appertaining' to particular groups in order to identify a prohibited form of discrimination. The inclusion of breastfeeding as a ground in its own right will avoid this confusion.

4. SEXUAL HARASSMENT

Definition of 'sexual harassment'

- 4.1 We submit that the proposed insertion of the word 'possibility' in the definition of sexual harassment, while properly being intended to strengthen the protection against sexual harassment, goes too far. In our submission, if it is sufficient that there be the 'possibility' that the person would be 'offended, humiliated or intimidated', then there will be unlawful sexual harassment whenever there is 'unwelcome conduct of a sexual nature'. This is so because a 'reasonable person' will appreciate that there is always the possibility that a person will be offended (etc) by such conduct.

Sexual harassment in schools

- 4.2 Based on our experience working with schools and other educational institutions, we appreciate the proposal to extend the range of possible victims of sexual harassment in educational institutions to students who are not 'adult' (ie: to children under the age of 16). We know from experience that children can be and often are the victims of sexual harassment at school.
- 4.3 However, the extension of the concept raises the issue of schools' responsibilities in respect of sexual harassment by students. While existing child protection laws recognise sexually predatory or intimidatory behaviour amongst children, they primarily require schools to report the matter to relevant authorities (for example, in New South Wales, to the Department of Community Services). The matter is (in our submission appropriately so) seen by those laws as one suitable for welfare-type intervention. By making sexual harassment by students also a matter that can found a complaint of unlawful discrimination, the possibility of litigation between children and families arises, as does the issue of a school's potential liability and thus litigation between families and schools. While we recognise that there is already some risk of litigation arising from the laws of negligence, the proposed change significantly widens the scope of potential claims. This is a very serious matter for schools and their communities.
- 4.4 The SDA is currently not entirely clear about the obligations of schools to protect their students from sexual harassment; and the Bill in its current form does not seek to change that situation. Section 106 of the SDA, which creates vicarious liability for schools as employers, does not apply to schools as education providers. However, section 105, which imposes liability on anyone who (amongst other things) 'permits' unlawful conduct to occur, potentially does apply.
- 4.5 In our submission, the proposed extension of the definition of sexual harassment by students, while it recognises a problem in schools that must be addressed, ignores the fact that there is another (and in our submission more appropriate) legal framework in which it can and should be addressed: the framework of child protection legislation. We submit that the potential for widespread litigation in school communities that would be created by the proposed change is undesirable.
- 4.6 However, if it is determined that the proposed change will be made, then we submit that at the same time the potential liability of schools when students harass one another should be clearly defined and limited.

We hope that our submissions are of assistance to the Committee. Please direct any questions to either of the writers.

27 October 2010

Jacquie Seemann
Partner

Paul Ronfeldt
Partner