Australian Government
Attorney-General's Department

16 February 2011

Senator Trish Crossin
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

Thank you for your questions of 15 February 2011 in relation to the Sex and Age Discrimination Legislation Amendment Bill 2010. We welcome the opportunity to respond to the Committee's inquiries.

At the outset, it is important to clarify that the amendments to the *Sex Discrimination Act 1984* (the SDA) in the Bill are primarily intended to implement the accepted recommendations made by the Senate Committee in its 2008 *Inquiry into the effectiveness of the SDA*. As you are aware, the remaining recommendations which have wider implications for the other anti-discrimination Acts were deferred for further consideration as part of the project to consolidate federal anti-discrimination laws into a single Act. Exposure draft legislation for that single Act is due to be released later in 2011.

The recommendations that were accepted by the Government were accepted on the basis they applied only to the SDA.

Consistent with this, the Bill is not designed to address broader questions about the SDA. A number of the submissions to the Committee's inquiry have dealt more with what is *not* contained in the Bill, rather than what is. The Department will consider each of the issues raised in the submissions in the context of consolidation project.

Within that context, your queries and our responses are set out in the attachment.

Yours sincerely

Dr John Boersig PSM
Assistant Secretary
Human Rights Branch

Sex and Age Discrimination Legislation Amendment Bill 2010
Answers to the Senate Committee's questions

1. The Western Australia Department of Premier and Cabinet (Submission 29) is concerned that the amendments proposed by the Bill would result in the provisions of the Sex Discrimination Act conflicting with Regulation 5.63 of the Occupational Safety and Health Regulations 1996 (WA). Regulation 5.63 enables employers to remove pregnant or breastfeeding employees from employment with lead risks to a job that does not have lead risks. As a result, the Department has submitted that regulation 5.63 'may impose an obligation on employers which may be deemed to be discriminatory under proposed section 7AA'.

a. What is the Attorney-General's Department's view on the issue raised by the Western Australia Department of Premier and Cabinet?

b. Would a state law that allows discrimination for the benefit of, for example, breastfeeding mothers, be inconsistent with the provisions of the Sex Discrimination Act as amended by this Bill?

c. Further, the Department of Premier and Cabinet stated that the Bill 'does not acknowledge that there may be other laws in force that require what would otherwise be discriminatory action to be taken'. Does the Attorney-General's Department consider that this view is accurate? If so, what would be the implications of this?

Response: The Bill seeks to establish breastfeeding as a separate ground of discrimination. However, discrimination against breastfeeding mothers is currently protected as a component of sex discrimination. One of the reasons to establish breastfeeding as a separate ground of discrimination is to make it clearer that actions known as special measures can be taken by employers to address specific requirements of women who are breastfeeding. Discrimination against pregnant or potentially pregnant women is also prohibited under the SDA, which will not be changed by the Bill.

Under the SDA, discrimination on the grounds of breastfeeding or pregnancy only occurs if an employer treats a breastfeeding or pregnant woman less favourably than someone who is not breastfeeding or pregnant. The SDA also permits special measures to be taken to achieve substantive equality between women who are breastfeeding or pregnant and people who are not. Whether an action is discriminatory or constitutes a special measure will depend on the individual circumstances of each case.

If a State law requires a person to treat a breastfeeding or pregnant woman less favourably than a person who is not breastfeeding or pregnant, other than to achieve substantive equality, this law could be found to be inconsistent with the SDA by a court.

2. Thomsons Lawyers (Submission 18) submitted that, like the Disability Discrimination Act, the Sex Discrimination Act should also prohibit discrimination against a person on the basis that their 'associate' 'is pregnant, breastfeeding or has family responsibilities'. Does the Attorney-General's Department have any views on this suggestion?

Response: The 'associate' extension is applied inconsistently across the four Discrimination Acts. As noted in Thomsons' submission, it is applied to discrimination under the *Disability Discrimination Act 1992* but not the SDA. A variation of the extension applies to conduct prohibited by the *Racial Discrimination Act 1975* but there is no such extension in the *Age Discrimination Act 2004* (the ADA).

As previously noted, the Bill was developed to implement recommendations made by the Senate Committee in its 2008 *Inquiry into the effectiveness of the SDA* and is not designed to address broader questions about the SDA. However, the Department will consider options to achieve greater consistency in this and other aspects of Commonwealth anti-discrimination law as part of the consolidation project.

3. Will the Attorney-General's Department advise the Committee whether there is a reason that fathers who bottle-feed are not also protected from discrimination under the ground of breastfeeding or elsewhere?

Response: Establishing breastfeeding as a separate protected attribute recognises the unique physical nature of breastfeeding and demonstrates the Government's commitment to support a woman's choice to breastfeed. However, any parent, male or female, is protected from discrimination in employment on the basis of their family responsibilities, which could include a refusal to consider reasonable flexibility in working arrangements.

4. The Queensland Anti-Discrimination Commissioner Queensland (Submission 16) notes that the phrase, 'in relation to', in subsection 28A(1) has been interpreted more broadly than the way it is used in the Sex Discrimination Act. Is the Attorney-General's Department attempting to limit the operation of subsection 28A(1) of the Sex Discrimination Act by retaining the requirement that the act be done 'to a person, or in the presence of a person'?

Response: Section 28A of the SDA defines sexual harassment as an unwelcome sexual advance, an unwelcome request for sexual favours or other unwelcome conduct of a sexual nature. Subsection 28A(2) provides some clarity about what 'conduct of a sexual nature' could include. However, it is not intended to be exhaustive and does not limit what can constitute sexual harassment. It merely provides a guide for the courts.

5. In relation to the change to the definition of sexual harassment in the Sex Discrimination Act, the National Association of Community Legal Centres and Kingsford Legal Centre (Submission 17), have expressed their concern about the proposed inclusion of a list of factors which may be taken into account in determining whether a person should have anticipated the possibility that a person would be offended by the conduct. In particular, they are concerned that the inclusion of such a list would place a focus on the characteristics of the victim and could result in a minimising of the harassment. The Association propose instead, that the Bill be amended to make these factors circumstances of aggravation, for which aggravated damages could be awarded. What are the Attorney-General's Department's views on this proposal?

Response: The amendments to add an indicative list of circumstances which may be relevant in determining whether a reasonable person would have anticipated the possibility that the person harassed would have been offended, humiliated or intimidated in line with the Senate Committee's recommendation following its comprehensive inquiry into the SDA.

The current definition provides that the court is to have regard to 'all the circumstances' in which a reasonable person would have anticipated that the aggrieved person would be offended, humiliated or intimidated.

Inserting a statutory guide to what circumstances are relevant is intended to direct the court to consider the individual circumstances of the case in assessing what is reasonable conduct. It is not intended to be an exhaustive list, as evidenced by the inclusion of the phrases 'include, but not limited to' in proposed subsection 28A(1A) and 'any other relevant circumstance' in proposed paragraph 28A(1A)(d). It will not limit a court from taking into account any relevant factor in determining whether an act or conduct constitutes sexual harassment.

This amendment is not intended to have a 'minimising' effect. Its intent is to direct courts to take a more sensitive approach to determining whether a reasonable person would have anticipated offence. A court would be entitled to take these and any other circumstances into account in assessing any damages to be awarded.

6. The Office of the Anti-Discrimination Commissioner (Tas) (Submission 5) notes that the definition of 'sexual harassment' in the Sex Discrimination Act is narrower than that in the Anti-Discrimination Act 1998 (Tas). The Anti-Discrimination Act 1998 (Tas) defines conduct of a sexual nature to include displaying matter related to a prescribed attribute, such as sex, which could encompass the displaying of pornographic images, for example. The Office of the Anti-Discrimination Commissioner suggests that the Bill should be amended to include such conduct in the definition of 'sexual harassment'. Does the Attorney-General's Department have any views on this suggestion?

Response: The current definition of sexual harassment in the SDA and the proposed amended definition are intended to be as broad and inclusive as possible in order to ensure that all forms of sexual harassment are covered.

As noted above in the response to question 4, the definition of 'conduct of a sexual nature' in subsection 28A(2) is deliberately broad and inclusive. It has been interpreted to cover situations such as the displaying of pornographic images[1] and the Department believes that it is also broad enough to cover emerging forms of sexual harassment such as the increasing problem of cyber-bullying of a sexual nature.

The Department will consider the definition of key terms in all the discrimination Acts, including sexual harassment, as part of the consolidation project.

7. Although the Bill would amend the requirements around sexual harassment in schools to protect students of all ages, the conduct would only be unlawful if the harassing student was an 'adult student'. The Anti-Discrimination Commissioner Queensland (Submission 16) submitted that retaining the requirement that the harasser be an 'adult student' is not necessary. Could the Attorney-General's Department provide an explanation as to why it would retain the requirement that the harassing student must be an 'adult student'?

Response: The Government does not condone sexual harassment by young students.

The approach taken in the Bill was informed by the Senate Committee's recommendations in its 2008 *Inquiry into the effectiveness of the SDA*, which focussed on providing better protection for students who are victims of sexual harassment, regardless of their age.

8. Thomsons Lawyers (Submission 18) raise a question as to what the liability of schools would be under the expanded protections against sexual harassment in schools proposed by this Bill. What is the Attorney-General's Department's understanding of schools' liabilities under these provisions?

Response: The amendments relating to sexual harassment in education are aimed at providing better protection for the victims of sexual harassment and are not intended to change the vicarious liability of educational institutions. If, in the circumstances of a particular case, a school could be found to vicariously liable for the actions of its employees or students, this would continue to be the case, regardless of whether the harassment occurred against a student over or under the age of 16 or at that or another institution.

---

[1] Australian Human Rights Commission, *Federal Discrimination Law*, section 4.6.1 <http://www.hreoc.gov.au/legal/FDL/index.html>, last viewed 18 February 2011.

9. Thomsons Lawyers (Submission 18) further suggest that the child protection framework is a more appropriate vehicle for the amendments in relation to sexual harassment in schools. Does the Attorney-General's Department have any views on this suggestion?

Response: The SDA currently contains prohibitions on sexual harassment in educational institutions, which in addition to schools include universities, technical colleges and vocational training organisations. The Bill seeks to strengthen these protections in line with the Committee's recommendation following its comprehensive inquiry into the SDA. The Government agreed with the Committee that the proposed amendments would provide more comprehensive protection for students from sexual harassment, including cyber-bullying of a sexual nature. As with the existing protections against sexual harassment in the SDA, these strengthened protections would operate in conjunction with other mechanisms designed to protect children, including mechanisms within schools themselves.

10. The EM does not clearly explain the purpose for Items 9 and 62 of Schedule 1 of the Bill. It appears that these provisions would enable states and territories to refuse to alter records of a person's sex if the refusal is based on the fact that the person is married. Is this because the Marriage Act 1961 (Cth) requires a marriage to be between a man and a woman? Further, is there a reason why the Attorney-General's Department has not clearly explained the purpose and operation of these provisions in the Explanatory Memorandum to the Bill?

Response: The purpose of this amendment is to preserve the operation of State and Territory laws regarding official records of a person's sex, as stated in the Explanatory Memorandum.

Currently the Births, Deaths and Marriages (BDM) laws of each State and the Northern Territory require the Registrar of BDMs to refuse to register a change of sex if the person in question is married. Accordingly, the exemption in item 62 of Schedule 1 to the Bill is included to maintain the existing policy position that the registration of change of sex is a matter for States and Territories.

The *Marriage Act 1961* does not prohibit a person who is married from legally changing their sex.

This issue was raised by the Australian Human Rights Commission in its 2009 report, *Sex Files: The Legal Recognition of Sex in Documents and Government Records*. The Government is continuing to work with the States and Territories to consider the issues raised by this report. It would be premature to alter the existing law without full consideration and consultation on the effect this might have on State and Territory BDM laws.

11. Dr Helen Watchirs, on behalf of the ACT Human Rights Commission (Submission 11), expressed her concern that the wording of the Explanatory Memorandum specifically mentions that the Age Discrimination Commissioner will 'advocate for the rights of people, particularly older Australians'. However, the purpose of the Age Discrimination Act is clearly to protect against any discrimination based on age, whatever that person's age might be. Is there a reason why the Explanatory Memorandum does not mention the role that the Commissioner would also have in relation to younger Australians as well?

The Age Discrimination Commissioner will be an advocate for all Australians who are susceptible to age discrimination, regardless of their age. However, the Explanatory Memorandum specifically referred to older Australians as in practice, discrimination in employment against older workers has been the most common cause for complaint under the ADA.

In addition, the role of the Age Discrimination Commissioner is to further the purposes of the ADA, one of which is (subsection 3(e)):

> (e) to respond to demographic change by:
>
> > (i) removing barriers to older people participating in society, particularly in the workforce; and
> >
> > (ii) changing negative stereotypes about older people;
>
> bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.

12. Thomsons Lawyers (Submission 18) has raised a concern with the existing drafting of the definition of family responsibilities in section 4A. They draw the Committee's attention to the fact that the definition refers to an obligation to 'care for or support' in subsection (1). This includes a dependent child under subparagraph (a). However, in subparagraph (b), in relation to a family member, it requires that there be a requirement to both 'care and support' the person. Does the Attorney-General's Department have any views in relation to the drafting of this provision?

Response: The Government's position is that any person who is required to provide care and/or support for a member of their family should be able to do so free from fear of any discrimination as a result. The Department notes the point raised by Thomsons' submission, but considers such a limited interpretation seems unlikely on the face of the provision, noting that courts will usually give a broad reading to legislation which is designed to protect people's rights. The provision in question is currently in the SDA (that is, it is not sought to be inserted by the Bill) and there is no evidence to suggest this provision is being interpreted as Thomsons has suggested.