

# CHAPTER 9

## PREVENTING DISCRIMINATION

9.1 The terms of reference required the committee to examine the effectiveness of the Act in preventing discrimination including by educative means. The committee heard proposals to prevent discrimination through:

- imposing a positive duty to eliminate discrimination and promote equality;
- greater efforts in relation to human rights education; and
- ‘buying’ equality outcomes through government purchasing requirements.

### Positive duty to promote equality

9.2 Some submissions, including the Equal Opportunity Commission of Western Australia, recommended amending the Act to impose a positive duty on public organisations to eliminate discrimination and harassment, and promote equality. This would be similar to the scheme established in the United Kingdom by the *Equality Act 2006 (UK)*.<sup>1</sup> The commission argued that:

The existing rights-based approach to addressing discrimination, as formalised in the SDA and other Australian discrimination statutes, relies too heavily on the capacity and willingness of individuals to assert those rights and commence legal proceedings. As a start to shifting the burden off individuals and on to institutions, the SDA should be amended to incorporate a gender equality duty, to apply to all Australian public authorities when carrying out their functions.<sup>2</sup>

9.3 Similarly, Dr Belinda Smith told the committee that:

The US, Australia, Canada and the United Kingdom originally adopted a negative anti-discrimination law system—an individual, complaint based, human rights based mechanism. What we have seen in the leading countries—Canada and the UK—is a positive duty that supplements that. They still have an anti-discrimination law system, and it is supplemented by a positive duty.<sup>3</sup>

9.4 Women’s Health Victoria explained that the *Equality Act 2006 (UK)* placed a new statutory duty on public authorities. The duty requires authorities, when carrying out their functions, to have due regard to the need:

- to eliminate unlawful discrimination and harassment on the grounds of sex; and

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1 *Submission 57*, pp 2-5. See also Women’s Health Victoria, *Submission 14*; Australian Women’s Health Network, *Submission 30*, p. 9.

2 *Submission 57*, p. 3.

3 *Committee Hansard*, 9 September 2008, p. 61.

- to promote equality of opportunity between women and men.<sup>4</sup>

9.5 There are also more specific requirements for public authorities to develop and implement gender equality schemes. The schemes show how authorities will meet their gender equality duties and must be developed in consultation with employees, service users and other stakeholders. Compliance with these positive duties is monitored by the Commission for Equality and Human Rights which has the power to issue compliance notices. If necessary, the commission can seek enforcement of a compliance notice through the courts.<sup>5</sup>

9.6 Women's Health Victoria noted that:

The Duty has been introduced by the UK Government 'in recognition of the fact that women and men have different needs in relation to many public service areas, and that in both the workplace and as service users they can experience unfair and unequal outcomes'. With the focus of the duty on outcomes rather than process, organisations are duty bound to proactively promote gender equality.<sup>6</sup>

9.7 Dr Smith argued that, by contrast, existing laws in Australia impose only weak process obligations:

One way to think about it is that we have an existing system—which is our Equal Opportunity for Women in the Workplace Act. That is in effect a positive duty because it says to employers not only that they must not discriminate but also that they must do something. It is a very mild, soft process ...obligation. What must you do? In Australia you must audit your workplace, you must consult, you must develop a plan and you must report.

The UK has gone further than that. It says, drawing on regulatory theory, that you must promote equality—that is the general duty—and then it gives specific duties along the lines of the [EOWW Act]. You must develop a program and identify the particular problems in your workplace. You must audit and find those problems. Importantly—something that differs from our [EOWW Act] — you must publish that information in a way that is comparable so that stakeholders can actually use it to start lobbying for change and to make informed decisions.<sup>7</sup>

9.8 Dr Sara Charlesworth suggested that consideration should also be given to imposing positive duties to promote equality on private sector employers:

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4 *Submission 14*, p. 2. See also section 84 of the *Equality Act 2006 (UK)*; section 76A of the *Sex Discrimination Act 1975 (UK)*.

5 *Submission 14*, p. 3. See also HREOC, *Submission 69*, pp 246-247; section 85 of the *Equality Act 2006 (UK)* and sections 76B and 76D of the *Sex Discrimination Act 1975 (UK)*; Commission for Equality and Human Rights, *Overview of the Gender Equality Duty*, at <http://www.equalityhumanrights.com/en/publicationsandresources/Gender/Pages/Publicsector.aspx> (accessed 1 November 2008).

6 *Submission 14*, p. 2. See also Emily's List, *Submission 61*, p. 2.

7 *Committee Hansard*, 9 September 2008, p. 61.

It is my view that serious consideration should also be given to extending such equality duties to the private sector. This is to ensure that in the area of employment, all those who have redress under the individual complaint mechanism under the SDA are also able to benefit from positive action taken to address systemic discrimination and disadvantage.<sup>8</sup>

9.9 Dr Charlesworth considered that the existing duties of private sector employers under the EOWW Act are inadequate:

The Equal Opportunity for Women in the Workplace Agency under Equal Opportunity for Women in the Workplace Act... provides a mechanism to receive and assess reports on steps taken to advance women from private sector employers of more than 100 people. However the Agency is not resourced or empowered to conduct comprehensive audits. Moreover there is little remedial action available to the Agency when possible industry sector or occupation wide-systemic discrimination is identified...<sup>9</sup>

9.10 Dr Charlesworth also noted that for almost 20 years there has been a statutory requirement on private sector employers in Northern Ireland to monitor and report on their equality practices in relation to the employment of Catholics and that these duties have been effective in improving the employment profile of Catholics.<sup>10</sup>

9.11 Ms Catharine Bowtell expressed the ACTU's support for a positive duty to eliminate discrimination applicable to the public and private sectors including small businesses:

We support a positive duty—that is, a duty to eliminate discrimination or a duty to provide fair treatment. That is a general duty. How that is given effect becomes the issue around whether there is compulsory reporting, compulsory auditing, compulsory lodging of plans and those sorts of things. In our view there is no reason to exempt the private sector or to exempt business on the grounds of business size. But the obligation would clearly be higher the more sophisticated the organisation is.<sup>11</sup>

9.12 HREOC supported amending the Act to impose a positive duty to take reasonable steps to eliminate sex discrimination and promote gender equality.<sup>12</sup> HREOC noted that this would be consistent with the approach taken in relation to disability discrimination where there has been an increasing shift towards imposing positive obligations on employers, educators and service providers to take reasonable steps to improve access and equality for people with disabilities.<sup>13</sup>

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8 *Submission 39*, p. 10.

9 *Submission 39*, p. 10.

10 *Submission 39*, p. 11.

11 *Committee Hansard*, 9 September 2008, pp 73-74. See also *Submission 55*, pp 5-6; Shop, Distributive and Allied Employees' Association, *Submission 42*, p. 8.

12 *Submission 69*, pp 79-82. See also pp 143-145.

13 *Submission 69*, p. 80.

9.13 However, HREOC did not recommend the immediate introduction of a gender equality duty:

HREOC recognises that the move towards the adoption of a positive duty to eliminate discrimination and promote gender equality may require further consultation to identify the way in which a positive duty should be defined, and how it should be applied. For this reason, HREOC recommends that introduction of a general positive duty should be considered in Stage Two of reform.<sup>14</sup>

9.14 HREOC suggested other more specific options for reform including introducing a capacity for employers not bound by the EOWW Act to register voluntary 'gender equality action plans'. These would be similar to the disability action plans which are available under the *Disability Discrimination Act 1992*.<sup>15</sup> HREOC explained that:

A Gender Equality Action Plan would be a plan which sets out specific actions that are to be taken by the employer to promote gender equality in their organisation, with tangible objectives, ...strategies, roles and responsibilities, targets or other measures, and evaluative mechanisms.<sup>16</sup>

9.15 HREOC argued that such plans would allow organisations not covered by the EOWW Act to demonstrate their commitment to equality. Furthermore, preparation of a plan could be a settlement term where organisations are found to be in breach of the Act. In addition, HREOC suggested that the EOWW Act or the Act could be amended to provide for the independent auditing of the implementation and effectiveness of gender equality action plans by HREOC or EOWA. HREOC noted that such a function would be similar to the role performed by the Commission for Equality and Human Rights in the United Kingdom and would require additional resources.<sup>17</sup>

9.16 ACCI expressed some concerns about the proposals to impose a positive duty on the private sector to eliminate discrimination and promote equality, Mr Daniel Mammone of ACCI noted that:

The difficulty for employers is knowing exactly what their legal obligation is and how to comply with it. If there is a general amorphous obligation on employers, particularly vicarious liability, it would be very difficult for the employer to ensure that they comply with it.<sup>18</sup>

9.17 On the more specific proposals that businesses be required to develop gender equity policies or plans, Mr Scott Barklamb of ACCI also cautioned that, to be more than a piece of paper, policies have to be a living part of the culture of the workplace.

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14 *Submission 69*, p. 82.

15 *Submission 69*, pp 247-248. See also sections 59 to 65 of the *Disability Discrimination Act 1992*.

16 *Submission 69*, p. 247.

17 *Submission 69*, pp 248-249.

18 *Committee Hansard*, 10 September 2008, p. 15.

He suggested that a universal obligation to have a policy may simply lead to organisations producing pro forma policies or to ‘ticking the box’.<sup>19</sup> He went on to suggest:

[W]e would be very concerned that any compulsory plans and the like are simply additional costs to small businesses, additional regulatory burdens. ...They will simply become an exercise in compliance and will not contribute to further cultural change and awareness and diversity and the like, but will also be potentially resented because they cost money or will be quite narrowly complied with and put away. I think it is a far more powerful notion to see a more diverse workplace, to see a more diverse [range] of people in work and the benefits they provide in your company and in your peer companies and to hear personal stories of successes.<sup>20</sup>

## Education

9.18 Some submissions suggested that education is the most effective means of preventing discrimination. For example, the Muslim Women’s National Network of Australia noted that education may ultimately be a more effective tool in promoting gender equality than legislative change:

The law is a blunt instrument for changing behaviour. While changes in the law can have some educative value and can sometimes be used to bring about change, they may, in the short term at least, have adverse consequences for community harmony. Educational programs and incentives for organizations that include women in their consultative processes and adequately meet the needs of all their constituents may be more successful and less confrontational.<sup>21</sup>

9.19 HREOC and EOWA both play a role in educating employers and the general public about sex discrimination, sexual harassment and equal employment opportunity for women (EEO). HREOC has existing functions:

- to promote understanding and acceptance of, and compliance with, the Act; and
- to undertake educational programs for the purpose of eliminating sex discrimination and sexual harassment, and promoting gender equality.<sup>22</sup>

9.20 HREOC advised that its statutory functions in relation to education and public awareness are adequately set out in the Act and the HREOC Act but that HREOC is

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19 *Committee Hansard*, 10 September 2008, pp 16 and 17.

20 *Committee Hansard*, 10 September 2008, p. 20. See also pp 16 and 17.

21 *Submission 65*, p. 3.

22 Paragraphs 48(1)(d) and (e) of the Act. See also paragraphs 11(1)(g) and (h) of the HREOC Act.

constrained in its ability to carry out activities in these areas due to limited resources and competing priorities.<sup>23</sup>

9.21 EOWA also has statutory functions:

- to undertake educational programs for the purpose of promoting equal opportunity for women in the workplace; and
- to promote public understanding and acceptance of equal opportunity for women in the workplace.<sup>24</sup>

9.22 EOWA advised that its activities in carrying out these functions include producing educational resources such as its pay equity and bullying and harassment prevention tools. In addition:

EOWA provides expertise to employers on EEO matters and provides workshops and tools to assist organisations to address these issues in their workplaces including online training and educational sessions...

In addition, EOWA conducts workshops and other educational sessions to assist clients in developing EEO workplace programs and to educate employers on the business benefits of removing barriers to women's participation in the workforce. In 2007-08, a total of 23 workshops were conducted across Australia, attracting over 200 attendees.<sup>25</sup>

### ***Education in schools***

9.23 The committee received evidence which suggested that more needs to be done in relation to educating the public about their rights and responsibilities under the Act. Some of this evidence was focused on the particular importance of education in schools. The Castan Centre for Human Rights Law suggested that human rights education about sex discrimination, particularly for primary and secondary students, is vital to eradicating sex discrimination from Australian society yet there is currently a widespread absence of human rights education in the curriculum taught at all levels of Australian schools.<sup>26</sup> The Castan Centre argued that:

Human rights education is fundamentally important to preventing sex discrimination and promoting gender equality in Australian society. Formal, structured education concerning human rights generally, and sex discrimination more particularly, is needed at both primary and secondary levels in order to create a culture of respect for human rights and freedoms from a young age. It is only through education that the aims of the SDA can be achieved, and sex discrimination eliminated.<sup>27</sup>

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23 *Submission 69*, pp 202 and 220.

24 Paragraphs 10(1)(e) and (f) of the EOWW Act.

25 *Submission 79*, p. 8.

26 *Submission 51*, pp 1-3. See also NACLC *Submission 52*, pp 30-31.

27 *Submission 51*, p. 8.

9.24 The Castan Centre advocated amending the Act to mandate the study of human rights, including sex discrimination, by all Australian school students.<sup>28</sup>

9.25 The Australian Education Union proposed that HREOC be given an increased 'educative role' supported by increased resources.<sup>29</sup> The union acknowledged HREOC's existing educational work but suggested that more could be done:

The Human Rights and Equal Opportunity Commission conducts training and produces education resources to help teachers introduce human rights concepts to students and build an awareness of the law and avenues for discrimination redress. However, this role can always be expanded and better supported by Government by way of funding.

Schools are being asked to respond to more and more social problems which are difficult for teachers to manage with limited time. This is not to say human rights is neglected in the curriculum, but that organisational support and communication is required to get the best result in terms of student engagement.<sup>30</sup>

### *Education in workplaces*

9.26 Other organisations pointed to a need for educational programs beyond schools, particularly in workplaces. For example, Australian Women Lawyers, submitted that:

[A]ttempts at reform must be multifaceted and target legislative change, social policy change, cultural change in the workplace and attitudinal change, in combination. The cultural and attitudinal barriers to women and men achieving equality in the workplace and the community cannot be addressed by legislative reform to the SDA alone.

Funding, education and co-ordination of agencies and services are the key to changing the attitudes which serve as barriers to men and women taking up flexible work options, and achieving equal opportunity in the workplace and community.<sup>31</sup>

9.27 More specifically, Australian Women Lawyers recommended that the federal government provides subsidies to employers who provide employees with education and training targeted at addressing these attitudinal barriers.<sup>32</sup>

9.28 Mr Ian Scott of Job Watch suggested that many complaints under the Act are the result of employers simply being unaware of their obligations under the Act:

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28 *Submission 51*, pp 7-9.

29 *Submission 17*, p. 8. See also Mr Angelo Gavrielatos, Australian Education Union, *Committee Hansard*, 10 September 2008, p. 61.

30 *Submission 17*, p. 8. See also Ms Catherine Davis, Australian Education Union, *Committee Hansard*, 10 September 2008, p. 64.

31 *Submission 29*, p. 15.

32 *Submission 29*, p. 15.

[A] lot of our callers work for small to medium enterprises. ...[A] lot of these smaller employers just do not know what their obligations are. They are strapped for cash occasionally and cannot get legal advice or a lawyer to help them out with policies and procedures. ...I think that much of the time the employer just does not know what their obligations are...<sup>33</sup>

9.29 Similarly Legal Aid Queensland suggested that HREOC providing additional training or materials to employers could help to reduce complaints:

One of the biggest problems experienced in our legal practice is the lack of knowledge by employers both big and small about sexual discrimination and sexual harassment and how to deal [with] complaints. The existence of the Act has not assisted in raising that knowledge of employers, particularly in the private sector, until they are forced to deal with a complaint. The Commonwealth Government publications on the Act are an excellent resource. The Commonwealth Government and [HREOC] are positioned well to publish and distribute more resources in the future. There could also be a role in providing more training for employers as it is often the way that the matter is handled internally that prompts the complaint.<sup>34</sup>

9.30 From an employer's perspective, VACC suggested that the focus should be on early education and awareness instead of sanctions and complaints resolution:

VACC members believe that Federal sex discrimination legislation focuses on sanctions and complaints resolution. While VACC members seek to comply with their obligations under the Act, the key focus should be on early education and awareness - raised by the Sex Discrimination Commissioner.

Employers in the industry also believe that the federal sex discrimination legislation imposes a disproportionate onus on employers in terms of educating employees about equal opportunity and discrimination.

In our view any reform to the Act should focus on education. Rather than rely on employers to change the culture of individuals, in most cases adults, the responsibility of education in the area of equal opportunity should be collaboratively borne by HREOC, employers and the education system.<sup>35</sup>

9.31 Mr Barklamb of ACCI suggested education was particularly important for small and medium size businesses:

The legislation has done quite a deal of work concurrently with generational change, cultural change in management. It is a time to further promote, encourage, educate and start to think about distilling down quite important and major work in big businesses on diversity, on cultural change

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33 *Committee Hansard*, 10 September 2008, pp 39-40.

34 *Submission 26*, p. 2. See also Diversity Council Australia Inc, *Submission 47*, p. 6; National Legal Aid, *Submission 76*, p. 2..

35 *Submission 32*, pp 8-9. See also ACCI, *Submission 25*, pp 17 and 24.



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and the like, and [think] about how to spread those lessons to the small and medium sized enterprises.<sup>36</sup>

9.32 The Equal Employment Opportunity Network of Australia noted that on paper many organisations offer a wide variety of flexible work practices but implementation of these is less effective than it could be. The network identified building managerial capability as the key to bridging this gap between policy and practice and suggested HREOC could provide guidance to employers about implementing flexible work practices.<sup>37</sup>

9.33 Finally, Carers Australia submitted that there is a particular need for better understanding in workplaces about the role of carers other than parents of children.<sup>38</sup> Carers Australia recommended that the Australian Government fund a national campaign to promote to employers the benefits associated with providing carer-friendly workplaces as well as assisting employers with education and resources to support carers in the workforce.<sup>39</sup>

### **Government purchasing requirements**

9.34 Dr Charlesworth suggested that another means of preventing discrimination is to make greater use of government purchasing power to “buy gender equality outcomes”. Specifically, she recommended strengthening the existing requirements which exclude organisations from Australian Government contracts if they are non-compliant with the EOWW Act.<sup>40</sup> Dr Charlesworth argued that:

One way of ensuring that employers in the private sector adhere to minimum decent employment and anti-discrimination standards set by HREOC and move to address systemic discrimination is to ensure that government contracts are only awarded to those organisations that can demonstrate that they meet those standards. The use of government purchasing policy has been particularly effective in Victoria where law firms tendering to carry out services for the government are obliged to provide evidence of a minimum amount of pro bono work undertaken and provide details on the quantity and value of the legal work given to women barristers. As a consequence, the rate of pro bono work has risen significantly ...as has the rate at which women barristers are briefed.<sup>41</sup>

9.35 In a similar vein, Associate Professor Beth Gaze argued that the government should:

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36 *Committee Hansard*, 10 September 2008, p. 18.

37 *Submission 41*, p. 5.

38 *Submission 33*, pp 7-8.

39 *Submission 33*, p. 9. See also Ms Ashton, Carers Australia, *Committee Hansard*, 11 September 2008, p. 24.

40 *Submission 39*, p. 12.

41 *Submission 39*, p. 12. See also Collaborative submission, *Submission 60*, p. 23.

...make much more extensive use of the tool of contract compliance, requiring those with whom it contracts for goods and services to demonstrate commitments to equity in their own suppliers and workforces. Consulting firms seeking government business, for example, could be required to provide workforce analyses demonstrating fair employment practices for women and pay equity audits demonstrating that they take their responsibilities as equal opportunity employers seriously.<sup>42</sup>

9.36 Similarly, HREOC recommended that the Australian Government should consider how it can best use its purchasing power to promote gender equality and address systemic discrimination.<sup>43</sup>

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42 *Submission 50*, p. 3.

43 *Submission 69*, p. 250.