

## Anti-discrimination legislation

### Intersection of anti-discrimination law and industrial relations: *Fair Work Act 2009*

- 6.1 It is an objective of the *Fair Work Act 2009* to prevent discrimination in the workplace (s. 3).
- 6.2 The *Fair Work Act 2009* excludes state industrial relations law (to the extent that it applies to 'national system employees') but preserves the operation of state and territory anti-discrimination law that otherwise apply to 'national system employees' (s. 27). These provisions make it clear that in respect of discrimination matters a person has a choice of pursuing a claim under the discrimination provisions of the *Fair Work Act 2009*, or under anti-discrimination laws at the Commonwealth, State or Territory level.
- 6.3 Notwithstanding federal and state regimes of anti-discrimination legislation, instances of workplace discrimination based on sex, pregnancy, potential pregnancy and family responsibilities remain the subject of complaints to the Australian Human Rights Commission. Kingsford Legal Centre advised that they see:

... a number of women on issues related to sex discrimination, including discrimination relating to pregnancy, maternity leave, and sexual harassment in the work place. There are clearly trends, recurring problems, and repeat perpetrators ... the presence of clear laws making it unlawful to discriminate and/or to terminate employees on discriminatory grounds has failed to bring about a change in behaviour in workplaces both large and small.<sup>1</sup>

---

1 Kingsford Legal Centre, *Submission No. 142*, p. 2.

6.4 The Association of Professional Engineers, Scientists and Managers Australia referred to a form of discrimination which is less easily identified. For instance, when asked about factors affecting career advancement:

...most people ... would in fact be referring to direct discrimination, and what we also have is indirect or systemic discrimination. The gender pay gap by its very nature in many ways is a form of systemic discrimination, which is much broader and a much larger issue. It is very different to direct discrimination.<sup>2</sup>

6.5 Indirect discrimination can occur when a person imposes a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons with family responsibilities. The Equal Opportunity Commission of Western Australia reported that indirect discrimination against women was continuing and persistent and the types of complaints included payment of wages, promotional opportunities, access to part time work and issues relating to family status.<sup>3</sup>

6.6 Equal Employment Opportunity Network of Australasia suggested that anti-discrimination law was limited in its ability to combat indirect discrimination:

Discrimination law, at best, achieves minimum compliance, rather than active involvement and proactive initiatives.<sup>4</sup>

6.7 Notwithstanding the introduction of the *Sex Discrimination Act 1984*, the comments above clearly indicate that there is a great deal still to be done. This Chapter will outline the legislative grounds for discrimination claims as they now stand, briefly observe relevant changes recommended by the Senate Legal and Constitutional Affairs Committee in its recent review of the Act and propose additional changes that the Committee believes are needed to address Australia's gender pay gap.

---

2 Ms Karinda Flavell, National Research Officer, Association of Professional Engineers, Scientists and Managers Australia, *Transcript of Evidence*, 2 April 2009, p. 50.

3 Equal Opportunity Commission of Western Australia, *Submission No. 131*, p. 3.

4 Equal Employment Opportunity Network of Australasia, *Submission No. 85*, p. 5.

## Grounds of discrimination claims

6.8 The following section outlines the current sex discrimination requirements that work within the federal industrial relations system and the mechanisms available to redress discrimination claims.

### *Sex Discrimination Act 1984* Part II Division 1 (Discrimination in work)

6.9 The *Sex Discrimination Act 1984* provides a statutory definition of sex discrimination in work:

#### *14 Discrimination in employment or in superannuation*

- (1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy:
  - (a) in the arrangements made for the purpose of determining who should be offered employment;
  - (b) in determining who should be offered employment; or
  - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, pregnancy or potential pregnancy:
  - (a) in the terms or conditions of employment that the employer affords the employee;
  - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
  - (c) by dismissing the employee; or
  - (d) by subjecting the employee to any other detriment.
- (3) Nothing in paragraph (1)(a) or (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.
- (3A) It is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee.

## Awards and agreements must not contain terms that are discriminatory

6.10 The *Fair Work Act 2009* specifies that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (s 153(1)). Parties engaged in collective bargaining for an enterprise agreement cannot agree to unlawful terms, which include, among other things, a discriminatory term. For the purposes of an

enterprise agreement, the meaning of discriminatory term is the same as s 153(1) above, (s 195 (1)).

- 6.11 S. 195 is a standard formulation of the rule of non-discrimination and it is unlikely that it will be interpreted expansively so as to require the terms of an enterprise agreement to implement the right to pay equity

### Referral to Australian Industrial Relations Commission

- 6.12 Under the *Australian Human Rights Commission Act 1986* an individual, representative or class action may be initiated alleging discrimination under an industrial instrument (s 46PW(1) (a) (d)).<sup>5</sup> The President of the Australian Human Rights Commission must refer the complaint to the Australian Industrial Relations Commission, where 'it appears' the act would otherwise be unlawful under the Part II of the *Sex Discrimination Act 1984* (s 46W AHRC Act 1986) and is otherwise admissible (i.e. not vexatious, frivolous, misconceived or lacking in substance) (s 46PW (3)). The power to refer is triggered even though the act is done in compliance with an industrial instrument. In the case of indirect discrimination the case is also to be referred even where the indirect discrimination appears to be 'reasonable'.<sup>6</sup>

### Modern awards and enterprise agreements

- 6.13 The *Fair Work Act* requires that Fair Work Australia must review a modern award or an enterprise agreement if the award or agreement is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (s.161(1) s.218(1)). If an award or agreement is referred:
- The Sex Discrimination Commissioner is entitled to make submissions to Fair Work Australia for consideration in the review of an award or an agreement (s 161(2) and s 218(2))
  - If Fair Work Australia considers that the modern award or the enterprise agreement reviewed requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* (but for the fact that the act would be done in direct compliance with the modern award), Fair Work Australia must make a determination varying the modern award or the agreement so that it no longer requires the person to do an act that would be so unlawful (s 161 (3) and s 218(4)).

---

5 A trade union may act on behalf of one or more of its member or class of its members aggrieved by the act (46PW(1)(d)).

6 S.7B (1) (2) *Sex Discrimination Act 1984* (Commonwealth) makes lawful otherwise unlawful indirect discrimination if the requirement or practice is 'reasonable in all the circumstances'.

### Equal remuneration orders

- 6.14 The specific equal remuneration jurisdiction of Fair Work Australia may be invoked by an individual employee, a trade union or the Sex Discrimination Commissioner (s.302 (3)). Fair Work Australia may only make an equal remuneration order if it determines that the employee(s) does not enjoy equal remuneration for work of equal or comparable value. This provision replicates the provision under the *Workplace Relations Act 1996*. The Sex Discrimination Commissioner has never initiated an Equal Remuneration Order under the *Workplace Relations Act 1996*, largely due to a lack of resources.<sup>7</sup>

### Family and carer responsibilities

- 6.15 At the federal level, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992* provide some protections for workers with families and carer responsibilities. The *Disability Discrimination Act 1992* provides protection for workers with a disability and workers who are “associates” (*inter alia* a carer) of people with a disability. The states and territories also have legislation that prohibits discrimination on the grounds of sex, parental status and family and carer responsibilities.
- 6.16 Under part II, division 1, section 14 of the *Sex Discrimination Act 1984* makes it unlawful to discriminate on the grounds of sex, marital status, pregnancy, potential pregnancy, or to harass another person, in any areas of public life such as employment and education.
- It is unlawful for an employer to discriminate against an employee on the ground of the employee’s family responsibilities by dismissing the employee.
- 6.17 The Act provides only limited protection against discrimination on the grounds of family responsibilities. Questions have been raised as to whether the Act would even protect an employee against ‘constructive dismissal’ where an employee is not formally dismissed but the employer’s actions give the employee no choice but to leave their employment.
- 6.18 For instance, it has been found that the provisions of the *Sex Discrimination Act*:
- Only apply to discrimination that results in dismissal from employment;

---

7 Commissioner Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 2. See also Australian Human Rights Commission, *Submission No. 108*.

- Are limited to direct discrimination, leaving no protection against 'indirect' discrimination;
- Only apply to employment; and
- May not protect all caring relationships.<sup>8</sup>

6.19 Work and Family Policy Roundtable suggested that the *Sex Discrimination Act* be amended to:

- extend the protection under the Act against discrimination on the grounds of family responsibilities to indirect discrimination and to all stages of employment, not merely dismissal;
- provide enforceable standards in relation to all forms of pregnancy related discrimination; and
- provide a fast tracked resolution of complaints that involve dismissal.<sup>9</sup>

### Proposed legislative changes

6.20 The Queensland Industrial Relations Commission concluded 'that the legislative intention and scheme of the *Anti Discrimination Act 1991 (Qld)* establishes a complaints based model which is not well suited for securing equal remuneration for work of comparable value.<sup>10</sup> The principles apply to the federal system where discrimination complaints can be time consuming, damaging and expensive with a substantial burden on the *individual complainant* to collect the necessary evidence.<sup>11</sup> Usually, remedies relate to past harms. Conciliation provides a lower cost model but if this approach does not provide a solution, then the complainant must take the matter to the Federal Magistrates Court or the Federal Court which are more costly options.<sup>12</sup> Further, it has been suggested that while the complaints process can provide a remedy for individuals, it can 'fail to promote systemic change' but may assist in establishing legal precedents which promote flexible work practices.<sup>13</sup>

6.21 The Queensland Discrimination Commissioner commented that:

---

8 Human Rights and Equal Opportunity Commission, 2007 *It's About Time Women, men, work and family Final Paper 2007*, p. 54.

9 Work and Family Policy Roundtable, *Submission No. 143*, p. 20.

10 Queensland Industrial Relations Commission, 2007, *Pay Equity TIME TO ACT*, Inquiry to examine the impact of the federal Government's WorkChoices amendments to the *Workplace Relations Act 1996* on pay equity in Queensland, p. 4. See also comments by The National Pay Equity Coalition and the Women's Electoral Lobby Australia Inc, *Submission No. 118*, p. 31.

11 For example see ACT Council of Social Services, *Submission No. 54*, p. 7.

12 Commissioner Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 9.

13 Human Rights and Equal Opportunity Commission, 2007 *It's About Time Women, men, work and family Final Paper 2007*, p. 56.

A complaints based process is not an effective approach to deal with pay equity. The constraints ... prevent the application of a remedy to a third party or on a collective basis .... workplace legislation can only go so far, when in fact the causes of pay inequity go beyond industrial concerns and encompass those broader social issues.<sup>14</sup>

6.22 In a similar vein, the Victorian Government is reviewing the Victorian *Equal Opportunity Act 1995*. The inquiry working party:

... supported the development of broader measures such as representative complaints, non-complaint based investigations and other proactive measures being available under the Victorian *Equal Opportunity Act 1995* to address pay equity issues. Consequently, the Victorian government has undertaken a review of the EO Act. The options paper to that review set out five key issues for reform, including ways to restructure the framework of the EO Act so it could better address systemic discrimination. Pay inequity is one example of such discrimination, where there is a need to remove barriers and to achieve equal opportunity.<sup>15</sup>

6.23 Consideration was being given to 'whether the Victorian Human Rights and Equal Opportunity Commission should be given powers to launch its own investigations and to enter into enforceable undertakings and issue compliance notices rather than relying on individuals to pursue a complaint'.<sup>16</sup>

6.24 On these grounds it has been argued that:

Current federal anti-discrimination law provides insufficient protection for men and women workers with family and carer responsibilities, and a limited platform to support and promote systemic change.<sup>17</sup>

6.25 Thus, there is a 'need for additional legislative provisions to assist workers to balance their paid work with their family care responsibilities in relation to paid leave, the right to request flexible work arrangements and

---

14 Ms Susan Booth, Commissioner, Anti-Discrimination Commission Queensland, *Transcript of Evidence*, 31 March 2009, p. 74.

15 Ms Sarah Tuberville, Officer, Department of Innovation, Industry and Regional Development, Victoria, *Transcript of Evidence*, 2 April 2009, p. 8.

16 Ms Sarah Tuberville, Officer, Department of Innovation, Industry and Regional Development, Victoria, *Transcript of Evidence*, 2 April 2009, p. 8.

17 Human Rights and Equal Opportunity Commission, 2007 *It's About Time; Women, men, work and family Final Paper 2007*, p. 57.

carer's leave.<sup>18</sup> Specifically, new legislation is required to expand family responsibilities protection for both men and women.<sup>19</sup> These matters have been discussed previously in relation to the National Employment Standards.

- 6.26 The City of Perth saw the effectiveness of the anti-discrimination legislation in relation to fair access to training and promotion as dependent on the definition of 'operational reasons'.<sup>20</sup> The Council called for clear definitions of what are "reasonable operational reasons" for employers to grant or refuse flexible work arrangements.<sup>21</sup>

### Remedies under federal *Sex Discrimination Act 1984*

- 6.27 It has been suggested that the *Sex Discrimination Act 1984* be amended in relation to:

- broadening discrimination on the ground of family responsibilities;
- include positive obligation on employer to make reasonable accommodation for pregnancy and family/carer responsibilities;
- grant the Commissioner powers to initiate own motion inquiries;
- confer power for Commissioner to certify special measures; and
- expand provisions for *amicus curiae* (friend of the court) briefs and other interventions (as a right) in court proceedings.<sup>22</sup>

### Senate inquiry into the effectiveness of the *Sex Discrimination Act 1984*

- 6.28 In 2008, the Senate Legal and Constitutional Affairs Committee undertook an inquiry into the effectiveness of the *Sex Discrimination Act 1984*. The report entitled the *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* was tabled on 12 December 2008. The report made a number of recommendations relevant to this inquiry.

---

18 Human Rights and Equal Opportunity Commission, 2007 *It's About Time Women, men, work and family Final Paper 2007*, p. 82.

19 Human Rights and Equal Opportunity Commission, 2007 *It's About Time Women, men, work and family Final Paper 2007*, pp. xi - xii

20 City of Perth, *Submission No. 31*, p. 1.

21 City of Perth, *Submission No. 31*, p. 1.

22 Australian Human Rights Commission, *Submission No. 108*, pp. 16-21.



- 6.29 In relation to the commitment to the elimination of sex discrimination and sexual harassment **Recommendation 1** states that:

The committee recommends that the preamble to the Act and subsections 3(b), (b) and (c) of the Act be amended by deleting the phrase 'so far as is possible'.

- 6.30 In relation to the objects of the Act that currently give effect to CEDAW and do not refer to other conventions such as the ICCPR, ICESCR or the ILO. The Senate Committee considered that the objects of the Act should explicitly refer to these other international conventions which create obligations in relation to gender equality and **Recommendation 2** states that:

The committee recommends that subsection 3(a) of the Act be amended to refer to other international conventions Australia has ratified which create obligations in relation to gender equality.

- 6.31 In relation to an 'express requirement under the Act for the courts to interpret the provisions of the Act consistently with the international conventions it seeks to implement', **Recommendation 3** states that:

The committee recommends that the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.

- 6.32 **Recommendation 5** states that:

The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.

- 6.33 **Recommendation 6** states that:

The committee recommends that section 7B of the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.

6.34 **Recommendation 12** states that:

The committee recommends that the Act be amended to make breastfeeding a specific ground of discrimination.

6.35 In relation to family responsibilities, the Senate Committee found 'Evidence to the committee overwhelmingly supported the view that the protection against discrimination on the basis of family responsibilities under the Act is too limited and **Recommendation 13** states that:

The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.

6.36 Further, the Senate Committee supported 'providing for a positive duty on employers not to unreasonably refuse requests for flexible working arrangements to accommodate family or carer responsibilities' and **Recommendation 14** states that:

The committee recommends that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995 (VIC)*.

6.37 **Recommendation 33** states that:

The committee recommends that the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years.

6.38 The Senate Committee's recommendations are currently being considered by the Government.

### Own motion inquiries

6.39 Australian Human Rights Commission (AHRC) suggested the Sex Discrimination Commissioner be given authority to conduct own motion inquiries into systemic forms of discrimination. The Commissioner does have some investigative powers in respect to the acts and practices of Commonwealth programs but discrimination issues that occur in business

rely on individual complaints.<sup>23</sup> The Commission has produced guidelines for businesses and conducted relevant workshops.<sup>24</sup>

- 6.40 The AHRC suggested that the *Sex Discrimination Act 1984* be amended to include functions to enable :
- the Sex Discrimination Commissioner to commence self initiated complaints for alleged breaches of the Sex Discrimination Act, without requiring individual complaint. The new function would include the ability to enter negotiations, reach settlements, agree enforceable undertakings, and issue compliance notices.
  - The Australian Human Rights Commission to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the Sex Discrimination Act.<sup>25</sup>
- 6.41 Support for enhancing the Sex Discrimination Commissioner's powers to conduct own motion inquiries can be found in international arrangements. The United Kingdom's Commission for Equality and Human Rights has the power to 'investigate whether an unlawful act of discrimination or harassment has occurred and need only suspect that an unlawful act has taken place'.<sup>26</sup>
- 6.42 The Canadian Human Rights Commission can initiate a complaint if 'it has reasonable grounds for believing a discriminatory practice has occurred'.<sup>27</sup>
- 6.43 The New Zealand Human Rights Commission 'may inquire into any matter including any law, practice or procedure (governmental or non-governmental) where it thinks human rights might be, or have been, infringed'.<sup>28</sup>
- 6.44 In relation to the powers of AHRC and the Sex Discrimination Commissioner, the Senate Committee concluded that there are 'deficiencies in the existing powers ... to enforce the obligations created by the Act' and made several recommendations:

---

23 Commissioner Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, pp. 6-7.

24 Dr Cassandra Goldie, Director, Sex Discrimination Unit, Australian Human Rights Commission, *Transcript of Evidence*, 1 April 2009, p. 7.

25 Australian Human Rights Commission, *Submission No. 108*, p. 21.

26 Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee inquiry into Effectiveness of the *Sex Discrimination Act 1984* citing the *Equality Act 2006* (United Kingdom), s 20(1)(a) and ), s 20(2)

27 *Canadian Human Rights Act RS 1985*, cH-6, s 40(3)

28 *Human Rights Act 1993*, New Zealand, s 5(2)(h)

**Recommendation 29**

The committee recommends that the Act and the HREOC Act should be amended to expand HREOC's powers to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a state or under state laws.

**Recommendation 30**

The committee recommends that paragraph 48(1)(gb) of the Act be amended to explicitly confer a function on HREOC of intervening in proceedings relating to family responsibilities discrimination or victimisation.

**Recommendation 31**

The committee recommends that subsection 46PV(1) of the HREOC Act be amended to include a function for the special purpose commissioners to appear as *amicus curiae* in appeals from discrimination decisions made by the Federal Court and the Federal Magistrates Court.

**Recommendation 32**

The committee recommends that paragraph 48(1)(gb) of the Act and subsection 46PV(2) of the HREOC Act be amended to empower HREOC to intervene in proceedings, and the special purpose commissioners to act as *amicus curiae*, as of right.

- 6.45 The Sex Discrimination Commissioner has standing to make submissions in a review of an award (s. 161(2) FWA) in a variation of an enterprise agreements (s.218 (2) FWA) referred by the President of AHRC (s. 46PW SDA). The Commissioner also has standing to make an application for an equal remuneration order (s.302 (3)(f) FWA).
- 6.46 Where the Commissioner receives a complaint and, but for the term of the award or the agreement, the term is *prima facie* unlawful under the SDA, the President of HREOC must refer the matter to Fair Work Australia (s. 46PW SDA).

- 6.47 Fair Work Australia must ensure that awards and agreements comply with the SDA and the Sex Discrimination Commissioner has a role in bringing expertise on discrimination and the status of women before the Fair Work Australia. Fair Work Australia does not have the power to initiate an investigation but must respond to applications for award creation or variation, certification of enterprise agreements and research to inform the annual national wage case or an application for an equal remuneration order.
- 6.48 The *Sex Discrimination Act* requires amendment to grant the Sex Discrimination Commissioner the power to conduct an own motion inquiry into systemic inequality in the workplace. Further discussion is needed to determine the scope of inquiry function, related powers that would be necessary and the appropriate reporting mechanism. Unlike the Indigenous Social Justice Commissioner, the Sex Discrimination Commissioner cannot initiate an investigation in to systemic indirect discrimination even though a pattern of systemic discrimination is evidenced through multiple complaints.
- 6.49 An own motion inquiry function would enable the Commissioner to investigate systemic discrimination recognising that the concept of equality is 'substantive' equality and that systemically entrenched discrimination requires more proactive investigative and inquisitorial approach. The current anti-discrimination model puts the burden of responsibility onto aggrieved parties to lodge a complaint. It is well recognised that those who are most vulnerable to exploitation and discrimination are generally less able to access complaints mechanisms. It appear to be appropriate that this function remain outside Fair Work Australia given the relevant expertise and access to information of the Australian Human Right Commission.
- 6.50 The Senate Committee made the following further recommendations in relation to enhanced powers of the Sex Discrimination Commissioner:
- 6.51 **Recommendation 37**
- The committee recommends that further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.
- 6.52 **Recommendation 38**
- The committee recommends that further consideration be given to amending the Act to give HREOC the power to commence legal

action in the Federal Magistrates Court or Federal Court for a breach of the Act.

- 6.53 The capacity of the Commission to conduct own motion inquiries depends on resources. However, that should not determine the fundamental issue of good quality institutional design. The Commissioner may choose to set priorities and allocate funds according to those priorities. It is not envisaged that the Commissioner would be routinely engaged in own motion inquiries into pay equity. However, a strategically planned approach may yield positive results and contribute both to the expertise and knowledge of Fair Work Australia, unions and employers and to Government policy.

### **Recommendation 19**

**That the *Sex Discrimination Act 1984* be amended to enable the Sex Discrimination Commissioner to commence self initiated complaints for alleged breaches of the Sex Discrimination Act, without requiring individual complaint and including the ability to enter negotiations, reach settlements, agree enforceable undertakings and issue compliance notices.**

### **Recommendation 20**

**That the *Sex Discrimination Act 1984* be amended to enable the Australian Human Rights Commission to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the Sex Discrimination Act.**

### **Educative processes**

- 6.54 In addition to the above changes in relation to the powers of the Commissioner, there is a need to get the message across to the community. The Kingston Legal Centre believes that employers should know the economic and human costs of discrimination and harassment and that:

... the raft of discrimination and employment laws have so far been ineffective in bringing about change for recalcitrant

employers, there clearly needs to be more emphasis on education in the workplace.<sup>29</sup>

### Recommendation 21

**That the *Sex Discrimination Act 1984* be amended to make it mandatory for employers who are repeat offenders discriminating on the basis of pregnancy or carer's responsibility to be required to attend counselling or an approved training course.**

### Committee comments

- 6.55 Discrimination legislation is a vital part of the approach to achieving pay equity. The brevity of this chapter reflects the fact that the Senate Legal and Constitutional Affairs Committee commenced an inquiry into the effectiveness of the *Sex Discrimination Act 1984* on the same day as the pay equity inquiry commenced in the House of Representatives. The Senate inquiry covered much of the ground that is relevant to this inquiry and the Government is currently considering that set of recommendations. Accordingly, this Committee has presented only a brief overview of these matters. The Committee does, however, strongly urge the Government to give due consideration to the issues relating to the *Sex Discrimination Act 1984* raised by both committees.
- 6.56 The Committee has emphasised the importance of investigative powers for the Sex Discrimination Commissioner. The systemic nature of the gender pay gap can be attributed to indirect discrimination which is not easily addressed in a system reliant on individual complaints. In addition to the direct discrimination discussed above, the gender pay gap also reflects the undervaluation of the work that women traditionally do and a broader approach is needed to address these.

---

<sup>29</sup> Kingsford Legal Centre, *Submission No. 142*, p. 6.

