

CHAPTER 2

BACKGROUND

2.1 This chapter outlines background matters relevant to this inquiry including the history of the Act, Australia's international obligations with respect to gender equality, the key provisions of the Act and other inquiries and initiatives regarding gender equality issues.

History of the Act

2.2 The Act implements certain provisions of CEDAW.¹ Australia ratified CEDAW in July 1983 and has thus been a party to the convention for over 25 years.²

2.3 In general terms, CEDAW imposes obligations on states to eliminate discrimination against women. Article 1 defines 'discrimination against women' as meaning:

...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.³

2.4 Article 2 creates general obligations on states to employ legislative and other measures in order to eliminate discrimination against women. While article 3 requires states to ensure the advancement of women so that they are able to enjoy human rights and fundamental freedoms on a basis of equality with men.⁴

2.5 CEDAW includes more specific obligations to eliminate discrimination against women in areas including:

- political and public life (article 7);
- education (article 10);
- employment (article 11);
- health care (article 12); and
- other areas of economic and social life (article 13).⁵

1 See subsection 3(a) of the Act.

2 [1983] ATS 9, at <http://www.austlii.edu.au/au/other/dfat/treaties/1983/9.html> (accessed 29 September 2008), note 2.

3 [1983] ATS 9.

4 [1983] ATS 9.

5 [1983] ATS 9.

2.6 Australia has two reservations to CEDAW regarding the introduction of paid maternity leave and excluding women from combat duties. This means that CEDAW does not apply in Australia in relation to these two matters.⁶

2.7 The ratification of CEDAW was driven, at least in part, by the government's desire to rely on the external affairs power under section 51(xxix) of the Constitution as a basis for broader sex discrimination legislation than would have been possible relying upon other constitutional heads of power.⁷

2.8 In June 1983, Senator the Hon Susan Ryan, the Minister Assisting the Prime Minister for the Status of Women, introduced the Sex Discrimination Bill 1983 (the Bill) in the Senate. The Bill was substantially amended before being passed by the Senate in December 1983 and then by the House of Representatives in March 1984. The Act commenced on 1 August 1984.⁸

2.9 The passage of the Act was extremely controversial. On the twentieth anniversary of the Act, the Hon Susan Ryan stated that:

At the time, the politics surrounding the Bill were explosive. From the first legislative step – the ratification of CEDAW – the initiative met with sustained, vociferous and irrational opposition from powerful sectors in the community. Parliament was besieged by thousands of petitions stating opposition to the Bill in the most colourful terms. Inside and outside Parliament, opponents claimed that the Bill would bring about the end of the family, ruin the economy, undermine the male labour force and destroy Christianity and the Australian way of life.⁹

2.10 As a result of this controversy, several submissions noted that the Act represents a political compromise.¹⁰ Similarly, the Australian Law Reform Commission (ALRC) has noted that the passage of the Act through Parliament was marked by controversy as great as that which marked the passage of the *Native Title Act 1993* and that:

6 Originally, the combat duties reservation also excluded women from 'combat related duties'. However, the reservation was narrowed in August 2000. See [1983] ATS 9, at <http://www.austlii.edu.au/au/other/dfat/treaties/1983/9.html> (accessed 29 September 2008), note 2.

7 The Hon Susan Ryan AO, 'The Ryan Juggernaut Rolls On', *UNSW Law Journal*, vol 27(3), 2004, pp 829-829; see also Senator the Hon Susan Ryan, Minister Assisting the Prime Minister for the Status of Women, *Senate Hansard*, 2 June 1983, p. 1187.

8 For a comprehensive account of the history of the Act see HREOC, *Submission 69*, appendix A.

9 The Hon Susan Ryan AO, 2004, p. 829.

10 See for example HREOC, *Submission 69*, p. 40; Women's Electoral Lobby, *Submission 8*, p. 5.

As a result of the controversy and compromises, the Act is at best a partial implementation of the Convention on the Elimination of All Forms of Discrimination Against Women.¹¹

2.11 This inquiry represents the first comprehensive national review of the Act in more than ten years. However, several of the issues raised during the course of this inquiry were previously considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the House of Representatives Committee) in its 1992 report *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (the *Half Way to Equal* report)¹² and subsequently by the ALRC inquiry into women's equality before the law which reported in 1994 (the *Equality Before the Law* report).¹³

2.12 As a result of the recommendations of the *Half Way to Equal* report, the Act was substantially amended by the *Sex Discrimination and other Legislation Amendment Act 1992* and the *Sex Discrimination Amendment Act 1995*.¹⁴ The 1995 amendments were also influenced by the *Equality Before the Law* report.¹⁵ However several of the recommendations of the House of Representatives Committee and ALRC have not been implemented.

Other international obligations in relation to gender equality

2.13 CEDAW is primarily directed at the elimination of discrimination against women. However, other international conventions Australia has ratified create obligations in relation to gender equality which are not directed solely at women. In particular, article 2 of ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind,

11 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, July 1994, at <http://www.austlii.edu.au/au/other/alrc/publications/reports/69part1/> (accessed 29 September 2008), para 3.2.

12 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, Canberra, April 1992.

13 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, July 1994, at <http://www.austlii.edu.au/au/other/alrc/publications/reports/69part1/> (accessed 29 September 2008); ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, December 1994, at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/69part2/ALRC69part2.pdf> (accessed 29 September 2008).

14 The 1992 and 1995 amendments represent the most significant changes to the Act. For a more detailed summary of amendments and proposed amendments to the Act see HREOC, *Submission 69*, pp 270-276.

15 HREOC, *Submission 69*, p. 272.

such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶ (emphasis added)

2.14 Article 26 of the ICCPR provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. This provision also requires that the law prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the grounds of sex (amongst other grounds).¹⁷

2.15 Similarly, under article 3 of ICESCR states undertake to ensure the equal right of men and women to the enjoyment of the economic, social and cultural rights set out in that convention.¹⁸

2.16 Australia has also ratified three ILO conventions which are of particular relevance to the elimination of sex discrimination in the area of employment:

- (a) the ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation (ILO Convention 111);¹⁹
- (b) the ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO Convention 100);²⁰ and
- (c) the ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO Convention 156).²¹

Related inquiries and initiatives

2.17 There are several other inquiries and initiatives which are relevant to the terms of the reference of this inquiry.

2.18 The Joint Standing Committee on Treaties recently conducted an inquiry regarding the proposed accession by Australia to the Optional Protocol to CEDAW

16 [1980] ATS 23, at <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (accessed 29 September 2008).

17 [1980] ATS 23.

18 [1976] ATS 5, at <http://www.austlii.edu.au/au/other/dfat/treaties/1976/5.html> (accessed 29 September 2008).

19 [1974] ATS 12 at <http://www.austlii.edu.au/au/other/dfat/treaties/1974/12.html> (accessed 29 September 2008).

20 [1975] ATS 45, at <http://www.austlii.edu.au/au/other/dfat/treaties/1975/45.html> (accessed 1 October 2008).

21 [1991] ATS 7, at <http://www.austlii.edu.au/au/other/dfat/treaties/1991/7.html> (accessed 29 September 2008); see also Women's Electoral Lobby, *Submission 8*, pp 5-6.

and recommended that Australia accede to the protocol.²² Accession would allow the United Nations Committee on the Elimination of Discrimination against Women (the UN Committee) to receive and consider written complaints about alleged violations of obligations under CEDAW where domestic remedies have been exhausted. The UN Committee can issue views on whether a breach has occurred and make recommendations for addressing any breach.²³ On 24 November 2008, the Attorney-General and the Minister for the Status of Women indicated that the government has initiated the formal steps required to accede to the Optional Protocol.²⁴ In this context, the committee notes that it is particularly important to consider the extent to which the Act implements Australia's obligations under CEDAW since domestic implementation of that treaty may now be subject to additional international scrutiny.

2.19 The Productivity Commission is currently conducting an inquiry into paid maternity, paternity and parental leave which is due to report in February 2009.²⁵ The commission released a draft report on 29 September 2008 which sets out proposals for a national paid parental leave scheme.²⁶

2.20 In addition to federal anti-discrimination legislation such as the Act, each state and territory has its own anti-discrimination legislation but there are slight differences in coverage and procedures under these acts.²⁷ In March 2008, the Standing Committee of Attorneys-General (SCAG) established a working group which will advise Ministers on options for harmonising state, territory and Commonwealth anti-discrimination laws (see paragraph 8.25).²⁸

22 Joint Standing Committee on Treaties, *Report 95: Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008*, at: <http://www.aph.gov.au/house/committee/jsct/4june2008/report1/chapter6.pdf> (accessed 10 November 2008), p. 59.

23 Attorney-General's Department, *National Interest Analysis*, [2008] ATNIA 26, p. 1.

24 Attorney-General and Minister for the Status of Women, *Media Release: Australia comes in from the cold on women's rights*, 24 November 2008, at http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_24October2008-AustraliaComesInFromTheColdOnWomensRights (accessed 26 November 2008).

25 For details see <http://www.pc.gov.au/projects/inquiry/parentalsupport> (accessed 26 August 2008).

26 Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children*, Draft inquiry report, Canberra, September 2008 at: <http://www.pc.gov.au/projects/inquiry/parentalsupport/draft> (accessed 29 September 2008).

27 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 11 September 2008, p. 2.

28 Standing Committee of Attorneys-General, *Communiqué*, 25 July 2008 at: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_25July2008-Communique-StandingCommitteeofAttorneys-General (accessed 26 August 2008).

2.21 Finally, the House of Representatives Standing Committee on Employment and Workplace Relations is conducting an inquiry into pay equity and other issues related to increasing female participation in the workforce.²⁹

2.22 The committee has also considered several other recent reports relevant to the terms of reference including:

- the report on the Sex Discrimination Commissioner's national community consultation: *Gender Equality: What Matters to Australian Women and Men – The Listening Tour Community Report*;³⁰
- a report to the Victorian Attorney-General on a review of the Victorian *Equal Opportunity Act 1995: An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*;³¹
- the HREOC report regarding balancing paid work with family and carer responsibilities: *It's About Time: Women, men, work and family*;³² and
- the 2006 report of the UN Committee on the reports Australia submits under article 18 of CEDAW concerning measures adopted to give effect to the convention.³³

Key provisions in the Act

2.23 This section provides a brief description of some of the key provisions of the Act.³⁴

2.24 Section 3 sets out the objects of the Act which are to:

- (a) give effect to certain provisions of CEDAW;

29 For further details see <http://www.aph.gov.au/house/committee/ewr/payequity/index.htm> (accessed 2 October 2008).

30 HREOC, *Gender Equality: What Matters to Australian Women and Men. The Listening Tour Community Report*, Sydney, July 2008 at: http://www.humanrights.gov.au/sex_discrimination/listeningtour/ListeningTourCommunityReport.pdf (accessed 29 August 2008).

31 Equal Opportunity Act Review Project Team, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, Department of Justice (Vic), Melbourne, June 2008 at: <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebe62e407b4f289/Final%20Version%20-%20Final%20Report.pdf> (accessed 1 September 2008).

32 HREOC, *It's About Time: Women, men, work and family*, Sydney, March 2007 at: http://www.hreoc.gov.au/sex_discrimination/its_about_time/index.html (accessed 29 August 2008).

33 United Nations, *Report of the Committee on the Elimination of Discrimination against Women*, United Nations, New York, 2006 at: <http://www.un.org/womenwatch/daw/cedaw/34sess.htm#documents> (accessed 29 August 2008) pp 40-46.

34 For a comprehensive overview of the Act see chapter 4 of HREOC, *Federal Discrimination Law*, at <http://www.hreoc.gov.au/legal/FDL/index.html> (accessed 30 September 2008).

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- (b) eliminate, so far as is possible, discrimination:
- (i) on the ground of sex, marital status, pregnancy or potential pregnancy in certain areas of public life;
 - (ii) involving dismissal of employees on the ground of family responsibilities; and
 - (iii) involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- (c) promote recognition and acceptance within the community of the principle of the equality of men and women.

2.25 The definitions and interpretative provisions are set out in sections 4 to 8 of the Act. There is not a single definition of ‘discrimination’, rather separate provisions set out what constitutes discrimination on the grounds of:

- sex (section 5);
- marital status (section 6);
- pregnancy or potential pregnancy (section 7); and
- family responsibilities (section 7A).

2.26 Sections 5 to 7 include both direct and indirect discrimination but section 7A includes only direct discrimination.

2.27 Under subsection 5(1) of the Act, direct sex discrimination occurs where a person is treated less favourably, in circumstances that are not materially different, to how someone of the opposite sex would be treated. The less favourable treatment must be ‘by reason of’:

- the person’s sex;
- a characteristic that appertains generally to persons of that sex (such as breast feeding in the case of women); or
- a characteristic generally imputed to persons of that sex.

2.28 This definition of direct discrimination is mirrored in the following sections with respect to the other grounds of discrimination, namely: marital status in subsection 6(1), pregnancy and potential pregnancy in subsection 7(1), and family responsibilities in section 7A.

2.29 Under subsection 5(2) of the Act, indirect sex discrimination occurs where a condition, requirement or practice is imposed (or proposed) that has, or is likely to have, the effect of disadvantaging people of one sex.³⁵ Once again, this definition is mirrored in relation to marital status in subsection 6(2) and with respect to pregnancy

35 An example would be the imposition of a minimum height requirement for a job which, because women are on average shorter than men, is likely to disadvantage women.

and potential pregnancy in subsection 7(2). However, section 7B provides that a condition, requirement or practice will not amount to indirect discrimination if it is reasonable in the circumstances.

2.30 Section 7D ensures that special measures, which are taken for the purpose of achieving substantive gender equality, do not fall within the definitions of discrimination set out in sections 5 to 7.

2.31 Section 9 sets out the circumstances in which the Act applies.³⁶ In particular, subsections 9(4) to 9(20) set out the circumstances in which most of the provisions of the Act prohibiting discrimination have effect. These subsections draw on various heads of constitutional power to support the prohibitions. For example, subsection 9(10) relies on the external affairs power under section 51(xxix) of the Constitution, while subsection 9(11) rests upon the corporations power in section 51(xx) of the Constitution.³⁷

2.32 The Act does not contain a general prohibition on sex discrimination. Instead it prohibits discrimination in particular areas of public life, specifically, in relation to:

- work (sections 14 to 20).
- education (section 21);
- the provision of goods, services, facilities and accommodation (sections 22 and 23);
- dealings with land (section 24);
- clubs (section 25); and
- the administration of Commonwealth laws and programs (section 26).

2.33 Discrimination on the grounds of family responsibilities is only prohibited in relation to an employer directly discriminating against an employee on this ground by dismissing the employee (subsection 14(3A)).

2.34 Part II Division 3 of the Act deals with sexual harassment. Section 28A defines sexual harassment as:

- an unwelcome sexual advance or request for sexual favours; or
- other unwelcome conduct of a sexual nature.

36 HREOC, *Federal Discrimination Law*, p. 3.

37 Some provisions prohibiting discrimination are clearly within constitutional power in their own right, such as section 26 which prohibits discrimination in connection with the administration of Commonwealth laws and programs. These provisions are not limited to operation in the circumstances prescribed by subsections 9(4) to 9(20). The definitions of prescribed provisions in subsection 9(1) exclude the provisions which operate in this more expansive fashion. See also Attorney-General's Department, *Answers to question on notice*, 22 October 2008, p. 2.

2.35 In addition, the conduct must occur in circumstances where a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated.

2.36 Once again, the Act only prohibits sexual harassment in particular spheres of public life as follows:

- work (sections 28B to 28E);
- educational institutions (section 28F);
- the provision of goods, services, facilities and accommodation (section 28G and 28H));
- dealings with land (section 28J);
- clubs (section 28K); and
- the administration of Commonwealth laws and programs (section 28L).

2.37 The Act provides for a number of permanent exemptions: that is circumstances in which otherwise discriminatory behaviour is not unlawful. These are set out in sections 30 to 43 and include exemptions relating to:

- religious bodies (section 37);
- educational institutions established for religious purposes (section 38);
- voluntary bodies (section 39);
- sport (section 42); and
- combat duties (section 43).

2.38 HREOC is also empowered under section 44 to grant temporary exemptions from the operation of certain provisions of the Act.³⁸

2.39 In addition to the section 44 power, section 48 sets out the functions of HREOC under the Act including:

- undertaking research and education programs;
- publishing guidelines; and
- intervening in court proceedings which involve sex discrimination.

2.40 Sections 85 to 95 of the Act create offences. In particular, section 94 makes it an offence to victimise a person who asserts his or her rights under the Act (for example by making or proposing to make a complaint).

2.41 Finally, provisions dealing with the appointment of the Sex Discrimination Commissioner are set out in sections 96 to 103 of the Act.

38 HREOC, *Federal Discrimination Law*, p. 2.

Related legislation

2.42 The Act operates in conjunction with the *Human Rights and Equal Opportunity Act 1986* (the HREOC Act) which sets out other functions and powers of HREOC particularly in relation to complaints and inquiries.

2.43 With respect to complaints, section 46 of the HREOC Act sets out the process for lodging a complaint of unlawful discrimination. Under section 46F, the President of HREOC must inquire into the complaint and attempt to conciliate it. If the complaint cannot be conciliated, or is terminated by the President for some other reason, then section 46PO allows a complainant to make an application to the Federal Court or the Federal Magistrates Court in relation to the alleged discrimination.

2.44 These provisions in relation to complaints were introduced by the *Human Rights Legislation Amendment Act (No. 1) 1999*. Prior to the 1999 amendments, the Act provided for HREOC to make determinations in relation to the rights of the parties and for these determinations to be registered in the Federal Court. However, the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission* struck down equivalent enforcement provisions under the *Racial Discrimination Act 1975*. These provisions purported to give the HREOC determinations effect as Federal Court orders. The High Court held that this involved an exercise of federal judicial power by a body that is not a court contrary to section 71 of the Constitution.³⁹ As a result, the Act and other human rights legislation was amended to establish the existing scheme under which complainants have direct access to the federal courts if conciliation is unsuccessful.⁴⁰

2.45 In addition to the provisions dealing with complaints, the HREOC Act gives the Sex Discrimination Commissioner and other special-purposes commissioners the function of assisting the Federal Court and the Federal Magistrates Court as *amicus curiae*⁴¹ in matters which raise human rights issues.⁴²

2.46 Each state and territory also has anti-discrimination legislation which provides protection against sex discrimination.⁴³ Subsection 10(3) of the Act allows these laws to operate concurrently with the Act as far as possible. Subsection 10(4) of the Act

39 [1995] HCA 10.

40 HREOC, *Submission 69*, p. 273.

41 'Amicus curiae' literally means 'a friend of the court' and is one who calls the attention of the court to some point of law or fact which might otherwise be overlooked. See Roger Bird, *Osborn's Concise Law Dictionary*, London, Sweet and Maxwell, 1983, p. 25.

42 Section 46PV of the HREOC Act.

43 See section 7 of the *Discrimination Act 1991 (ACT)*; section 24 of the *Anti-Discrimination Act 1977 (NSW)*; section 19 of the *Anti-Discrimination Act 1992 (NT)*; section 7 of the *Anti-Discrimination Act 1991 (QLD)*; section 29 of the *Equal Opportunity Act 1984 (SA)*; section 16 of the *Anti-Discrimination Act 1998 (TAS)*; section 6 of the *Equal Opportunity Act 1995 (VIC)*; sections 8 to 10 of the *Equal Opportunity Act 1984 (WA)*.

prevents a person from making a complaint under the HREOC Act where he or she has already lodged a complaint under the relevant state or territory legislation.

2.47 While the Act prohibits sex discrimination, the *Equal Opportunity for Women in the Workplace Act 1999* (the EOWW Act) creates positive obligations for employers to develop and implement workplace programs to ensure women have equality of opportunity.⁴⁴ Employers are required to report annually on these programs.⁴⁵ These obligations apply to employers of 100 people or more, and higher education institutions that are employers.⁴⁶ The EOWW Act also establishes the Equal Opportunity for Women in the Workplace Agency (EOWA) which monitors compliance with these obligations.⁴⁷

44 Sections 6 and 8 of the EOWW Act.

45 Sections 13 and 13A of the EOWW Act.

46 Definition of 'relevant employer' in section 3 of the EOWW Act.

47 Sections 8A and 10 of the EOWW Act.