CHAPTER 9

WOMEN WITH PARTICULAR NEEDS

9.1 Aboriginal and Torres Strait Islander Women

9.1.1 The Committee received only a small number of submissions from Aboriginal women which may, in part, reflect the accessibility of parliamentary inquiries to certain groups in the community. It is also significant to note that apart from recognising that Aboriginal women have special needs, very few submissions advocated concerns on their behalf. Those who did comment, concentrated on access to education and training as vital prerequisites for Aboriginal women who want to take fulfilling roles in the paid work force.

9.1.2 The participation of Aboriginal and Torres Strait Islander women in the paid workforce is comparatively low. Janet Durling, EEO Officer from the Northern Territory noted:

> The level of unemployment in Aboriginal communities for men and women is a national disgrace as is the high school completion rate for Aboriginal youth.[1]

9.1.3 Those who are in paid employment tend to occupy community and public sector jobs. Many Aboriginal women who join the paid workforce do not re-enter it after a period of child rearing. The reasons given for the low participation rate relate to low levels of training, the unavailability of paid work and the experience of discrimination. This situation is exacerbated for the 30 per cent of Aboriginal and Torres Strait Islander mothers who are sole parents.[2]

9.1.4 Mary-Ann Bin-Sallik, Head of Aboriginal Studies and Teacher Education Centre at the University of South Australia, warned of gender programs which may further divide Aboriginal communities:

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1 Evidence, p.S3897
2 Evidence, p.S3168

> Gender balance programs can be detrimental to our relationships. We are an oppressed people and we cannot further divide and separate ourselves.[3]

9.1.5 Rosemary Hunter, Lecturer in Law at Melbourne University similarly argued that:

> Aboriginal women do not necessarily want to be addressed as 'women', they see a need for programs which address the needs of Aboriginal people, taking the view that Aboriginal women suffer more from racism/colonisation than from patriarchy.[4]

9.1.6 Carol Thomas, Secretary of the NSW Women's Aboriginal Corporation, presented a different perspective. She reported that Aboriginal women generally were missing out on long-term employment opportunities, highlighting the fact that while there were many training programs aimed at Aboriginal people, none of them specifically targeted Aboriginal women. She commented:

> We are concerned that Aboriginal women are being disregarded within all present employment programs. ... Aboriginal women have specific needs which differ from the needs of non-Aboriginal women and the needs of Aboriginal men. ... I believe that government agencies believe (from ignorance, convenience or based on their own sexist values), that there can be no 'special needs' within a 'special needs' group. This is not true.
>
> It is not necessary to have programs for Aboriginal women only so long as the needs of Aboriginal women are actively included in programs for women and in programs for Aboriginal people. Too often the programs for women ignore the particular needs of Aboriginal women believing that the Aboriginal programs will pick them up. To date Aboriginal programs have not done this.[5]

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3 Evidence Seminar, p.47
4 Evidence, p.S4131
5 Evidence, p.S3926

9.1.7 *Failure to register with the Commonwealth Employment Service (CES)* means that many unemployed Aboriginal and Torres Strait Islander women are not able to take advantage of training and employment opportunities offered by the CES. Ms Thomas notes that Aboriginal women are often assumed not to exist because they are not on the electoral roles either.[6]

9.1.8 Support networks within training institutions appear to be effective in assisting Aboriginal women in returning to study. But their location within institutions in humanities and education areas may well act as a disincentive to Aboriginal women entering other disciplines.

9.1.9 Financial constraints are also a disincentive to Aboriginal women who may be denied access to further education due to costs associated with distance and the imposition of fees. As the submission from the Aboriginal and Torres Strait Islander Commission stated:

> Bridging courses available to Aboriginal and Torres Strait Islander women do not attract high levels of allowances under *Aboriginal Study Grants (ABSTUDY) so there is little* incentive for pensioner students to take steps to eliminate their educational handicap.[7]

9.1.10 The Northern Territory Government described several initiatives designed to encourage greater participation for Aboriginal women involving the development of television programs focussing on achievement of Aboriginal and non-Aboriginal women. They have also appointed an Aboriginal project officer within the Office of Women's Affairs.

9.1.11 Several submissions expressed concern that while much research has already been done into the needs of Aboriginal people, little has actually been acted upon. Carol Thomas, said in her submission to the Committee:

> Concerns regarding the employment of Aboriginal women (or lack of) are not new and I think it is valuable to quote the recommendations which came from the 1986 Women's Business: Report of the Aboriginal Women's Task Force (Department of Prime Minister and Cabinet, Office of the

6 Evidence, p.S3924
7 Evidence, p.S3167

> Status of Women) ... To our knowledge, none of these recommendations have been acted upon.[8]

9.1.12 Aboriginal women attending the *Recognition Seminar* believed it was important that a history of Aboriginal women be recorded. In this regard, the work at the centre for Aboriginal and Torres Strait Islander Studies was supported. Further, the Seminar heard that all women should be aware of the existence of histories detailing Aboriginal women and where such histories can be accessed.[9]

9.1.13 Of importance for Aboriginal women is the broader issue of land rights. This was summed up most succinctly at the 1991 North West Women's Meeting:

> Securing land tenure is paramount to effectively addressing Aboriginal women's needs. The current legacy of oppression, denial and avoidance of historic wrongdoings that continues today can no longer be handed down to the next generation. ... The status of Aboriginal women will improve as they gain control over the forces that shape their lives and those of their families.[10]

9.2 Women in Rural and Remote Communities

9.2.1 A significant body of evidence presented to the Committee dealt with issues related to recognition for women living in rural and remote areas of Australia. Representations to the Committee came from a gamut of rural women ranging from those who ran farms, on their own, or in partnership, to those who lived on the outskirts of rural towns and those who worked as professionals in the bigger rural cities.

9.2.2 There is no accurate stereotype of rural women, despite the prevailing myths of the modern day 'Drover's Wife'. It is significant however that much of the knowledge that urban Australians have about rural Australia, via the bush ethos, either ignores rural women altogether or totally misunderstands their role. This was exemplified by an anecdote from Paddy Cowburn, a private citizen from the Northern Territory, describing the life of a women living in a remote part of the Territory:

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8 Evidence, p.S3925
9 Recognition Seminar, p.113
10 Exhibit No.136

> A friend who lives on a pastoral property in Central Australia works seven days a week in her capacity of 'house-wife' - caring for her family; operating the station store; giving attention to the children's School of the Air education; taking radio and telephone messages for her husband and others who operate the Station, a trucking business and road-plant; taking care of poddy calves, the chooks, pigs and other animals; taking care of garden and trees on the homestead; coping with emergencies which always seem to arise when the men are away; catering for an endless stream of visitors and guests both friends, family and business people. The question 'town' visitors most ask that most infuriates my friend is 'What do you do all day'? The inference is that she doesn't have a job out there in the sticks, and therefore does nothing much.[11]

9.2.3 Most women on the land, according to Jean Tom, the immediate past President of the Country Women's Association, consider that they are equal partners in farming enterprises. Indeed, in the past decade, there has been a general trend for more women to be involved in actual agricultural work, replacing paid staff. They continue to handle their traditional role of handling the house and the accounts.

9.2.4 On farms the rural women earn their equal partnership status by their varied contributions: working out in the paddocks; helping to make management decisions; keeping the farm books; interviewing bank managers and accountants; sometimes earning off-farm income to keep the farm viable; looking after the house and the family; and caring for elderly relatives.[12]

9.2.5 Official data on rural women is quite patchy. The Rural Women's Network in Victoria[13] has developed a clearer view of both the activities and the needs of rural women in their state but the picture is not replicated in other states. Michael Lee, an Assistant Secretary, with the Department of Primary Industry and Energy,[14] argued that data on rural women can be extrapolated from a variety of existing sources. Cathy McGowan, a rural project consultant, disagrees. She contends that data collected on 'farmers' or 'workers' usually only reflects the

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11 Evidence, p.S425
12 Evidence, p.S912
13 Evidence, p.S909
14 Evidence, p.S4369

work done by men and that women's work, particularly that which is unremunerated, is completely ignored.[15]

9.2.6 The capacity of rural women to participate fully in society is linked to the kinds of infrastructure which urban dwellers take for granted but for which rural women pay an enormous cost. Good roads, available and affordable public transport and affordable and efficient postal and telephone services are all of key concern to women in rural areas.

9.2.7 Evidence suggests that indirect discrimination in service delivery and provision affects life options for rural women as illustrated in an example provided by Cathy McGowan at the *Recognition* conference:

> You might be interested to know that in the country if you are a farmer and you use diesel to drive a tractor you can get a rebate for it; it is a diesel rebate. If you actually use diesel to go into town to do any of your women's work, you cannot get a rebate on it. ... the way we use money in our communities defines diesel petrol for work - for example producing food - as rebatable; yet petrol to keep your community going, to keep your family going on that side is off the record; it is not work.[16]

9.2.8 Lack of public transport in rural areas leads to a dependence on private cars. This results in many rural women operating virtual taxis, ferrying children to and from school and extra-curricular events, covering many kilometres in each trip and consuming valuable hours every day. Lack of public transport however also causes problems for many older women who do not drive. For those who depended on their husband for transport, widowhood can cement their isolation even further. Petrol costs in the country are often prohibitive especially for rural women living on pensions. Older women in rural areas are also unable to access fare concessions which are available to pensioners in the city.

9.2.9 Another area of concern for rural women is the cost of telephone calls. The use of telephones by women as a vital tool of communication was emphasised to the Committee by Anne Moyal's research.[17] It is particularly important for rural women and those in remote communities for whom it can often be a life-line. The

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15 Evidence, p.S4274
16 Recognition Seminar, p.88
17 Evidence, p.S3123

dependence on the telephone for older rural women was also noted by Elwyn Jones, Vice-President for External Policy with the Business and Professional Women's Association:

> In isolated areas, the telephone is a life-line for pensioners but the costs of calls seriously inhibits their ability to use the phone.[18]

9.2.10 The current study being undertaken by DOPIE and AUSTEL into appropriateness of telecommunications delivery in rural areas was reported to the Committee.

9.2.11 Evidence to the Committee recognised the importance of the ABC as a vehicle for information, entertainment and education for rural women. It was argued that the ABC should continue to be funded to provide the excellent service for rural Australians.

9.2.12 Financial security is as important for rural women as it is for women in the cities. This is a major concern as while many rural families have worthwhile assets, their disposable income is almost non-existent. Many women are being forced to increase their work load by taking on extra farm work. Recent changes in eligibility rules for family payments announced in the 1991-92 budget have been a welcome initiative in this area as have the changes to NEWSTART and JOBSEARCH allowances.

9.2.13 Women who leave the farm and take up paid employment in the town, experience many of the difficulties of their urban sisters attempting to re-enter the paid work force, although the problems are often exacerbated by distance.

9.2.14 Access to information on training opportunities, such as those provided by the JET program, is limited - especially for women outside the cities and large regional centres. Problems of accessing classes due to lack of transport is a real issue for many women, as is the funding for such programs. Classes need to be available in appropriate environments, not necessarily schools. Programs need to be advertised through informal networks.

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18 Evidence, p.S544

9.2.15 A shortage of child care is a major constraint for many rural women wishing to retrain or return to the paid workforce. Women, not in the paid workforce, seeking occasional child care in the town are also at a major disadvantage.

9.2.16 Particular concern was expressed to the Committee about the options for participation for girls and young rural women. Like their mothers, their lives are affected by isolation and by economic and social concerns as outlined in this profile from Cathy McGowan:

> I want to paint you another picture now, of a young woman; my neighbour in fact. She has just left school. She is 17 and she wants to be a farmer and we were talking about sport and recreation and she laughed and she said, 'It is no-go Cathy'. I said 'Why not?'. She said, 'My options are footy or netball. I do not want to play footy, and netball I don't like'. That is her sporting options. She has not got a licence so she cannot get into town to join other sports. Her parents are in the situation they are not able to afford the petrol to take her in and out of town. She is theoretically unemployed because the farm cannot support her so she has a $30 a week Job Search allowance which does not go very far. She is in a really invidious situation and she does not have many options except to leave and, for her, that means Melbourne or Sydney, which is very expensive, very difficult. There is accommodation to think about and all the other costs that go with it. Many of the rural young people leave, which is worth noting. It is hard to participate if you re not there.[19]

9.2.17 This anecdotal evidence was supported by the findings, alluded to in a submission from the Department of the Chief Minister in the Northern Territory.[20] The report to the Australian Education Council's Review of the National Policy for Education for Girls in Schools concluded:

> Students living in the country are likely to suffer some educational disadvantage. The consultations showed that girls in these categories suffer additional educational advantages by being female. The patterns of subject choice and uptake of post-school options are the most stereotyped. They are the most likely to opt out of school because of pregnancy,

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19 Recognition Seminar, p.90
20 Evidence, p.S2339

> motherhood, overwork, lack of self confidence and so-on. These girls suffer a double disadvantage.[21]

9.2.18 A particular group of rural women whose case was presented to the Inquiry were those who had moved from the city to take up work, or more commonly, to accompany their husbands. The conflict caused by relocation of families from urban to rural areas due to job commitments was seen as more significant for women than men. It is still far more likely for a woman to follow her husband's career than for a man to follow his wife. In practical terms, as Denese Gray explained, women academics for example find it very difficult to accept postings in more remote institutions as their husbands are generally not keen to accompany them. She also noted that, in her experience, most women academics at James Cook University in Townsville were either childless or unmarried.[22]

9.2.19 Attention was also drawn to the special needs of women in very remote communities where employment is almost totally restricted to men, particularly towns developed by the mining industry. The isolation and alienation which can be experienced by these women was noted by the Northern Territory Government submission. A solution for these women was seen to be strong involvement in the local community.[23]

9.2.20 A further area of concern for rural women workers is occupational health and safety. Worksafe Australia is attempting to redress the problem with the introduction of farm safety kits to community based farm safety action groups being established around the country. Limited funding has been provided to farmsafety projects targeting women workers.[24]

9.3 Women From Non-English Speaking Backgrounds

9.3.1 The Committee received a number of submissions from individual women and groups representing women of non-English speaking background. These women comprise mostly migrants and refugees. While they are not a homogenous

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21 Evidence, p.S4243
22 Evidence, p.S115
23 Evidence, p.S511
24 Evidence, p.S3979

group, many of these women have common difficulties which hinder their capacity to participate fully in life in Australia.

9.3.2 Evidence to the Inquiry suggests that racial and religious discrimination is a problem particularly for Moslems and some Asian ethnic groupings. Settlement difficulties remain an issue particularly for refugees and those migrants who are transferring not just from different cultures but from rural to urban communities as well. Low self-esteem and self-confidence, resulting from the status shock associated with migration and related cross-cultural experiences, can be a debilitating problem - particularly for older migrant women. Repercussions of domestic violence and family breakdown are also exacerbated for women from NESB. The major area where migrant women experience restricted opportunity is in paid employment. Representations to the Inquiry suggest that key issues related to migrant women's employment are English language proficiency, child care and equal access to opportunities.

Language

9.3.3 The costs of low language skills are enormous, both personally and for the nation. Poor English skills in the workplace cost the country $3.2 billion annually.[25] English language proficiency is a key issue for migrant women in obtaining work and making the most of advancement opportunities. The benefits of language skills include safer working environments, better communication and greater productivity. Language training for migrants is a necessity given that of the 121,277 immigrants from the top ten sources of countries in 1989-90, 46.08 per cent were non-English speaking.

9.3.4 Despite the fact that many initiatives have been developed to assist migrants to learn English, it is now evident that women are under-represented in the English language programs in the workplace. While English in the Workplace programs are currently run by 250 employers the majority of recipients are men. In 1990 only 30 percent of enrolments were female. This appears to be because male dominated work places are the ones taking advantage of the program.

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25 Exhibit No.148

9.3.5 The Green Paper on Languages[26] estimated that there was a backlog of 50,000 to 60,000 people seeking placement in adult ESL programs. There was also concern over the low proficiency outcomes for graduates of the Adult Migrant English Program. In 1989, AMEP had 70,000 clients, 80 percent had been resident for less than five years and 56 percent were female. Funding shortfalls means that women, who comprise the majority of migrants not in paid employment, are less priority than men and women looking for work.

9.3.6 The Australian Language and Literacy Policy announced in September 1991 incorporating the Workplace English Language and Literacy program to be managed by DILGEA and DEET in association with DIR was noted by the Committee. Concern is felt however as to how to ensure that worker participation reflects appropriate gender and ethnic balance.

9.3.7 The group with the least language proficiency are refugees and humanitarian arrivals. Programs must ensure that these groups continue to access English language services. 96 per cent of refugees need language training compared to only 60 per cent of migrants.

Childcare

9.3.8 Childcare is a major issue for migrant women especially those isolated from traditional extended family and support networks. Of special note is the need for cultural sensitivity in the delivery of child care services, a concern most loudly expressed by Muslim women. Affordability, especially when more than one child is involved, is paramount. Day-long care for shift workers as well as before and after school and vacation care is also obviously in demand, given the predominance of NESB women in shiftwork occupations.

Workplace Issues

9.3.9 It is clear that migrant women are especially disadvantaged by the gender imbalance in Australian industry. Women from non-English speaking backgrounds are over-concentrated in the manufacturing, retail/wholesale and

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26 *Department of Employment, Education and Training, December 1990*

community service areas - particularly in the textile, clothing, footwear and processing industries. A large number of immigrant women, particularly from Asia, are outworkers. These women work excessively long hours without the benefits of protection provided by award coverage and union membership.

9.3.10 Industry and award restructuring is likely to be having a significant impact on migrant women due to their concentration in manufacturing, clothing, textile and footwear industries.

9.3.11 The implications of this was highlighted in 'Making it Work: Access and Equity at Work Around Australia', a report prepared by the Office of Multicultural Affairs:

> Because those more likely to be displaced by restructuring are those in the lowest skilled, least paid jobs, and because these are more likely to be newer migrants, women and people from non-English speaking backgrounds, the education, training and retraining process for them must be a high priority.[27]

9.3.12 Despite the efforts of the Overseas Skills Recognition Board, many professionally qualified immigrant women still face great difficulties in having their qualifications and experience recognised resulting in under-utilisation of their skills and high levels of personal frustration and dissatisfaction:

> 41.2 per cent of NESB women have post school qualifications. 10.5 per cent with degree; 3.8 per cent trade qualification or apprenticeship, both higher than Australian born or English speaking background women; and 26.5 per cent with a certificate or diploma a little lower than Australian born and English speaking background women.[28]

9.3.13 This poor English proficiency is often a cause for underemployment of qualified new-comers.

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27 OMA, *Making it Work: Access and Equity at Work Around Australia*, 1991, p.45
28 Exhibit No.148

Discrimination Legislation

9.3.14 While complaints of discrimination can be lodged by migrant women under both race and sex discrimination legislation, comparatively few women of non-English speaking background invoke legislative protection. Representations to the Committee have indicated that many migrant women are unaware of the existence of equal opportunity and affirmative action legislation or their rights. In South Australia, Commissioner Josephine Tiddy reported that the number of complaints from male migrants outnumber those from female migrants 5:1. The challenge she suggests is to work out why migrant women don't complain and what can be done to make services more accessible.[29]

9.3.15 Understanding of the legislation seems particularly lacking for women in blue collar and process working occupations. The Victorian Equal Opportunity Commissioner, Moira Rayner, questions if Commissions are providing an appropriate service to these women.[30]

9.3.16 It would appear that distrust of bureaucracy, fear of reprisals from husband or bosses and lack of spoken English all act as deterrents for women accessing their rights under legislation.

9.4 Women and Disabilities

9.4.1 Disability refers to a functional limitation caused by physical, intellectual, psychiatric or sensory impairments. The extent to which a person with disabilities is able to take part in the community is determined not so much by physical impairment as by social attitudes and barriers. These social factors largely determine the extent to which a person with disabilities is handicapped.

9.4.2 Women with disabilities experience a double disadvantage, being subject to constraints which arise from society's expectations of women's abilities, in addition to social attitudes towards people with disabilities.

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29 Exhibit No.148
30 Exhibit No.148

9.4.3 As a result, women with disabilities are at greater relative disadvantage to men with disabilities, reflecting the relative disadvantage experienced by women in general.

9.4.4 Exacerbating this relative disadvantage is the perceived 'invisibility' of women with disabilities, and the subsequent lack of attention, given to the specific needs of women with disabilities. A significant number of women are disadvantaged by this. The Australian Bureau of Statistics estimates that there are nearly 1.25 million women of all ages in Australia with disabilities or disabling conditions associated with aging.

9.4.5 Submissions to this Inquiry identified a range of barriers limiting participation in society of women with disabilities. Lack of employment and training opportunities and support services, low income, social perceptions and expectations, media portrayal of women with disabilities and discrimination based on both gender and disability all rated a mention. Jeannine Millsteed, from the Curtin University of Technology, points out in regard to access to sport and leisure that women with disability face greater barriers than men with disability being subject to the stereotypes of passivity and dependence associated both with women and people with disabilities.[31] The effects of this stereotyping can be experienced by women with disabilities in all aspects of their lives.

9.4.6 Overwhelmingly, submissions identified the extent of poverty amongst women with disabilities as a major issue. The high cost of disability together with fewer employment opportunities means that many women with disabilities are financially disadvantaged and are forced into dependency on family or inadequate welfare payments.

9.4.7 The Australian Council for the Rehabilitation of the Disabled (ACROD) cited Australian Bureau of Statistics survey results which show that women with disabilities are significantly less likely to be in the paid labour force that their male counterparts.[32] Women with disabilities also have a higher rate of unemployment than men with disabilities.

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31 Evidence, p.S3698
32 Evidence, p.S4039

9.4.8 Since 1986 a number of disability policy changes have been brought about with the objective of assisting people with disabilities to gain training and employment and live within the community.

9.4.9 A number of submissions raised the issue of caring for people with disabilities, a task disproportionately borne by women. This matter is discussed in Chapter 5 of this report.

9.5 Summary and Recommendations

9.5.1 While evidence to the Inquiry indicates quite clearly that most women in Australia experience a degree of disadvantage relative to men, some groups of women face more difficulties than others. It is significant that government policy and programs designed to assist women and to increase equal opportunity are often less effective for women in special needs groups. To overcome this, these women need to be targetted specifically with initiatives that can address particular disadvantage and which can be effectively monitored to ensure that real improvement takes place.

9.5.2 The Committee received the bulk of its evidence in respect of four groups of women with special needs: Aboriginal and Torres Strait Islander women; women in rural and remote communities; women from non-English speaking backgrounds and women with disabilities.

9.5.3 In the light of this evidence the committee makes the following conclusions and specific recommendations.

9.5.4 The Committee acknowledges that conditions and opportunities for all Aboriginal people are unsatisfactory. The particular position of Aboriginal women is exaberated by a combination of race, gender and, in some cases, geographical isolation.

9.5.5 The Committee believes that improving employment opportunities is an essential element in improving the status of Aboriginal women. In this regard the Committee asserts that initiatives designed to assist all Aboriginal people should incorporate specific measures for Aboriginal women.

RECOMMENDATION 50

The Committee recommends that ATSIC:

(a) **ensure adequate consultation with Aboriginal women so that their training and employment needs are understood and incorporated in ATSIC's own programs; and**

(b) **provides advice on the needs of Aboriginal women to other relevant Government service providers, particularly those associated with vocational training and childcare.**

9.5.6 Evidence suggests that women in rural and remote communities experience a sense of voicelessness and isolation. Traditionally rural women have belonged to the Country Women's Association and the women's affiliates of men's organisations. In recent years however, women have become more vocal in farmer's federations, primary producers' groups and local government. What is needed now is for women to expand their networks to achieve greater visibility and recognition.

9.5.7 There is also clearly a need to portray a far more accurate picture of the role of rural women, for them to be more visible and to be consulted more vigorously. Women in rural areas want to be recognised for who they are: women who run farms in their own right or who are equal partners in agricultural enterprises. Data on rural women needs to be more accurate and far more accessible to rural women themselves.

RECOMMENDATION 51

In line with other recommendations regarding the national accounts, the Committee recommends regular data collection on women in rural areas. This could be done through:

- **the census;**
- **better disaggregated data collection;**
- **a stronger focus on women's issues by the Department of Primary Industry and Energy; and**
- **revision of the agricultural census to take account of women's contribution to agriculture.**

RECOMMENDATION 52

To further improve recognition for rural women, the Committee recommends that a rural women's section be established within the Office of the Status of Women to monitor government policy and legislation to ascertain if it adequately reflects the needs of rural women. The rural women's section should undertake to liaise directly with rural women's organisations and networks and to ensure greater feedback on government policy, research and development to the rural women.

9.5.8 The Committee recognises that rural life imposes particular costs due to distance from main towns and facilities. While it acknowledges that distance can also be a problem for some people in outer-urban areas, rural dwellers are more likely to suffer disadvantage.

9.5.9 Women living in rural and remote areas should not be further disadvantaged in terms of their communication needs. In particular petrol pricing policy and telephone charges need to be maintained at a level which ensures that these services remain accessible to rural women.

RECOMMENDATION 53

In order to ensure that those low income people living in rural communities not be further penalised the Committee recommends that the Department of Health, Housing and Community Services undertake investigations to assess the feasibility of providing transport subsidies for private car registration and petrol particularly for women and men living on the pension in rural areas.

9.5.10 While young women with children in the cities are not without their problems, their counterparts in rural areas lack many of the facilities available in urban areas. Evidence suggests that the needs of older women in respect of access to community support, respite care and ancillary services are not adequately recognised.

RECOMMENDATION 54

The Committee recommends that community support grants such as the Rural Access Program through the Department of Primary Industries and Energy be expanded.

RECOMMENDATION 55

The Committee recommends that relevant Commonwealth agencies give priority to the adequate provision of appropriate and cost effective community services for women in rural areas. This may require:

(a) **expansion of child care, including increased flexibility and funding guidelines to enable a greater range of providers; and**

(b) **further investigations into community health needs and education support services.**

9.5.11 Women from non-English speaking backgrounds experience the double disadvantage of gender and ethnicity. The difficulties experienced by most NESB women in achieving life options are amplified by communication difficulties and cultural dislocation.

9.5.12 There is clearly a need to take account of migrant women's dual responsibilities as workers and mothers in the provision of appropriate language training opportunities.

RECOMMENDATION 56

In respect of women from non-English speaking backgrounds the Committee recommends that relevant Commonwealth Service Agencies provide:

(a) **more resources for existing English language training, particularly community literacy programs;**

(b) **culturally sensitive child care;**

(c) **for employment of occupational health and safety officers who have appropriate cross-cultural training; and**

(d) **culturally sensitive aged care.**

RECOMMENDATION 57

The Committee recommends that DIR and the Office of Multicultural Affairs work with employer and union bodies to encourage the expansion of workplace induction and training programs, covering occupational health and safety, staff services and

language proficiency. Particular efforts must be made to ensure that these courses are made available to women.

9.5.13 Submissions to this Inquiry raised a wide range of issues relating to the barriers to achievement of equal opportunity and equal status for women with disabilities. The Committee believes, nevertheless, that a more complete investigation and analysis of these issues is necessary. It is crucial that women with disabilities be able to take up both the employment and training opportunities available under the Disability Services Program which funds both competitive and supported employment services, and the 4,000 new training places funded by the Department of Employment, Education and Training as an integral component of the Disability Reform Package.

RECOMMENDATION 58

The Committee recommends that:

(a) an affirmative action policy for women with disability be developed and implemented by the Department of Health, Housing and Community Services, of Employment, Education and Training, and Social Security in relation to the Disability Services Program, the Commonwealth Rehabilitation Service and the Disability Reform Package;

(b) the Department of Health, Housing and Community Services work together with existing and potential competitive employment, training and placement services funded under the Disability Services Program to increase the numbers of women receiving those services, and in doing so, encourage and support women to obtain training and employment particularly *in non-traditional occupations*;

(c) the Department of Health, Housing and Community Services fund a comprehensive study into the specific needs of women with disabilities to assist them with

independent living. Further, that this study take account of the additional disadvantages experienced by women with disabilities who are aged, or of Aboriginal, Torres Strait Islander or non-English speaking background. The Committee believes that there would be advantages for this study to be conducted be a research team of women with disabilities; and

(d) the special needs of women with disabilities need to be accounted for in respect of financial independence, child care support, employment and training needs. In particular evaluation of changes in disability allowances needs to be evaluated in the light of their likely impact on women with disabilities.

CHAPTER 10

LEGISLATION

10.1 Sex Discrimination Legislation

Introduction

10.1.1 The major legislative instrument designed to prohibit discrimination against women in Australia is the *Sex Discrimination Act* 1984 (SDA). This legislation was based on the United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) which Australia signed in 1980 and ratified in 1983.

10.1.2 Under the SDA, arrangements were put into place for complaints on the grounds of sex, marital status and pregnancy to be lodged with the then Canberra-based Human Rights Commissioner or to the State Commissioners for Equal Opportunity (or President of the Anti-Discrimination Board in the case of New South Wales). This produced a 'one-stop shop' for discrimination complaints. In 1986 the Human Rights Commission was replaced by the Human Rights and Equal Opportunity Commission based in Sydney.

10.1.3 Much of the evidence canvassing the SDA made the point that the original drafting of the Act reflected the level of public understanding of Discrimination Legislation in the early 1980's. Since the passing, the Commonwealth, all States and Territories with the exception of Tasmania have enacted similar legislation. Submissions argued that public understanding and acceptance of the workings of the SDA and related Legislation had improved and it was now appropriate to review the scope and operation of the SDA.

The Sex Discrimination Act 1984

10.1.4 The aims of the SDA included the elimination of discrimination on the basis of sex, marital status or pregnancy in a number of key areas such as employment, education and the provision of services. The Act explicitly included sexual harassment as a form of discrimination in employment and education. The other main aim of the Act was to promote community respect for the principle of the equality of men and women.

Definitions of Discrimination

10.1.5 Discrimination on the ground of sex or marital status is defined as having occurred:

- if the aggrieved person is treated less favourably by reason of that person's sex or marital status, or a characteristic appertaining to or generally imputed to persons of that sex or marital status; or

- if the aggrieved person is required to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex or different marital status are able to comply, which is not reasonable, having regard to the circumstances of the case, and with which the aggrieved person does not or is not able to comply.

10.1.6 Discrimination on the ground of pregnancy is defined as having occurred:

- if the aggrieved person is treated less favourably by reason of her pregnancy or a characteristic appertaining to or generally imputed to pregnant women, and where the less favourable treatment is not reasonable in the circumstances; or

- if the aggrieved person is required to comply with a requirement or condition with which a substantially higher proportion of persons who are not pregnant comply or are able to comply, which is not reasonable having regard to the circumstances of the case, and with which the aggrieved person does not or is not able to comply.

10.1.7 However, a man cannot claim to have been discriminated against by reason only of not being granted the same rights or privileges accorded to a woman in connection with pregnancy or childbirth.

Sexual Harassment

10.1.8 Sexual harassment is defined as an unwelcome sexual advance, or an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature directed to a person, where that person has reason to believe that rejecting or refusing the advance or request or taking objection to the conduct would disadvantage that person in any way in connection with employment or work, or possible employment or work, or in connection with the person's studies or application for admission to an educational institution as a student.

The Commission

10.1.9 The Sex Discrimination Act is administered by the Human Rights and Equal Opportunity Commission (HREOC) a permanent independent authority, established by the Australian Parliament in 1986. It replaced an earlier body, the Human Rights Commission, which has been set up in 1981. It also administers the *Human Rights and Equal Opportunity Commission* 1986 and the *Racial Discrimination Act* 1975.

10.1.10 The Commission is responsible for handling complaints under the Act, promoting understanding and education of the objects of the Act, as well as providing advice to the Attorney-General on matters relating to discrimination. In performing its functions, the Commission is expected to consult widely.

10.1.11 The functions of HREOC also include undertaking research and educational programs, examining enactments, reporting on what laws should be made on matters relating to discrimination on the ground of sex, marital status or pregnancy, or involving sexual harassment, and preparing guidelines for the avoidance of discrimination on these grounds.

10.1.12 Inquiries may be referred to the Commission by the Commissioner or by the Minister. The Commission may hold a single inquiry when the subject matter of two or more complaints is substantially the same, or may determine that a complaint should be dealt with as a representative complaint. The Commission has no legal power to enforce a determination. If a complaint is unresolved through conciliation, or after a hearing, the Commission or complainant may institute proceedings in the Federal Court to give effect to a determination of the Commission. The Act also sets out penalties for failure to provide information or other forms of obstruction when the Commission is undertaking inquiries.

Amendments to the Act

10.1.13 The *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act* 1986 amended the SDA to substitute the new Commission for the former Human Rights Commission, and to provide that the Sex Discrimination Commissioner is not subject to the direction of the Commission in the performance of functions under the SDA. Other amendments included an increase in the penalty for misuse or wrongful disclosure of information by Commission staff to $5,000 or imprisonment for one year or both.

10.1.14 In 1986 the *Sex Discrimination (Consequential Amendments) Act* was passed to amend certain Commonwealth Acts which contained provisions inconsistent with the SDA. Section 40 of the SDA had provided a two-year exemption for acts done in direct compliance with any other Commonwealth, State or Territory law in force at the commencement of the Act, and s 40(3) allowed for regulations to be made to continue exemptions for specified legislation beyond the two-year "sunset" clause. Commonwealth legislation has been reviewed to identify discriminatory provisions based on sex or marital status and a number of Acts and ACT Ordinances have been amended.

10.1.15 The *Sex Discrimination Amendment Act* 1991, repealed the provisions by which inconsistent legislation was able to be exempted by regulation (see Sub-section 40 (3)) and inserted a number of indefinite exemptions for Commonwealth legislation subject to review after 5 years.

State Anti-discrimination Legislation and Cooperative Arrangements with the States

10.1.16 All Australian States, with the exception of Tasmania, have enacted legislation which prohibits discrimination on the ground of gender. The State legislation is broadly similar to the Commonwealth legislation.

10.1.17 The HREOC, on behalf of the Attorney-General, has cooperative arrangements with most of these States. Under these arrangements complaints of discrimination arising under the SDA and the RDA are handled by the State machinery on behalf of the HREOC. The cooperative arrangements provide 'one-stop shopping' which means that persons in those four States who wish to lodge complaints can seek advice from a single office handling both Federal and State legislation. However, a complaint which is brought under a State anti-discrimination Act cannot also be brought under the Commonwealth Acts. By contrast, if an action taken under Commonwealth legislation does not succeed, a complainant may still have recourse to State legislation. In respect of the criminal offences in the Acts, a person may be prosecuted or convicted under either the State or Commonwealth legislation, but not both, for the same action or omission.

The Need for Legislation

10.1.18 One of the stated objects of the SDA is 'to promote recognition and acceptance within the community of the principle of the equality of men and women'. While this tenet is not questioned, there is still some argument as to the efficiency of legislation in contributing to that equality. The Confederation of Australian Industry argue that attitudinal change will not flow from the imposition of penalties and that imposition of penalties will 'only lead to impressions of injustice, and lasting grievances amongst those whose attitudes are sought to be changed'. Other submissions however queried the argument that legislation cannot be effective in changing attitudes. This is often raised in relation to discrimination, whereas its effectiveness in other areas of social change (for example, safety issues such as wearing of seatbelts) is not doubted[1].

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1 Evidence, p.S520

10.1.19 The need for legislation to protect women from discriminatory behaviour was generally supported. The Western Australian Women's Advisory Council to the Premier remarked that:

> ...statutory intervention (is) crucial to the establishment of equal opportunity and equal status for women in Australia. ... While equal opportunity legislation is designed to encourage attitudinal change, it is also designed to give effect to women's rights to equality in all areas of public life, by providing sanctions where this right has been denied.[2]

10.1.20 Justice Elizabeth Evatt, giving evidence in a private capacity, agreed that:

> ... laws enacted by Parliament in relation to matters of current social interest play an important part in changing attitudes.
>
> There is a very interesting process involved in public opinion, legislation and judicial decision-making; they each feed into the other. But where the leaders, the elected members, see that there is an issue which is fully justified in terms of human rights and internationally accepted standards, and they legislate for it, that legislation will work towards change, if it is carefully planned and implemented appropriately. That is my belief. I am a law reformer and I say that law reform is not there to follow; it is there to push the barriers forward... not to wait until attitudes change.[3]

10.1.21 The bulk of the evidence acknowledged that the legislation reflects that discriminatory behaviour is not acceptable in Australian society. It then becomes a question of whether the legislation is effective in protecting this community standard.

Effectiveness of Legislation

10.1.22 It is generally accepted in evidence to the Committee that the introduction of the SDA in 1984 has greatly assisted women to seek redress for immediate and direct discrimination. The short period of time during which the legislation has existed does, in the view of some, make it difficult to gauge its

2 Evidence, p.S1530
3 Evidence, p.1430

effectiveness. The overwhelming view expressed in the submissions is that the existence of a non-threatening remedy for a complaint has helped women take steps to overcome certain forms of discrimination.

10.1.23 In 1990-91, 803 complaints were lodged under the Sex Discrimination Act: a 35 per cent increase over the previous year. Women complainants continued to outnumber men. The most common area of complaint was employment (some 85 per cent of all complaints) and the most common ground was sexual harassment (292 or 36.3 per cent). The majority of cases were considered to be successfully conciliated with a mutually agreed settlement or with the complaint not proceeded with or withdrawn. Only 5 per cent of complaints handled by HREOC were referred for a formal hearing, the most expensive and traumatic way of reaching settlement.

10.1.24 The Human Rights and Equal Opportunity Commission[4] attests to the effectiveness of the Act in the following terms:

> The Act provides a national framework for sex discrimination to be addressed in Australia. Thousands of women have used the Act to complain of unlawful discrimination and the overwhelming majority of their complaints have been conciliated under the Act.
>
> Since the introduction of the Act in 1984, the general public has developed a much greater awareness of sex discrimination. Employers and other organisations are beginning to consider the potential for discrimination and HREOC has noted that increasing numbers consult HREOC to ensure that their policies and practices do not include acts of unlawful discrimination. This is partly attributable to the flow-on effect of complaint handling procedures. It is also a direct result of the extensive educational and promotional work carried out under the Act.
>
> The Act benefits women today, but, perhaps more importantly, the impact of the legislation in areas such as employment and education makes an important contribution to opportunities for young women and their ability to participate equally in society.[5]

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4 Evidence, p.S1553
5 Evidence, p.S1545

10.1.25 The feeling conveyed in the submissions is that, generally speaking, many of the more blatant examples of discrimination are no longer in evidence. For example, advertisements for employment are no longer categorised under sex; women can join most clubs; and educational institutions take care in applying admission criteria to ensure that women are not directly discriminated against. The educative effect of anti-discrimination legislation in terms of making employers aware of the occurrence of sexual harassment within the workplace is also noted.

10.1.26 One issue which has been raised with the Committee concerns the accessibility of the Act, because at the time of its enactment it was regarded as a highly controversial piece of legislation, its drafting is extremely cautious, not to say convoluted. Many of those involved in promoting equal opportunity have complained of the tortuous nature of the drafting and the desirability of redrafting the Act in plain English in the interests of those it is intended to benefit.

Theories of Equality

10.1.27 There is a threshold question which has been raised about the appropriate theory of equality on which to base the SDA. This issue was first raised with the Committee by Dr Rosemary Hunter in her evidence to the Committee at public hearings in Melbourne.[6] In a discussion concerning difficulties raised with the 'reasonableness requirement' in the test for indirect discrimination, Dr Hunter suggested a need to reformulate the concept of indirect discrimination to get away from the current reliance on mathematical formulations in preference to the subordination principle advanced by American lawyer Catharine MacKinnon.[7]

10.1.28 The subordination model defines women's inequality in terms of subordination to men rather than differences between the two groups. Practices, policies and laws are evaluated to assess whether they operate to maintain women in a subordinate position. If these laws and policies are purportedly justifiable on the basis of women's differences, then the differences themselves must also be examined to ascertain whether they are a consequence of social or economic oppression. The assessment of whether a practice or policy subordinates women is made with regard to its historical origins, its social and economic effects, and its real meaning as

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6 Evidence, p.48

7 Catherine A Mackinnon, 'Making Sex Equality Real' in Righting the Balance: Canada's New Equality Rights, pp.37-43

understood by women. This model then requires affirmative steps toward eliminating the subordinate status, including, for example, a 'redistribution' of burdens and benefits.

10.1.29 The important advantage of the subordination principle is that it avoids legalistic analysis of whether differences not valid bases for disparate treatment, focussing instead on women's experience of the effect of such practices. It thus asks the law to pronounce on the reasons for gender differences. Do they work to the benefit of the male gender? Do they result in reduced autonomy, self-esteem or employment options for women? This model is also significant in that it demands practical and immediate remedial action as opposed to formal vindication of abstract rights.

10.1.30 Associate Professor Regina Graycar of the Law School of the University of New South Wales also advised the Committee that it is necessary to look behind the superficial ratios of equality. Professor Graycar expressed a concern that the SDA is structured upon a formal equality model of assuming always a male comparator and that it works for some people and not for others.

10.1.31 Professor Graycar notes:

> It works for people like ourselves who participate in very public worlds, as it were, but there are a lot of things that it just cannot come to terms with at all. It is also limited to areas of public life; i.e. employment, accommodation, goods and services, and so on. A lot of the areas that we look at where women are particularly disadvantaged are not those sorts of areas.[8]

Conciliation Model

10.1.32 The effectiveness of the conciliation model was referred to in a number of submissions. The HREOC[9] submission in noting the advantages of the flexible, confidential and cost-effective remedy of conciliation stated that 97 per cent of complaints are successfully conciliated or not proceeded with. The flexibility of the conciliation process to achieve results which would not be available through

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8 Evidence, p.1383
9 Evidence, p.S1567

traditional litigation processes was also referred to, (for example, the giving of an apology, a reference or re-instatement in employment).

10.1.33 The conciliation model was seen to have some deficiencies. Ms Moira Rayner, Equal Opportunity Commissioner for Victoria, provided the following perspective on the claim that 97 per cent of complaints are successfully conciliated:

> We say that about 95 to 97 per cent of the cases which come before the Commissioners for Equal Opportunity and other agents who are supposed to handle complaints are settled in the conciliation process. All I can say to you is that while they may not proceed to a determination, that does not necessarily mean that they are settled in the conciliation process. My experience in the last five months has been that people just pull out and say they have had enough. We are not, in fact, providing a very prompt or effective process.[10]

10.1.34 This view was also supported by June Williams, Commissioner for Equal Opportunity in Western Australia:

> Statistics indicating high levels of success in conciliation ... are misleading. Such data indicate the effectiveness of the model in keeping matters from proceeding to formal hearings, not the success of the conciliation model.[11]

10.1.35 The Attorney-General's Department in acknowledging the success of the conciliation approach notes, however, that:

> The procedures established under the SDA (and the RDA) are primarily aimed at achieving the conciliation of a complaint. An important aspect of this underlying philosophy of the Act is that the conciliation of a complaint is more likely to achieve a lasting result than the adoption of an adversarial approach (especially where there needs to be an ongoing relationship, for example, in the employment context). Conciliation has proved exceptionally successful and the vast majority of complaints have been conciliated. It is only where the Sex Discrimination Commissioner has formed the opinion that a complaint cannot

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10 Sex Discrimination Legislation Seminar, p.154
11 Evidence, p.S4500

> be settled that the complaint is referred to the Commission for hearing.[12]

10.1.36 At the seminar conducted by the Committee on Sex Discrimination Legislation, Professor Margaret Thornton of La Trobe University and Joan Ross of the Women's Bureau of the Department of Employment, Education and Training also spoke of the advantages of conciliation for settling disputes under anti-discrimination legislation.[13]

10.1.37 Some concern has also been expressed that the conciliation of complaints under the Sex Discrimination Act does have some undesirable consequences. The National Women's Consultative Council balances its general support for conciliation with its concern about the process in the following terms:

> The conciliation model used by the Human Rights and Equal Opportunities Commission, in principle, provides a sound basis against which complainants can have grievances adequately addressed. NWCC believes that the HREOC is perceived as a neutral organisation which complainants can approach without fear of reprisal. NWCC would be concerned if the integrity of the legislation were lost should the HREOC no longer be an independent body.
>
> Whilst conciliation provides a less 'threatening' model for complaints, NWCC is concerned that this model pushes the Sex Discrimination Act out of public view. Sex discrimination is thus viewed as a private matter. A balance between private and public settlement of disputes would ensure that information about the SDA would be more prominent in our society through media reports, etc. NWCC is also concerned that the conciliation model cannot, as it stands, adequately address systemic discrimination in the workplace.[14]

10.1.38 Dr Rosemary Hunter, of the University of Melbourne Law School, in a paper presented to the Committee's Seminar on Sex Discrimination Legislation, also articulated concerns about the conciliation process:

> The emphasis on resolving complaints by conciliation means that the legal provisions are under-publicised. Media reports of the outcomes of public hearings are an important source of

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12 Evidence, p.S959
13 Sex Discrimination Legislation Seminar, p.11; p.169
14 Evidence, p.S2051

information about the legislation: people are reminded of its existence, can see it working, and may be encouraged to use it themselves. By contrast, a few notes on conciliated cases in a HREOC *Annual Report*, reach only a limited and specialised audience.

Further, decided cases provide a necessary background to conciliation. In clarifying the meaning of particular statutory provisions, and providing an indication of how similar cases might be decided if they were to proceed to a hearing, they also help to clarify the bargaining positions of future disputants.

There would thus appear to be a need for more balance between public decisions and conciliated settlements. Such a balance is achieved in 'deregulated' jurisdictions by the fact that parties to any civil action - or their lawyers - will generally endeavour to negotiate a settlement before proceeding to litigation.

The enshrinement of conciliation as a compulsory step in discrimination cases suggests, however, that discrimination is seen as essentially a private matter between the parties, involving nothing more serious than a difference of opinion. Thus while the role of a lawyer in negotiation is to protect the position of, and produce the best possible outcome for, their client, a conciliator plays a neutral role: helping the parties to appreciate each other's view of the facts, explaining how the legislation applies, and hence putting them in a position to discuss a mutually acceptable solution. The conciliator's agenda is to get the complaint resolved.[15]

10.1.39 It is also recognised that while the conciliation mode of addressing complaints has advantages in terms of flexibility, informality and reduced cost, the complainant is invariably in a position of less power than the respondent. Often that power imbalance is reflected in the financial advantage of the respondent. This may be reflected by greater access to legal representation. While a conciliator has a discretion to refuse to allow parties to be represented at a conciliation conference, access to legal advice in the conduct of the conciliation process is not excluded by the SDA.

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15 Evidence, p.S499

10.1.40 Another view is that the conciliation process should be kept non-legal wherever possible and that refusal of legal representation should be the norm, rather than extending the formal litigation role to the complainant as well. *Heather Carmody, Executive Director of the CAI and BCA's Commission for Equal* Opportunity in Employment suggests limiting legal representation of all parties but increased access to legal advice.[16] Josephine Tiddy, Commissioner for Equal Opportunity in South Australia recommends inclusion in the SDA of provisions similar to those in the Sub-section 95(a) of the South Australian Equal Opportunity Act (SA) which provide for the Commissioner to assist complainants in the presentation of cases before a Tribunal.[17]

Scope of Legislation

Proscription of Discrimination as Unlawful

10.1.41 Unlike the Racial Discrimination Act, which has general provisions proscribing discrimination as unlawful (section 9) and providing for a right to equality before the law (section 10), the SDA operates within the confines of specific grounds for complaint and within the specific definitions of discrimination on the basis of sex, marital status and pregnancy.

10.1.42 Both Dr Rosemary Hunter and Mr John Basten[18] suggest the need for the Sex Discrimination Act to be amended to proscribe as unlawful discrimination in the exercise of any human rights or fundamental freedoms. In the words of Dr Hunter:

> Despite the fact that CEDAW is rooted in an international jurisprudence concerning human rights and fundamental freedoms, the Sex Discrimination Act does not create or confer a positive, substantive right to equality or freedom from discrimination. Instead, it confers merely procedural rights on persons who may perceive themselves as 'victims' of another's action which the Act defines as unlawful.

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16 Evidence, p.S4418
17 Evidence, p.S4494
18 Evidence, p.S2934

> This approach was perhaps inevitable within a legal culture which is wary of 'rights' or broad statements of principle and more familiar and comfortable with detailed negative regulation. Yet the implementation of social policy within the parameters of such a culture is problematic. The proscription of specified types of discrimination, on specified grounds, in specified areas, and subject to specified exceptions, tends to produce an undue focus on jurisdictional and definitional issues, while obscuring the basic harms which the law is supposed to alleviate.
>
> In order to overcome these problems, the Act needs to provide a strong countervailing emphasis on the detrimental effects of all forms of discrimination against women, and victims' entitlement to redress where unlawful discrimination has occurred. It is submitted that the Act's procedural mechanisms fall some way short of these standards.[19]

Family Responsibilities

10.1.43 The role of women as care-givers as well as paid workers was seen as the basis of much discrimination against women. Discrimination on the ground of family responsibilities is seen as "a major source of direct and indirect discrimination against women.[20] A number of submissions pointed to the failure of the SDA to capture this common form of discrimination against women and speakers at the Seminar on Sex Discrimination Legislation, including Moira Rayner, the Victorian Equal Opportunity Commissioner, urged that the ground of parental status be included in the Commonwealth Act.

Sexual Preference

10.1.44 A number of submissions called for the inclusion of the ground of sexuality or sexual preference in the Act (eg submissions from the Australian Nursing Federation, the Labor Women's Organisation (Qld), Equal Employment Opportunity in Public Employment (SA), WAS (WA), Women's Electoral Lobby (Vic), Women's Legal Reform Group). This ground is included in comparable legislation in New South Wales, South Australia and the ACT. It has also been included by

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19 Evidence, p.S499
20 Evidence, p.S625

regulation among the grounds of discrimination handled by HREOC under ILO Convention 111 (the Convention relating to discrimination in employment and occupation). The Human Rights Commission has the power to conciliate complaints on these grounds.

Pregnancy and Marital Status

10.1.45 The HREOC submission highlights the inadequacy of the 'pregnancy' grounds in the SDA, in cases where the ground of discrimination is not pregnancy but the perceived likelihood of pregnancy, and suggests such discrimination should be expressly addressed by the SDA as prohibited discrimination.[21]

10.1.46 It should also be noted that the prohibition of discrimination on the ground of pregnancy in the SDA is weaker than the prohibition on the grounds of sex or marital status in that less favourable treatment on the ground of pregnancy is not discrimination if it is 'reasonable'. Neither the South Australian Equal Opportunity Act nor the ACT Discrimination Act make this distinction and there is a strong argument for treating pregnancy discrimination in the same way as other forms of discrimination.

10.1.47 The limits imposed on complainants by the interpretation of 'marital status' in the courts was also referred to in submissions. The restriction on the application of 'marital status' to discrimination against persons who are in a particular married state as distinct from discrimination against a person because of the identity of the partner of that person is also an unnecessary one. These difficulties are easily remedied by amendments to the SDA. Both the Queensland Labor Women's Organisation[22] and Marg O'Donnell, Director of the Queensland Community Justice Program,[23] cited such discrimination.

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21 Evidence, p.S1579
22 Evidence, p.S133
23 Sex Discrimination Legislation Seminar, p.105

Sexual Harassment

10.1.48 Numerous submissions referred to the issue of sexual harassment and to perceived deficiencies in the protection currently provided by the SDA against this form of discrimination. Complaints of sexual harassment are on the rise in Australia (there was an increase of over 100 per cent in the number of such complaints dealt with by HREOC in 1990-91), making it the largest category of complaints dealt with under the SDA.

10.1.49 A number of submissions (such as those from the Equal Opportunity Board of the University of Adelaide[24], the Equal Opportunity Officer of the University of Adelaide and the Working Women's Centre) argued that the definition of sexual harassment in the SDA was too restrictive and that a complainant should not have to demonstrate that a detriment had been suffered, or was feared, in addition to the harassment itself. The difficulties in proving detriment under the existing definition was also referred to by Ms Marg O'Donnell in her address to the Sex Discrimination Seminar. These submissions recommended that the definition of sexual harassment in the SDA be amended along the lines of the definition in the South Australian Equal Opportunity Act. This step has recently been taken in the ACT where the definition of sexual harassment covers situations where:

> ... a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimated.[25]

10.1.50 A number of other submissions (for example, from the University of Canberra, the South Australian College of Advanced Education and Ms Maureen McInroy) argued that the SDA failed to provide protection against common forms of sexual harassment in educational institutions - student/student harassment and harassment of staff by students. The need to cover the issue of student/student and student/staff sexual harassment has been picked up in the ACT Discrimination Act. The Working Women's Centre[26] notes that existing proscription of sexual harassment in these areas in State legislation does not provide protection for those providing goods and services, only those receiving them. This means that there is

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24 Evidence, p.S434
25 Evidence, p.S58
26 Evidence, p.S1525

no protection for either, staff harassed by patients in hospitals or for staff harassed by patrons in restaurants or hotels.

Representative Complaints

10.1.51 While some women have been awarded damages in relation to unlawful acts pursuant to the SDA, it is also true that the personal cost to complainants whose matters are referred to the Human Rights and Equal Opportunity Commission (rather than being settled by way of conciliation, by the Sex Discrimination Commissioner) places an immeasurable burden on the individual complainant. While there is provision in section 50(1)(c) of the SDA for class complaints to be made and in section 50(1)(d) for a complaint to be made by a trade union, the requirement that the persons be aggrieved by the alleged unlawful act has restricted the potential use of class actions.

10.1.52 The Human Rights and Equal Opportunity Commission submission offers the following possible reasons for the low rate of union involvement in sex discrimination complaints:

. the union movement may be unfamiliar with the complaint handling processes under the Sex Discrimination Act;

. additional difficulties may arise when the complainant and the respondent belong to the same union (any difficulties here could be alleviated by the union adopting a neutral stance and simply offering to assist with the conciliation process, within the framework of union policy on matters to do with sex discrimination);

. the woman may not have been a union member during the period to which the complaint relates, either because the complaint concerns the period prior to gaining employment or, in line with the general trend of a falling union membership and low membership rates among women, the complainant may not be a union member;

. trade unions can only participate in a case brought by an individual or a group of individuals if it is known that the union can assist and chooses to be involved - the confidentiality provisions of the Sex Discrimination Act prohibit the

Commission from seeking the involvement of a union in a particular complaint.[27]

10.1.53 Mr John Basten, in a presentation to the Seminar on Sex Discrimination Legislation, noted that systemic discrimination moves, in most cases, beyond individual instances of discrimination to discrimination against groups. In this regard he made a case for the refinement of the representatives action provisions. In particular, the requirements of Section 70. Mr Basten believes Section 70 is based on a misunderstanding of the United States Federal Rules of Civil Procedure and that it is internally inconsistent; cumbersome; does not readily provide for group damages; and provides no guidance to tribunals, commissions or courts on how to apply the rules. He submits that:

> It is absolutely essential that a proper group procedure be instituted; that it be made applicable in the Human Rights and Equal Opportunity Commission; and that ... it be applicable to those courts including the Federal Court which hear appeals from the Human Rights and Equal Opportunity Commission. That is a matter of urgent consideration for reform.[28]

10.1.54 The enactment of the *Federal Courts of Australia Amendment Act* 1991, allowing for representative actions is consistent with attempts by HREOC to accept representative actions.

Functions of the HREOC and the Sex Discrimination Commissioner

10.1.55 Much evidence has been presented to the Committee concerning the stress and personal costs imposed on complainants by the nature of the SDA, which places the onus on persons in less powerful positions to bring complaints against persons in positions of greater power. A more proactive role for the Sex Discrimination Commissioner is seen as one solution to this dilemma.

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27 Evidence, p.S1566
28 Sex Discrimination Legislation Seminar, p.67

10.1.56 The complaint-based functions of the Sex Discrimination Commissioner are only as effective as the extent to which individuals are prepared to lodge complaints. Individuals may not be prepared to undergo the trauma of pursuing a complaint against a powerful and intransigent respondent, regardless of the merits of the case.

10.1.57 The WA Women's Advisory Council to the Premier makes the point that implicit in complaint-based legislation is a disregard for, and a lack of recognition of the power relations involved when an individual decides formally to complain.[29] In areas of employment and education particularly, lodging a complaint usually requires a 'trade-off' on the part of the individual. Fear of threatened or actual victimisation and reprisals (in relation to either, job security, career prospects, academic results or pay packet) is balanced against the determination to realise the right to equality of opportunity and status or to ensure that rights for others.

10.1.58 Complaint-based functions prevent the unmasking of the historical, cultural, social and economic institutionalisation of sex discrimination by approaching discrimination as if it were only an individual and occasional problem. The discrimination embedded in the gendered division of labour and education cannot be unmasked or addressed in any practical or significant way within the confines of the complaint-based functions of the Commissioner.

10.1.59 There is also significant evidence before the Committee of a need to amend the SDA to remove the additional burden of a further Federal Court hearing before a complainant has a legally enforceable right to recover compensation which the Human Rights and Equal Opportunity Commission has awarded. The ineffectiveness of the SDA in ensuring that compensation, is in fact paid is a deterrent to the complainant. Added to this is the possibility that a party who is the subject of the Commission's determination may proceed to the Federal Court, pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 to challenge the decision of the Commission and in so doing may name the original complainant as a respondent in the Federal Court. This can involve the complainant in Court costs and impose a further deterrent to the pursuit of remedies made possible by the SDA.

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[29] Evidence, p.S1539

10.1.60 The Human Rights and Equal Opportunity Commission in its Annual Report 1988-89 commented on difficulties encountered in administering its legislation. Unlike its state counterparts, the Human Rights and Equal Opportunity Commission cannot enforce its decisions without recourse to the Federal Court:

> The Commission has considered whether the existing scheme of hearings in relation to sex and race matters is satisfactory from both the Commission's and the parties' points of view. At present the Commission hears and determines complaints but its determinations are not enforceable without a further hearing in the Federal Court. By way of comparison, the Privacy Act requires only one hearing to provide enforceable rights to a complainant who proves breach of an Information Privacy Principle by a Federal agency.[30]

10.1.61 On this question of enforcement, the current President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, recently commented:

> I do not wish to understate the significance of the Sex Discrimination Act and the Racial Discrimination Act in translating international law on human rights into rights enforceable in the Australian legal system. But there are substantial problems in enforcement...
>
> The Commission may make determinations as to whether unlawful conduct has occurred, and as to what if any remedies should be given. The process has many of the indicia of judicial power. However, the determinations of the Commission are stated not to be binding or conclusive between the parties.
>
> In this the Commission contrasts with the NSW Equal Opportunity Tribunal and its equivalents under other State anti-discrimination legislation, which exercise judicial power in the full sense. Unlike the State bodies, the Commission is constrained by the boilermakers case.
>
> The Commission's hearings are considerably less formal, lengthy and expensive than court proceedings. Nonetheless, a complaint which goes to hearing normally requires far more of the Commission's resources, and takes a longer period, than the more typical complaint settled in conciliation. It is frustrating for the Commission, therefore, and no doubt for

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30 Exhibit No.156(xvii)

> complainants, to know that a respondent against whom a determination is made is under no direct legal duty to comply.
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> Enforcement proceedings in the Federal Court are provided for. The Federal Court has held, however, that these are not strictly proceedings for enforcement of the Commission's order. The Federal Court is required to satisfy itself that unlawful conduct has occurred, and determine for itself what order is appropriate, rather than relying on the determinations of the Commission or on evidence given to the Commission.
>
> It must be possible to arrive at a simpler and more workable procedure than this for determining cases.[31]

10.1.62 The question of possible conflict in the conciliation and judicial roles of the Commissioner is relevant for both the Commonwealth and State anti-discrimination bodies. This question has arisen when conciliation attempts have failed and the Commissioner then plays a part in presenting the case before a Tribunal or Supreme Court in the case of an appeal, or before the Federal Court. In considering this question the Law Reform Commission of Victoria has proposed, for Victoria, a clearer distinction between administrative and judicial function, and that the Equal Opportunity Board should be renamed the Equal Opportunity Tribunal to better describe its functions.

10.1.63 The Attorney-General's Department also provided details of judicial criticism of the determination making function of the Human Rights and Equal Opportunity Commission. The Department acknowledges that:

> The Federal Court hearings are de novo hearings, ie a full re-hearing by the Court is required. In view of the non-binding nature of the determinations some respondents to complaints have deliberately withheld pertinent evidence from the Commission and only brought it forward at the time of the hearing before the Federal Court. The Federal Court has criticised the current scheme of making determinations under the RDA and the SDA.[32]
>
> It is arguable that the fact that the Commission's determinations are not binding undermines the effectiveness of the Commission's role in eradicating sex and race discrimination. As noted above, in recent cases respondents

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31 Speech to the Australian Academcy of Forensic Science, October 1991

32 See Maynard v Neilson and Aldridge v Booth

> have exercised the option of withholding their evidence but assessing the complainant's case in the hearing before the Commission, ignoring the Commission's determination and then developing or patching up their own case in the Federal Court. In future, as more and more respondents learn that the Commission's hearings are indecisive, there is a risk that they will use their financial superiority over complainants (who are generally more financially vulnerable and under more stress) to force repetition of proceedings in the Federal Court. The Government is therefore giving consideration to means whereby some of the more onerous effects of the need for de novo hearings in the Federal Court are alleviated.[33]

10.1.64 The Senate Standing Committee on Legal and Constitutional Affairs is presently giving consideration to options for reform of the determination process in respect of the Human Rights and Equal Opportunity Commission.

Resources

10.1.65 The need to extend the Sex Discrimination Commissioner's role into education, coupled with the necessity for adequate funding for such education campaigns free from 'other major priorities adopted by the Human Rights and Equal Opportunity Commission', was referred to in a significant number of submissions and other evidence.[34]

10.1.66 The Women's Electoral Lobby provide the following comprehensive statement of the need for adequate resources in this area:

> Legislation can only be effective in securing fundamental human rights if citizens are aware of the legislation protecting those rights and if employers and providers of services are fully aware of their responsibilities.

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33 Evidence, p.S968

34 EEO Practitioners in Education, SA, Submission No.84; Labor Women's Organisation, Qld, Submission No.25; Working Women's Centre,. Submission 162; Women's Electoral Lobby, WA, Submission No.97; Women's Electoral Lobby, ACT, Submission No.110; SACAE, Submission No.117; the Union of Australian Women, Submission No.137; and the WA Women's Advisory Council, Submission No.163.

> Lack of resourcing is endemic to areas concerned with protecting women's rights. Apart from undermining the effectiveness of legislation, it is also interpreted in the community as indicating a lack of serious commitment on the part of government. This has a significant effect on the attitudes of employers and senior managers.[35]

10.1.67 The pivotal role of adequate resources in assuring equal opportunity in society were summarised by Josephine Tiddy, South Australian Commissioner for Equal Opportunity, as follows:

> Section 48 *describes an educative component as a function of* the Human Rights and Equal Opportunity Commission. These legislative requirements have been implemented to a very limited degree. Priority should be given to these educative functions, and adequate resources provided to ensure the creation and maintenance of such programs. It is the experience of this Commission:
>
> - that people's awareness of their rights governs their ability to participate fully in society;
> - that compliance with the laws fluctuates with the amount of assistance the Commission can provide;
> - and that both of these are absolutely dependent on the level of funding the Commission receives from State and Commonwealth Governments.[36]

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35 Evidence, p.S621
36 Evidence, p.S1650

Legal Aid

10.1.68 The submission from the Women's Legal Resource Group[37] amongst others drew attention to the difficulty of attracting legal aid for sex discrimination complaints and proposed that instead HREOC make available advocates to assist complainants.

10.1.69 Mr John Basten, the lawyer involved with the test case of *Australian Iron & Steel Pty Ltd v Banovic*, advised the Committee that:

> A significant lesson from the AIS case was that resources must be available, preferably through the Human Rights and Equal Opportunity Commission, or its state counterparts, to obtain independent assessments of the conduct of potential discriminators. In that case it is unlikely that the complainants would have succeeded had the President not appointed an independent consultant to review the practices of the company. Any serious attempt to counter indirect discrimination must include the provision of resources which would permit such challenges to be mounted.[38]

Victimisation

10.1.70 The Sex Discrimination Act contains provisions, described in section 94, which make it an offence for any person to subject, or threaten to subject, another person to any detriment because the second person has taken action under the Act. Committing an act of victimisation is punishable by fines and/or imprisonment.

10.1.71 A number of submissions identified difficulties arising from the legal processes involved in pursuing a claim of victimisation. Because the Act proscribes victimisation as an offence, complaints must be heard in a court of law - to which the public and the media have access. This process is sufficiently daunting for many women to decide not to pursue their complaint.

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37 Evidence, p.S1754
38 Evidence, p.S2950

10.1.72 If the problems associated with pursuing the present remedies are so great as to prevent their use, the sanction becomes ineffective and the community will come to know that discrimination, and subsequent victimisation, will go unchallenged.

10.1.73 A possible solution to these problems would be to amend the Act so that complainants are able to seek redress through a confidential process of conciliation, rather than through public confrontation in a court of law. The NSW Anti-Discrimination Act provides that complaints of victimisation should be settled through conciliation in this way and the Anti-Discrimination Board of NSW suggests that the Commonwealth Act should be amended to this effect.[39]

10.1.74 Another way of improving the effectiveness of the Act would be to allow complainants to seek redress against victimisation either through a court of law (as at present) or through a confidential process of conciliation. An amendment to this effect may encourage more women to take action against victimisation, while at the same time preserving the value, both real and symbolic, of victimisation being a criminal offence.

Indirect Discrimination

10.1.75 Ms Helen Styles[40] and Mr John Basten[41], both with experience in leading Australian cases on indirect discrimination, have provided the Committee with detailed evidence on the concept of indirect discrimination and its utility. The importance of the concept of indirect discrimination and the widespread interest in achieving a more workable definition was also attested to at the Sex Discrimination Seminar held by the Committee, where two separate workshops had to be held on the subject to accommodate the numbers of participants who wished to be involved.

10.1.76 Indirect discrimination was first proscribed in the United States and may be said to occur where an ostensibly neutral criterion or condition has a disproportionate and unreasonable impact on either sex.

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39 Evidence, p.S3780
40 Evidence, p.S1192
41 Evidence, p.S2943

10.1.77 Indirect discrimination is rendered unlawful by provisions of Sub-sections 5(2) 6(2) and 7(2) of the SDA. In order to establish the existence of indirect sex discrimination it is necessary that the four elements of the concept be proved. The first is that the alleged discriminator 'requires the aggrieved person to comply with a requirement or condition'. The second is that the requirement or condition be one 'with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply'. The third is that the requirement or condition be 'not reasonable' having regard to the circumstances of the case. The final element is that the requirement or condition be one 'with which the aggrieved person does not or is not able to comply'.

Difficulties with Proving Indirect Discrimination

10.1.78 Both the Federal and the NSW Courts have in recent years striven to give meaning to sub-sections 5(2) 6(2) and 7(2) of the SDA and a similar section of the NSW Anti- Discrimination Act. The area of most difficulty identified by the Courts is giving meaning to the second element, namely that the discriminator imposed a condition which is able to be complied with by a substantially higher proportion of persons of the opposite sex to the aggrieved person. The test involves a comparison of proportions and it is how these proportions are derived that can be problematic. The central question is which base pool group of employees should be used for comparative purposes.

10.1.79 The landmark case in indirect discrimination is the High Court decision in *Australian Iron & Steel v Banovic,* 1989. This case involved the retrenchment policy of Australian Iron & Steel and whether the policy amounted to indirect discrimination. The Court found that AIS retrenchment policy amounted to indirect discrimination because the women employees suffered disproportionately as a result of that policy in conjunction with a discriminatory hiring policy which caused women to experience significant delays between applying for work and obtaining employment. In arriving at this conclusion, the majority of the High Court found that the relevant base pool was all employees, both women and men, employed after the date of application for employment of the last women retrenched.

The Styles Case

10.1.80 The case of *Secretary, Department of Foreign Affairs and Trade vs Styles,* 1989 illustrated the difficulty involved comparing proportions. Ms Styles claimed indirect discrimination against the Department of Foreign Affairs and Trade on the grounds that the preconditions for suitability for overseas posting were able to be filled by a substantially higher number of men than women. Having originally won her case the decision in favour of Ms Styles was overturned in several respects but particularly due to difficulty in proving appropriate proportions.

10.1.81 The case left the position uncertain, especially in relation to the important issue of proof of indirect discrimination. Indeed there is a concern, expressed vigorously by Rosemary Hunter of the University of Melbourne Law School, that:

> The concept of indirect discrimination, far from receiving judicial endorsement, has been misunderstood by the HREOC, and subordinated to notions of managerial prerogative by the Full Federal Court. These interpretations, considered as precedent, render the relevant statutory provisions virtually meaningless.[42]

10.1.82 Despite the complexity of the definition, John Basten concluded:

> I am not sure that any great purpose is served by abandoning the definition contained in the *Sex Discrimination Act* (and other State Acts) at a time when the High Court has accepted a reasonably liberal and purposive interpretation.[43]

Evidentiary Burden in Indirect Discrimination

10.1.83 John Basten[44] makes a very direct plea for change to the burden of proof in the indirect discrimination provisions. In discussing the tests employed by the High Court in the AIS Case and the Federal Court in the Styles Case, Mr Basten concluded that there is a concern that the test of 'reasonableness' is lower than the

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42 Evidence, p.S505
43 Sex Discrimination Legislation Seminar, p.8
44 Evidence, p.S2949

requirement of 'business necessity' to be found in *Griggs v Duke Power Co*, (401 US 424, 1971), or that the condition be "justifiable" as required by the UK statutes.

10.1.84 He also notes that:

> Commonsense would suggest that the justification for the discriminatory provision should lie on the respondent and not on the complainant. The employer (or other alleged discriminator) who applied the requirement or condition is the person most likely to be able to say why it is reasonable. It may have had consideration to industrial or other issues affecting its workforce as a whole, of which the individual complainant would have no knowledge. It would, in my view, be quite wrong for a complainant to fail where a tribunal is satisfied that the requirement might be reasonable, even though it is unable to come to a conclusion as to whether it is in fact reasonable or not. Presumably, in such a case, the complainant would have failed to satisfy her burden of proof.[45]

10.1.85 However, Heather Carmody, Chief Executive of the Council for Equal Opportunity in Employment, representing the Confederation of Australian industry and the Business Council of Australia warned that any changes to the 'reasonableness' requirement could be impractical and possibly disadvantage employees.[46]

Exemptions

10.1.86 The SDA provides for numerous exceptions to, and exemptions from, the operation of the Act. Many submissions have argued that it is timely to look at the appropriateness of the specific exemptions enumerated in the Act.

10.1.87 During the course of the Inquiry the HREOC has also resolved to undertake a review of permanent exemptions in the Sex Discrimination Act. The Commission is currently reviewing exemptions under the following sections:

Section 13 - instrumentality of a State;

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45 Evidence, p.S2942
46 Evidence, p.S4419

Section 38 - educational institutions established for religious purposes;

Section 39 - voluntary bodies;

Section 40 - acts done under statutory authority; and

Section 42 - sport

10.1.88 The numerous exemptions from the operation of the SDA are, in the view of many who have given evidence to the Committee, contrary to the aims of the legislation, let alone the Convention on which it is based. Many submissions referred to the need for review and, where appropriate, the deletion of those exemptions which actively prevent the promotion and recognition of equality of men and women. Submissions addressing the different grounds of exemption were received by the Committee.

Employment Exemptions

10.1.89 In the area of employment, the SDA provides in section 30 a list of situations in which discrimination is not unlawful. These are where it is a genuine occupational qualification, to be a person of a particular sex.

Section 30(1) - Genuine Occupational Qualification

10.1.90 Several submissions argued that the occupational qualification included in Section 30 should be revised in light of the indirect discrimination provisions in the SDA. Furthermore changes in social attitudes should be taken into account in relation to the gender based exemptions. The repeal of this exemption was strongly recommended by the WA Women's Advisory Council which believes:

> ... there to be little, if any, justification for the generality of sub-section (1) in reference to genuine occupational qualification. Occupational qualifications, except where stipulated in sub-section (2), ought to be regarded as relating to skill, education, training, experience and knowledge.[47]

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[47] Evidence, p.S1534

10.1.91 Possible removal of the exemption in respect to genuine occupational qualification was strongly opposed by MIM Holdings who argued that occupational health and safety provisions should have precedence over gender equity.[48]

Educational Institutions Established for Religious Purposes

10.1.92 Section 38 of the SDA provides an exemption in relation to discrimination on the ground of sex, marital status or pregnancy for the hiring or dismissal of staff for employment at an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion or creed where the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

10.1.93 Sub-sections 2 and 3 refer specifically to dismissal of contract workers and discrimination on the grounds of marital status or pregnancy for educational institutions established for religious purposes, in regard to their educational practices.

10.1.94 The difficulty of determining at an objective level whether the exemption granted to educational institutions established for religious purposes is in fact protecting discrimination in good faith in order to avoid injury to that religion or just protecting discrimination, was outlined in the submission from the Independent Teachers' Federation of Australia.[49] Even if the exemption allowing for the 'sensitivities of religious bodies' is not challenged, there would appear to be an overwhelming view that the institutions must act reasonably and in an even handed manner between men and women.[50]

10.1.95 The Seventh-day Adventist Church,[51] the National Catholic Education Commission,[52] and the Australian Association of Christian Schools[53] all argued strongly that the removal of the exemption in Sub-section 38 (3) would be an infringement of the right of religious institutions to practice their own religion.

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48 Evidence, p.S4486
49 Evidence, p.S797
50 Evidence, p.S1080; and p.S1536
51 Evidence, p.S4435
52 Evidence, p.S4507
53 Evidence, p.S4619

10.1.96 The Women's Advisory Council believes that women in religious educational institutions are not accorded the same right to equality as are women in non-religious or public institutions. The Council challenges that:

> If Australia is committed to establishing and guaranteeing minimum standards of equality for all women section 38 exemptions for religious educational institutions allowing discrimination on the basis of sex, marital status or pregnancy cannot be retained.[54]

10.1.97 The Council notes that religious educational institutions are in receipt of significant Government funding. In the Council's view, the funding of institutions which discriminate against women in employment and education on the basis of sex, marital status or pregnancy raises serious questions about the Government's commitment to equality for women. The Council:

> ... strongly argues that Section 38 (1),(2) and (3) be repealed, so that women in religious educational institutions have the same right to equality, and recourse to the Sex Discrimination Commissioner, as have women in non-religious education institutions.[55]

10.1.98 Among the evidence received by the Committee are a number of case studies of particular forms of discrimination in religious schools which are currently protected by the operation of section 38 of the SDA. The Independent Teacher's Federation of Australia provided details of a such cases in its submission, which notably evidence a double standard between what has been expected of female teachers compared with male teachers.[56]

10.1.99 In another case, the Catholic Education Office, in rejecting an application from one of its own teachers for promotion provided the applicant with the following advice:

> I am sure you would understand that teachers seeking to occupy a managerial position in a Catholic school should be able to demonstrate not only an ability to teach religious education and to assist in the personal function and faith development of the students in their care, but also in their own personal situations, be in accord with the Church's guidelines

54 Evidence, p.S1536
55 Evidence, p.1536
56 Evidence, p.S792

> regarding marriage ... the decision not to accept your application has been based, not on any personal judgement of yourself, but rather on an obligation to ensure that the marriage status of those appointed to management positions is seen as being in accord with the official teaching of the Church.[57]

10.1.100 The Catholic Education Office's concern with the marriage status of the applicant in that particular instance resulted from her marriage having been celebrated in the Anglican and not the Catholic Church.

10.1.101 In the correspondence accompanying the above submission the following propositions are advanced:

> If the Catholic system is going to discriminate in this way, I believe that these things are not spelled out to people before they make a commitment to the system. I also wonder how appropriate it is that any system which is funded by the Australian public, should be able to flout the spirit of anti-discrimination legislation so blatantly.[58]

Voluntary Bodies

10.1.102 This clause provides for exemptions in regard to discrimination on the grounds of sex, marital status or pregnancy by voluntary bodies in connection with admission of persons to membership of the body or in provision of benefits, facilities or services to members of the body.

10.1.103 This exemption has the effect of excluding many women associated with sporting activities from the complaints-based remedy under the SDA where the association responsible for the sport is a voluntary body which does not fall within the limited definition of a club. This exemption is discussed in Chapter 6.

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57 Evidence, p.S3545
58 Evidence, p.S3546

Acts Done Under Statutory Authority

10.1.104 The *Sex Discrimination Amendment Act* 1991 removed the previous provisions in Section 40 of the SDA. Exemption of legislation by regulation was replaced by statutory exemptions for certain Commonwealth and Territory legislation, for example:

. taxation laws which include spouses (legal and de facto) in certain definitions. These provisions are necessary to prevent tax avoidance; and

. provisions in the National Health Act, the Income Tax Assessment Act and the Norfolk Island Social Services Act which mirror the different ages for pension eligibility under the Social Security Act (which is already exempted from the SDA).

10.1.105 Another consequence of 1991 Amendments was the amendment of the Marriage Act and the War Gratuity Act to remove discriminatory provisions (for example, the marriageable age for both sexes is now 18).

10.1.106 The 1991 Amendment Act requires the Minister to review the operation of the remaining statutory exemption for inconsistent legislation within five years and to report to Parliament on whether it should be repealed.

Industrial Awards

Section 40(1)(e) - Order or Award of the Court Fixing Minimum Wages and Other Terms and Conditions

10.1.107 When the Sex Discrimination Act came into force there were many awards which contained sex differentiating and discriminatory provisions.

10.1.108 Several submissions addressed this exemption with the general conclusion that the exemption for industrial awards is no longer warranted and is a major barrier to the achievement of pay equity for women[59]. These argued that the existence of such a provision endorses discrimination in the workplace and

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[59] Evidence, p.S2932 at p.S2948, p.S3005 and p.S1081

should no longer be acceptable in the Australian community. They contend that there has been a sufficient period of time for the Industrial Relations Commission to become familiar with the intention of the SDA and noted the same aims are written into the Industrial Relation Commission Act 1988.

10.1.109 Lawyer, John Basten argues that this exemption:

> ... has a potentially broad area of operation and constitutes a significant inroad into measures to eliminate discrimination against women in the field of employment.

10.1.110 Mr Basten also points out that removal at this exemption from the Commonwealth legislation would provide a protection to women employed under State awards which would not be otherwise available under those awards.[60]

10.1.111 The *Industrial Relations Act* 1988 requires the Industrial Relations Commission to take account of those sections of the SDA relating to discrimination in employment. With the advent of enterprise bargaining, and the proposed change to Section 115 of the Industrial Relations Act to remove the Commission's obligation to the 'public interest',[61] it is argued that it is critical that the impact of award restructuring, productivity gains, and enterprise bargaining on pay equity for women be taken into account by the Commission. The removal of the exemption provided under paragraph 40(1)(e) would assist the Commission in this.

10.1.112 The simultaneous removal of the exemption currently applying to awards in the Sex Discrimination Act would create a strong additional ground for this wider industrial agenda to be seriously addressed, and would remove a further barrier to the achievement of pay equity for women.

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60 Sex Discrimination Legislation Seminar, p.80
61 Draft Federal Legislation, introduced by Minister for Industrial Relations

10.1.113 There was some concern expressed that the current exemption has the capacity to benefit women in that it provides for some degree of positive assistance. An example would be the provision of paid taxis for women leaving work after 7.00pm as covered in the public service awards. However evidence collated by the Human Rights and Equal Opportunity Commission suggest that this exemption is used more often to discriminate against women than in favour of them.[62]

Income Tax Assessment Act

10.1.114 Evidence suggests that the Income Tax Assessment Act is excluded from the operation of the SDA principally because of marital status provisions.

10.1.115 The New South Wales Government submission also made the point that the failure to recognise childcare expenses as a tax deduction may be regarded as a discriminatory provision with the Income Tax Assessment Act.

The Social Security Act

10.1.116 The Social Security Act continues to be indefinitely exempted from the operation of the SDA under Section 40, although the exemption is subject to review within five years. As the NSW Government points out, the Act encompasses a number of directly and indirectly discriminatory provisions, rules and practices[63]. One of the most controversial is the cohabitation test applied to Sole Parent Pensioners, most of whom are women. Pensioners involved in a heterosexual relationship are presumed to receive financial support from their partner and may lose their pension even though they have no legal entitlement to support from their partner.

10.1.117 Another provision which indirectly discriminates against women is the work test relating to unemployment benefits. This requires the claimant to be available for full-time work, which is impossible for many women with childcare responsibilities. In general, married women (including the wives of unemployed

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62 *Survey of Discriminatory Provisions in Awards*, SATEXT, Department of Industrial Relations, December 1991

63 Evidence, p.S3040

men) suffer discrimination in relation to access to unemployment benefits in their own right and in relation to job retraining and other schemes for the unemployed.

10.1.118 One issue which is often raised in relation to the Social Security Act is the fact that women become eligible for the Age Pension five years earlier than men. According to the Department of Social Security this reflects a number of social realities including the unequal access of women, particularly older women, to employment opportunities. In order not to further disadvantage women, any move to eliminate the age differential should only be contemplated in the context of a fundamental review of the Social Security Act.

Activities Specifically Exempted from the Prohibition on Discrimination

Section 41 - Superannuation and Insurance

10.1.119 Amendments to the SDA in 1991, which will come into operation in 1993, removed the blanket exemption for discrimination in superannuation and replaced it with more limited exemptions. One effect of the amendments will be to enable women who are denied access to benefits under superannuation schemes because their work is part-time or casual, to complain of discrimination under the SDA. The Australian Nursing Federation argues, however, the amendments are 'one step forward and two steps back for women' in that the legislation now broadens the definition of indirect discrimination by providing an exemption for discrimination in relation to vesting preservation and portability provisions of superannuation schemes[64]. The new definition of indirect discrimination contained in the superannuation amendments covers 'discrimination by reason of a characteristic that appertains or is generally imputed to persons of a particular sex or marital status'. Elsewhere in the Act this is part of the definition of direct discrimination. Commissioner Tiddy notes that these amendments 'contradict the purpose and intentions of the Sex Discrimination Act'.

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64 Evidence, pp.S1081-1082; and p.S1642 at p.S1647

Section 43 - Combat and Combat Related Duties

10.1.120 The submission from the WA Women's Advisory Council points out that this exemption "reflects myths of male physiological superiority and the patriarchal need to exhibit this superiority in the protection of the 'weaker, inferior' sex".[65] A change in policy within the Department of Defence referred to in the submission of the Minister for Defence, Science and Personnel[66] means that the SDA exemption in relation to combat-related duties will no longer be generally applied. The net effect of the change in policy according to the Minister's submission is that 94 per cent of positions in the Navy will be available to women; 53 per cent of positions in the Army will be available to women (the smaller percentage of positions available in the Army reflects the higher percentage of positions directly involved in combat) and 94 per cent of positions in the Air Force will be available to women. The submission recognises that a 'lead-in' time will be required to give effect to the change in policy but anticipate that it will lead to an increase in the scope and career opportunities available to women. The exemption relating to combat duties and positions involving combat duties will continue to be applied.

The States Exclusion

10.1.121 Unlike the Racial Discrimination Act, the SDA does not have Australia-wide coverage. Section 13 of the SDA excludes State Government or statutory body employees from coverage under the Act. While this exclusion may have been seen as politically necessary when the legislation was introduced in 1984, there is no longer a need or justification to exclude from the protection of the SDA persons who are employed by State Governments[67]. The seriousness of this exclusion in States where there is no equivalent State legislation was referred to in the HREOC.[68]

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65 Evidence, p.S2317
66 Evidence, p.S2317
67 Evidence, p.S5134
68 Evidence, p.S1548

10.1.122 The existence of this exemption is described as 'an important exemption' in the submission from the Attorney-General's Department[69] but there is no attempt to explain an on-going need for the exemption. The Human Rights and Equal Opportunity Commission argues that this exclusion should be removed.[70]

Measures Intended to Achieve Equality

10.1.123 The need to clarify the operation of Section 33 to ensure that initiatives designed to achieve equality for women are not inhibited was referred to in several submissions.[71] There is also a need, referred to in a number of submissions, to make it clear that the exemption applies to measures to promote equal opportunity for women in the context of systemic or institutional disadvantage, regardless of whether formal equality exists. Secondly, it is vital that the section be amended to make it clear that the exemption covers measures to meet the special needs of women. It is also important that such needs be defined by women themselves - in the recent Proudfoot hearing, the complainant argued that the unmet health needs which women had identified in extensive consultative processes were only 'perceived' or 'subjective' needs and not real needs. The ACT Discrimination Act has already moved in this direction, by wording its special measures exemption as follows:

> Nothing ... renders it unlawful to do an act a purpose of which is to -
>
> . ensure that members of a relevant class of persons have equal opportunities with other persons; or
>
> . to afford members of a relevant class of persons access to facilities, services or opportunities to meet their special needs.

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69 Evidence, p.S957

70 Evidence, p.S1548

71 EO Practitioners in Higher Education, Submission No.92; University of Melbourne, Submission No.105; the WA Women's Advisory Council No.163; and the supplementary submission from the Women's Electoral Lobby, ACT

10.1.124 The ACT Branch of WEL, believes that the government should move *quickly to remove the possibility of further challenges of this kind, which consume* precious resources which would be better used in ensuring that women receive the services that they have demonstrated over and over again they both want and need.[72]

10.2 The Affirmative Action Act

Introduction

10.2.1 While the Sex Discrimination Act aims at removing clear cases of discrimination, pro-active programs to ensure equal opportunity have been legislated through the Affirmative Action Act which was proclaimed in 1986 and phased in over 3 years. It covers all private sector employers with more than 100 employees and all higher educational institutions. The first 1500 companies reported in 1990.

10.2.2 The objective of the Affirmative Action Act is to promote equal employment opportunity for women. Val Pratt, Director of the implementing body, the Affirmative Action Agency, emphasised that affirmative action is not positive discrimination or social engineering. She continued:

> It is a necessary outcome of Australia's ratification of ILO Conventions which outlaw discrimination as unacceptable under the Sex Discrimination Act to allow for special measures to eliminate discrimination against women.[73]

10.2.3 The Act is commended by many. Ms Collins from the Shop Distributive and Allied Employees Association, which had been encouraging retailers to think about discriminatory work practices, commented on the impact of the Affirmative Action Legislation:

> The Affirmative Action (Equal Employment Opportunity for Women) Act has assisted progress towards achieving equality of opportunity in the workforce. The Act has attracted broad compliance and has played an educative role in encouraging the employers to rethink attitudes and biases which may operate to limit opportunities. The Act has assisted the union

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72 Evidence, p.S4377

73 *Employment Seminar*, p.10

> in such negotiations by providing a charter for consultation and a framework, via eight steps, for action.[74]

10.2.4 Women in music and the arts have also been encouraged by affirmative action programs negotiated by agencies funded under the Australia Council. However, Anne Esdaile, Director, Strategic Development with the Australia Council, concluded that there is still no dramatic improvement. Women in orchestras for example still tend to undervalue their skills and are less likely to see their work as a career than their male counterparts.[75]

10.2.5 Margaret Lobo, Federation Coordinator for Soroptimist International Pacific, reported on a recent survey of Affirmative Action Legislation which indicated a high degree of recognition of the legislation.[76]

10.2.6 The generally agreed benefits of good affirmative action programs include improved morale for women workers, a more stable work force and development and use of previously untapped potential.

Effectiveness of Equal Opportunity Programs

10.2.7 More than fifty submissions reported on the operations of Equal Opportunity programs. Significantly, most of those who reported to the Committee would also have been required to do so under the Affirmative Action legislation.

10.2.8 The advantages of equal opportunity were recognised by many. The principal benefit relates to highlighting the protection against discrimination offered by the legislation. It is also seen as a mechanism to protect women's status in employment. As Denese Gray from James Cook University commented:

> In the long term the greatest benefit of the legislation may well be the requirement that organisations appoint staff to implement their EEO and AA programs.[77]

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74 Evidence, p.1065
75 Evidence, p.512
76 Evidence, p.S4071
77 Evidence, p.S119

10.2.9 The recognised advantages of EEO programs include the following:

- helping clarify and reform personnel policies and practices expanding job opportunities for women provision of statistical information for planning;
- fostering exchange of information between employers and employees; and
- leading to more efficient and equitable use of human resources.

10.2.10 However, others reported a very negative view of success. Viki Rutter, of Footscray Institute of Technology at the time of writing, stated:

> Existing legislation, based largely on complaints-based regulations, employer goodwill and questionable means of accountability has had minimal effects.[78]

10.2.11 The majority of evaluations of equal opportunity programs came from academic institutions which reported various successes in the implementation of the legislation. The common view though was that women academics are still under-represented in all senior positions in academic life and that gender segregation in fields of study was still a problem.

10.2.12 Government departments which reported on their programs claimed better success, however they still cited problems in attracting women into non-traditional areas of employment. They also noted problems in finding pools of appropriately qualified women to undertake such work. One solution mooted by the Department of Administrative Services recommended possible arrangements of scholarships, cadetships and traineeships outside normal staffing arrangements, aimed at providing women with appropriate qualifications to enable advancement once they have joined the workforce.[79]

10.2.13 Dr Marian Sawer, from the ACT Branch of WEL, in her submission to the Committee provided a far more critical evaluation of how EEO is being implemented in the public sector. In noting the inadequate EEO profiles in annual reports, she lamented the demise of the Public Service Board and the lack of teeth of the Public Service Commission in achieving accountability from government

78 Evidence, p.S317
79 Evidence, p.S248

departments. She also noted the high turnover of EEO staff due to it being seen as 'marginalised' and a 'dead end' position. Dr Sawer recommended:

> Commonwealth departments and authorities need to be publicly accountable for EEO performance to an independent and expert body reporting to Parliament;
>
> EEO personnel should be directly responsible to the chief executives of agencies;
>
> Ministers, if they are to play an effective role in ensuring EEO performance, need adequate briefing for this purpose.[80]

10.2.14 Sandra McKnight from Women in Tertiary Institutions National, among others, made a case for the continued resourcing of Equal Opportunity Commissions and the Affirmative Action Agency as part of the effort to change society's attitudes. These offices are seen to be essential in maintaining support for people working, often against the odds, in the field.[81]

10.2.15 The position of equal opportunity within the hierarchy of the organisation or administration was also seen as significant. Dr Susan Baggett argued that:

> ... within organisations only marginally committed to an EEO program, the employee status of the EEO officer may considerably weaken the effectiveness of the program. Where discrimination is widespread but derided and when the EEO officer is female, she may be subjected to the same discrimination: told she is wrong and ignored.[82]

10.2.16 Elsa Atkin, one of Australia's first Equal Opportunity Officers, confirmed that for programs to be successful, EEO officers need to work directly to the Chief Executive, not to the Head of Human Resources who may stand in the way of EEO implementations.[83]

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80 Evidence, p.S3977
81 Evidence, p.1670
82 Evidence, p.S3777
83 Evidence, p.535

10.2.17 Several submissions warned of the tendency to drain resources from EEO programs in the mistaken belief that they are no longer necessary. Anne-Marie Mioche from the Women's Electoral Lobby implied that mainstreaming equal opportunity is doomed to failure without the necessary mechanisms and expertise to ensure its success.[84] Louise Allison, a National EEO Adviser, similarly conceded that support from the top of departmental structures was vital to the successful implementation of EEO programs.[85]

10.2.18 It is clear that the success of Equal Opportunity programs is influenced by related issues such as lack of access to child care, lack of clear career paths and mentors and availability of part-time work.

10.2.19 Evidence to the Committee indicates that designated EEO programs are still necessary. Denis Ives, the Public Service Commissioner, urged further research into the productivity gains wrought by equal opportunity to convince managers to pursue EEO in the current economic climate.[86] A similar warning that EEO not be ignored in times of economic restraint was expressed by Janet Durling, EEO Officer from the Northern Territory University, who observed that there was a perception that EEO was seen in Territory government circles as a luxury which could not be afforded.[87]

10.2.20 It is significant that evidence to the Inquiry regarding EEO and AA related almost without exception to women in clerical and professional occupations. Judith Rich, from the Economics Faculty at Monash University, commented:

> The major beneficiaries appear to be women working in what we call the upper tier.[88]

10.2.21 There is considerable concern that the majority of women in blue collar jobs are not benefiting from these programs. Denese Gray however suggests that:

> ... women at the lower end of the employment spectrum are benefiting not only from programs designed for their particular needs, but also from the trickle down effect. ... Staff training and development and occupational health and safety have

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84 Evidence, p.S623
85 Evidence, p.S3905
86 Evidence, p.S3197
87 Evidence, p.S3897
88 Evidence, p.220

> accompanied the introduction of Affirmative Action and anti-discrimination legislation to the benefit of women at all levels.[89]

10.2.22 Nevertheless, it is a matter of real concern that a significant numbers of women in blue collar jobs are not covered by the Affirmative Action Legislation as they work in small workplaces with less than 100 employees.

10.2.23 Finally, there is concern regarding the use and abuse of the qualification 'equal opportunity employer'. Anne O'Byrne from the National Women's Consultative Council, among others questioned whether all the employers who use this descriptor are actually qualified to do so.[90]

10.2.24 A confidential submission to the inquiry detailed an example whereby a company had misleadingly reported to the Affirmative Action Agency over several years that equal employment opportunity initiatives had been undertaken, when in reality these were not evident.

Problems with the Implementation of the Act

10.2.25 Affirmative action programs need to be achieved by a process of detailed negotiations between management and employee representatives, most often unions. Where problems in implementation exist, it is often due to failure to consult. Affirmative action programs are not effective if they are imposed. Rather they need to be negotiated according to the eight steps outlined by the Agency to ensure effective implementation.

10.2.26 There is also concern regarding the setting of forward estimates and a misconception that affirmative action requires the setting of quotas. The Shop, Distributive and Allied Employees Association does not support setting of objectives or forward estimates that may become de facto quotas. Val Pratt however was emphatic that quotas are not part of the agenda. She continued:

89 Evidence, p.S3886
90 Evidence, p.S2065

> ... the setting of appropriate objectives and forward estimates is critical for a successful program. These objects should be developed from information gathered through the consultation processes, statistical profile and review of personnel policies and practices and have a simple and logical connection to the former. Such objectives are important because they enable organisations to have a clear picture of what they want their program to achieve and importantly a means of knowing when they have achieved it. The setting of objectives is, after all, a very familiar process for organisations in regard to their profits and other aspects of organisation development. So I sometimes wonder why they are finding difficulty with affirmative action.[91]

10.2.27 It is clear that affirmative action and related equal opportunity programs need to be seen as part of the corporate plan and not peripheral to it, if they are to succeed. Significant benefits are to be gained by enterprises which incorporate affirmative action in their human resource development strategy.

10.2.28 While industry may benefit from affirmative action programs, Joan Eveline, from Murdoch University, warned that the experience is not always positive for women. Based on her research at the Argyle Diamond Mine, she suggested that affirmative action has wrought great benefits for management and the largely male work force at the expense of the women employed at the mine. Eveline's comments highlight the problem of evaluating success purely on numbers and not investigating other aspects of gender in the work place. By supposedly treating all employees in the same way, what in fact occurred was that women were treated like men and no account was made of difference. She claims:

> The universal application of the masculine norm applied and women were left with no legitimate grounds for criticising or trying to change male culture. They were expected to accept pin-ups without flinching, the jokes without complaining, and the aggressive competitiveness between men as normal. Even the clothing they were given to wear was traditional male blue-collar overalls, shirts and shorts. There was an allowance for difference in size but not in shape. For the women this often meant a certain discomfort in fit, but there were repercussions in safety, in that the gloves for handling dangerous chemicals came in only one size - large.[92]

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91 Evidence, p.9
92 Evidence, p.S2445

10.2.29 This denial of difference failed to recognise the special contribution made by women at the site. Eveline continues:

> With the advanced technology employed at the mine site women were expected to perform the same work functions as men and for this they received the same pay. What they did not get paid for (and which industry has so far managed to avoid accounting and rewarding workers for) was the assumed feminine qualities of being a good listener, of providing a more homely and relaxed feeling which, among other attributes, were that many of the men said came into the work place with women.[93]

10.2.30 Another difficulty in relation to affirmative action relates to the limitation that currently, the Affirmative Action Act only applies to private businesses employing more than one hundred people. 57 per cent of women employed in the private sector work in enterprises of less than 100 employees and these women are not gaining advantage from the legislation. Maxine Murray, the Director of the Office of Women's Interest in Western Australia, pointed out that this one hundred employee quota effectively excludes most companies in WA.[94] Many submissions suggested that the Affirmative Action legislation be altered to include businesses of less than one hundred people. The implications for such an amendment would, however, be an enormous increase in the workload for the Affirmative Action Agency.

10.2.31 Dr Marian Sawer argued the case for special affirmative action programs to be implemented for special needs groups such as women from non-English speaking backgrounds.[95]

10.2.32 APS public service departments are subject to the Public Service Reform Act. It has also been noted that while statutory authorities are subject to the *Commonwealth Authorities (EEO) Act* 1987, their reporting requirements are seen by some to be too weak.

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93 Evidence, p.S2446
94 Evidence, p.S3890
95 Evidence, p.S3978

10.2.33 Another area which escapes scrutiny in terms of affirmative action is the voluntary sector. Several submissions suggested that Government grants to voluntary organisations could be tied to conformity with legislation. This would effectively encourage non-government organisations to adopt equal opportunity programs.

Compliance

10.2.34 Currently companies which fail to comply with the Affirmative Action Act are named in Parliament. 75 were named in 1990. While some companies are possibly still reporting under sufferance, Brian Noakes, the Director General of the Confederation of Australian Industry, reported a definite change in attitude of the business community.[96] Denese Gray, EEO Officer from James Cook University questions the real impact of the 'change in attitude' when statistics reveal that self-regulation has not resulted in women achieving more powerful positions. She concludes:

> The confidence of the business sector is incompatible with the statistics. Are there yet any female members of the Business Council of Australia or the Confederation of Australian Industry despite all their officers' supportive activity.[97]

10.2.35 Questions were also raised as to whether the Affirmative Action Act needed more teeth. While the business sector was strongly against instituting further sanctions and expressed a deal of confidence in the capacity of business to respond voluntarily, other submissions recommended that the Act be amended to include greater sanctions for non-compliance.

10.2.36 Many submissions recognised the value of contract compliance. This has been instituted in Victoria under an arrangement derived as part of a government policy on women's employment. Companies which fail to comply with the Affirmative Action Act are unable to tender for government contracts nor are they permitted to apply for industry assistance. The practice has brought about a 70 per cent compliance rate from companies which initially failed to report.

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[96] Evidence, p.1092
[97] Evidence, p.S3885

10.2.37 A related issue in terms of compliance lies in the nature of the reporting. Ann Esdaile from the Australia Council[98] and Linda Pettersson from the EEO Co-ordinators Group[99] questioned the effectiveness of the reporting requirement. While many companies comply with the reporting requirement there is no guarantee of quality in the programs. When companies set their own parameters, very small achievements can be reported upon in a way that appears impressive.

10.2.38 Employers and some equal opportunity practitioners alluded to problems caused by the multiplicity of regulations arising out of separate Commonwealth and State legislation in the areas of equal opportunity, sex discrimination and affirmative action. Specific differences in interpretation can be very confusing, particularly for employers operating in more than one state. There is also confusion about reporting requirements between bodies. T Ledwidge, Interim Vice-Chancellor of the University of Southern Queensland, summarised the concern:

> Equal opportunity will remain a fringe issue until the principles are embodied in all legislation and industrial awards and agreements. Clearly it is of benefit to all Australians for all employers to operate in a non-discriminatory manner towards women.[100]

10.2.39 Finally, several submissions complained that more resources needed to be spent in making the Affirmative Action Act and its principles better known. Lindsay MacKay, Associate Director of Victoria College Burwood Campus, noted that:

> A substantial survey of staff attitudes and knowledge regarding Affirmative Action was recently conducted at the College. A preliminary assessment of the results supports the suggestions ... that the Act is little understood or misunderstood. This appears to apply across gender and status at Victoria College, despite the fact that the College has not only met the requirements of the Act, but has initiated moves (such as the survey) beyond those requirements.[101]

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98 Evidence, p.511
99 Evidence, p.619
100 Evidence, p.S3894
101 Evidence, S4012

10.3 Summary and Recommendations

10.3.1 Evidence to the Committee suggests that the *Sex Discrimination Act* 1984 and the related *Affirmative Action Act* 1986 have had a significant impact on increasing equal opportunity and equal status for women in Australia. The bulk of this report has indicated that while achievements for women have been significant, there is still a long way to go.

10.3.2 At the time that the legislation was introduced, public knowledge of and acceptance of gender discrimination was not widespread. Indeed the passage of legislation was accompanied by a deal of cynicism and even fear as to its repercussions.

10.3.3 The Committee canvassed views on the operation of EEO programs, particularly for those organisations subject to Affirmative Action legislation. Generally, there is strong support for maintaining the structure of the existing legislation, with a consolidation of on-going activity. Quality of programs, effective consultation and a balance between incentive and compliance were all seen as vital to the success of good EEO programs.

10.3.4 The Committee believes that the operation of the legislation has, while protecting the rights of individual women who have had occassion to avail themselves of the Acts, resulted in a degree of re-education of the Australian public. While there is still need for further education of the implications of the legislation, successes to date suggest that it is time that aspects of the current Acts now need to be amended to reflect the more sophisticated level of public understanding.

10.3.5 In the light of the evidence, the Committee makes the following recommendations in respect of sex discrimination legislation.

10.3.6 Although criticisms have been made of the conciliation model, both as a concept and in its practical operation, most submissions and evidence accepted that its benefits outweighed its deficiencies. Attention, therefore is on the means of minimising or overcoming those deficiencies, rather than on abandoning conciliation. In this connection it should be noted that because HREOC determinations are not binding, there is no incentive for an uncooperative respondent to work out a conciliated settlement.

RECOMMENDATION 59

The Committee recommends that without breaching the rights of privacy of parties to a complaint, HREOC publish more comprehensive statistics on the nature of concluded complaints, including those:

- **(a) which did not proceed to conciliation;**
- **(b) those resolved through conciliation; and**
- **(c) those requiring formal determination by the Commission or the Court.**

10.3.7 The absence of a general prohibition in relation to discrimination against women in the SDA is in direct contrast to the Commonwealth legislation dealing with discrimination on the grounds of race. As discrimination against an individual on the basis of race or sex should be regarded as a contravention of a basic right, the Committee believes that it is desirable to bring the Sex Discrimination Act in line with the general prohibition contained in the Racial Discrimination Act.

RECOMMENDATION 60

The Committee recommends that:

- **(a) a general provision stating that discrimination on the basis of sex, marital status, potential pregnancy and family responsibilities is unlawful should be included in the SDA;**

- **(b) a provision allowing for 'equal protection before the law' similar to the provision in the Racial Discrimination Act be adopted in the SDA.**

10.3.8 Women who are discriminated against because they express an intention to become pregnant, or because of the likelihood that they may become pregnant, should be able to lodge a complaint under the SDA. The likelihood of pregnancy may already fall within the definition of sex discrimination in the Act - as an imputed characteristic of women however the Committee believes that it would be desirable for it to be specifically stated. The Committee further believes that the defence of reasonableness contained in paragraph 7 (1)(b) of the Act dealing with pregnancy

should be deleted so that discrimination on the ground of pregnancy is in the same terms as that for discrimination on the grounds of sex or marital status.

RECOMMENDATION 61

The Committee recommends that Section 7 of the SDA be amended by:

(a) the inclusion of 'potential pregnancy' as a ground of prohibited discrimination.

(b) the repeal of 7 (1)(b).

10.3.9 Further, the Committee believes that obligations associated with family responsibilities should be included as prohibited grounds for discrimination, in line with the Government's commitment to the UN Convention ILO 156, *Workers with Family Responsibilities.*

RECOMMENDATION 62

The Committee recommends that ILO 156 be attached to the SDA as a schedule and further that the powers of the Commissioner be expanded to include responsibilities in association with ILO 156.

RECOMMENDATION 63

The Committee recommends that the SDA be amended to include as a prohibited ground for discrimination, family, parental and carer responsibilities.

10.3.10 A fundamental premise of the SDA is that an individual should be judged on his or her own merits and not on their sex or marital status. Currently Section 6 of the Act provides protection on the basis of marital status but does not protect an individual against discrimination based on the identity of their spouse. The Committee considers that such a distinction was never intended and therefore should be made explicit by amendment to Section 6.

RECOMMENDATION 64

The Committee recommends that the definition of 'marital status' in Section 6 be *extended to include discrimination on the basis of the identity of the spouse of the* person lodging the complaint.

10.3.11 At the time that the SDA was enacted the general understanding of the harmful effects sexual harassment in the public and the workplace was not particularly widespread. It is now widely understood that sexual harassment is not a trivial matter and that unwanted sexual advances are serious offences in themselves and need not be linked to some sort of disadvantage or detriment to an individual's employment or education prospects. In addition, the proscription of sexual harassment in the SDA is limited in that it applies only to the areas of employment and education and not to the provision of goods and services and accommodation (unlike, for example, the Victorian and South Australian Equal Opportunity Acts). Given the incidence of sexual harassment in areas such as provision of accommodation this is a serious weakness in the SDA. It would be desirable for the Act to be amended to extend its coverage to provisions of goods and services and accommodation.

RECOMMENDATION 65

The Committee recommends that Division 3 of the *Sex Discrimination Act* be amended to:

(a) remove the need for a complainant to demonstrate disadvantage by repealing Sections 28(3) and 29(2) and replacing them with a definition of sexual harassment similar to that in Section 58 of the *ACT Discrimination Act* 1991;

(b) amend Section 29(1) to include harassment of staff by students as an offence; and

(c) make unlawful sexual harassment in the provision of goods and services and accommodation.

10.3.12 The SDA allows for representative complainants, however, these provisions have rarely been utilised. It is particularly noted that trade unions have not availed themselves of the opportunity to represent their women members in this way. Recent amendments to the Federal Courts Act allowing for representative actions provide an opportunity to overcome current difficulties with the Act.

RECOMMENDATION 66

The Committee recommends that:

(a) the Sex Discrimination Commissioner seek, through arrangements with the ACTU, to ensure that the union movement is familiar with the complaint handling processes of the SDA and of the potential for union involvement in complaints under the SDA;

(b) the Attorney General's Department examine Section 70 of the SDA in light of the recent *Federal Courts Amendment Act* 1991 to ascertain whether amendment is needed to provide for a less cumbersome procedure for initiating a group complaint and to clarify the right to damages by way of representative action.

10.3.13 A major criticism of the Act is the cumbersome enforcement procedures of HREOC determinations. In order for a determination to be binding on parties, the matter must be heard again by the Federal Court. In practical terms such a procedure is a substantial deterrent to most complainants. On the other hand as the Act is based on a confidential conciliation model, there is scope for publicity of the determinations as provided by the Federal Court decisions. It is important that the option to proceed to the Federal Court remains both available and workable.

RECOMMENDATION 67

The Committee recommends that HREOC determinations be registrable in the Federal Court and that in the absence of an appeal they automatically become an enforceable order of the Court.

10.3.14 The enforcement of the Sex Discrimination Act since 1984 has, to a degree, been limited by the resources available to the Commission. The multiple function of the Commission inevitably leads to trade-offs in allocation of staff, time and budget. However, the Committee believes that the effectiveness of the Act in eradicating discrimination is dependent on greater public knowledge of the Act and clear allocation of resources to the more pro-active functions of the Commission, such as education campaigns, research and analysis of Government Legislation.

RECOMMENDATION 68

The Committee recommends that:

(a) **the Sex Discrimination Commissioner be provided with adequate resources to ensure that the Commission's proactive functions specified in Section 48 (1) of the Act can be more effectively carried out;**

(b) **the Human Rights and Equal Opportunities Commission determine separate budget allocations for each of its areas of responsibility in order that the Sex Discrimination Commissioner have access to a clearly designated budget.**

10.3.15 While the basis of the Sex Discrimination Act is to resolve matters by conciliation, there are cases which require Court determination. The Committee is concerned by evidence of difficulty in attracting legal aid for such cases. This may act as a serious impediment to the enforcement of rights under the Act.

RECOMMENDATION 69

The Committee recommends that the Attorney-General investigate the criteria applied by the Legal Aid Commission in deciding aid applications for assistance in sex discrimination cases with the views to ensure that complainants and respondents are assisted in appropriate cases.

10.3.16 The Committee recognises that indirect discrimination is a major inhibiting factor in women achieving opportunities on the basis of merit. Much of the evidence supported a change in the definition of indirect discrimination, contained in Sections 5, 6 and 7 of the SDA, however, the Committee, in light of the High Court decision in the AIS case believes that it is unnecessary at this stage, to substantially amend these sections.

RECOMMENDATION 70

The Committee recommends that:

(a) **sub-sections 5(2), 6(2) and 7(2) paragraph (b) be deleted.**

(b) **a new sub-section be added to Sections 5, 6 and 7 in the following terms:**

it shall be a defence for a discriminator to show that the imposition of the condition or requirement was reasonable in order to pursue the least discriminatory option available to the discriminator in the circumstances of the case.

10.3.17 As the Minister for Defence, Science and Personnel has demonstrated, there is scope for increased participation of women within the military forces and the continued review of those areas where women are excluded should be conducted within the Department. A requirement to apply for exemptions on a regular basis (say 2 years, if an exemption for that period is granted by the Commission) would allow for ongoing review and an increased rate of participation of women within the defence force.

RECOMMENDATION 71

The Committee recommends that Section 43 be amended to include a specified time period not exceeding two years to allow the removal of prohibitive and discriminatory provisions from Defence Force legislative requirements and administrative procedures.

10.3.18 The recent decision in the challenge to the effectiveness of the Sex Discrimination Act by Dr Proudfoot serves as an important precedent in the maintenance of some gender specific services, where a case can be made for special needs. Whilst the Court decision in the Proudfoot case endorses the Committee's understanding of the Act, evidence to the Committee suggests that Section 33 of the Act needs some attention in order to protect gender specific services so they cannot be put under threat.

RECOMMENDATION 72

The Committee recommends that the Attorney-General's Department, in consultation with HREOC, determine if an amendment is necessary to Section 33 so that it ensures their measures to promote equal opportunity for women or to meet their special needs are not unlawful.

10.3.19 The Committee has received evidence arguing for the repeal of or amendment of a number of exemptions to the SDA. The Committee does not believe that all exemptions should be repealed but believes that a number of exemptions should be made to a number of provisions.

10.3.20 The exemption allowing discrimination against teachers in educational institutions established for religious purposes was of great concern to the Committee. While the Committee accepts the right of religious schools to set standards of behaviour for teachers and staff, it cannot accept that there should be a double standard between men and women employed in such schools or that the rights of teachers between government and church schools should be significantly different. The Committee believes that the exemption in Section 38 should be reworded to avoid ambiguity, to require the employer to meet the common legal standard of reasonableness and to allow for an objective assessment of the circumstances.

RECOMMENDATION 73

The Committee recommends that Section 38 of the *Sex Discrimination Act* be amended to add the requirement of 'reasonableness'.

10.3.21 While the Committee recognises that the exemption in paragraph 40 (1)(e), on occasions, allows discrimination in favour of women, the overwhelming evidence suggests that it is more often used to discriminate against them. The Committee believes that this exemption should over time, be completely removed and as a precursor to such an event, makes the following recommendation.

RECOMMENDATION 74

The Committee recommends that the Pay Equity Unit in the Department of Industrial Relations undertake investigations into the impact on women of removing the current exemption at 40 (1)(e). In particular they should monitor the extent to which discriminatory clauses are being removed as part of structural efficiency negotiations and decisions.

10.3.22 The Committee is concerned that the effectiveness of the Act can be put at risk by the very real fear of victimisation. The Committee therefore believes that Section 94 of the Act needs to be amended to ensure that complainants can seek redress against victimisation through either conciliation or formal court processes.

RECOMMENDATION 75

The Committee recommends that Section 94 of the Sex Discrimination Act be amended so as to allow complaints of victimisation to be considered either through a court of law or a process of conciliation.

10.3.23 The Committee has canvassed other aspects of the *Sex Discrimination Act* in respect to equal opportunity in sport. Two amendments to the Act have been suggested and are outlined in Chapter 6.

10.3.24 The Committee regards affirmative action and related equal opportunity programs as integral to greater access to career opportunities for all women. The Committee is concerned, however, that equal opportunity programs vary considerably and while the rhetoric is among, the reality is not necessarily promoting women's interests or prospects. The Committee is particularly concerned as to the effects of mainstreaming EEO prematurely, significantly weakening its strength in the workplace.

10.3.25 Affirmative action programs have great potential in maximising women's contribution in the labour market, however, evidence to the Committee suggests that while organisations may be complying with the letter of the law, there is often a lack of commitment to the spirit.

10.3.26 The Committee believes that adequate resources need to continue to be devoted to developing and monitoring EEO programs in both the private and public sector and in higher educational institutions. The Committee is also alarmed that the status of EEO programs within organisations are not safeguarded and reports to the AAA are not able to be checked.

RECOMMENDATION 76

The Committee recommends that:

(a) the Affirmative Action Agency be resourced to undertake qualitative assessments of reports received.

(b) the Agency encourages companies to focus more carefully on identifying and addressing the particular needs of groups of women with special needs in the workforce.

10.3.27 The Committee was particularly concerned over the number of employers covered by the Act. The restriction imposed by the current legislation which requires compliance of organisations with over 100 employees has the effect of ignoring smaller businesses and enterprises where women tend to predominate. Similar concern was expressed over the exemption to voluntary bodies, which the Committee deemed inappropriate.

RECOMMENDATION 77

The Committee recommends that:

(a) a further expansion of the number of companies which come under the Affirmative Action Act to include those employing 40 people and in the long-term, all employees;

(b) the resources of the Affirmative Action Agency would need to be increased commensurate with the increased work load;

(c) those organisations consistently recording good progress should have the obligation of reporting reduced accordingly, reducing the workload of the organisation itself and the Affirmative Action Agency; and

(d) the Affirmative Action Agency be charged with responsibility to distribute reports to relevant interest groups, principally trade unions.

RECOMMENDATION 78

The Committee recommends that:

(a) evaluative analysis be undertaken by DIR to ensure that statutory authorities are adopting effective affirmative action programs; and

(b) work needs to be undertaken by DIR in consultation with AAA to establish how employers in the voluntary sector can be encouraged to adopt affirmative action programs.

10.3.28 While naming organisations in Parliament is a powerful tool for compliance, the Committee recognises that economic incentives are probably more effective. To this end, the Committee is attracted to contract compliance in both Commonwealth and State environments as a method of strengthening conforming with the Act.

RECOMMENDATION 79

The Committee recommends that:

(a) the Commonwealth Government introduce contract compliance for all Commonwealth contracts so that all corporations/organisations tendering for government contracts should be required to supply evidence that they practice equal employment opportunity; and

(b) as part of greater Commonwealth State co-operation in equal opportunity matters, the State and Territory Governments explore options such as contract compliance to enhance the effectiveness of sex discrimination legislation.

MICHAEL LAVARCH, MP
Chair

14 April 1992

DISSENTING REPORT

Half-way for Whom?

A dissenting report in the Inquiry into Equal Opportunity and equal Status for Australian women.

1. Introduction

1.1 Equality of opportunity for men and women is an important ideal for Australians. Many steps have been taken over the past century to implement this ideal. Yet in some areas it remains unfulfilled. The purpose of this Inquiry was to review equality of opportunity for Australian women.

1.2 Specifically the Committee's terms of reference provided:

> To inquire into and report on the progress made towards the achievement of equal opportunity and equal status for Australian women, as detailed in the National Agenda for Women, and the extent to which the objects of the Sex Discrimination Act 1984 have been achieved or are capable of being achieved by legislative or other means, with particular reference to:
>
> (1) effective participation by women, including young women in the decision making processes;
>
> (2) the extent to which women receive appropriate recognition for their contribution to society;
>
> (3) participation by women in the labour force including efficacy of equal opportunity employment schemes;
>
> (4) participation by women in leisure and sport; and

(5) the extent to which young women are encouraged to participate equally in society.

1.3 This Inquiry arose out of the National Agenda for Women that the then Prime Minister, the Hon R.J.L. Hawke, outlined in the Federal Parliament in February 1985. In his outline, the Prime Minister acknowledged some significant progress over the United Nations Decade for Women and said:

> We want to give women a choice. We want to give women a say, and we want to give women a fair go.

1.4 The Office of the Status of Women stated in a message to all Australians:

> We want to give women the opportunity to make a full contribution to Australia's development, whether they work in the home, in the paid workforce, or in any other aspect of life.
>
> The National Agenda will open up opportunities for all women.

1.5 The Agenda raised many important issues, for example:

- the freedom of women to choose to be full-time mothers or to combine motherhood and paid work outside the home;
- the education of girls
- the provision of child-care for both working mothers and women in the home;
- the taxation of sole parents;
- affirmative action programs;
- the contribution to the national well-being of women in the home and rural women;

- the recognition of women's health needs;

- the dignity of women, including their portrayal in the media and advertising; and

- women's participation in sport.

1.5 Following the 1990 General Elections, the Inquiry was reconvened on 15 May 1990 and received 634 submissions from interested parties. Much of the Report of the Committee has our endorsement. However, we are concerned that some of the recommendations, particularly those relating to proposed changes to federal legislation, will have the consequence of diminishing rather than enhancing the equal opportunity and the equal status for Australian women.

1.6 We are dismayed that an inquiry that has taken almost two years and has been the subject of a considerable number of submissions has been hastened to a premature conclusion. The fact that the Sub-committee was accorded just 1 1/2 hours to consider proposals relating to legislation and the full Committee just 3/4 hour to consider the whole Report demeans Australian women and treats with contempt the process of Parliamentary Committee Inquiry. Only 4 Members of the Government Party attended the final meeting of the Committee. In effect, these four have determined the Committee's recommendations although the actual attendance of Opposition Members at that meeting was greater in number. This meant the Report was approved in effect by four of a total membership of fifteen. It was not a representative meeting nor did it carry the endorsement of the Government Party.

1.7 Given the fact that the current Parliament still has a period of one year of its term to run, we are disappointed that the Chairman and these Government Party Members hastened to release the Report on behalf of their colleagues without further discussion and consideration.

1.8 This Report has not been supported by the majority of the Government Party Committee Members and more than likely would not have the support of the Parliament as a whole.

2. WOMEN IN THE PAID WORKFORCE

Recommendations 10, 11(b), 12, 13 and 14

2.1 We believe that equality of opportunity and status for women is best advanced by industrial arrangements which involve workplace enterprise bargaining encompassing many of the matters in Chapter 4 of the Report such as work-based childcare, parental leave, special family leave and conditions for casual workers and outworkers. Accordingly, we recognise the importance of such matters in industrial agreements, and in regard to recommendations 10, 11(b), 12, 13 and 14 we recommend that they be subject to workplace enterprise agreements.

3. LEGISLATION

Sex Discrimination Act 1984

3.1 The Sex Discrimination Act was enacted in 1984 by the Federal Parliament. The objects of the Act are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women;

(b) to eliminate, so far as is possible, discrimination against persons on the grounds of sex, marital status or pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs;

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace and in educational institutions;

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

3.2 The Act has two branches:

> First, discrimination on the grounds of sex, marital status or pregnancy; and secondly, sexual harassment.

4. GROUNDS OF DISCRIMINATION

Recommendation 60

4.1 There are grounds for considering that discrimination based on the likelihood of pregnancy should be included in the Act together with the existing grounds of sex, marital status and pregnancy. Although the likelihood of pregnancy may already fall within the definitions of discrimination in the Act, we recognise that it should be included as a specific ground.

> We recommend that the Sex Discrimination Act should be amended to provide a further specific provision in terms similar to Sections 5, 6 and 7 relating to discrimination on the grounds of potential pregnancy.

> We recommend that the Sex Discrimination Act should be amended to provide a specific provision similar to Sections 5, 6 and 7 to include as a prohibitive ground for discrimination for those who have family responsibilities.

Recommendation 60(b)

4.2 We believe that the proscription of discrimination should be by specific provisions in the legislation. It is spurious to claim that a provision that renders discrimination unlawful is necessary where specific provisions apply.

4.3 The Racial Discrimination Act is not analogous as it is drafted on a different basis.

4.4 The inclusion of a provision allowing for 'equal protection before the law implies that such protection does not exist currently. This we reject.

4.5 The absence of equal protection has not been seriously suggested for any citizen in relation to this Act or other legislation. We oppose recommendations 60, 61, 62 and 63.

We recommend that Recommendation 62(b) make specific reference to the definitions of family responsibilities as defined in Articles 1 and 2 of ILO Convention 156.

5. THE ELEMENTS OF DISCRIMINATION

Recommendation 69

5.1 In order to establish discrimination under Sections 5, 6 or 7 on the grounds of sex, marital status or pregnancy, a person must prove, (in addition to proving that the alleged discrimination 'requires the aggrieved person to comply with a requirement or condition') that the requirement or condition be one 'with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply'; the requirement or condition be 'not reasonable' having regard to the circumstances of the case; and the requirement or condition be one 'with which the aggrieved person does not or is not able to comply'.

5.2 The effect of this provision is to impose an element of reasonableness in relation to a complaint of discrimination. The 4 Government Party Members of the Committee who attended the final meeting believe this element should be removed from the legislation and replaced with a defence of the least discriminatory course of action.

5.3 In some circumstances, the rejection of a person of one sex for preferment, although prima facie discriminatory, may be reasonable for social, health or cultural reasons. A male breast feeding counsellor may not be acceptable to some women; a male pool attendant may not be acceptable to Islamic women. Similarly, evidence was given about the health and safety risks to pregnant women in the lead industry. Accordingly, we believe that the element of 'reasonableness' should be retained in the legislation. Moreover, we are concerned that recommendation 69, if enacted, involved something less than 'reasonableness' which in practice is unlikely

to constitute any real defence at all. We recommend that the element of reasonableness be retained in Sections 5, 6 and 7 of the Act.

6. COMPLAINTS AND HEARINGS

Recommendation 67

6.1 The Sex Discrimination Act provides that a complaint is first dealt with by way of conciliation. Although there were some inadequacies noted in submissions about the process, the evidence overwhelmingly supported the conciliation process. We support the primary role of conciliation and reject proposed changes that would have the consequence of making sex discrimination actions more litigious. As we are dealing with cultural and social attitudes, the conciliatory process has a important educative function. We believe a more litigious system will prove a disservice to the equal opportunities and status for Australian women and create another burgeoning field of legal practice.

6.2 Consistent with the emphasis on conciliation, the Commission has no legal power to enforce a determination. As the Special Minister of State, Mr Young, said in his second reading speech in 1984:

> Where the complaint cannot be resolved by conciliation, the Commissioner will refer the matter to the Human Rights Commission, which will inquire into the complaint ...
>
> While such determinations (of the Human Rights Commission) are not binding on the parties ... we anticipate that the majority of them will be accepted by the parties and acted upon in most instances. Where this does not happen the complainant or the Commission may seek an order from the Federal Court to enforce the Commission's determination.

6.3 It has been suggested that the Commission's determinations should become an enforceable order of the Federal Court in the absence of an appeal. This recommendation confuses the administrative and judicial role of the Commission, and would have the effect, if implemented, of changing the role of the Commission

from one of conciliation to prosecution and litigation. We believe the current provisions are adequate, and recommend they be retained.

We oppose Recommendation 67

7. REPRESENTATIVE ACTIONS

7.1 The use of representative or class actions is provided in the Sex Discrimination Act. The Act further provides that the Commission should satisfy itself that such an action is made in good faith. This is not an unreasonable provision and we recommend it be retained.

7.2 The majority also recommend that the Act be amended to clarify the right to damages by way of representative action. We recommend that any clarification of the right to damages by way of representative action must be more precisely drafted so as to indicate that damages can only be claimed by a person against whom discrimination has actually been proven, and, moreover, that the measure of damages be made with particular reference to each person so discriminated.

8. EXEMPTIONS

Defence Forces - Recommendation 70

8.1 There was no evidence, particularly from the Chiefs of Staff or other members of the Defence Forces to enable recommendation 70 to be made by the Committee. We are aware that the Israeli armed forces have repealed their previous decision to allow women to occupy certain front line defence positions. In the absence of adequate evidence recommendation 70 is inappropriate.

9. EDUCATIONAL INSTITUTIONS ESTABLISHED FOR RELIGIOUS PURPOSES

Recommendation 72

9.1 Section 38 of the Sex Discrimination Act provides that the general proscription of discrimination in work or education is not unlawful if done in accordance with 'the doctrines, tenets, beliefs or teachings of a particular religion or creed' if the discrimination is 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

9.2 The majority recommend that this Section be amended to add the requirement of reasonableness.

9.3 We believe that if the exemption is to remain workable, it must be referable to the believers of the religion or creed. The Commission already has the power to determine whether the doctrines, tenets, beliefs or teachings of a particular religion or creed are held in good faith.

We recommend that Section 38 be retained in its current form.

10. AFFIRMATIVE ACTION ACT

Recommendations 76 - 79

10.1 Although the Affirmative Action Act was proclaimed in 1986, the impact of its operation has yet to be fully ascertained or adequately analysed. Indeed, the first company reports of affirmative action programs were made only in 1990. While the legislation has been the subject of debate and criticism, there remains little evidence of its real impact on Australian women. Some evidence is contradictory; other evidence remains untested. Indeed, the agency has recently initiated a review of the process.

10.2 In these circumstances we believe it premature, if not irresponsible, to make recommendations that the Act be extended to encompass all employees, employees in the voluntary sector, and corporations and organisations contracting with government. The role of a Parliamentary Committee in the area of law reform demands thoughtful and detailed debate with adequate opportunity for community consultation and with regard to all the consequences of proposed changes. This cannot be claimed about the Committee's proposals about the Affirmative Action Agency.

> We recommend that the role of affirmative action be subject to wide-ranging review involving the community, government, employers and employees. Accordingly, we cannot support recommendations 76 to 79.

CONCLUSION

Equality of opportunity and status for all Australians, including women, remains our objective. However, this objective will not be achieved by opinion, wishful thinking, preconceived notions of women's wishes, inadequate analysis of developments, or insufficient attention to the consequences of proposals. While the conduct of this inquiry has afforded a review of women in Australian society it remains incomplete and inadequate.

K J Andrews, MP
F E Bailey, MP
A G Cadman, MP
P H Costello, MP
M J C Ronaldson, MP