



## Sex and Age Discrimination Legislation Amendment Bill 2010

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Law and Bills Digest Section

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## Sex and Age Discrimination Legislation Amendment Bill 2010

**Date introduced:** 30 September 2010

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Formal provisions: on Royal Assent; Schedule 1: the day after Royal Assent; Schedule 2: a day to be fixed by proclamation, or after a six month period following Royal Assent

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

### Purpose

The main aims of the Sex and Age Discrimination Legislation Amendment Bill 2010 (the Bill) are to amend:

- the *Sex Discrimination Act 1984* (the SD Act) to strengthen protections against sex discrimination and sexual harassment, and
- the *Age Discrimination Act 2004* (the AD Act) to establish the position of Age Discrimination Commissioner in the Australian Human Rights Commission.

In addition, the Bill also proposes consequential amendments to the *Australian Human Rights Commission Act 1986* (the HREOC Act) and the *Fair Work Act 2009* (the FW Act).

### Background information

#### Sex Discrimination Act 1984

The objects of the SD Act are (according to section 3 of the [SD Act](#)):

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

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the

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disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

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

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

Australia ratified CEDAW in 1983, informing the passage of the SD Act, which in turn seeks to satisfy CEDAW's requirement to eliminate discrimination against women using legislative and other measures.<sup>1</sup>

The SD Act currently prohibits discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy in several areas of public life, such as in work and the areas outlined in section 3.<sup>2</sup> The SD Act also prohibits discrimination in relation to dismissal of employees on the grounds of family responsibilities, as well as discrimination involving sexual harassment in various contexts.<sup>3</sup>

While the Attorney-General's Department has portfolio responsibility for the SD Act, complaints relating to sex discrimination are made to the Australian Human Rights Commission (AHRC).<sup>4</sup>

## Sex Discrimination Act amendments

The amendments to the SD Act proposed in the Bill form part of the Government's response to the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs

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1. For further information about Australia's obligations under CEDAW, see Department of Families, Housing, Community Services and Indigenous Affairs, 'Women's Human Rights', viewed 24 January 2011, [http://www.fahcsia.gov.au/sa/women/progserv/intengage/un/Pages/human\\_rights.aspx](http://www.fahcsia.gov.au/sa/women/progserv/intengage/un/Pages/human_rights.aspx)  
For further information about CEDAW itself, see United Nations Division for the Advancement of Women, 'Convention on the Elimination of All Forms of Discrimination Against Women', viewed 24 January 2011, <http://www.un.org/womenwatch/daw/cedaw/>
  2. See SD Act Part II, Divisions 1 and 2.
  3. Ibid., section 14(3A) (dismissal on grounds of family responsibilities) and Part II, Division 3 (sexual harassment).
  4. As to the Attorney-General's Department's role, see Attorney-General's Department, 'Human rights and anti-discrimination', viewed 20 January 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_Humanrightsandanti-discrimination](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrightsandanti-discrimination)  
As to the AHRC's role, see Australian Human Rights Commission, 'Sex discrimination', viewed 20 January 2011, [http://www.hreoc.gov.au/sex\\_discrimination/index.html](http://www.hreoc.gov.au/sex_discrimination/index.html)

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(Legal and Constitutional Affairs Committee) in its 2008 *Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality* (the 2008 Inquiry).<sup>5</sup>

In its report, the Legal and Constitutional Affairs Committee made several recommendations, which are attached in the Appendix to this Digest, of which only some were supported by the Government of the time.<sup>6</sup> Supported recommendations include:

- making breastfeeding a specific ground of discrimination
- broadening the prohibition on discrimination on the grounds of family responsibilities to include indirect discrimination and discrimination in all areas of employment
- amending the definition of sexual harassment to provide:
  - that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated, and
  - that the circumstances relevant to determining whether a reasonable person would have anticipated the *possibility* that the other person would be offended, humiliated or intimidated, include:
    - the sex, age and race of that other person
    - any impairment of that other person
    - the relationship between the people concerned, and
    - any other circumstances of that other person
- protecting students from sexual harassment regardless of age
- removing the requirement that the person responsible for harassment must be at the same educational institution as the victim, and
- protecting workers from sexual harassment by customers, clients and other people with whom they come into contact in connection with their employment.<sup>7</sup>

On 24 June 2010, the Attorney-General, Robert McClelland, introduced into Parliament the Sex Discrimination Amendment Bill 2010 (the previous Bill), which only proposed amendments to the SD

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5. For information about the inquiry, see Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, viewed 18 January 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sex\\_discrim/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/index.htm)

6. However, there was a dissenting report by the Liberal Senators and additional comments by Senator Hanson-Young: see Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, pp. 167–183, viewed 18 January 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sex\\_discrim/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/report.pdf)

7. See the Committee's report at Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, op. cit., pp. xiii–xviii. See further the Government's response to the Committee's report: Attorney-General, *Government response*, tabled 4 May 2010, viewed 18 January 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sex\\_discrim/gov\\_response.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/gov_response.pdf)  
For a non-exhaustive list of matters not addressed in the Bill, see p. 19 of this Digest.

Act in relation to sex discrimination and sexual harassment. However, that Bill lapsed when Parliament was prorogued on 19 July 2010.

## Age Discrimination Act 2004

The [AD Act](#) makes it unlawful to discriminate on the basis of age in several areas of public life. These include employment; and access to goods and premises, services and facilities.<sup>8</sup>

As with the SD Act, although the Attorney-General's Department has portfolio responsibility for the AD Act, complaints relating to age discrimination are made to the AHRC.<sup>9</sup>

## Age Discrimination Act amendments

The amendments to the AD Act proposed in the Bill had not been put before Parliament prior to the last election. However, on 7 August 2010, the Prime Minister, Julia Gillard, promised that a re-elected Labor Government would create a stand-alone Age Discrimination Commissioner.<sup>10</sup>

## Review and consolidation of anti-discrimination laws

The Government has stated that recommendations by the Legal and Constitutional Affairs Committee, which are not included in the Bill, will be considered as part of the Government's review and consolidation of federal anti-discrimination laws in Australia (the Consolidation project).<sup>11</sup>

Currently, federal anti-discrimination laws are largely set out in four separate Acts:

- the *Racial Discrimination Act 1975* (the RD Act)
- the SD Act
- the AD Act, and
- the *Disability Discrimination Act 1992* (the DD Act),

while the HREOC Act provides a framework for the implementation of views on anti-discrimination and human rights generally.<sup>12</sup>

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8. See AD Act Part 4, Divisions 2 and 3.

9. As to the Attorney-General's Department's role, see above note 4. As to the AHRC's role, see Australian Human Rights Commission, 'Age discrimination', viewed 20 January 2011, <http://www.hreoc.gov.au/age/index.html>

10. See Julia Gillard (Prime Minister) and Julie Macklin MP, *Election 2010: Prime Minister Julia Gillard MP And Jenny Macklin MP Joint Press Conference – transcript*, 7 August 2010, viewed 18 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22emms%2Femms%2F178592%22>

11. R McClelland, 'Second reading speech: Sex and Age Discrimination Legislation Amendment Bill 2010', House of Representatives, *Debates*, p. 275, 30 September 2010, viewed 26 January 2011.

On 21 April 2010, the Government announced its intention to streamline federal anti-discrimination legislation into one single comprehensive Act and stated that it would develop exposure draft legislation to be used as the basis for consulting with stakeholders and the public.<sup>13</sup>

## National human rights consultation project

According to the Attorney-General, Robert McClelland, the Consolidation project itself is part of a wider national human rights consultation, which was launched by the then Government on 10 December 2008 and conducted by a Human Rights Consultation Committee (more commonly referred to as the 'Brennan Committee').<sup>14</sup>

The Brennan Committee's report was released on 8 October 2009<sup>15</sup>, in which it recommended that, among other things:

... the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant

- that, in the conduct of the audit, the Federal Government give priority to the following areas:

- anti-discrimination legislation, policies and practices ...<sup>16</sup>

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12. Note, however, that other legislation may also be relevant in particular circumstances. See, for example, the [Human Rights \(Sexual Conduct\) Act 1994](#).
  13. R McClelland and L Tanner, *Reform of anti-discrimination legislation*, media release, 21 April 2010, viewed 26 January 2011, [http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_SecondQuarter\\_21April2010-ReformofAnti-DiscriminationLegislation](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAnti-DiscriminationLegislation)
  14. See Human Rights Consultation Committee, *National Human Rights Consultation Report*, September 2009, pp. 3–4, viewed 26 January 2011, [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads#pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads#pdf)  
See also R McClelland, 'A message from the Attorney-General the Hon Robert McClelland MP', viewed 26 January 2011, [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who\\_AMessagefromtheAttorney-GeneraltheHonRobertMcClelland](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who_AMessagefromtheAttorney-GeneraltheHonRobertMcClelland) ; R McClelland, 'Second reading speech: Sex and Age Discrimination Legislation Amendment Bill 2010', op. cit.
  15. R McClelland, *Release of National Human Rights Consultation Report*, media release, 8 October 2009, viewed 26 January 2011, [http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2009\\_FourthQuarter\\_8October2009-ReleaseofNationalHumanRightsConsultationReport](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_8October2009-ReleaseofNationalHumanRightsConsultationReport)
  16. Human Rights Consultation Committee, *National Human Rights Consultation Report*, op. cit., Recommendation 4.

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## National human rights framework

On 21 April 2010, the Attorney-General launched the Human Rights Framework (the Framework), which addresses key recommendations of the Brennan Committee. In summary, the Framework focuses on:

- **reaffirming** a commitment to our human rights obligations;
- the importance of human rights **education**;
- enhancing our domestic and international **engagement** on human rights issues;
- improving human rights **protections** including greater parliamentary scrutiny; and
- achieving greater **respect** for human rights principles within the community.<sup>17</sup>

The Framework specifically endorses the need to combine federal anti-discrimination laws into a single Act 'to remove unnecessary regulatory overlap and make the system more user-friendly'.<sup>18</sup>

## Committee consideration

On 30 September 2010, the Bill had been referred to the Legal and Constitutional Affairs Committee for inquiry and report by 10 February 2011.<sup>19</sup>

The Senate Scrutiny of Bills Committee (the Scrutiny of Bills Committee) had also reviewed the Bill.<sup>20</sup> The Scrutiny of Bills Committee's only comment was in relation to **items 9** and **62 of Schedule 1**—official record of a person's sex. The Scrutiny of Bills Committee expressed concern that:

... because of the inconsistent treatment of cardinal records of a person's sex relating to gender reassignment by States and Territories these items have the effect that people in similar circumstances will be treated differently when the official status of a person's

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17. For further information about the Human Rights Framework, see Attorney-General's Department, 'Australia's Human Rights Framework', viewed 8 February 2011, <http://www.ag.gov.au/humanrightsframework>; R McClelland (Attorney-General), *Australia's human rights framework*, media release, 21 April 2010, viewed 8 February 2011, [http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_SecondQuarter\\_21April2010-AustraliasHumanRightsFramework](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-AustraliasHumanRightsFramework); and R McClelland (Attorney-General), *Address to the National Press Club of Australia - launch of Australia's human rights framework*, 21 April 2010, viewed 8 February 2011, [http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2010\\_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework)
  18. See Attorney-General's Department, 'Australia's Human Rights Framework', op. cit.
  19. Details of the inquiry are at Senate Standing Committee on Legal and Constitutional Affairs, 'Information about the inquiry', *Sex and Age Discrimination Legislation Amendment Bill 2010 [provisions]*, viewed 18 January 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sexandagediscrimination2010provisions/info.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sexandagediscrimination2010provisions/info.htm)
  20. See Senate Scrutiny of Bills Committee, *Alert Digest*, no. 8 of 2010, 27 October 2010, p. 59, viewed 18 January 2011, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d08.pdf>

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sex is important. The explanatory memorandum (at pages 5 and 15 respectively) does not address this issue.<sup>21</sup>

Consequently, the Scrutiny of Bills Committee requested an explanation from the Attorney-General who responded by letter dated 12 November 2010.<sup>22</sup>

## Position of major interest groups

The Legal and Constitutional Affairs Committee's current inquiry into the Bill has attracted many submissions from various interest groups.<sup>23</sup>

The views expressed in these submissions will be addressed in the relevant parts of 'Key Provisions' section of this Digest. However, at the outset, it is noted that most concerns expressed by major interest groups relate to what is *not* in the Bill, rather than what is in the Bill.

## Financial implications

The Government has stated that the establishment of the Age Discrimination Commissioner will cost \$1.0 million per year from 2011–12 when the position is established and that other amendments proposed in the Bill will have 'negligible financial implications'.<sup>24</sup>

## Key provisions

### Schedule 1—amendments relating to sex discrimination

This Digest will focus on some, not all, of the proposed amendments to the SD Act in Schedule 1 of the Bill, which relates to sex discrimination.

### International law instruments

**Item 24 of Schedule 1** proposes to **repeal subsections 9(10) and (10A)** in the SD Act, inserting a **new subsection 9(10)**.

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21. Ibid.

22. For a copy of the Minister's response, see Senate Scrutiny of Bills Committee, *Ninth report of 2010*, 17 November 2010, viewed 9 February 2011, <http://www.aph.gov.au/senate/committee/scrutiny/bills/2010/b09.pdf>

23. See Senate Standing Committee on Legal and Constitutional Affairs, 'Submissions received by the Committee', *Sex and Age Discrimination Legislation Amendment Bill 2010 [provisions]*, viewed 18 January 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sexandagediscrimination2010provisions/submissions.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sexandagediscrimination2010provisions/submissions.htm)

24. Explanatory Memorandum, Sex and Age Discrimination Legislation Amendment Bill 2010, p. 2.

Section 9 relates to the application of the SD Act and the relevant subsections currently provide:

(10) If the Convention is in force in relation to Australia, the prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention.

(10A) Subsection 14(3A) has effect in relation to discrimination involving dismissal of employees on the ground of family responsibilities, to the extent that the subsection gives effect to any of the following instruments:

(a) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 [1980] ATS 23 (a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*);

(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 [1976] ATS 5;

(c) ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation done at Geneva on 25 June 1958 [1974] ATS 12 (a copy of the English text of which is set out in Schedule 1 to the *Australian Human Rights Commission Act 1986*);

(d) the Convention on the Rights of the Child done at New York on 20 November 1989 [1991] ATS 4.

**Proposed subsection 9(10)** would support anti-discrimination and sexual harassment provisions, which give effect to a ‘relevant international instrument’ as defined in **item 10** of **Schedule 1**.

**Item 10** of **Schedule 1** would cover a much broader range of international instruments than is currently listed in the SD Act.

**Item 3** of **Schedule 1** also proposes **amending the objects of the SD Act in section 3**, to include the new definition and additional instruments.

## Commentary

According to the Explanatory Memorandum:

Section 9 ensures that the SDA is within the constitutional power of the Commonwealth. Items 23–29 will amend section 9 to incorporate additional powers which have not previously been relied on, and expand the extent to which powers already specified are relied upon.

...

The amendment in Item 24 aims to address these situations by specifying additional relevant international conventions to which Australia is a party which prohibit discrimination against men, as well as women.<sup>25</sup>

This amendment accords with the Legal and Constitutional Affairs Committee's recommendation 7 in its 2008 Inquiry report (see Appendix).

## Breastfeeding

The Bill proposes to include breastfeeding as a separate ground of discrimination.

For example, **item 17 of Schedule 1** proposes to insert a **new section 7AA (Discrimination on the ground of breastfeeding)**, which provides for both direct and indirect discrimination on the ground of breastfeeding. Direct discrimination arises where a woman who breastfeeds is treated less favourably than another woman who does not breastfeed.<sup>26</sup> Indirect discrimination arises where what appears to be a neutral practice, condition or requirement effectively disadvantages women who breastfeed.<sup>27</sup>

According to **proposed subsections 7AA(3) and (4)**, breastfeeding includes the expressing of milk, the act of breastfeeding and breastfeeding over a period of time.

However, **proposed section 7AA** would be subject to sections 7B and 7D of the SD Act, as amended. In other words:

- a requirement, condition or practice, which would disadvantage women who breastfeed, would not be discriminatory if the requirement, condition or practice is reasonable in the circumstances (see **item 19 of Schedule 1**), and
- special measures to achieve equality in particular circumstances can be taken without resulting in claims of unlawful discrimination (see **items 20–21 of Schedule 1**).

The Bill proposes that breastfeeding, as a ground of discrimination, will apply in various areas of public life, which include:

- workplaces (**items 37–44 of Schedule 1**)
- education (**item 45 of Schedule 1**)
- goods, services and facilities (**item 46 of Schedule 1**)
- accommodation (**item 47 of Schedule 1**)
- land (**item 48 of Schedule 1**)
- clubs (**item 49 of Schedule 1**)

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25. Explanatory Memorandum, op. cit., p. 9.

26. For example, an employer refusing to hire a woman who breastfeeds or a restaurant refusing to serve a customer who is breastfeeding: *ibid.*, p. 6.

27. For example, an employer requiring all employees to not take breaks at particular times of the day would affect women needing to express milk: *ibid.*

- administration of Commonwealth laws and programs (**item 50 of Schedule 1**), and
- requests for information (**items 51–52 of Schedule 1**).

## Commentary

This accords with the Legal and Constitutional Affairs Committee’s recommendation 12 in its 2008 Inquiry report (see Appendix) and in general, most major interest groups support this proposal.<sup>28</sup>

## Family responsibilities

Currently, under section 14(3A) of the SD Act, it is unlawful for an employer to discriminate against an employee, on the ground of the employee’s family responsibilities, by dismissing the employee.

The meaning of ‘family responsibilities’ is set out in section 4A, as:

... responsibilities of the employee to care for or support:

(a) a dependent child of the employee; or

(b) any other immediate family member who is in need of care and support.

Immediate family member includes the employee’s spouse; or an adult child, parent, grandparent, grandchild or sibling of the employee or employee’s spouse (subsection 4A(2) of the SD Act).

Family responsibilities, as a ground of discrimination, is currently limited to direct discrimination and an employee’s dismissal from a workplace.

**Item 18 of Schedule 1** proposes to **amend section 7A** of the SD Act to extend this ground to cover both men and women in the workplace and in relation to requests for information. Consequently, existing references to ‘employee’ in, for example, sections 4A and 7A would be changed to ‘person’.

**Proposed section 7A** would also relate to both direct and indirect discrimination against a person with family responsibilities. As mentioned earlier, direct discrimination arises where a person with family responsibilities is treated less favourably than someone else without such responsibilities.

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28. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Australian Family Association; Office of the Anti-Discrimination Commissioner (Tas); Human Rights Law Resource Centre; Women’s Legal Services (NSW); Public Interest Advocacy Centre; Uniting Church (Vic and Tas); Anti-Discrimination Commission (Qld); Office of the Commissioner for Equal Opportunity (SA); Thomson’s Lawyers; Law Council of Australia; Australian Lawyers for Human Rights; Australian Human Rights Commission; Department of the Premier and Cabinet – Government of Western Australia; and Australian Council of Trade Unions, viewed 20 January 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sexandagediscrimination2010provisions/submissions.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sexandagediscrimination2010provisions/submissions.htm) However, see also the submission by FamilyVoice Australia, who does not support this particular amendment.

Indirect discrimination arises where what appears to be a neutral practice, condition or requirement effectively disadvantages people who have family responsibilities.

However, as with breastfeeding, **proposed section 7A** would be subject to sections 7B and 7D of the SD Act. In other words:

- a requirement, condition or practice which would disadvantage people with family responsibilities would not be discriminatory if the requirement, condition or practice is reasonable in the circumstances (see **item 19** of **Schedule 1**), and
- special measures to achieve equality in particular circumstances could be taken without resulting in claims of unlawful discrimination (see **items 20–21** of **Schedule 1**).

Unlike breastfeeding, however, the Bill proposes that family responsibilities, as a ground of discrimination, will only apply to the workplace (see **items 37–44** of **Schedule 1**) and requests for information (see **items 51–52** of **Schedule 1**).

## Commentary

The proposed amendments relating to family responsibilities generally accord with the Legal and Constitutional Affairs Committee's recommendation 13 in its 2008 Inquiry report (see Appendix).

However, it is noted that the Bill does not include recommendation 14 by the Legal and Constitutional Affairs Committee, which states:

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)*.<sup>29</sup>

The Government had noted recommendation 14, but stated that this was already covered by the *Fair Work Act 2009* and the National Employment Standards.

This omission has been a subject of importance for many major interest groups who support the Legal and Constitutional Affairs Committee's Recommendation 14.<sup>30</sup>

Submissions by major interest groups also pointed out that the Bill does not extend family responsibilities as a ground of discrimination in areas of public life, other than employment, covered by the SD Act.<sup>31</sup>

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29. See Appendix to this Digest.

30. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by: Public Interest Advocacy Centre; Thomson's Lawyers; Law Council of Australia; Australian Human Rights Commission; and Australian Council of Trade Unions, *op. cit.*

## Sexual harassment

**Item 53 of Schedule 1** proposes to broaden the definition of ‘sexual harassment’ in **subsection 28A(1)** of the SD Act, to the effect that a person sexually harasses another person if the conduct in question occurs where a reasonable person in those circumstances would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated.

Currently, subsection 28A(1) provides that a person sexually harasses another person if the conduct in question occurs where a reasonable person in those circumstances would have anticipated that the person harassed would be offended, humiliated or intimidated.

**Item 54 of Schedule 1** proposes to insert a **new subsection 28A(1A)** into the SD Act, which lists factors to be considered when determining whether a reasonable person in the circumstances would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated. These would include, but would not be limited to:

- the sex, age, marital status, sexual preference, religious belief, race, colour, or national or ethnic origin of the person harassed
- the relationship between the person harassed and the person engaging in the conduct in question
- any disability of the person harassed, and
- any other relevant circumstances.

**Items 56 and 57 of Schedule 1** propose to amend **section 28F** in relation to sexual harassment relating to educational institutions as follows:

- to extend the protection from sexual harassment to include sexual harassment by a student who is 16 years of age or older (‘adult student’) under subsection 28F(2), to *all* students at the institution, as well as members of staff, and
- to extend the protection from sexual harassment to include sexual harassment by either a staff member or an adult student at one institution to staff and students of a different institution (**new subsections 28F(2A) and (2B)**).

Currently, under section 28F(2), only adult students have protection from sexual harassment by another adult student and students under the age of 16 years would not be protected from such harassment.

**Items 58 and 59 of Schedule 1** propose to amend **section 28G** in the SD Act to also protect the providers of goods, services or facilities from sexual harassment by their clients and customers.

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31. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Office of the Anti-Discrimination Commissioner (Tas); and Public Interest Advocacy Centre, op. cit.

Currently, section 28G only protects the clients and customers from sexual harassment from providers of goods, services or facilities.

## Commentary

The proposed amendments relating to family responsibilities generally accord with the Legal and Constitutional Affairs Committee's recommendations 15–18 in its 2008 Inquiry report (see Appendix).

However, there has been some particular criticism regarding the proposed definition of 'sexual harassment'. These include:<sup>32</sup>

- that the definition does not include 'cyber-harassment'—including the display of offensive material and communication via electronic means, in the context of increasing technology with access to a range of electronic media such as mobile phones and the internet,<sup>33</sup> and
- that the circumstances listed in **item 54 of Schedule 1** could result in minimising the harassment by focusing on the complainant's characteristics rather than the conduct of the alleged harasser.<sup>34</sup>

In addition, it has been suggested that the proposed provisions relating to sexual harassment in educational institutions raise the question of schools' responsibilities in respect of sexual harassment of students and invokes criticism that the potential for widespread litigation in school communities that would be created is 'undesirable'.<sup>35</sup>

## Voluntary bodies exemption

**Item 61 of Schedule 1** proposes to amend **section 39** of the SD Act. Section 39 currently provides:

Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, marital status or pregnancy, in connection with:

- (a) the admission of persons as members of the body; or

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32. In addition, the proposed definition has been criticised for going too far: see the submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by Thomson's Lawyers, *op. cit.*, p. 3. See also the submission in relation to that inquiry into the Bill by the Lone Fathers' Association (Australia) Inc, p. 13.

33. See, for example, the submissions in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by: Office of the Anti-Discrimination Commissioner (Tas) and Independant Education Union of Australia, *op. cit.*

34. See, for example, the submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by the National Association of Community Legal Centres, *op. cit.*

35. See the submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by Thomson's Lawyers, *op. cit.*, p. 3.

(b) the provision of benefits, facilities or services to members of the body.

This provision exempts voluntary bodies from provisions in the SD Act prohibiting discrimination on the ground of the person's sex, marital status or pregnancy in those circumstances.

The proposed amendment means that voluntary bodies would also be able to discriminate on the grounds of breastfeeding and family responsibilities, in relation to admitting people as members of the organisation or providing benefits, facilities or services to their members.

## Commentary

This proposed amendment contradicts the Legal and Constitutional Affairs Committee's recommendation that the exemption for voluntary bodies in section 39 be removed<sup>36</sup> and, in fact, goes further by extending the existing exemption. This proposed amendment has been criticised by major interest groups.<sup>37</sup>

## Comments relating to both the Sex Discrimination Act as a whole, as well as key provisions in Schedule 1 of the Bill

Comments have been made regarding the use of a comparator test in definitions of direct discrimination in the SD Act, as well as the Bill. A comparator is a hypothetical person without the attributes of the complainant.<sup>38</sup>

For example, **items 17 and 18 of Schedule 1**, propose new definitions of discrimination on the grounds of breastfeeding and family responsibilities in **proposed sections 7AA and 7A** respectively. These provisions generally provide that a person discriminates against another person if, by reason of:

- the breastfeeding by, or family responsibilities of, the person discriminated against, or
- such characteristics of, or generally imputed to, the person discriminated against,

the discriminator treats the person discriminated against *less favourably* than, in the circumstances that are the same or not materially different, the discriminator treats or would treat a different person without those same characteristics.

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36. See Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, op. cit., Recommendation 25.

37. See, for example, the submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by: Office of the Anti-Discrimination Commissioner (Tas); Independent Education Union of Australia; Public Interest Advocacy Centre; Anti-Discrimination Commission (Qld); and National Association of Community Legal Centres, op. cit.

38. For example, someone of the opposite sex: see Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, op. cit., p. 20.



Some major interest groups disagree with this test.<sup>39</sup> For example, the Law Council of Australia suggests using ‘unfavourably’ instead of ‘less favourable’ because the latter relies on using or identifying a real or hypothetical comparator to determine whether the complainant has in fact been discriminated less favourably, which can be very difficult to demonstrate.<sup>40</sup>

The Legal and Constitutional Affairs Committee, in its 2008 Inquiry, recommended 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)*.<sup>41</sup>

The Government has stated that it would consider the Legal and Constitutional Affairs Committee’s recommendation regarding the use of a comparator test in the SD Act as part of its Consolidation project, as any new definition of discrimination would need to be consistently applied over all grounds of discrimination.<sup>42</sup>

Related comments have also been made regarding the reasonableness test in relation to indirect discrimination in section 7B of the SD Act. Section 7B provides:

(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.

(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

The Legal and Constitutional Affairs Committee, in its 2008 Inquiry, recommended that:

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39. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Independent Education Union of Australia; Law Council of Australia; and Australian Human Rights Commission, *op. cit.*
40. See, for example, the submission in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by the Law Council of Australia, *op. cit.*, p. 19.
41. See Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, *op. cit.*, Recommendation 5.
42. Attorney-General, *Government response*, *op. cit.*, p. 4.

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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.<sup>43</sup>

Again, the Government has stated that it would consider the Legal and Constitutional Affairs Committee's recommendation regarding the reasonableness test in the SD Act as part of its Consolidation project, because:

For consistency, the suitability of any new test for indirect discrimination in one Commonwealth anti-discrimination law would need to be considered in the context of the complementary anti-discrimination laws.<sup>44</sup>

## Schedule 2—amendments relating to age discrimination

**Item 3 of Schedule 2** establishes the position of Age Discrimination Commissioner with the usual provisions relating to the appointment etc of that position.

### Commentary

This proposal is generally supported by major interest groups.

Although it is noted that **proposed new subsection 53A(2)** provides that a person may only be appointed Age Discrimination Commissioner if the Minister is satisfied that such person has appropriate qualifications, knowledge or experience, without including a list of factors to be considered by the Minister in being so satisfied—this approach is consistent with the RD Act, SD Act and DD Act.<sup>45</sup>

It is also noted that the Australian Association of Gerontology Inc., in its submission to the Legal and Constitutional Affairs Committee's inquiry into the Bill, stated that the Bill should also provide that the Minister for Ageing should be consulted on the appropriateness of the appointment, since the Minister responsible for the Age Discrimination Act is the Attorney-General.<sup>46</sup>

Comments have also been made that this position and its functions require adequate funding to be appropriately resourced.<sup>47</sup>

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43. See Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, op. cit., Recommendation 6. See also the submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by the Australian Human Rights Commission, op. cit., p. 10 (Recommendation 10).

44. Attorney-General, *Government response*, op. cit., p. 4.

45. See RD Act section 29; SD Act section 96; and DD Act section 113.

46. Submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by the Australian Association of Gerontology Inc., op. cit.

47. Submission in relation to the Legal and Constitutional Affairs Committee's inquiry into the Bill by COTA, op. cit., p. 4.

## Matters not addressed in the Bill

As mentioned previously, most concerns of major stakeholders related to what was *not* addressed in the Bill, rather than was the Bill contained. Although a comprehensive discussion of this is not covered in this Digest, in summary, these concerns include (but are not limited to) the following unaddressed matters:

- the expansion of the definitions, such as ‘marital status’, in the SD Act so as to extend protection against sex discrimination generally to relationships such as same-sex relationships and kinship ties, as well as people who have undergone transgender surgery<sup>48</sup>
- replacing the reasonableness test in relation to indirect discrimination in section 7B of the SD Act, with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate<sup>49</sup>
- a general prohibition of sex discrimination in the SD Act<sup>50</sup>
- a general prohibition of sexual harassment in the SD Act,<sup>51</sup> and
- the ability of the Sex Discrimination Commissioner to initiate investigations without requiring individual complaints.<sup>52</sup>

The Government has stated that it would consider most of those matters as part of its Consolidation project.<sup>53</sup>

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48. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Women’s Legal Services (NSW); Public Interest Advocacy Centre; National Association of Community Legal Centres; Australian Lawyers for Human Rights; Australian Human Rights Commission; Equality Rights Alliance; YWCA; and Australian Council of Trade Unions, *op. cit.*  
However, it is noted that ‘*de facto partner*’—specifically in relation to ‘family responsibilities’ in section 4A of the SD Act—as amended by section 77 of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (an Act to address discrimination against same-sex couples in Commonwealth laws), now has the same meaning given in sections 22A and 22C of the *Acts Interpretation Act 1901*, which allows for same-sex relationships. Perhaps the definition of ‘*marital status*’ in section 4 of the SD Act could be amended to also refer to ‘*de facto partner*’ instead of ‘*de facto spouse*’ for consistency.
49. See, for example, the submission in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by the Law Council of Australia, *op. cit.*, p. 20.
50. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Women’s Legal Services (NSW); Law Council of Australia; and Australian Human Rights Commission, *op. cit.*
51. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Law Council of Australia; and Australian Human Rights Commission, *op. cit.*
52. See, for example, submissions in relation to the Legal and Constitutional Affairs Committee’s inquiry into the Bill by: Women’s Health Victoria; Human Rights Law Resource Centre; Women’s Legal Services (NSW); National Association of Community Legal Centres; Equal Opportunity Commission (WA); Law Council of Australia; Australian Human Rights Commission; and Australian Council of Trade Unions, *op. cit.*
53. See Attorney-General, *Government response*, *op. cit.*

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## Concluding comments

The Bill, with some exceptions as previously mentioned, is generally supported by major interest groups. However, as many of those major interest groups have pointed out—the Bill is limited and does not address many of the Legal and Constitutional Affairs Committee’s recommendations in its 2008 Inquiry report.

The Government has stated it would consider and/or consult further on the remaining recommendations of the Legal and Constitutional Affairs Committee’s recommendations, as part of its Consolidation project.

## APPENDIX

**RECOMMENDATIONS MADE BY THE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

These recommendations are from Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, pp. xiii–xviii,

[http://www.aph.gov.au/senate/committee/legcon\\_ctte/sex\\_discrim/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/report.pdf)

## Recommendation 1

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

## Recommendation 2

11.8 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.

## Recommendation 3

11.10 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.

## Recommendation 4

11.15 In order to provide protection to same-sex couples from discrimination on the basis of their relationship status, the committee recommends that:

- references in the Act to 'marital status' be replaced with 'marital or relationship status'; and
- the definition of 'marital status' in section 4 of the Act be replaced with a definition of 'marital or relationship status' which includes being the same-sex partner of another person.

## Recommendation 5

11.16 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)*.

## Recommendation 6

11.17 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.

## Recommendation 7

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11.19 The committee recommends that subsection 9(10) of the Act be amended to refer to ICCPR, ICESCR, and the ILO conventions which create obligations in relation to gender equality, as well as CEDAW, in order to ensure that the Act provides equal coverage to men and women.

#### Recommendation 8

11.24 The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the *Racial Discrimination Act 1975*.

#### Recommendation 9

11.25 The committee recommends that the Act be amended to include a general equality before the law provision modelled on section 10 of the *Racial Discrimination Act 1975*.

#### Recommendation 10

11.26 The committee recommends that the Act be amended:

- to provide specific coverage to volunteers and independent contractors; and
- to apply to partnerships regardless of their size.

#### Recommendation 11

11.27 The committee recommends that subsection 12(1) of the Act be amended and section 13 repealed to ensure that the Crown in right of the states and state instrumentalities are comprehensively bound by the Act.

#### Recommendation 12

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

#### Recommendation 13

11.33 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.

#### Recommendation 14

11.34 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)*.

#### Recommendation 15

11.43 The committee recommends that the definition of sexual harassment in section 28A of the Act be amended to provide that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated.

#### Recommendation 16

11.44 The committee recommends that the section 28A of the Act be amended to provide that the circumstances relevant to determining whether a reasonable person would have

anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:

- the sex, age and race of the other person;
- any impairment that the other person has;
- the relationship between the other person and the person engaging in the conduct; and
- any other circumstance of the other person.

#### Recommendation 17

11.45 The committee recommends that section 28F of the Act be amended to:

- provide protection to students from sexual harassment regardless of their age; and
- remove the requirement that the person responsible for the harassment must be at the same educational institution as the victim of the harassment.

#### Recommendation 18

11.46 The committee recommends that the Act be amended to protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment.

#### Recommendation 19

11.58 The committee recommends that the HREOC Act should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated.

#### Recommendation 20

11.59 The committee recommends that subsection 46PO(1) of the HREOC Act be amended to make the standing requirements for lodging an application with the Federal Court or the Federal Magistrates Court consistent with the requirements for lodging a complaint with HREOC as set out in subsection 46P(2) of the HREOC Act.

#### Recommendation 21

11.60 The committee recommends that subsection 46PO(2) of the HREOC Act be amended to increase the time limit for lodging an application with the Federal Court or Federal Magistrates Court from 28 days after termination of the complaint to 60 days.

#### Recommendation 22

11.61 The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the *Sex Discrimination Act 1975 (UK)* so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

#### Recommendation 23

11.62 The committee recommends that the remedies available under subsection 46PO(4) of the HREOC Act where a court determines discrimination has occurred be expanded to include corrective and preventative orders.

#### Recommendation 24

11.63 The committee recommends that increased funding be provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for sex discrimination and sexual harassment matters.

#### Recommendation 25

11.72 The committee recommends that the Act be amended to remove the exemption for voluntary organisations in section 39.

#### Recommendation 26

11.73 The committee recommends that the definition of 'clubs' in section 4 be expanded so that:

- the prohibition on discrimination with respect to clubs applies to a broader range of organisations; and
- those organisations have access to the automatic exception in subsection 25(3) permitting single-sex clubs.

#### Recommendation 27

11.74 The committee recommends that provisions such as sections 31 and 32, which clarify that certain differential treatment is not discriminatory, should be removed from Part II Division 4 which deals with exemptions and instead be consolidated with section 7D.

#### Recommendation 28

11.75 The committee recommends that section 44 of the Act be amended to clarify that the power of HREOC to grant temporary exemptions is to be exercised in accordance with the objects of the Act.

#### Recommendation 29

11.83 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

11.84 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

11.85 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



11.86 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.

#### Recommendation 33

11.87 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.

#### Recommendation 34

11.90 The committee recommends that HREOC be provided with additional resources to enable it to:

- carry out an initial public education campaign in relation to changes to the Act;
- perform the additional roles and broader functions recommended in this report; and
- devote additional resources to its functions to educate the public about the Act.

#### Recommendation 35

11.97 The committee recommends that further consideration be given to reviewing the operation of section 38 of the Act, to:

- retain the exemption in relation to discrimination on the basis of marital status; and
- remove the exemption in relation to discrimination on the grounds of sex and pregnancy; and
- require a test of reasonableness.

#### Recommendation 36

11.98 The committee recommends that further consideration be given to removing the existing permanent exemptions in section 30 and sections 34 to 43 of the Act and replacing these exemptions with a general limitations clause.

#### Recommendation 37

11.99 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.

#### Recommendation 38

11.100 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.

#### Recommendation 39

11.101 The committee recommends that further consideration be given to expanding the powers of HREOC to include the promulgation of legally binding standards under the Act equivalent to the powers exercised by the Minister under section 31 of the *Disability Discrimination Act 1992*.

#### Recommendation 40

11.102 The committee recommends that further consideration be given to amending the Act or the EOWW Act to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.

#### Recommendation 41

11.103 The committee recommends that further consideration be given to the relationship between the Act and the EOWW Act, in particular, whether:

- the obligations under the EOWW Act and should be incorporated within the Act; and
- the functions of EOWA and HREOC should be combined.

#### Recommendation 42

11.104 The committee recommends that the Attorney-General's Department conduct consultations regarding the further possible changes to the Act outlined in recommendations 35 to 41 and report publicly on the outcomes of that consultation within 12 months.

#### Recommendation 43

11.111 The committee recommends that HREOC conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act. The inquiry should report by 2011 and should also consider:

- what additional grounds of discrimination, such as sexual orientation or gender identity, should be prohibited under Commonwealth law;
- whether the model for enforcement of anti-discrimination laws should be changed; and
- what additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.

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