



public interest
ADVOCACY CENTRE LTD

**The Other Side of the Story:
Extending the protections of the Sex
Discrimination Act 1984 (Cth)**

**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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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on equality and anti-discrimination laws

PIAC has a long history of involvement with the operation of human rights and anti-discrimination law in Australia. This has included conducting test case litigation under both federal and NSW anti-discrimination statutes, proposing amendments to both substantive and procedural aspects of anti-discrimination laws and responding to proposals for reform to existing anti-discrimination legislation. In 2009, PIAC undertook extensive community consultation as part of the National Human Rights Consultation and made a submission supporting enhanced protections against discrimination and the adoption of a Human Rights Act to provide greater protection for human rights in Australia.

The current inquiry

PIAC commends the Federal Government on progressing implementation of the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs from its *Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality* (**Senate SDA Inquiry**).¹ In 2008, PIAC contributed to the joint National Association of Community Legal Centres, Combined Community Legal Centres Group (NSW), Kingsford Legal Centre submission to the Senate SDA Inquiry. PIAC welcomes the

¹ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality* (2008).

opportunity to provide this submission to the current Senate inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth) (**the Bill**).

General comments

PIAC welcomes the principal provisions of the Bill in extending protection from discrimination and sexual harassment. PIAC commends the following aspects of the Bill to the Senate Legal and Constitutional Affairs Committee:

- including breastfeeding as a separate ground of discrimination;
- extending the protection of discrimination on the ground of family responsibilities to indirect discrimination;
- extending the protection of discrimination on the ground of family responsibilities to all areas of work;
- amending the test of sexual harassment to refer to the “possibility” that a person would be offended, humiliated or intimidated;
- providing for the relevant circumstances that must be considered in relation to sexual harassment claims;
- extending protection from sexual harassment to school students under the age of 16;
- extending protection from sexual harassment to harassment from staff and adult students from other educational institutions;
- extending protection from sexual harassment to ensure harassment from customers and clients is covered; and
- the establishment of a dedicated Age Discrimination Commissioner.

Scope of the Bill and consolidation of federal anti-discrimination legislation

PIAC notes that the Federal Government intends to respond to many of the recommendations made by the Senate SDA Inquiry as part of the proposed consolidation of federal anti-discrimination legislation. In part, this explains the limited scope of the Bill in proposing recommendations to the *Sex Discrimination Act 1984* (Cth) (**Sex Discrimination Act**). PIAC acknowledges that many of the recommendations of the Senate SDA Inquiry address broader issues that are not confined to the Sex Discrimination Act, for example, recommendations that address the powers of the Australian Human Rights Commission. PIAC agrees that some of these broader recommendations are more appropriately addressed as part of the consolidation process.

PIAC welcomes the proposal to consolidate federal anti-discrimination legislation and supports a federal Equality Act. A review of federal anti-discrimination legislation provides an opportunity to address systemic issues with Australia’s discrimination protection, for example the cost barriers in pursuing discrimination complaints in the Federal Court and Federal Magistrates Court. Also, the consolidation process presents a good opportunity to ensure that current gaps in discrimination protection, in particular discrimination on the basis of sexual orientation and sex and/or gender identity, are provided with federal legislative protection in line with Australia’s international obligations and state and territory anti-discrimination legislation. Importantly, an Equality Act should address the issue of intersectional discrimination, which the current separate federal discrimination acts do not adequately recognise.

PIAC submits that the consolidation of federal anti-discrimination legislation should be the subject of community and public consultation. The 2009 National Human Rights Consultation Committee addressed the question of consolidating Australia’s anti-discrimination laws in its report.² However, further consideration and

² See Brennan F et al, *National Human Rights Consultation Report* (2009), Recommendation 4, xxx, 157-158 <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads#pdf> at 25 October 2010.

consultation are needed to consider the procedural, definitional and structural issues arising from the consolidation of federal anti-discrimination laws. PIAC looks forward to participating further in the consolidation process.

Given the above, the comments in this submission are confined to amendments to the Sex Discrimination Act that are not more appropriately dealt with as part of the broader consolidation process. However, PIAC believes that some of the recommendations of the Senate SDA Inquiry could be adopted in this Bill and that its scope is unnecessarily limited. The remainder of this submission focuses on these issues in relation to the Sex Discrimination Act.

Schedule 1 – Amendments relating to sex discrimination

Extending protection to same-sex couples

PIAC is disappointed that the Bill does not extend protection from discrimination on the basis of relationship status to same-sex couples. The Sex Discrimination Act provides incomplete discrimination protection for same-sex couples. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* amended section 4A of the Sex Discrimination Act to extend protection from discrimination on the basis of family responsibilities to same-sex couples. PIAC welcomes this and other changes at a federal level that removed discrimination against same-sex couples. However, same-sex couples remain unprotected from discrimination on the basis of marital status in the Sex Discrimination Act.

Section 6 of the Sex Discrimination Act protects discrimination on the ground of marital status. ‘Marital status’ is defined in section 4, as the status or condition of being:

- (a) single;
- (b) married;
- (c) married but living separately and apart from one’s spouse;
- (d) divorced;
- (e) widowed; or
- (f) the de facto spouse of another person.

The term “de facto spouse” is in turn defined in section 4 as:

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 of that person on a bona fide domestic basis although not legally married to that person [emphasis added]

The effect of these definitions is that protection from discrimination on the basis of marital status is limited to opposite-sex couples only.

The Senate SDA Inquiry recommended that the Sex Discrimination Act be amended to replace references to ‘marital status’ with ‘marital or relationship status’.³ It also recommended that the definition of marital status, in section 4 of the Sex Discrimination Act, be replaced with a definition of ‘marital or relationship status’ and to include being the same sex partner of another person. PIAC supports these recommendations, as they would

³ Recommendation 4.

ensure that same-sex couples are afforded the same protection as opposite-sex couples from discrimination on the basis of marital status.

The Federal Government, in its response to this recommendation of the Senate SDA Inquiry, stated that such a change might impact on the private sector and on State and Territory laws relating to adoption and artificial conception. The Federal Government stated that this recommendation would be considered further in consultation with key stakeholders. Same-sex couples and opposite sex-couples should have equal access to conception services and adoption. The NSW Parliament recently passed the *Adoption Amendment (Same Sex Couples) Act 2010* (NSW) to allow same-sex couples to adopt children. PIAC welcomes this development as it removes a significant discriminatory barrier against same-sex couples (albeit that the NSW legislation continues to permit differential treatment by certain faith-based organisations). Consistent with the thrust of the recent NSW amendment, PIAC submits that the Sex Discrimination Act should provide equal protection to same-sex and opposite-sex couples from discrimination on the basis of marital status.

PIAC notes its concern that there is currently no federal protection for discrimination on the grounds of sexual orientation and gender identity. This is a significant gap in federal anti-discrimination protection. PIAC acknowledges that the Sex Discrimination Act may not be the most appropriate legislative vehicle to extend protection to these grounds of discrimination. PIAC submits that the consolidation of federal anti-discrimination laws should ensure that protection from discrimination is extended to these grounds.

Recommendation 1 – Same-sex couple protection

PIAC recommends that the Bill be amended to extend protection from discrimination on the basis of marital status to same-sex couples. The definition of 'de facto spouse' in section 4 of the Sex Discrimination Act should be amended in accordance with the definition of 'de facto partner' in section 22A of the Acts Interpretation Act 1901 (Cth).

Family responsibilities

PIAC welcomes the extension of protection from discrimination on the ground of family responsibilities to indirect discrimination. This will make claims by women in relation to flexible working arrangements easier, as previously such claims relied on indirect discrimination on the ground of sex. This is an important development as the reliance on indirect discrimination on the ground of sex in relation to family responsibilities depended on courts making a finding, on the basis of judicial notice, that women are the primary carers of infants and children. This perpetuates the stereotype that women should be responsible for caring for infants and children. The Bill ensures that men are able to claim indirect discrimination in relation to discrimination on the ground of family responsibilities. This is significant because, in order to change societal attitudes towards the role of women as carers, the responsibilities of men in performing carer roles needs to be recognised and afforded legislative protection.

PIAC also welcomes the extension of the protection of discrimination on the ground of family responsibilities to all areas of employment. This is an important amendment as it ensures that women and men are protected from discrimination in relation to offers of employment and throughout the duration of their employment. The amendment also ensures that the protections in the Sex Discrimination Act are consistent with the protection employees are afforded in the *Fair Work Act 2009* (Cth) (**Fair Work Act**) from adverse action on the ground of family responsibility.

Extending to areas beyond employment

However, discrimination on the ground of family responsibilities is not limited to employment. Women, and men, are subject to discrimination on the ground of their family responsibilities in other areas of public life, for example in applying for rental accommodation. PIAC submits that the Bill should be amended so that the protection from discrimination on the ground of family responsibilities is extended to other areas of public life, including education; the provision of goods, services and facilities; and accommodation.

Recommendation 2 – extending protection from discrimination on the ground of family responsibilities

PIAC recommends that the Bill be amended to ensure that the Sex Discrimination Act provides protection from discrimination on the ground of family responsibilities in education, the provision of goods, services and facilities, and accommodation.

Duty on employers to reasonably accommodate requests for flexible work arrangements

PIAC submits that the Bill should include provision for a positive duty on employers, partnerships and principals to reasonably accommodate requests by employees for flexible working arrangements in order to accommodate family responsibilities. The imposition of such a duty would strengthen the protection from discrimination on the ground of family responsibilities and it would ensure that employers are required to take positive steps to consider flexible working arrangements.

The Senate SDA Inquiry recommended that the Sex Discrimination Act be amended to include such a provision.⁴ The recommendation was that such a provision be modelled on section 14A of the *Equal Opportunity Act 1995* (Vic). PIAC supports this recommendation.

In its response to the Senate SDA Inquiry, the Federal Government noted the recommendation and pointed to the provisions in the Fair Work Act and the National Employment Standards that allow employees to request flexible working arrangements. However, the right in the Fair Work Act is limited in important respects. ‘Family responsibilities’ is defined narrowly in the Fair Work Act and the right to request flexible working conditions only applies to employees who are caring for a child under school age, or for a child under the age of 18 who has a disability. In contrast, family responsibilities in the Sex Discrimination Act is defined more broadly and includes caring for a child or immediate family member in need of care or support. The Sex Discrimination Act should be amended to provide the right of male and female employees, who are caring for family members, to request flexible work arrangements.

⁴ Recommendation 14.

Recommendation 3 – duty on employers, principals and partnerships to reasonably accommodate requests by employees for flexible working arrangements in respect of family responsibilities

PIAC recommends that the Bill be amended to include a provision that imposes a positive obligation on employers, principals and partnerships to reasonably accommodate requests by employees for flexible working arrangements in respect of their family responsibilities. The provision should be modelled on section 14A of the Equal Opportunity Act 1995 (Vic).

Extension of protection to volunteers, independent contractors and partnerships

Volunteers and independent contractors

The Senate SDA Inquiry recommended⁵ that the Sex Discrimination Act be amended to extend coverage to volunteers, independent contractors and partnerships regardless of their size. In its evidence to the inquiry, the Human Rights and Equal Opportunity Commission (as it then was) noted the uncertain protection the Sex Discrimination Act affords to contractors and volunteers.⁶ This is because a volunteer or independent contractor may not be regarded as an employee and therefore may not be protected from discrimination or sexual harassment in employment. For example, a student volunteer on work experience may not be protected from sexual harassment under the Sex Discrimination Act.

In its response to the recommendation, the Federal Government noted the differing approaches to coverage of volunteers and independent contractors in the Sex Discrimination Act, *Age Discrimination Act 2004* (Cth) (**Age Discrimination Act**), *Race Discrimination Act 1975* (Cth) (**Race Discrimination Act**) and *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**). Accordingly, the Federal Government stated that the inconsistent coverage in respect of volunteers and independent contractors in the acts will be considered in the consolidation process.

PIAC submits that the issue of coverage for contractors and volunteers should be addressed in this Bill and should not be delayed until the consolidation process. There is no reason in principle or practice why contractors and volunteers should be deprived the right to be protected from discrimination and sexual harassment and the Sex Discrimination Act should be amended to provide such protection.

Partnerships

The Sex Discrimination Act only covers partnerships of six or more people. This limitation of partnerships of six or more people is arbitrary and unnecessary. The limitation should be removed so that partnerships, regardless of their size, are covered by the provisions of the Sex Discrimination Act. The Race Discrimination Act covers partnerships of all sizes and the Disability Discrimination Act covers partnerships of three or more persons. Despite this inconsistency in the scope of coverage of federal anti-discrimination laws, it is appropriate that the Sex Discrimination Act be amended ahead of the consolidation process. The consolidation process should ensure that all federal anti-discrimination laws cover partnerships, regardless of size.

⁵ Recommendation 10.

⁶ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sydney, 9 September 2008, 17 (Brook Hely).

Recommendation 4 – extending coverage to volunteers, independent contractors and partnerships, regardless of size

PIAC submits that the Bill should include provision for extending the coverage of the Sex Discrimination Act to cover volunteers and independent contractors. The Bill should also amend section 17 of the Sex Discrimination Act to cover partnerships, regardless of size.

Removing exemption for voluntary bodies

The Bill proposes to extend the exemption in section 39 of the Sex Discrimination Act to allow voluntary bodies to discriminate on the ground of breastfeeding or family responsibilities. PIAC opposes this change and instead submits that the Bill should repeal the entire exemption for voluntary bodies.

The Senate SDA Inquiry recommended that the exemption in section 39 be removed.⁷ Neither the Disability Discrimination Act nor the Race Discrimination Act provides exemptions for voluntary bodies. The rationale behind the scope of the Sex Discrimination Act is that it regulates aspects of public life. However, voluntary bodies increasingly provide essential community services to members of the public and should therefore be regulated by the Sex Discrimination Act. It is not necessary to wait for the consolidation process to be finalised to address this issue; this Bill should repeal the exemption for voluntary bodies from the Sex Discrimination Act.

Recommendation 5 – remove exemption for voluntary bodies

PIAC submits that the Bill should remove the exemption for voluntary bodies contained in section 39 of the Sex Discrimination Act.

⁷ Recommendation 25.