



National Association of Community Legal Centres
(NACLC) Inc
Tel: 61 2 9264 9595
Fax: 61 2 9264 9594
Email: naclc@clc.net.au
Mail: PO Box A2245 Sydney South NSW 1235
Australia



27 October 2010

Committee Secretary

Senate Select Committee on Legal and Constitutional Affairs

via email: legcon.sen@aph.gov.au.

Dear Sir/Madam,

Inquiry into proposed amendments to the Sex Discrimination Act 1984 (SDA) 2010

On behalf of the National Association of Community Legal Centres Australia and Kingsford Legal Centre, we welcome the opportunity to provide comment on the draft amending Bill, the Sex Discrimination Amendment Bill 2010.

We note that we have previously provided an in-depth submission to the Senate Inquiry into the effectiveness of the Sex Discrimination Act (SDA) 1984 in eliminating discrimination and promoting gender equality. This submission reiterates many of the recommendations of our previous submission. We attach a copy of that earlier submission with these comments.

Kingsford Legal Centre is a community legal centre which provides legal services, law reform and community legal education to the Randwick and Botany local council areas. We primarily provide legal services to people facing economic and social disadvantage. Kingsford Legal Centre has a discrimination law specialisation and has extensive experience using the Sex Discrimination Act and the complaints based system under the Australian Human Rights Act. Every year, Kingsford Legal Centre assists hundreds of women who have experienced discrimination. Our comments are drawn from our experience providing legal advice and representation to these women.

Overall, Kingsford Legal Centre wishes to comment that the current amendment Bill is a lost opportunity to undertake significant amendments to reduce discrimination against women in

Australia. Whilst we welcome the amendments that offer increased protection against discrimination for women (specific comments below), it is our view that the limited nature of the proposed amendments will not reduce the entrenched inequality and systemic discrimination. The Sex Discrimination Act has failed to adequately redress this inequality and as we discussed in detail in our earlier submission (see attached) amendments to the Act need to address both the problems of an individual complaints model and promote a systemic approach to the elimination of discrimination.

Specific comments about the draft Bill

Objectives

We note that the draft bill does not include any objectives in the first part of the Bill. We recommend that the SDA should include objectives which draw from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and include as an objective the attainment of equality for women. We note that there is no definition of substantive equality included in the draft amending Bill. We recommend that a definition of substantive equality be included in the Bill.

Insertion of 'breastfeeding', 'potential pregnancy', 'family responsibilities'

We note that the amending bill includes these additional grounds which are explicitly included within grounds of unlawful discrimination. We commend the inclusion of these grounds.

Widening of unlawful discrimination on the basis of family responsibilities

We commend the amending bill for including additional forms of unlawful discrimination on the basis of family responsibilities. Over the years we have advised many clients who have experienced discrimination at work on the basis of family responsibilities, who were not dismissed but who have been treated unfavourably which has had a substantial impact on their careers. This amendment provides these clients with an avenue for redress and is welcomed by Kingsford Legal Centre.

Case study - Discrimination at work due to family responsibilities

Pia works in a real estate agency. Due to her family responsibilities she works slightly shorter hours so she can pick her children up at school. Pia applies for an internal promotion but this is refused on the basis that she does not put in the hours and hasn't shown suitable commitment. Pia feels that she has been denied the promotion because of her family responsibilities.

Definition of Family Responsibilities should be widened

Whilst the increased protection for discrimination against family responsibilities is a positive development, as noted in our previous submission, the definition of family responsibilities should be amended to include same sex families, and family relationships beyond the immediate family definition currently contained in the Act. We believe this is particularly important in recognising different family models, and in particular Indigenous kinship associations that currently fall outside the definition of family responsibilities. We recommend that the definition should be amended to provide the greatest protection against discrimination on the basis of family responsibilities.

Register of sex

We recommend that discrimination against transgender women and intersex people should be made unlawful under the SDA. The proposed amendments to the register of sex which refers to an official record of a person's sex do not make clear whether or not transgender women and intersex people will be included. The content of State and Territory law around transgender and intersex identity varies substantially across the States and Territories. This lack of legal protection is concerning as transgender women and intersex people experience high levels of discrimination. The SDA should make discrimination against transgender and intersex women unlawful.

Reference to international instruments

We commend the inclusion in the draft bill of CEDAW, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the ILO Convention no 100, ILO Convention no 111 and ILO Convention NO 156. We recommend that other international conventions which should be included are the Convention on the Rights of People with Disabilities and the Convention for the Elimination of Racial Discrimination. Due to the diversity of women and girls who experience discrimination it is appropriate to include these other international conventions.

Sexual harassment provisions

We are concerned that the inclusion of circumstances to be taken into account when considering sexual harassment include - "the sex, age, marital status, sexual preference, religious belief, race, colour or national or ethnic origin of the person harassed."

Whilst we agree that in some cases the characteristics of the person harassed could make the nature of the complaint aggravated, we are concerned that a focus on the characteristics

of the victim could result in a minimising of the harassment. We are concerned that a reference to the characteristics of the victim could lead to damaging conclusions that because of such a characteristic the harassment was not as serious and lead a focus on the characteristics of the victim, rather than the conduct of the harasser.

We would recommend that a better approach would be to make it clear that circumstances such as sex, age, marital status, sexual preference, religious belief, race, colour, national or ethnic origin could result in an circumstances of aggravation, and that as a result aggravated damages could be awarded. We recommend that the intention of this amendment needs to be further considered as it could have the potential to minimise sexual harassment based on the characteristics of the victim. We do not think this is a desirable approach.

Sexual harassment at educational institutions and goods and services

We welcome the inclusion of a specific provision covering harassment between members of staff at an educational institution and students.

We welcome the provision prohibiting sexual harassment in the provision of goods, services or facilities.

Additional amendments we recommend

Prohibition on Discrimination

The SDA should be amended to reflect CEDAW's general prohibition on discrimination.

Substantive equality/ removal of direct/indirect discrimination definitions

As stated in our previous submission, in addition to expanding and clarifying the objectives of the SDA and including a definition of substantive equality, we also recommend that the distinction between direct and indirect discrimination should be removed. This should be replaced with a definition which focuses on ensuring that women can enjoy the full range of rights and freedoms to ensure their equality.

SDA exempt areas

We recommend that in order to fully implement CEDAW into domestic law, the SDA should be amended to include the full range of areas in which discrimination can occur, removing current exemptions. For example, discrimination should be unlawful when done by charities, religious bodies, and within sport. Exemptions should be limited and should only be granted through the Sex Discrimination Commissioner and should have a short time span. The range

of areas which are currently exempt from the SDA are numerous and limit the strength and efficacy of the SDA in addressing discrimination against women.

Systemic discrimination not adequately addressed

The current discrimination regime relies on individual complaints which are most commonly resolved through private conciliation. The limitations of this system for dealing with repeat discriminators, for entrenched practices and systemic discrimination have been widely discussed, including in our previous submission. We recommend that the Sex Discrimination Commissioner (SDC) be given power to investigate of her own motion conduct that appears to be unlawful under the SDA. We also believe the SDC should be adequately resourced to perform this role.

We also recommend that the Sex Discrimination Commissioner have power to commence proceedings without having to rely on an individual complaint.

Specifically the SDA should be amended to include the role of the Sex Discrimination Commissioner to:

- regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality;
- monitor respondents, and investigate, report and potentially prosecute parties who repeatedly breach the SDA;
- the SDC should be properly resourced to increase the role of the SDC as an intervenor and as a *amicus curiae* in matters affecting discrimination and gender equality;
- have the power to commence complaints of her own motion and without the need for a specific complainant;
- report directly to Parliament on gender equality with a requirement that Parliament responds to such reports;
- report publicly on the inconsistency of any enactment or proposed enactment with the SDA.

Intersectionality

Many women experience discrimination because they are both from a culturally diverse background and because they are a woman. Kingsford Legal Centre advises many women

who experience intersectional discrimination and is aware that the current Act is deficient in recognising this form of discrimination.

Casestudy – Intersectional Discrimination

Veronica worked in a large, male dominated company. She began to experience unwanted sexual advances from her male boss. These advances continued, and Veronica felt she could not rebuff these advances as this man was her boss. Ms V had recently come to Australia and was from a cultural background where work hierarchies were respected. She did not feel she was able to make a complaint about the behaviour because of her cultural background. As a result the harassment escalated and Veronica felt she could not challenge the behaviour.

The current SDA does not make provision for this complex form of discrimination which is not just two forms of discrimination added together. We recommend that the SDA include a definition of substantive equality which includes the diverse experience of women and this would go some way to addressing this issue.

Sexual orientation

Discrimination against women on the basis of their sexual orientation is not unlawful under the SDA. We recommend that the amending Bill include sexual orientation as an unlawful ground of discrimination.

Transgender

Discrimination against transgender women is not clearly unlawful under the SDA. We recommend that discrimination against transgender and intersex women be unlawful under the SDA.

Complaints system

As we discussed in detail in our earlier submission there are substantial problems with the current individual complaints based system. We reiterate those comments and highlight that any amendment to the SDA should include amendments allowing for an expedited conciliation process, increased damages comparable to tort and routine cost capping in the Federal Courts.

Increased Human Rights protection in Australia

Ensuring the elimination of discrimination against women and equality in Australia requires Australia to recognise and protect human rights beyond those currently protected through anti-discrimination legislation. To ensure substantive equality, especially for disadvantaged women Australia should also enact a Human Rights Act.

Conclusion

We commend the steps included within the draft Bill to amend the SDA and in particular the amendments which increase protection on the grounds of breastfeeding and family responsibilities and increased protection against sexual harassment.

Kingsford Legal Centre remains concerned, however, that they do not go far enough to progress the real potential of the SDA to address the entrenched and systemic inequality of women within Australia. We recommend that this opportunity to amend the SDA be maximised to deepen the protections afforded under the SDA and further amendments be included in this Bill to achieve substantive equality for Australian women.

If you have any questions regarding this submission, please contact Anna Cody

Yours sincerely,

Julia Hall
Executive Director
National Association of
Community Legal Centres Inc

Anna Cody
Director
Kingsford Legal Centre