The Elusive Promise of Equality: Analysing the Limits of the *Sex Discrimination Act 1984*
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Sex Discrimination Act 1984

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The Elusive Promise of Equality: Sex Discrimination Legislation in Australia 1998

Major Issues Summary

The notion of equality, including equality before the law, is a fundamental, if not absolute, value of democratic societies. Despite the centrality of this ideal, both formal and informal impediments remain to the realisation of equality for women, indigenous peoples and some minority groups. Sex discrimination law represents a legislative attempt to ensure that women’s equality is substantively realised.

The practical success of the Commonwealth *Sex Discrimination Act 1984* (SDA) has been mixed. Given this limited success after fifteen years of operation, it is timely to review the legal and social pressures limiting a more comprehensive operation of such an important piece of Commonwealth human rights legislation. Additionally, many of these limitations raise issues that have ignited Parliamentary debate in relation to other social concerns, such as native title.

One limitation on the practical success of sex discrimination legislation has been the differing political, social and legal interpretations of the complex concepts of ‘discrimination’, ‘equality’ and ‘equal opportunity’. The most common perception of discrimination is that it results from the personal prejudices of individuals. On the other hand, more structural critiques of discrimination conceptualise it as an institutional problem generated from a complex web of systemic practices.

Legal models of equality designed to address discrimination have been informed by these different interpretations. Formal equality models are developed on the assumption that inequality can be remedied by treating all people in an identical manner and focuses primarily on equal opportunity or equality of access. Critics of this model argue that treating unequally situated people equally will serve to further entrench more systemic aspects of discrimination. These critics advocate for models of substantive equality designed not merely to create equality of access and opportunity but to ensure equality of result. By focussing on the experience of women and aiming at equality of result, models of substantive equality logically embrace ‘special measures’ that have a differential impact on men and women as a way of addressing social conditions that generate systemic discrimination.

The United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) is generally drafted in accordance with a model of substantive equality. Australia was a key player in the working group that developed the final draft of CEDAW and was influential in ensuring its international adoption.
Despite Australia's involvement in CEDAW's development and the fact that CEDAW was, legally and socially, a key catalyst in development of Australian sex discrimination laws, the translation of these internationally accepted human rights norms into domestic legislation has been complex and partial. Rather than instigating a regime that confers a positive right to equality or freedom from discrimination *per se*, the SDA provides a much more limited framework whereby one has a right of individual complaint in specific circumstances of discrimination. The three standard concepts of direct discrimination, indirect discrimination and special measures reflect this tension between formal and substantive equality.

The grounds covered by the SDA include sex, marital status, pregnancy and potential pregnancy, family responsibilities and sexual harassment. Areas in which discrimination is prohibited include employment, education, accommodation, provision of goods and services, disposition of land, membership of clubs and the administration of Commonwealth laws and programs. A wide range of exemptions are attached to the operation of the SDA generally in relation to religious, charity and voluntary bodies, competitive sport, insurance and superannuation and court or tribunal decisions. These exemptions have been persistently criticised as granting an imprimatur to discriminatory behaviour contrary to recognised international human rights norms.

Throughout the paper, the differences between addressing issues of formal and substantive equality in sex discrimination are considered. The way in which sex discrimination legislation is primarily structured to respond to individualised harms that occur within a specific area of public life is also considered. Although addressing individualised, discriminatory harms within specific contexts is an essential and valuable legal mechanism, this framework is unable to respond to the fundamental dynamic of systemic discrimination. The paper suggests that an important aspect of continuing legal reform in this area is the development of proposals that aim to remedy systemic and hidden structures of sex discrimination. In terms of truly achieving respect for women's human rights and substantive equality, it can be argued that it is this issue with which the Parliament must continue to grapple. Otherwise, it can also be argued, the democratic ideal of non-discrimination, without the realisation of substantive equality, will remain a hollow promise.
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Introduction

This paper critically appraises the operation and limits of the Commonwealth Sex Discrimination Act 1984 (SDA).

The first section of the paper analyses the key concepts that underpin sex discrimination legislation, particularly the models of formal and substantive equality. It traces how although the model of substantive equality is entrenched within the international human rights regime and the Convention on the Elimination of All Forms of Discrimination Against Women (which partly provides a constitutional basis for the SDA), the SDA generally only implements a more limited model of formal equality. A range of significant reviews of the SDA have proposed amendments to the SDA to entrench a regime of substantive equality, however only very few of these recommendations have received a Government response. The paper then critically analyses the operation and scope of the key sections of the SDA. It concludes with proposals to address the shortfalls of the SDA, particularly in relation to the phenomena of systemic discrimination.

For a detailed analysis of the background and development of the SDA, see Information and Research Service Background Paper Number 19, 1993 Sex Discrimination Legislation in Australia by Consie Larmour. For a history and analysis of State and Territory anti-discrimination legislation, see Information and Research Services, Research Paper No. 17 1998–99, Sex Discrimination Legislation in the States and Territories by Consie Larmour. Detailed information on the remedies available in sex discrimination legislation is provided in Information and Research Service Paper No. 13, 1997–98, What Price Dignity?—Remedies in Australian Anti-Discrimination Law by Carol Andrades.

Key Concepts in Sex Discrimination Law

The notion of equality, including the common law premise of equality before the law, is entrenched within Western political traditions and is a fundamental norm of democratic societies. However, despite the centrality of equality as an ideal, the meaning of equality is neither transparent nor stable. On the contrary, what one means by 'equality' is highly contested and malleable, as is clear from the fact that particular definitions of 'equality' have historically been consistent with the formal exclusion of women and certain minority groups from basic democratic rights (such as the right to vote).
In Australia, although limitations on the basic democratic rights of all peoples have been lifted during the past century, both formal and informal impediments remain to the realisation of equality for women, indigenous peoples and some other minority groups. The passage of anti-discrimination legislation throughout Australia over the past two decades represents a legislative attempt to ensure that our society's aspiration of equality for all is substantively realised.

Consistent with the recognition of 'equality' as a contested concept, the passage, administration and effects of anti-discrimination legislation have been subjected to strenuous debate, particularly in relation to the meaning of the interlocking concepts of discrimination, equal opportunity and equality. In order to provide a framework for evaluating Australia's sex discrimination laws, the following outlines the scope and limitations of these concepts of discrimination and equality.

Discrimination, Equal Opportunity and Substantive Equality

Discrimination

The phrase 'discrimination' attracts a range of interpretations which can be characterised as falling broadly into two categories:

- discrimination occurs due to the personal prejudices or beliefs of individuals or
- discrimination is an institutionalised phenomena and occurs due to a web of systemic, social practices.

As the first definition is the most commonly understood, the following will provide only a brief outline of the individualised concept of discrimination and will focus more on the definition of discrimination as a systemic phenomenon.1

'Discrimination' is most commonly understood as occurring when an individual acts on an irrelevant and prejudicial consideration when judging the worth or ability of a person. Although it is usually accepted that the reason such discriminatory behaviour is inflicted upon a person is because of their membership of a group (e.g. being a woman, an indigenous person, a person with a disability), this group-based analysis is rarely applied when explaining the discriminator's behaviour or the effects of the discrimination. On the contrary, discrimination is primarily characterised as an event between individuals, the result of the discriminator's usually conscious and deliberate prejudices and an occurrence which has isolated, individual effects.

Individualising discriminatory behaviour (for example by conceptualising sexual harassment as solely the result of the harasser's abusive sexual beliefs) overlooks a major
aspect of the debate concerning discrimination and equality. Prejudicial considerations concerning a person's worth or ability are rarely the arbitrary, aberrant whim of the discriminator, but are socially stigmatised characteristics that attach to the person or people discriminated against due to their membership of a particular social group. From this perspective, discrimination is a social problem not an individual problem.

Structuralist analyses of discrimination focus on this question of stigmatised characteristics. It is argued that attaching stigmatised characteristics to particular groups is deeply embedded within social belief systems and power structures, primarily through socialised assumptions about what constitutes 'normal' characteristics. Characteristics that do not reflect this norm are accordingly marked as different, deviant or abnormal. An important consequence of this dynamic is that what is defined as 'different' is not set in stone, but is defined by the relationship between different groups of people.

According to this critique, the norm in Australia and other Western societies generally exhibits the typical qualities of white, able-bodied, heterosexual men. Women, indigenous peoples, people with a disability and people from non-Anglo-Saxon backgrounds are, in various ways, defined as different or other to this norm. It is the constant comparison between what is deemed the 'normal' group and differently situated groups which generates definitions of 'different' which are discriminatory and oppressive.

It is argued that a significant way through which this dynamic of normal/different-deviant works is by conflating natural differences with socially generated differences in such a way as to allow inequality to be perceived as natural. For example, women's child bearing ability has historically anchored arguments as to women's social inequality. In the eighteenth century, it was considered that women's ability to give birth was a sign of their natural irrationality and hence their inability to engage in rational debates in the public sphere. More contemporary arguments assign women's lack of equal influence in the political and economic sphere to the fact that childbirth or child care responsibilities curtail the amount of time women can spend pursuing a career. Critics of these arguments suggest that they fail to account for the fact that the leave required for actual childbirth is minimal and that the effect of other parental responsibilities on one's potential political or economic influence is governed by social choices concerning the availability of child care, the recognition of skills connected with parenting, the acceptability of fathers equally engaging in a parenting role and so on. By failing to recognise the social nature of such choices, it is argued that socially produced inequality becomes synonymous with natural inequality.

As suggested by this example, a structural critique considers that the dynamic of normal/different-deviant is not confined to social assumptions. Rosemary Hunter, whose research provides a structural analysis of anti-discrimination law in Australia, notes that legal, political and economic institutions all reflect and reinforce norms, rules and entitlements which have generally been designed, whether deliberately or without reflection, around the behaviour, patterns and attributes of the historically dominant group in public life (Anglo-Australian, able-bodied, heterosexual males).
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The key point from this approach to discrimination as structural is that discriminatory actions do not result from isolated, aberrant views or behaviour, but are generated from a complex web of systemic practices which are substantially hidden and often unconscious. Individual acts of discrimination are a subset of this much broader and elusive systemic backdrop. If individual discrimination is to be remedied then it is argued that systemic discrimination must be simultaneously addressed.

Legal Models of Equality: Equal Opportunity and Substantive Equality

In general, there are two different legal models of equality designed to address the phenomena of discrimination. These models are formulated according to different characterisations of equality and discrimination and are generally referred to as models of formal equality or equal opportunity, and models of substantive equality. 6

Formal Equality/Equal Opportunity

Formal equality is developed on the assumption that inequality can be remedied by treating all people in an identical manner. Formal equality of individuals is the fundamental tenet of Western liberal political theory and as Professor Margaret Thornton has argued 'formal equality is the norm underlying Australia's legal system, and it is believed adherence guarantees the administration of the law in a fair, just and impartial manner in the interests of the individual.' 7 Within the discrimination regime, formal equality primarily focuses on equal opportunity or equality of access. For example, a formal equality approach to non-discriminatory employment would focus on eradicating procedural restrictions for women in traditional male domains.

Critics of this formal model of equality argue that a focus on strict equal treatment at the point of entry into a profession fails to account for the myriad ways in which informal barriers operate to prevent, dissuade or undermine women's access to certain professions (and to a lesser extent, men's access to historically feminised professions). In these circumstances, treating unequally situated people equally will serve to further entrench more systemic aspects of discrimination. 8

For example, although there are no formal barriers for women to be appointed to the judiciary, only a minority of judges throughout Australia are women (except in the Family Court which has historically been seen as more related to 'women's issues'). This situation has much less to do with a lack of suitably qualified women than it has to do with complex and systemic forms of discrimination within the legal profession which mitigate against more than a minimal percentage of women being identified as sufficiently senior in the legal profession, or otherwise appropriate, to receive attention for judicial appointments. 9
One aspect of this systemic discrimination is the way in which 'authority' is socially characterised. It remains the case that men (particularly middle-class, Anglo-Australian men) are considered more emotionally detached and objective than women and hence more able to operate with the requisite impartial authority required by judicial office. Conversely, women are stigmatised as naturally more emotive than men and hence less able to adopt the judicial guise of impartial authority, with the few women appointed to senior judicial positions presented as 'exceptional'.

On this view, although such assumptions may seem antiquated and no longer applicable their subtle persistence is clear from the fact that, whereas many may consider it acceptable for one or even possibly two 'exceptional' women to be appointed to the High Court, the appointment of six or seven women would be considered 'biased', whereas a court of six or seven men would not be questioned by the same observers on gender lines.

Substantive Equality

The concept of substantive equality is aimed at addressing these more hidden, systemic and less tangible aspects of discrimination. Advocates of this concept argue that models of substantive equality are designed not merely to create equality of access and opportunity but to ensure equality of result and subsequently are focussed on which laws, policies and actions detrimentally affect women's *de facto* enjoyment of a specific right or entitlement. 10

For example, although there are no formal barriers which prevent women having access to legal aid on an equal basis with men, Legal Aid Commission policy guidelines usually grant priority to certain criminal matters in which men are disproportionately represented. This has meant that legal areas of most relevance to women (family law, applications for restraining orders, criminal injuries compensation) have received little legal aid funding, creating what several reports have named as indirect gender bias within the legal aid system. 11 It is argued that a strict equal treatment model of equality would be unable to respond to this systemic form of discrimination, as it requires an analysis of women and men's different experiences, rather than only their equal access to specific programs. Arguments against substantive equality models state that the difficulty with such assessments is that they entail more complex and less transparent measurements of access and equity.

Special Measures

By focussing on the situated experience of women and aiming at equality of result, models of substantive equality logically embrace measures which have a differential impact on men and women as a way of addressing social conditions which generate systemic
discrimination. These measures are usually referred to as special measures or affirmative action measures.\textsuperscript{12}

Advocates of models of formal equality often construe special measures as anathetical to the anti-discrimination framework, because from a strict equal treatment point of view, treating groups of people differently is a form of discrimination or special favours. This point of view encapsulates the contradictions inherent in an individualised model of discrimination and equality: although it is recognised that discrimination legislation is required precisely because social inequality flows from one's membership of a group; liberalism's insistence on an individualised focus and the presumption of formal equality of individuals discourages the types of measures which address such systemic discrimination. As the 1996 Guidelines for Special Measures under the Sex Discrimination Act 1984 state:

Measures designed to redress...inequality should not be considered as special benefits which discriminate against men. In this context, men have not experienced the particular disadvantage which the measure aims to redress. The aim of special measures is not to discriminate by conferring favours but rather to achieve equal outcomes for people who have been disadvantaged with people who are not.\textsuperscript{13}

International Human Rights Law and Discrimination Against Women

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the key international human rights instrument relating to women which entered into force as an international treaty on 3 September 1981, is generally drafted in accordance with a model of substantive equality. Article 1 of CEDAW defines discrimination as:

Any distinction, exclusion or restriction, made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

By focussing on both the purpose and effect of any distinction, exclusion or restriction on women's enjoyment of human rights and fundamental freedoms, this definition of discrimination avoids the narrow approach of simply focussing on gender neutral treatment to eliminate discrimination against women. Rather, it is aimed at measures which both curtail women's equal access to opportunity as well as more systemic effects which undermine substantive equality. Consequently, any actions which deny women their full enjoyment of human rights and freedoms on the basis of equality with men are discriminatory.
The key articles in CEDAW similarly reflect this focus on substantive equality. In particular, Article 2 (b) of CEDAW requires that:

State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle.

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting discrimination against women.

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.

(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

(g) To repeal all national penal provisions which constitute discrimination against women.

These wide ranging provisions map out a comprehensive legal framework to address discrimination against women and institutionalise women's rights to equality with men.

Following the development of discrimination jurisprudence by the United Nations Committee on the Elimination of Discrimination Against Women14 and the United Nations General Assembly's 1993 Declaration on the Elimination of Violence Against Women,15 violence against women is now also included as a central aspect of discrimination against women and a fundamental impediment to women's lack of enjoyment of human rights, freedoms and equality. The nexus between violence against women and women's subordinate social status has been recognised by the Australian Law Reform Commission in its Equality Before the Law report.16
Australian Anti-Discrimination Laws: A Focus on Formal Equality

Australia's obligations under key international human rights conventions have been a primary catalyst in the development of Commonwealth, State and Territory anti-discrimination law.

Specifically in relation to women's human rights, this influence is linked to Australia's international role in supporting the progress of CEDAW. Australia was a key player in the working group that developed the final draft of CEDAW and was influential in ensuring that it was adopted by resolution at the 34th session of the United Nations General Assembly in 1979. Within one year of CEDAW being passed by the United Nations General Assembly, Australia became a party to it at a special signing ceremony held at the 1980 United Nations World Conference for the Decade of Women in Copenhagen. Ratification followed on 27 August 1983 after extensive consultations between the Commonwealth and the States and Territories over a period of three years.

Despite Australia's involvement in CEDAW's development the translation of these internationally accepted human rights norms into domestic legislation has been complex and partial. Rather than instigating a regime which confers a positive right to equality or freedom from discrimination per se, Commonwealth, State and Territory sex discrimination laws provide a much more limited framework whereby one has a right of individual complaint in specific circumstances of discrimination.

This procedural framework is fashioned in accordance with the model of formal equality with provision for limited aspects of substantive equality. The three standard concepts that thread throughout all Australian sex discrimination law, direct discrimination, indirect discrimination and special measures, reflect this tension between formal and substantive equality.

- **Direct Discrimination**: Direct discrimination is basically overt acts of differentiation on a prohibited ground that results in a person's less favourable treatment. It is therefore the quintessential form of an individualised experience of discrimination.

- **Indirect Discrimination**: Indirect discrimination relates to the imposition of ostensibly neutral rules, tests and requirements which have the effect of discriminating against a person on the grounds of their membership of a group (e.g. women who are potentially pregnant) and as such it is a concept aimed at a limited model of substantive equality.

- **Special Measures**: As discussed above, special measures are specifically designed to address systemic discrimination and taken for the purposes of achieving substantive equality. Within sex discrimination law, special measures have ranged from establishing specific women's legal services and women's health centres to allowing women-only advertisements to be placed for employment in a women's refuge.
Overwhelmingly, complaints of sex discrimination throughout Australia are individual complaints of direct discrimination, rather than more systemic complaints of indirect discrimination. This preponderance of direct, individual complaints is indicative of the focus of anti-discrimination law, court procedures including rules on standing and the difficulty in overturning the perception that discrimination is primarily an individual problem rather than fundamentally a systemic problem.

Individual anti-discrimination measures cannot address institutionalised and prejudicial assumptions about the appropriate role of women in society. It is this tension between the individualistic focus of traditional liberal legalism and anti-discrimination legislation and the group based, systemic reasons for discrimination that has proved so problematic in implementing anti-discrimination measures which are truly effective. Attempting to ameliorate these contradictory approaches has been the catalyst for many of the amendments to sex discrimination laws throughout Australia.

**Conciliation**

Another key feature of Australia's sex discrimination regime is the focus of dispute resolution on conciliation. A governing assumption underpinning anti-discrimination law is that methods of alternative dispute resolution, such as conciliation, provide a more equitable forum for discrimination complaints. This assumption flows from a range of factors, including the sustained criticism that current modes of formal justice are ill equipped to come to terms with the experiences of socially marginalised groups and that the cost of formal litigation is prohibitive for most individuals and small businesses. Less formal modes of justice encourage victims of discrimination to file complaints due to their relative administrative simplicity and cheapness, on the grounds that the process guarantees privacy and confidentiality, and because the legal immunisation of the conciliation process allows a flexibility and creativity in approach which is frequently impossible in a more rigid, judicial system.

However, in her study of Australian anti-discrimination legislation, Professor Margaret Thornton notes that, as a strategy, alternative dispute resolution is a double edged sword. The neutrality and non-advocacy ideal for conciliation often fails to equalise power imbalances between complainants and respondents, resulting in conciliated outcomes disproportionately favouring respondents or which provide relatively minimal remedies for complainants when compared to Court orders on similar issues. In a study of the outcomes of conciliation in sex discrimination matters, Rosemary Hunter and Alice Leonard suggest that part of the problem is the commonly held view of conciliation officers that the object of conciliation is to come to an agreement at all costs, regardless of the facts of the case and the equity of the agreement. They suggest elsewhere that in order to stop this trend, general guidelines as to the meaning of conciliation be established, in legislation or otherwise, ensuring that the object of anti-discrimination legislation is
central to conciliated agreements through what they term a 'rights based model of conciliation'.

**Historical Criticisms of Sex Discrimination Legislation**

Sex discrimination law has not been seen in a positive light by all sections of the community. The most sustained public criticism of these laws was presented during the lengthy debate on the 1993 Commonwealth Sex Discrimination Bill. Comments during this debate can be broadly categorised into two areas.

The first key criticism expressed was the negative impact such legislation would have on the family unit. Senator Robert Hill echoed the serious concerns raised by a range of people when he stated that:

> the legislation will undermine the family unit; that it will destroy the traditional concept of the family; that it will lessen the traditional respect accorded to women as homemakers; that it will virtually consign marriage to irrelevance; and that it will drive women who are totally satisfied with their roles as wife and mother, sustainer and supporter, and up-bringer of children to outside employment, against their wishes, and their children to creches.

Similarly, it was argued that the Bill's aim of supporting equality between men and women was misguided, as most women were biologically:

> homely and caring, that they are not wildly ambitious, that they are not naturally dominating and that they are mostly inclined to avoid authority.

The second group of criticisms focussed on the necessity of sex discrimination laws. It was argued that the Bill's aim of establishing standards of behaviour in relation to respecting women's human rights was misguided as social change was an incremental, educative process which could not be legislated for effectively. Similarly, examples were raised of the women who had succeeded in non-traditional areas, achievements that suggested the irrelevance of anti-discrimination legislation for appropriately skilled women.

It is rare to find these particular concerns about sex discrimination legislation overtly raised in contemporary public debate. However, it is possible to trace differently packaged concerns about the effects of sex discrimination laws. For example, public perceptions are often voiced on talk back radio that laws and policies focussed on addressing discrimination against women have 'gone too far' and that men are increasingly experiencing reverse discrimination in laws, policies and Government funding.
Commonwealth Sex Discrimination Act 1984 (SDA)

On 26 November 1981, Senator Susan Ryan introduced a Sex Discrimination Bill as a Private Member's Bill. The Bill was not proceeded with, but on 12 October 1982 the Government announced the planned introduction of a Sex Discrimination (Commonwealth Employees) Bill. This Bill would extend protection against discrimination on the ground of sex or marital status to Commonwealth employees throughout Australia and would complement existing State legislation. This Bill was not introduced into Parliament before the change of government in March 1983.

On 2 June 1983 Senator Ryan, as the Minister Assisting the Prime Minister for the Status of Women, introduced the Sex Discrimination Bill 1983 into the Senate. As discussed in the section above, passage of the Bill through Parliament was extremely controversial, pilloried as 'the brainchild of radical feminists...intent on destroying the nuclear family, creating a unisex society and, most dangerous of all, defying the laws of nature.' After redrafting and some amendments, the Bill was passed through both Houses by May 1984, with a conscience vote being taken by the Coalition. The Bill came into force on 1 August 1984.

As discussed in detail later in this paper, the SDA provides a procedural right of complaint to persons who consider they have been discriminated against on specific grounds in specified circumstances, subject to a considerable range of exceptions and exemptions. The Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission are empowered to administer the SDA, and, as with all other anti-discrimination legislation, the SDA provides for machinery for a complaint to be conciliated, and potentially arbitrated before the Human Rights and Equal Opportunity Commission. Decisions of the Commission are not enforceable, and currently if a complainant wishes to enforce a decision they must initiate an action in the Federal Court.

Reviews of the SDA

Due to the controversy surrounding the passage of the Act, the original SDA has been criticised as cautious and limited in terms of its definitions of discrimination and its coverage. By way of remedying some of these deficiencies, there has been a range of reviews and amendments to the Act since 1984, including the following.

Human Rights and Equal Opportunity Commission, Insurance and the Sex Discrimination 1984, AGPS, Canberra 1990, which considered the exemptions provided for both insurance and superannuation.

The two most significant reviews of the SDA occurred in the context of two detailed inquiries in the status of women in Australia, the 1992 House of Representatives Standing Committee on Legal and Constitutional Affairs Report Half Way to Equal and the Australian Law Reform Commission’s 1994, two part report, Equality Before the Law. As these Reports recommended significant amendments to the SDA, they are briefly outlined below.

**Half Way to Equal Report**

In 1989, in light of the Government’s *National Agenda for Women*, the House of Representatives Standing Committee on Legal and Constitutional Affairs was charged with inquiring into the equal opportunity and equal status of women in Australia. After the 1990 election, the inquiry was re-established and received over 634 submissions with the final report, *Half Way to Equal*, being submitted in April 1992.

In relation to women’s legal equality, *Half Way to Equal* specifically considered the efficacy of the SDA in terms of achieving substantive equality for women. A range of recommendations for strengthening the SDA were made, including:

- a provision ensuring equal protection before the law
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- inclusion of potential pregnancy, family responsibilities and spousal identity as prohibited grounds of discrimination
- significant strengthening of the test for sexual harassment, indirect discrimination and the special measures provision
- systematic monitoring of discriminatory clauses in industrial awards
- insertion of a victimisation provision
- introduction of contract compliance with affirmative action laws for Government contractors.

The Government proposed a three phase implementation scheme for these recommendations.

(1) Phase one was the Sex Discrimination and other Legislation Amendment Act 1992 which: empowered the Sex Discrimination Commissioner to refer discriminatory industrial awards to the Australian Industrial Relations Commission; significantly amended the definition of sexual harassment; and implemented victimisation provisions. As a sign of the significance of these changes, the 1992 Act was introduced by the then Prime Minister, the Hon. PJ Keating MP.

(2) Phase two was the Sex Discrimination Amendment Act 1995, which:

- inserted a Preamble into the SDA recognising and affirming the right to equality before the law into the SDA
- incorporated 'potential pregnancy' as a prohibited ground of discrimination
- implemented a new test for indirect discrimination and special measures provisions and
- removed combat-related duties as an exemption to the SDA.

These amendments were announced by Prime Minister Keating during the tenth anniversary celebrations of the SDA on 29 July 1994. The following text will discuss the amendments in detail.

(3) Phase three was identified as a consideration of permanent exemptions to the SDA. Both Half Way to Equal and a 1992 report by the Sex Discrimination Commissioner, Review of Permanent Exemptions to the Sex Discrimination Act 1984, identified the significant number of permanent exemptions to the SDA as a major obstacle to the SDA's effectiveness. No Government response has been forthcoming to date.
Equality Before the Law Report

On 10 February 1993, in response to the Government's *New National Agenda for Women*, Prime Minister Keating announced a reference to the Australia Law Reform Commission to inquire into women's equality before the law. The ALRC's terms of reference were broad and included: consideration of the principle of equality before the law; Australia's obligations under human rights conventions, particularly CEDAW, in implementing the right to equality before the law; and what legal proposals could properly remedy any legal deficiencies.

The ALRC received a record number of submissions, both written and oral, and presented an Interim report, and a two part final report, *Part I Equality Before the Law: Justice for Women* and *Part II Equality Before the Law: Women's Equality*. The premise of these lengthy reports is the urgent need to implement measures which will entrench substantive equality, rather than merely formal equality. The range of recommendations made in relation to the SDA reflects this vision and to a large extent replicate the recommendations of *Half Way to Equal*. The recommendations include:

- implementation of a general prohibition of discrimination in accordance with CEDAW
- a simpler definition of indirect discrimination
- implementation of investigative powers of the Sex Discrimination Commissioner into systemic discrimination
- inclusion of spousal identity as a prohibited ground of discrimination
- strengthening the special measures provision to reflect CEDAW
- removal of the exemptions for educational institutions established for religious purposes, voluntary bodies and sport.

Some of these recommendations are implemented by the *Sex Discrimination Amendment Act 1995* and are discussed below.

Objects of the SDA

The objects of the SDA are:

(a) to give effect to certain provisions of the United Nations 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 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.

Preamble

The objects of the SDA are also framed by a Preamble, which was inserted into the SDA 
by the *Sex Discrimination Amendment Act 1995*. The Preamble states:

Recognising the need to prohibit, so far as is possible, discrimination against people 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 disposal of 
land, the activities of clubs and the administration of Commonwealth laws and programs.

Affirming that every individual is equal before and under the law, and has the right to the 
equal protection and equal benefit of the law, without discrimination on the ground of 
sex, marital status, pregnancy or potential pregnancy.

A preamble has a limited effect at law. Unlike provisions in an Act, it does not create any 
legislative rights or obligations but is merely a preliminary statement which indicates the 
general tenor of the relevant legislation, as is indicated by the Preamble's declaratory 
language of 'recognising' and 'affirming'. The only potential legal effect of a Preamble is 
that it may operate as a guide to statutory interpretation if a substantive provision of an 
Act is ambiguous. However, even this legal effect is limited by the fact that a preamble 
will not extend the meaning of such provisions if their apparent meaning is narrower than 
the words of the preamble itself. 35

An understanding of this highly limited nature of a Preamble is particularly important in 
relation to the paragraph which affirms the right of every individual to equality before and 
under the law and the right to the equal protection and benefit of the law on the specified 
grounds. Such a general right to equality is far broader than the ambit of the SDA, and 
hence has no legal effect whatsoever. It is a purely symbolic statement.
Preamble or Equality Guarantee?

The impetus for inserting a preamble into the SDA can be traced to recommendations in *Half Way to Equal* and *Equality Before the Law Part I. Half Way to Equal*, citing submissions criticising the SDA's lack of a substantive right to equality before the law or freedom from discrimination despite its jurisprudential links to CEDAW, recommended a 'provision allowing for “equal protection before the law” similar to the provision in the Racial Discrimination Act be adopted in the Sex Discrimination Act.' The Government response to the Report noted that it would consider the recommendation and that if it appears that the new provision would strengthen the Act, it will be implemented.

*Equality Before the Law Part I* strongly reaffirmed this recommendation. The ALRC stated that such a substantive prohibition of discrimination would significantly remedy the SDA's limited model of individual, formal equality and would more properly give effect to Australia's obligations under CEDAW as well as Australia's obligations to prohibit discrimination under the two key human rights Covenants, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The insertion of the Preamble in the SDA falls short of these recommendations. In the Second Reading Speech to the *Sex Discrimination Amendment Act 1995*, the then Attorney-General, the Hon. Michael Lavarch MP, recognised the limited nature of the Preamble, but stated that further consideration of equality legislation would be given in the context of the Government's response to Part 2 of the ALRC Report, which recommended passage of an Equality Act. No Government response to that report has yet been forthcoming.

Grounds for Unlawful Discrimination

The Act prohibits both direct and indirect discrimination on the grounds of:

- sex (section 5)
- marital status (section 6)
- pregnancy or potential pregnancy (section 7)
- sexual harassment (section 28-28L)
- family responsibilities (section 7A in relation to dismissal from employment only).

Sexual harassment is also prohibited in specified areas, but will be considered separately below.
History of Grounds

Discrimination on the grounds of sex, marital status, pregnancy and sexual harassment has been prohibited by the SDA since its inception.

Discrimination on the ground of family responsibilities was inserted by the *Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992*, following a recommendation by the Half Way to Equal Report. The Report noted that the role of women as care-givers as well as paid workers was a major source of both direct and indirect discrimination against women and that the amendment would align the SDA more closely with Australia's obligations under the International Labour Organisation Convention 156, *Workers With Family Responsibilities* (ILO 156).\(^41\)

However, despite the fact that ILO 156 obliges governments to promote policies which prohibit discrimination on the ground of family responsibilities in a wide range of areas, the 1992 amendments only prohibit direct discrimination on the ground of family responsibilities in the context of dismissal from employment. In 1992, the Government circulated an issues paper containing options to more fully implement Australia's obligations under ILO 156.\(^42\) Nothing has ensued from these discussions.

Discrimination on the ground of potential pregnancy was inserted by the *Sex Discrimination Amendment Act 1995*, also in accordance with a Half Way to Equal Report recommendation. Although the Report acknowledges that the characteristic of being potentially pregnant arguably falls within the definition of discrimination on the ground of sex, the Report considered that it would facilitate understanding of the scope of the SDA if potential pregnancy was explicitly added as a ground.

Areas in which Discrimination is Prohibited

The Act prohibits discrimination in the areas of:

- employment (sections 14-20)
- education (section 21)
- the provision of goods and services (section 22)
- accommodation (section 23)
- disposition of land (section 24)
- admission to membership of clubs (section 25)
- administration of Commonwealth laws and programs (section 26)
• application form requirements (section 27).

Employment

Sections 14-20 prohibit discrimination in employment in relation to the circumstances in which employment is offered, the terms and conditions that the employer affords the employee and dismissal of an employee. Commission agents, contract workers, partnerships, qualifying bodies, registered industrial organisations and employment agencies are specifically covered by these provisions, although generally in more limited ways to the general prohibition.

Discrimination on the ground of family responsibilities is only unlawful in relation to dismissal from employment.

Prohibition of discrimination specifically does not apply to employment to perform domestic duties in a person's residence.

Education

Section 21 prohibits discrimination in relation to admission procedures (except if the admission is to a single sex educational institution) and the conditions and treatment of students in terms of the benefits and detriments they receive.

As discussed below, the SDA provides a broad exemption from this prohibition for religious schools.

Provision of Goods, Services and Facilities

Section 22 prohibits discrimination in relation to the terms, conditions and manner in which goods, services and facilities are provided. The phrase 'services' is broadly defined in section 4 as including banking, insurance, entertainment, transport and services provided by a government or government authority.

As discussed below, the SDA provides exemptions for insurance and superannuation regimes from this prohibition in specific circumstances.
Accommodation

Section 23 prohibits discrimination in accommodation in relation to the provision of, terms and conditions of, or deferral of an application for, accommodation.

Excepted from this prohibition is accommodation in which the provider resides, which is only available for no more than three persons, which is provided by a religious body or which is provided by a charitable organisation.

Disposition of Land

Section 24 prohibits discrimination in the disposal of land, or an interest in land.

Disposition of land or an interest in land by a will is excepted from the prohibition.

Clubs

The SDA's application to clubs is complex. Although section 25 sets out specific grounds on which such discrimination is prohibited, these specific grounds are subject to a range of complex exemptions, particularly in relation to voluntary bodies.

Discrimination is specifically prohibited in relation to clubs on matters such as:

- refusal to accept applications for membership
- terms and conditions on which the club is prepared to admit a person
- denial or limitation of access to benefits
- subjection of members to any other detriment.

Section 4 defines a club as an unincorporated or incorporated association of not less than 30 people which provides and maintains its facilities from some part of the funds of the associates and sells or supplies liquor for consumption on its premises.

Exceptions

There is a range of complex exceptions to the above prohibition of discrimination. Two of the most significant are:

- Single Sex Club: subsection 25(3) provides that it is not unlawful to discriminate on the ground of sex if membership of the club is available to persons of the one sex only. There
is no case law on this subsection and it is unclear what its effect is on situations such as 'men's only' clubs.

- **Voluntary Bodies**: section 39 provides a general exemption for voluntary bodies from the SDA. 'Voluntary bodies' are defined as incorporated or unincorporated bodies which are not engaged in making a profit, but do not include a club. (This exemption is discussed further at p. 30.)

Many bodies (such as sports clubs) would come into the definition of a voluntary body and hence would not be subject to the SDA.

### Administration of Commonwealth Laws and Programs

Section 26 prohibits discrimination by any person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program in the performance of that function or the exercise of that power.

'Commonwealth law' has been defined widely to encompass primary legislation, regulations, rules, by-laws or determinations made under or pursuant to an Act. Similarly, 'Commonwealth program' is broadly construed and can consist of a program where the Commonwealth contributes some funding, has a real interest in the outcome of the project and has some ongoing involvement in the program. For example, the Federal Court held that the carrying out by a local council of a project approved under the *Community Employment Act 1983* (Cth) was the performing of a function by the council for the purposes of the Commonwealth Employment Program.\(^{43}\)

In certain circumstances, the SDA's provisions in relation to vicarious liability are applicable to those responsible for administering a Commonwealth program.\(^{44}\)

### Definitions of Unlawful Discrimination

#### Direct Discrimination on the Grounds of Sex and Marital Status

Direct discrimination on the ground of sex (section 5) or marital status (section 6) is defined to have occurred if, because of the aggrieved person's sex or marital status, or a characteristic appertaining to or generally imputed to persons of that sex or marital status, the discriminator treats the aggrieved person less favourably than a differently situated person in circumstances that are the same or not materially different. The ground for the discriminatory treatment (e.g. sex) cannot be invoked to justify that the circumstances were materially different.
Direct Discrimination on the Ground of Pregnancy or Potential Pregnancy

Direct discrimination on the ground of pregnancy or potential pregnancy (section 7) is defined as having occurred if, because of an aggrieved woman's pregnancy or potential pregnancy or a characteristic appertaining to or generally imputed to women who are pregnant or potentially pregnant, the discriminator treats the aggrieved person less favourably than a differently situated person in circumstances that are the same or not materially different. The ground for the discriminatory treatment (e.g. potential pregnancy) cannot be invoked to justify that the circumstances were materially different.

Prior to the passage of theSex Discrimination Amendment Act 1995, this definition of discrimination allowed a defence of reasonableness to be invoked for discriminatory behaviour. Half Way to Equal recommended removal of this defence in order to align pregnancy discrimination with the test for discrimination on the ground of sex and marital status.

Direct Discrimination on the Ground of Family Responsibilities

Direct discrimination on the ground of family responsibilities (section 7A) is defined as having occurred if an employer, because of the family responsibilities of an employee or the characteristics appertaining to, or generally imputed to, a person with family responsibilities, treats that employee less favourably in relation to dismissal from employment than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different.

Family responsibilities are defined in the SDA as care for a dependent child or any other immediate family member. Same sex relationships are not covered.

Indirect Discrimination on the Grounds of Sex, Marital Status, Pregnancy or Potential Pregnancy

Indirect discrimination laws are aimed at stopping the effects of requirements, practices or conditions which are apparently neutral, but which reflect deeply discriminatory assumptions about the roles and abilities of men and women and which hence have systemic, discriminatory effects.

Indirect discrimination on the ground of sex (section 5(2)), marital status (section 6(2)), pregnancy or potential pregnancy (section 7(2)) is defined as having occurred if:

- the discriminator imposes, or proposes to impose, a condition, requirement or practice
that has, or is likely to have, the effect of disadvantaging persons of the same sex or marital status as the aggrieved person, or when the aggrieved woman is pregnant or potentially pregnant, women who are also pregnant or potentially pregnant.

However, the respondent has a defence of reasonableness to a complaint of indirect discrimination. Reasonableness is defined as including matters such as the nature and extent of the disadvantage; the feasibility of overcoming or mitigating the disadvantage and whether the disadvantage is proportionate to the object of the discriminatory requirement, condition or practice.

This definition of indirect discrimination was implemented by the Sex Discrimination Amendment Act 1995 and was the key amendment of that Act.

Prior to 1995, indirect discrimination was defined by an extremely convoluted, four part test. For example, if a woman complained of indirect sex discrimination, she was required to prove that:

- she was required to comply with a requirement or condition and
- a substantially higher proportion of men comply, or are able to comply, with the requirement or condition and
- the requirement or condition is not reasonable having regard to all the circumstances of the case and
- she does not, or is not able to, comply with the requirement or condition.

This test placed a heavy onus on the person alleging discrimination, and consequently only a handful of indirect discrimination complaints were brought before HREOC in the Act's first ten years. The limited effectiveness of the definition was of considerable concern in both Half Way to Equal45 and Equality Before the Law Part I46 and by anti-discrimination analysts more generally.47

Equality Before the Law Part I advocated a simplified test in which the burden of bearing the onus of proving whether a requirement or condition was reasonable lay with the respondent. The argument for shifting this aspect of the onus of proof was that it is logical that questions as to whether particular requirements are reasonable (for example due to business efficacy, costs) are a matter for the person who determined the need for the requirement. Changing the onus of proof in relation to the reasonableness of a requirement sparked some controversy during Parliamentary debate, and it was argued that the proposal amounted to a reversal of the onus of proof for indirect discrimination in general.48 However, this argument is misplaced as it is only one aspect of the test which placed the onus on the defendant—the complainant bears the overall onus of proof under the test.
As noted above, the Act does not prohibit indirect discrimination on the ground of family responsibilities.

Sexual Harassment

The SDA conceptualises sexual harassment as a specific form of sex discrimination and complaints of sexual harassment account for approximately half of all complaints lodged under the SDA. Sexual harassment has a specific history in the development of anti-discrimination law. Given its prevalence it is useful to provide a brief overview of the development of sexual harassment as a legally defined harm.

Development of Sexual Harassment Laws

Unlike the concept of 'sex discrimination' which has been recognised within human rights conventions as a legal harm since early this century, the concept of sexual harassment has only been conceptualised socially and recognised as a legal harm for the past two decades.

The development of the concept of sexual harassment arose from women's experiences of institutionalised, sexually harassing behaviour, primarily within the workforce, experiences most famously couched within legal language by the feminist lawyer Catharine MacKinnon. As noted by Professor Reg Graycar and Associate Professor Jenny Morgan, the creation of the legal concept of sexual harassment is an example of 'using law to create a cause of action to deal with injuries to women, designed from the standpoint of women's experience'.

The prevalence of sexual harassment complaints within Australia is noteworthy. From one perspective it indicates a positive awareness of sexual harassment procedures, but from another perspective it suggests the resistance of many employers and co-workers to recognising sexual harassment as a discriminatory harm.

Feminist commentators have argued that part of the difficulty in ensuring that sexual harassment is understood as a harm is twofold: first the perception that such behaviour is trivial, personal, private or natural; and secondly the perception that the women (or occasionally men) who are harassed are capable of merely saying no and ignoring the harassment without damaging effects.

Such a view of sexual harassment does not recognise the nexus between power, sexuality, and socialisation. Critics of this view argue that sexuality is not a natural phenomenon but is developed within a social context. Dominant forms of sexuality are an important mainstay of women's continuing inequality, particularly the web of practices that persist in
treatment of women as primarily sexual objects. The dynamic of sexual harassment flows from this sexual objectification. Patronising women as primarily sexual objects operates, either deliberately or unconsciously, to undermine women's intellectual capabilities and authority, for example within the workplace. It is the abuse of power translated sexually, rather than the expression of a 'natural' sexual dynamic. In this context Catharine A. MacKinnon argues that:

sexual harassment seems less an ordinary act of sexual desire directed towards the wrong person than an expression of dominance laced with impersonal contempt, the habit of getting what one wants, and the perception (usually accurate) that the situation can be safely exploited in this way - all expressed sexually. It is dominance eroticised.53

A recent case provides a stark illustration of the nexus between dominant constructions of sexuality and sexual harassment. Two women working in a non-traditional area requested that pornography be removed from rooms in which they were required to work. They were subsequently subjected to increasing displays of explicit pornography, including the image of a full-length naked woman which had been violently stabbed through the head, heart and genitals, and sexually violent graffiti. When they continued to complain about such conditions, they were told that they should not be working in a male environment and had taken men's jobs.54

**Definition of Sexual Harassment**

Section 28A defines sexual harassment as occurring if:

- a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed or engages in other unwelcome conduct of a sexual nature in relation to the person harassed

- in circumstances in which a reasonable person, having regard to all the circumstances would have anticipated that the person harassed would be offended, humiliated or intimidated.

This definition of sexual harassment was inserted by the *Sex Discrimination and Other Legislation Amendment Act 1992*. The previous definition required that the complainant show that they were subject to disadvantage beyond the issue of harassment (for example, being dismissed from employment) and the scope of the prohibition only applied to employment and education. The Half Way to Equal Report noted that numerous submissions had argued that requiring additional detriment be proved misunderstood the nature of sexual harassment as a serious harm in itself. Consequently, the Report recommended that the current definition be applied.

In order to assist in effective implementation of this provision, the Sex Discrimination Commissioner has recently released a code of practice on sexual harassment.55
Conduct of a Sexual Nature

'Conduct of a sexual nature' has been broadly interpreted by the Commission and the Courts, and has been determined to include:

- attempts at overt sexual intimacy, including kissing and touching
- sexual propositions, sexual remarks, declarations of love
- gender-based insults or taunting
- personally intrusive questions at interviews
- sexually explicit conversations and sustaining a sexualised atmosphere
- display of pornographic material.

Increasingly, these interpretations have reflected an acceptance that sexually harassing behaviour is not limited to individualised, overt requests for sexual favours but includes the oppressive effects on women as a group of a sexually hostile work environment or a sexually permeated workplace, even if the conduct in question is not specifically directed at the woman complainant. For example, the Western Australian Equal Opportunity Tribunal awarded significant damages in a case where two women were subjected to a workplace littered with pornography, stating that:

> It is now well established that one of the conditions of employment is quiet enjoyment of it. That concept not only includes freedom from physical intrusion or from being harassed, physically molested...but extends to not having to work in an unsought sexually permeated work environment.\(^\text{56}\)

There is no need for such behaviour to be ongoing and it is possible for a single act to amount to sexual harassment.\(^\text{57}\) There is also no requirement that the harasser deliberately intended to harass the other person or that the harassed person has overtly stated that the action is unwelcome. The law only requires that under an objective test the harasser would have known their actions were unwelcome.

Areas in which Sexual Harassment is Prohibited

Sexual harassment is prohibited in the following circumstances:

- employment
- by a member of an authority or body able to take action in connection with an occupational qualification
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- by a member/staff member of a registered organisation against a member or person seeking to become a member of the organisation
- by an officer of an employment organisation when providing or offering the agency's services
- by a member of staff of an educational institution against a student
- by a student over 16 years against another student over 16 years or a member of staff of the educational institution
- provision of goods and services
- provision of accommodation
- disposal or acquisition of land
- by a member of the committee of management against a member/potential member of a club
- exercising any power under a Commonwealth law or program.

The extension of the prohibition of sexual harassment of staff by students and to the provision of goods, services and accommodation was implemented by the Sex Discrimination and Other Legislation Amendment Act 1992, following a recommendation by Half Way to Equal.

Vicarious Liability

The vicarious liability of employers for sexual harassment has come under increasing scrutiny by the Commission and the Courts. Section 106 of the SDA provides that employers are vicariously liable for the actions of an employee or agent unless they have taken 'all reasonable steps' to prevent the prohibited action. Several recent cases involving large banks and mining companies have fleshed out the meaning of 'all reasonable steps'. It is not enough for organisations to merely have written policies, brochures, videos and codes of conduct concerning sexual harassment. What is required is an active and effective education program for employees on their rights and responsibilities under the SDA as well as continued follow up and scrutiny to ensure these responsibilities are being implemented. Grievance procedures also need to be established and effectively applied. This is particularly the case in sex segregated working environments.\(^{58}\)
Special Measures Intended to Achieve Equality

As discussed previously, ‘special measures’ are measures specifically designed to address systemic discrimination and taken for the purposes of achieving substantive equality. Section 7D provides that a person may take special measures for the purpose of achieving substantive equality between:

- men and women
- people of different marital status
- women who are pregnant or potentially pregnant and people who are not pregnant or potentially pregnant.

Achieving substantive equality is only required to be one of the purposes of the special measure and the measures are not authorised once the purpose of substantive equality has been achieved.

The current definition of ‘special measures’ was inserted by the *Sex Discrimination Amendment Act 1995* and was one of the key changes announced by Prime Minister Keating at the tenth anniversary celebrations of the SDA on 29 July 1994.

Previously, section 33 of the SDA had provided that special measures to assist women to achieve de facto equality of opportunity were exempt from the operation of the SDA. Both *Half Way to Equal* and the *Equality Before the Law Part I* strongly criticised this provision as inadequate on two grounds.

- First, it was argued that the focus on the phrase 'equality of opportunity' served to entrench a regime of formal equality, whereas special measures provisions were designed to achieve substantive equality. For example, *Half Way to Equal* noted that challenges by men that women’s only services were discriminatory indicated a fundamental misunderstanding of the role of special measures in achieving substantive equality for historically disadvantaged groups. This focus on substantive equality is consistent with Article 4 of CEDAW which provides for temporary measures to accelerate de facto equality.

- The second key criticism of the original definition was that it defined special measures as an ‘exemption’ to the SDA, displaying a fundamental misunderstanding of the relationship between special measures and the achievement of equality. As the then Attorney-General, the Hon. Michael Lavarch MP, stated in the Second Reading Speech for the Sex Discrimination Amendment Bill 1995:

  special measures should be presented and understood as an expression of equality rather than an exception to it.
Examples of Special Measures

The Sex Discrimination Commissioner has published *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984*, which offers a detailed analysis of the meaning, operation and development of special measures. Examples of special measures provided by the Commissioner include:

- a Commonwealth funded national women’s health program, following evidence of a lack of services with specific expertise in women’s health
- a women’s housing co-operative, following surveys that women to a far greater extent than men have difficulty securing adequate housing following a relationship breakdown
- women’s legal resource centres
- specific women’s research grants for PhD studies in areas with a low representation of women scholars, such as chemistry.

Exceptions and Exemptions

The SDA provides for numerous exceptions to, and exemptions from, its operation (primarily sections 30-47). For example, exemptions are provided where:

- sex is a genuine occupational qualification (section 30)
- where rights and privileges are accorded to women in connection with pregnancy and childbirth (section 31)
- where services are only operable for members of one sex (section 32) and for the residential care of children (section 34).

More problematic are a wide range of exemptions affecting areas such as the instrumentality of a state, charities, religious bodies, voluntary bodies, sport, insurance, superannuation and acts done under statutory authority.

These exemptions and exceptions to the SDA have been widely criticised as inconsistent with the spirit of the Act. In 1992, the Sex Discrimination Commissioner published a *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* (the Review Report). The Review Report argued that the wide ranging exemptions to the SDA were the product of political compromise necessary to secure the SDA’s contentious passage through Parliament and did not reflect changing social acceptance of anti-
discrimination law. The Review Report stated that the effect of the exemptions was to
grant an imprimatur to discriminatory behaviour in a wide range of areas, and
consequently sanctioned women's inequality contrary to recognised international human
rights norms.

Similarly, *Half Way to Equal* noted that these exemptions are:

> in the view of many who have given evidence before the Committee, contrary to the
> aims of the legislation, let alone the Convention [CEDAW].

Given these concerns, and evidence that women's status in Australia was only
incrementally improving, the Review Report recommended removing the major
exemptions to the SDA (instrumentality of a state, charities/voluntary bodies, educational
institutions for religious purposes, sport and industrial awards). A recommendation was
not made concerning the exemption for acts done under statutory authority as a legislative
requirement for a review of this exemption in 1996 was inserted in the SDA in 1991.

Only the recommendation concerning industrial awards has been implemented. The other
exemptions remain in place five years after the Review Report.

**Instrumentality of a State**

Section 13 of the SDA exempts discrimination or sexual harassment which occurs in the
course of employment by a State instrumentality. The effect of this is that State
Government departments and State authorities are exempt from the prohibition against
discrimination in employment, and State Government employees are exempt from sexual
harassment provisions. The scope of the definition of 'instrumentality' is unclear, however
it probably covers statutory corporations and quasi-autonomous State bodies in the public
sector. Section 13 has to be read with section 12, which states that the SDA does not bind
the Crown in right of the State, unless expressly provided.

The primary rationale for the exemption is a states' rights argument that the
Commonwealth should not impose its authority on state-related bodies. The contrary
argument is that the exemption permits some Australian employees to enjoy the SDA's
protection whilst others do not, solely on the ground of who is their employer.

The Review Report recommended removal of the exemption, in order to ensure equitable
coverage for all Australian employees.

No Government response has yet been made to this recommendation.
Charities and Voluntary Bodies

Section 36 provides an exemption for charities from the SDA in relation to the provision of a deed, will or other document that confers a charitable benefit on a class of persons. More broadly, section 39 provides an exemption for voluntary bodies in relation to admission to a voluntary body or the provision of benefits by a voluntary body.

The traditional argument in favour of exempting voluntary bodies from anti-discrimination laws is that the right to freedom of association should be maintained against public regulatory encroachment in the private sphere.

Professor Margaret Thornton has argued that justifying discrimination by raising the distinction between the public and private spheres ignores the ways in which those spheres inter-relate. For example, many voluntary bodies rely on public funding for survival, but, due to the exemption, are not accountable to public human rights obligations. Many of these voluntary bodies also have significant levels of public and commercial influence.

The Review Report recommended that voluntary organisations should not be prioritised over the human rights goals of anti-discrimination law. Equality Before the Law Part I similarly recommended removal of the exemption.

There has been no Government response to these recommendations.

Religious Bodies and Educational Institutions Established for Religious Purposes

Section 37 provides an exemption for the ordination, training and education of religious officials, selection of persons to perform religious functions or 'any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.' Similarly, section 38 provides an exemption for employment in a religious educational institution or in the provision of education or training by a religious institution.

Some form of exemption for religious bodies is common in sex discrimination law throughout Australia, Canada, the United Kingdom and the United States. The significant exemptions in the SDA were the result of lengthy consultations between the then Government and the church lobby, and were a key part of the negotiations aimed at ensuring the SDA's passage through Parliament.

The exemption for religious schools is contentious. Whilst some argue that religious liberty is a dominant right, others see the right to be free from discrimination as an inalienable human right, particularly in an employment context in which a large number of teachers are employed in non-government schools. A further argument is that if a religious school is prepared to accept government funding, it should be accountable to
public human rights standards. *Half Way to Equal* reports that one of the difficulties in determining the ambit of such an exemption was ascertaining whether it 'is in fact protecting discrimination in good faith or just protecting discrimination.'66

*Half Way to Equal* recommended that the exemption be amended to add a requirement of 'reasonableness', so that an employer was required to meet a common law standard which permitted an objective assessment of the circumstances.67 The Review Report and *Equality Before the Law Part I* went further. The Review Report recommended that the exemption in section 38 be removed to ensure protection against discrimination to all Australians including the large number of teachers employed in the non-government school system, noting that a less desirable but satisfactory solution would be that any discrimination must be reasonable.68 *Equality Before the Law Part I* similarly recommended removal of the section 38 exemption, stating that at the very least the exemption should be removed in relation to sex and pregnancy and if the exemption for marital status be retained, a requirement of reasonableness should be imposed.69

There has been no Government has response to these recommendations.

**Acts Done Under Statutory Authority**

Section 40 exempts certain acts done under statutory authority. The least contentious exemptions are for a determination of the Human Rights and Equal Opportunity Commission and an order of a court. More complex are the exemptions for awards and agreements and for certain legislative Acts (section 40(2)). The following discussion considers the exemption for legislation only and the status of discriminatory awards is considered later.

Section 40(2) was included in the Act from the first stages of drafting,70 and initially provided a two year exemption for acts done by a person in direct compliance with a Commonwealth, State or Territory law or regulation as in force at the commencement of the Act (1 August 1984). Section 40 also provided permanent exemptions for certain specified legislation.71

The aim of the original exemption was to provide Commonwealth, State and Territory governments a period to review discriminatory legislation and where possible to align all legislation and regulations with the SDA. At the expiration of the two year period, it was intended that all Commonwealth legislation as in force at the commencement of the SDA and all State and Territory legislation would be subject to the SDA, unless the two year exemption was extended by regulation or the legislation was subject to a permanent exemption.

In 1986, prior to the expiration of the two year exemption period, the Government utilised the regulation making power to begin implementation of a regime under which
Commonwealth, State and Territory legislation was exempted by regulation from the operation of the SDA. Further regulations were made in 1987, 1988 and 1989 and although there was a steady reduction in the number of exemptions provided for by regulation, many laws remained exempt.

In 1991, the Senate Standing Committee on Regulations and Ordinances expressed concerns about the existence of this broad regulation making power and the manner in which it was exercised. Apropos of this concern, the Committee strongly advised that the continued regime of the Executive exempting discriminatory statutes by regulation cease.

Consequently, the Sex Discrimination Amendment Act 1991 both repealed the power to extend exemptions to the SDA by regulation and provided an indefinite statutory exemption for acts done in direct compliance with specified legislation, most significantly a range of taxation laws and the Social Security Act 1947. An Australian Democrats amendment imposed a statutory obligation on the Attorney General to review the operation of the indefinite statutory exemptions before 1 June 1996. The Review was tabled in Parliament on 26 June 1996 and the Sex Discrimination Amendment Bill 1996 was introduced to implement its recommendations.

The Review's proposals reflect the status quo. Although the Review operated in accordance with the principle that where possible all federal legislation should be consistent with the objectives of the Act and there where exemptions to the Act are necessary they should be strictly limited, it contains no proactive elements to redress discrimination.

In a detailed study of Australian anti-discrimination law, Professor Margaret Thornton has noted her concern about this exemption:

[the exception accorded acts done under statutory authority has been potentially one of the most devastating...the usual principle of statutory construction in which the most recent enactment overrules the former, has been waived in some legislation. The subordinate status of anti-discrimination legislation reveals quite unequivocally that certain legislatures did not intend that their anti-discrimination legislation should be taken as seriously as other legislation.]

**Sport**

Section 42 provides an exemption for competitive sporting activity, where strength, stamina or physique of competitors is relevant. The exemption does not extend to coaching and umpiring or sporting activities of children under 12.
This exemption was not initially included in the SDA, but was inserted in order to ensure women were not disadvantaged in competitions which relied on strength. The Review Report notes that the exemption does not necessarily achieve this aim and may in fact undermine it, in situations where rigid sex differentiation should be irrelevant to merit and skill. Submissions to the Review also noted that breaking down sex discrimination in sport would go a long way to changing discriminatory attitudes in general. Finally, it was noted that when the exemption for sport was used in connection with the exemption for voluntary bodies, there was the potential for elite 'male-only' sporting institutions to exclude women on purely discriminatory grounds, rather than for reasons concerning strength and stamina.

The Review Report and the Equality Before the Law Report recommended repeal of the exemption. Again, this recommendation has not been implemented.

Superannuation and Insurance

Although discrimination in the provision of goods and service is prohibited by the SDA, and 'services' is defined as including insurance, the SDA provides specific exemptions for insurance and superannuation.

Superannuation

Section 41A of the SDA provides an exemption for superannuation on the grounds of sex or marital status discrimination:

- where the discrimination is based on actuarial or statistical data and is reasonable having regard to that data
- where a dependant benefit (ie. a benefit payable to another on the policy holder's death) need not be provided to those who do not have a spouse, de-facto spouse or child
- where the vesting, preservation and portability provisions may result in discrimination so long as it is indirect discrimination.

Section 41B permits existing superannuation funds to discriminate more generally provided they offer their members an option to transfer to a new fund which is non-discriminatory as defined in the SDA.

The SDA initially provided a much broader exemption on the ground of sex or marital status in relation to the terms and conditions on which a superannuation scheme operated.
This blanket exemption was modified by the *Sex Discrimination Amendment Act 1991* which introduced sections 41A and 41B.

The Senate Select Committee on Superannuation tabled a report in 1996 entitled *Super and Broken Work Patterns*. In order to ensure that the superannuation industry was more accountable to anti-discrimination norms, the Committee recommended that the Government encourage and monitor research on the use of gender and morbidity actuarial tables in respect of the provision of annuities with a view to:

- amending the SDA to exclude the exemption for actuarial data or
- declaring gender based actuarial tables to be not covered by the exemption.

No Government response has yet been made to this report.

However, pursuant to a 1996 election commitment, the Government has released the *Superannuation and Family Law Position Paper*, which deals with important reforms in this area. The paper notes that the current regime for dealing with superannuation on marriage breakdown is uncertain and limited in terms of the choices available to separated couples. Notably, separated couples cannot order their superannuation fund to divide an interest so that they both can share in the retirement income. The paper presents different options for reform, which are based on the premise that both parties to a marriage have an equal right to superannuation interest accumulated during the time they lived together.81

**Insurance**

Section 41 provides an exemption for discrimination on the ground of sex in the terms on which the insurance policy is offered where the discrimination:

- is based on actuarial or statistical data on which it is reasonable for the insurer to rely
- is reasonable having regard to that data and
- if the client requests access to the data, such access is granted.

The initial exemption did not contain the final dot point, which was inserted by the *Law and Justice Legislation Amendment Act (No 3) 1992* pursuant to a Human Rights and Equal Opportunity Commission Report, *Insurance and the Sex Discrimination Act 1984*. The Report recommended continuation of the exemption as along as insurance companies were fully accountable for justifiable sex differentiation.

Failure to provide the relevant actuarial or statistical data is an offence under section 87 of the SDA, and attracts a fine of $1000 for a natural person or $5000 for a corporate entity.
Discriminatory Awards

Section 40(1)(e) and (f) of the SDA exempts anything done in direct compliance with an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment or a certified agreement (within the meaning of the Workplace Relations Act 1996) from the operation of the SDA.

Industrial Awards

When the SDA was initially enacted, industrial awards were exempted from its operation in order to allow a period during which sex differentiation in awards could be considered and remedied. The Half Way to Equal Report noted that many submissions considered this exemption a major barrier to the achievement of pay equity for women. The Report recommended that research be undertaken as to how to remove the exemption.

The Government responded more strongly than this recommendation. As part of the Sex Discrimination and other Legislation Amendment Act 1992 a scheme was implemented in section 50A whereby complaints concerning discriminatory awards could be referred by the Sex Discrimination Commissioner to the Australian Industrial Relations Commission. The Australian Industrial Relations Commission was then empowered to reconvene the parties to the award or certified agreement with a view to redressing any discrimination. The Workplace Relations Act 1996 ensured that certified agreements as defined under that Act were covered by the SDA.

Other Discriminatory Awards

Sections 50C and 50E allow complaints to be made that a determination of the Remuneration Tribunal or the Defence Force Remuneration Tribunal is discriminatory. Once the complaint is accepted, the Sex Discrimination Commissioner is empowered to refer the complaint to the relevant Tribunal for consideration.

Temporary Exemptions

Section 44 of the SDA empowers the Human Rights and Equal Opportunity Commission to grant temporary exemptions for a particular action, policy or law. The rationale behind these exemptions is to provide time for the exempted act to be aligned with the SDA. The exemption may be granted subject to specific terms and conditions and shall be granted for a period not exceeding five years. Exemptions granted include those to 'men's only' sports clubs and to legal arrangements such as student assistance schemes.
Criminal Offences under the SDA

Sections 85-93 of the SDA create a range of criminal offences in relation to discriminatory actions, including:

- publishing or displaying a discriminatory advertisement (section 86)
- failure to attend a compulsory conciliation conference without reasonable excuse (section 88)
- failure to furnish information when requested by the Commissioner (section 89)
- actions in relation to the Commission including failure to attend a hearing, refusal to answer questions, insulting, disrupting or doing any other act which would constitute contempt (section 90)
- providing false or misleading information to the Commissioner, the Commission or any other person acting on their behalf (section 93).

These offences attract fines of $1000 for a person or $5000 for a corporate entity except the final offence which attracts a fine of $2,500 or imprisonment for three months or both for a natural person or $10 000 for a corporate entity.

Application of the SDA

Section 9 of the SDA sets out a complex grid of the areas to which the SDA applies. The SDA lists the heads of constitutional power for the operation of the SDA as the external affairs power in relation to implementation of CEDAW, foreign corporations power, trading or financial corporations power, banking and insurance power and the trade and commerce power. All these powers, except for the power in relation to external affairs, provide a plenary power for the Commonwealth to implement the SDA in relation to both men and women. However, the external affairs power only allows the Commonwealth to implement legislation that prohibits discrimination against women, as is established by CEDAW. Consequently, unless a complaint by a man can be locked onto one of the other powers (which is usually the case), there is no scope to hear the matter.

Section 109 of the Constitution provides that in the case of an inconsistency between a valid federal and a valid state law, the federal law shall prevail. In a 1983 case concerning the Racial Discrimination Act 1975, it was held by the High Court that the Racial Discrimination Act 1975 intended to cover the field of race discrimination law and that consequently aspects of the New South Wales Anti Discrimination Act 1977 were inoperative. To avoid this determination, drafters of the SDA inserted subsections 10(3) and 11(3) as 'savings provisions' in the SDA so that if a State or Territory law was capable
of operating concurrently with the SDA, or furthering the objects of CEDAW, then it would not be invalidated pursuant to section 109.

Subsections 10(4) and 11(4) address the potential 'double jeopardy' situation presented by similar Commonwealth and State and Territory laws. If a person has initiated a complaint under State or Territory legislation and would also be entitled to initiate a complaint under the SDA for the same matter, the complaint under the SDA is prohibited. Similarly, subsections 10(5) and 11(5) provide that if either Commonwealth, State or Territory legislation make an action a criminal offence, and a person has been prosecuted and convicted for that offence under a State or Territory law, the SDA does not authorise punishment for the same act or omission.

Section 12 exempts State Governments from the operation of the SDA.

All States and Territories have sex discrimination legislation. The history and scope of this legislation is provided for in Information and Research Service Background Paper Number 19, 1993, *Sex Discrimination Legislation in Australia*, and an update of this paper in relation to the States and Territories is provided in ***.

### Machinery for Handling Sex Discrimination Complaints

The machinery for responding to complaints under the SDA is complex and in a state of flux. The following provides a general overview of the main provisions and key proposals for reform.

#### Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner

The Human Rights and Equal Opportunity Commission Act 1986 establishes the Human Rights and Equal Opportunity Commission which, among other things, is responsible for administering the Commonwealth's anti-discrimination regime and for overseeing Australia's obligations under seven key international human rights instruments.

In relation to the SDA, the Commission is responsible for:

- inquiring into alleged infringements of the SDA and endeavouring by conciliation to effect a settlement
- consideration and referral of complaints concerning discriminatory awards
- inquiring into, and making determinations on, matters referred to it by the Minister or the Commissioner
• granting temporary administrative exemptions

• promoting an understanding and acceptance of the SDA

• undertaking research and educational programs to promote the objects of the SDA

• examining enactments and (when requested to do so by the Minister) proposed enactments for the purpose of ascertaining whether they would be inconsistent or contrary to the objects of the SDA

• on its own initiative, or at the request of the Minister, reporting to the Minister as to laws which should be made on matters relating to discrimination as defined by the SDA

• preparing and publishing sex discrimination guidelines

• intervening in court proceedings related to sex discrimination

• anything else incidental or conducive to the performance of these functions.

Section 96 of the SDA provides that there shall be a Sex Discrimination Commissioner. Section 49 of the SDA provides that the Commissioner shall be responsible for the Commission's functions concerning conciliation and referral of discriminatory awards. The Commission is also empowered to delegate its powers to the Commissioner, except in relation to any inquiry held by the Commission.

Making a Complaint under the SDA

A complaint under the SDA must be lodged in writing by a person aggrieved, a person included in a class of persons aggrieved (a representative complaint) or a trade union representing the person aggrieved (section 50).

When the complaint has been directed to the Commissioner, the Commissioner shall inquire into the complaint and attempt to effect a settlement by conciliation unless the Commissioner is satisfied that:

• the act is not unlawful

• the aggrieved person or persons does not or do not desire the inquiry to continue

• more than 12 months have elapsed since the act, or

• the complaint is frivolous, vexatious, misconceived or lacking in substance. (section 52(2)).
If the Commissioner decides not to inquire into a complaint, the complainant is to be informed in writing of that decision and the reasons for it, and of the complainant's right to serve notice in writing within 21 days requiring the Commissioner to refer the complaint to the Commission or the President for review.

To assist in the inquiry, the Commissioner may obtain information from such persons and make such inquiries as thought fit, may require the furnishing of relevant information and documents and may require attendance at a compulsory conference. Failure to provide requested information or to attend a compulsory conference are criminal offences (sections 88 and 89).

If conciliation fails, the complainant can seek to have the complaint determined by the Commission. The decision of the Commission, however, is not enforceable and if an enforceable determination is required, the complainant must initiate an action in the Federal Court.

Proposed Amendments to Complaint Handling Procedures

The Human Rights Legislation Amendment Bill 1996 seeks to change this regime for handling sex discrimination complaints. The Bill proposes to repeal the Human Rights and Equal Opportunity Commission's inquiry/determination functions and implement a scheme by which complaints not resolved through conciliation may be immediately continued by way of an application to the Federal Court in order to obtain an enforceable determination. The Bill also proposes to centralise all complaint investigations and conciliation procedures in the office of the President of the Human Rights and Equal Opportunity Commission.

For a detailed analysis of these proposals, see Bill Digest No 75 1996–1997. It is expected that the key elements of the Bill will receive bipartisan support. The following overview places these changes to discrimination complaint handling in their historical context.

History of Machinery to Handle of Sex Discrimination Complaints

Since the inception of the Commonwealth anti-discrimination regime in 1975, procedures for dealing with discrimination complaints have been the subject of regular amendment. These amendments have generally been forged around attempts to reconcile the at times conflicting objectives faced by legislators in the context of anti-discrimination law — the desire to afford equitable and accessible justice to people subject to discrimination through alternative dispute resolution (whilst protecting against vexatious litigants) as well as ensuring as far as possible the coercive power of the law for anti-discrimination matters.
Initially, the SDA provided for a Sex Discrimination Commissioner to conciliate complaints and if conciliation failed, the Commission was empowered to conduct an inquiry into the complaint. Determinations of the Commission were not binding or conclusive and to obtain an enforceable determination, the Commission or complainant could initiate new proceedings in the Federal Court, thereby effectively having to start the matter from scratch.

This tripartite structure for discrimination complaints (conciliation, an inquiry by the Commission and a possible completely new hearing in the Federal Court) met with significant criticism on the grounds that the system was inefficient and prone to exacerbate, rather than ameliorate, the distress of a complainant. In light of these concerns, the issue was referred to the Senate Standing Committee on Legal and Constitutional Affairs in 1990. The Committee considered the complex constitutional issues raised by the separation of powers doctrine (which prohibits administrative bodies like the Commission exercising judicial powers, such as enforcement of a decision) in light of the need to facilitate the most equitable structure for people alleging discrimination. The previous Government and Australian Democrat majority of the Committee recommended that it would be constitutional to allow a determination to be registered in the Federal Court and to operate as if it were an order of the Court, unless the respondent applied to the Court with 28 days for judicial review of the determination. The Coalition minority report disagreed and proposed that where conciliation was unsuccessful the matter should be directly referred to the Federal Court. In accordance with the majority report, the registration proposal was implemented by the Sex Discrimination and Other Legislation Amendment Act 1992. The enforcement procedures of the 1992 Act were challenged successfully in the case of Brandy v Human Rights and Equal Opportunity Commission, which argued that enforcing a Commission determination through Federal Court registration was unconstitutional as it allowed an administrative body (the Commission) to exercise de facto judicial power. The High Court unanimously agreed and the enforcement mechanisms in Commonwealth anti-discrimination legislation were rendered invalid.

A two stage response was announced to the Brandy decision on 27 February 1995. Firstly, the pre-1992 enforcement process was temporarily restored, therefore implementing a scheme of completely new hearings in the Federal Court following a Commission inquiry into an unconciliated matter. The Human Rights Legislation Amendment Bill 1997, discussed above, is the second stage of the response.

Proposals in Relation to Commissioners and the Commission

The Human Rights Amendment Bill (No. 2) 1998 proposes further significant changes to the operation of HREOC. The Bill seeks to:
The Attorney-General has argued that the current structure of six specialist commissioners is top heavy and inefficient. By replacing specialist commissioners with three Deputy Presidents with responsibility for particular subject areas, it is argued the efficacy of the Commission will be enhanced by:

- providing for a more streamlined and collegiate structure
- ensuring Commission members have a common responsibility to protect and promote human rights for all Australians whilst maintaining specific expertise
- removing the perception that the Commission seeks only to protect sections of the community for whom a specific Commissioner exists and
- enabling Deputy Presidents to develop expertise in other areas without needing to consider appointing specialist Commissioner as each new area develops.

For a detailed analysis of these proposals, see Bill Digest No 227 1997-1998, Human Rights Legislation Amendment Bill (No. 2) 1998.

Co-operative Arrangements

Historically, Commonwealth/State anti-discrimination agencies have negotiated co-operative arrangements by which either State or Commonwealth anti-discrimination offices operate as an agent of the other authority. Currently, these co-operative arrangements are in a state of flux. If no such arrangement is in place, complaints to HREOC from States and Territories are processed through Sydney.

Other Commonwealth Legislation

The other key pieces of Commonwealth legislation related to sex discrimination are the Affirmative Action (Equal Employment for Women) Act 1986 and the Equal Employment Opportunity (Commonwealth Authorities) Act 1987. A detailed discussion of these laws is presented Parliamentary Research Service Background Paper No. 19 1993, Sex Discrimination Legislation in Australia Paper. The only significant legislative changes to this previous overview is that the Affirmative Action (Equal Opportunity for Women)

Conclusion: Responding to Systemic Discrimination

The notions of liberty and equality are fundamental values of democratic societies. Sex discrimination laws indicate that legislatures throughout Australia consider that, regardless of these values, women continue to experience discrimination and inequality. Elevating anti-discrimination ideals to the status of law provides some formalised redress for the complex harm caused by inequality and discrimination. Anti-discrimination laws also serve an important symbolic and educative function, providing a moral touchstone as to ethical and unethical modes of behaviour and organisation.

However, from the perspective of many commentators, Australia's sex discrimination regime is 'riddled with weaknesses in respect of both substance and procedure'. Significantly, anti-discrimination law is primarily structured to respond to individualised, discriminatory harms that occur within a specific area of public life with a clearly identified complainant and respondent. Although this legal framework is essential and valuable, it is unable to respond to systemic discrimination that is not targeted at, or perpetrated by, a specific person. For example, discriminatory advertising that has extended cultural effects, is immune from any sort of legal challenge. The impact of Australia's anti-discrimination law regime is also limited by the fact that sex discrimination laws (like all anti-discrimination laws) are not constitutionally entrenched. The effect of this is to render sex discrimination standards generally irrelevant to later laws, providing scope for Parliament to pass discriminatory legislation which has systemic effects.

The ALRC's detailed report on equality before the law proposed three mechanisms to address the problem of systemic discrimination.

- The ALRC recommended that Commissioners be empowered to investigate conduct that appears to be unlawful under the SDA of their own motion. The result of the investigation could be that a report is made to the Attorney-General who is then required to table it in Parliament within an appropriate time (e.g. 15 sitting days).

- Secondly, the Report recommended that a general prohibition of discrimination in accordance with the fundamental human rights and freedoms and CEDAW Article 1 be implemented in the SDA.

- Thirdly, that an equality law be enacted to guarantee everyone's entitlement to equality before the law and the full and equal enjoyment of human rights and fundamental freedoms. The guarantee of equality would attach to any law, policy, program, practice or decision of the legislative, executive or judicial arms of the Commonwealth, States or...
The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984

Territories. Discriminatory laws passed after enactment of such a law would need to expressly derogate from the law to be operative.

As noted by the ALRC 'every democratic, industrialised country except Australia has legal protection of rights, including the right to equality, of one kind or another.' Implementing a general prohibition of sex discrimination or a broader Equality Act would go some way to aligning Australia's human rights regime with the laws of our political and social counterparts.

The former Government responded to the recommendations for a general prohibition on discrimination by inserting a symbolic Preamble into the SDA. However, even though the ALRC Reports were released in 1994 neither the former nor the current Government have yet responded to the other recommendations.

It can be argued that responding to the recommendations of the ALRC seems an important component of continuing to implement legal reforms which aim to remedy systemic and hidden structures of sex discrimination. In terms of truly achieving respect for women's human rights and substantive equality, it can be argued that it is this issue with which the Parliament must continue to grapple. Otherwise, it can also be argued, the ideal of non-discrimination, without the realisation of substantive equality, will remain a hollow promise.

Endnotes

1. For a general discussion of these two approaches to the meaning of discrimination, see Margaret Thornton, The Liberal Promise: Anti-Discrimination Legislation in Australia, Oxford University Press, Melbourne, 1990, p. 9–23.
2. ibid., pp. 9–23.
7. Margaret Thornton, The Liberal Promise, op. cit., p. 15.
8. Margaret Thornton relates Anatole France's famous aphorism to illustrate what she calls the hollowness of the purely formalistic approach to equality: 'The law, in its majestic equality,
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...forbids all men to sleep under bridges, to beg in the streets, and to steal bread — the rich as well as the poor.' Margaret Thornton, *The Liberal Promise*, op. cit., p. 15.


14. The Committee on the Elimination of Discrimination Against Women, the treaty body established to oversee implementation of CEDAW, has issued several general recommendations clarifying the links between CEDAW's prohibition of discrimination and violence against women.

- General Recommendation 12 stated that the prohibition on discrimination in CEDAW required States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life, and to detail such action in their periodic reports to the Committee. See Committee on the Elimination of Discrimination Against Women, *General Recommendation 12: Violence Against Women* (Eighth Session, 1989), HRI\GEN\N\Rev.1 at 78 (1994).

- General Recommendation 19 further elaborated on this requirement, detailing the links between the specific aspects of CEDAW and violence against women. See Committee on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence Against Women* (Eleventh Session, 1992) HRI\GEN\N\Rev.1 at 84 (1994).

15. G.A. res.48/104, 48 U.N. GAOR Supp. (No.49) at 217, U.N. Doc. A/48/49 (1993). Among other things, the Preamble to the *Declaration on the Elimination of Violence Against Women* establishes a clear link between violence against women and sex discrimination, by recognising that 'violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.'


18. Information provided by the Office of the Status of Women, Department of the Prime Minister and Cabinet.

19. For a comprehensive discussion of indirect discrimination law, see Rosemary Hunter, *Indirect Discrimination in the Workplace*, op. cit.


22. For example, as conciliation is deemed neutral, it is the complainant rather than the conciliation officer who is required to identify an appropriate remedy in relation to discrimination. Professor Thornton suggests that a combination of the power imbalances between complainants and respondents in general and the modesty, embarrassment and/or lack of knowledge of complainants appear to preclude them from identifying what, in more formal legal terms, would be a 'just' outcome. Margaret Thornton, *The Liberal Promise*, op. cit, p. 152. See also Carol Andrades, *What Price Dignity? — Remedies in Australian Anti-Discrimination Law*, Research Paper No. 13 1997–98, Department of the Parliamentary Library.


29. Reviews of the SDA include the following.


30. Office of the Status of Women, National Agenda for Women for the Year 2000, AGPS, Canberra, 1988. The National Agenda was the Government blueprint for policy development and action to be taken in relation to women until the year 2000. The National Agenda was part of Australia's commitments to the United Nations Decade for Women's agreed policy document, the Nairobi Forward Looking Strategies. The Agenda was superseded in June 1993 by The New National Agenda for Women, op. cit.

31. Speech Delivered by the Prime Minister, the Hon. PJ Keating MP, op. cit.


33. New National Agenda for Women, op. cit.


35. DC Pearce, Statutory Interpretation in Australia, Butterworths, Sydney, 1974, p. 39.


39. Ibid., p. 42.


44. Attorney-General's Department, 'Significant Changes to the Sex Discrimination Act' Legal Practice Briefing No 25, 1 May 1996.


52. For example, see the trial judge's views in *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) EOC 92–250.


58. Evans v Lee & Anor, HREOC, No H95/470 (unreported at time of publication); Dunn-Dyer v ANZ Bank (Keim C), 10 September 1997, unreported, as discussed by Leigh Jones, 'Words Alone are Not Enough', *Financial Review*, 10 September 1997, p. 18.


63. Margaret Thornton, *The Liberal Promise*, op. cit., p. 139.


67. Ibid., p. 266.


71. For example, subsection 40(2) currently provides that:

   nothing in Division 1 or 2 affects anything done by a person in direct compliance with any of the following as in force on 1 August 1984:

   - the Gift Duty Assessment Act 1941
   - the operation of (i) the definition of 'pensioner' in subsection 4(1) or (ii) the definition of 'concessional beneficiary' in subsection 84(1) of the National Health Act 1953
   - the Income Tax Assessment Act 1936
   - the Income Tax (International Agreements) Act 1953 [now titled the International Tax Agreements Act 1953]
   - the Papua New Guinea (Members of the Forces Benefits) Act 1957
   - the Sale Tax (Exemptions and Classifications) Act 1935
   - the Seaman's War Pensions and Allowances Act 1940
   - the Social Security Act 1947
   - the Taxation (Unpaid Company Tax) Assessment Act 1982
   - Social Services Act 1980 of Norfolk Island.

73. Sex Discrimination (Operation of Legislation) (No. 1) Regulations, (Amendment), Statutory


75. Ibid, p. 31.


77. Krysti Guest, Sex Discrimination Amendment Bill 1996, Bills Digest No.61 1996--97, Department of the Parliamentary Library.


84. On 23 September 1997, the Government also announced a policy to further restructure the Human Rights and Equal Opportunity Commission. It is proposed that the Commission be renamed the Human Rights and Responsibilities Commission and downsized from five specialist commissioner and a president to three deputy presidents (with specific portfolio responsibilities) and president. Attorney-General and Minister for Justice (Daryl Williams), 'Human Rights and Responsibilities Commission', Press release no. 341, 23 September 1997.

85. For example, in Aldridge v Booth (1988) 80 ALR 1, a woman complaining of sex discrimination was unable to have the matter resolved by conciliation, and after an inquiry by the Commission was awarded $7000 damages. The respondent refused to pay. The complainant received legal aid and initiated proceedings in the Federal Court, and one year later, after a seven day trial, was awarded the identical sum of money by the Federal Court. However, the respondent still refused to pay on the grounds that he was impecunious and the woman could not afford to pursue the matter further. The former Member for Kennedy, Mr Rob Hulls MP, publicly noted that '[t]o my mind, the whole process is an abuse of human rights'. See Report of the Senate Standing Committee on Legal and Constitutional Affairs, Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner, November 1992, pp. 8–12.

90. This model of reporting is similar to the current powers of the Human Rights and Equal Opportunity Commission under section 11(1)(f) to inquire into an abuse of a human right and make a report to Parliament if that matter cannot be conciliated. It is also consistent with ACT, South Australian and Western Australia laws that variously provide that Commissioners may conduct investigations without a complaint.