

CHAPTER 10

POWERS AND RESOURCES

10.1 Chapter 5 considered evidence critical of the failure of the Act to address systemic discrimination. Many witnesses and submissions advocated increasing the powers of HREOC and the Sex Discrimination Commissioner to enhance their ability to tackle the systemic elements of sex discrimination. The inquiry received several specific proposals for enhanced powers in relation to:

- initiating inquiries into systemic discrimination;
- enforcement of the Act;
- intervening in court cases which concern sex discrimination or sexual harassment;
- issuing binding codes of conduct; and
- monitoring and reporting on progress towards gender equality.

10.2 Other evidence commented on the interaction between obligations under the Act and the EOWW Act as well coordination of the activities of HREOC and EOWA. There was also evidence that HREOC requires additional resources to effectively perform its functions.

Powers of HREOC and the Sex Discrimination Commissioner

10.3 Some submissions argued that the Act does not currently provide adequate mechanisms for enforcement of the obligations it creates. In general terms, the ACTU suggested that:

The current system provides a low guidance and self-regulation level and a high judicial punitive level, but lacks the middle tier of ‘enforced self-regulation’.¹

10.4 The ACTU contrasted this with the approach taken to enforcement of occupational health and safety law, and obligations under the *Trade Practices Act 1974* and suggested the Act requires more regulatory tools to effectively eliminate discrimination.² Ms Bowtell submitted that the model used to ensure compliance with occupational health and safety laws could be applied to anti-discrimination laws:

If we look at what we do, for example, around health and safety, we say we want people to create safe workplaces and we put in place workplace representatives, health and safety committees, and we have an investigatory agency that investigates breaches or potential breaches and does spot

1 *Submission 55*, p. 11.

2 *Submission 55*, pp 12 and 17. See also Ms Bowtell, ACTU, *Committee Hansard*, 9 September 2008, p. 71.

inspections. Where breaches are found, a notice to improve is given. If that is not complied with, prosecution ensues.

In anti-discrimination, we say ‘Here is a change we want you to make in your behaviour. We want you to provide fair workplaces and move towards equality. If anyone complains, here is the avenue you can use.’ They are very different models of trying to bring about changed behaviour. We said, ‘Why don’t we drop some of the tools that we have used in occupational health and safety into this area?’³

10.5 In analysing the regulatory approach taken by the Act, Dr Belinda Smith has described the reliance on individuals pursuing complaints to enforce the obligations under the Act as a “fundamental regulatory weakness”. In addition, she has argued that this approach means that the Act is less likely to address systemic discrimination:

[B]y limiting enforcement to the victim, HREOC is denied an enforcement role and the scheme thereby lacks one of the key elements required for responsive regulation. Without any enforcement powers, the agency is limited in doing what it might be in the best position to do – identify systemic discrimination and, through the strategic use of investigation and regulatory sanctions, compel the worst offenders to change and help ratchet up the standards of the mild offenders or reluctant compliers.⁴

10.6 Ms Eastman of the Law Council also argued that there is now a need to focus more on systemic discrimination rather than the individual experiences of victims of discrimination:

The powers for the Sex Discrimination Commissioner, we think, need to focus on her ability to get into workplaces, get into industry and start to work with those bodies to look at addressing systemic practices, be they pay equity issues, be they the way in which workplaces are organised, be they the adoption of particular policies that deal with anti-discrimination and sexual harassment. We saw that there was a need for a very practical focus on what the Sex Discrimination Commissioner could do and we felt that ...the powers that are presently in the Act ...were perhaps not sufficient to allow the commissioner to engage in those types of tasks.⁵

10.7 These ideas are not new. On the twentieth anniversary of the Act, Ronnit Redman suggested:

If anti-discrimination litigation is to achieve more than the provision of individual redress for women who have suffered discrimination, then the public interest in the enforcement of equality principles must be recognised.

The Commissioner needs to be able to identify issues of inequality and locate patterns of discrimination in order to effect structural change. She

3 *Committee Hansard*, 9 September 2008, pp 71-72.

4 Dr Belinda Smith, ‘A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?’, 2006, p. 112.

5 *Committee Hansard*, 10 September 2008, p. 50.

needs to be able to take action on behalf of classes of complainants, complainants in work situations where discriminatory patterns are entrenched, and complainants whose cases raise critically important issues for the way in which discrimination against women is articulated. To this end, the Commissioner needs greater powers which will allow her to adopt a more central position than the relatively peripheral amicus role.⁶

10.8 Several submissions provided specific proposals for increasing the powers of the Sex Discrimination Commissioner or HREOC to enforce the Act.

Inquiry powers

10.9 Under paragraph 11(1)(f) of the HREOC Act, HREOC has the power to inquire “into any act or practice that may be inconsistent with or contrary to any human right”. However this power is limited by the definitions of ‘act’ and ‘practice’ in subsection 3(1) of the HREOC Act. HREOC explained:

The inquiry function under s 11(1)(f) of the HREOC Act is ...limited to Commonwealth laws or actions done by the Commonwealth or its Territories, and does not extend to employers, or other bodies which may be acting in breach of the SDA or failing to take reasonable steps to progress substantive gender equality.⁷

10.10 HREOC also has a function under subsection 31(b) of the HREOC Act to conduct inquiries into discrimination in employment, including systemic discrimination. This provision permits inquiries into acts or practices within a state or under state laws.⁸ However, HREOC does not have formal inquiry powers, such as the power to require the giving of information or the production of documents, when it conducts such inquiries.⁹

10.11 Mr John von Doussa, the former President of HREOC, told the committee:

There is not a general power to conduct inquiries independent of a complaint into many of the broad public issues that are covered by the Sex Discrimination Act. For example, we could not conduct an inquiry into the practice of leasing agents for rental properties. It is simply not an act or practice of the Commonwealth.¹⁰

10.12 HREOC recommended that the Act and the HREOC Act should be amended to provide for a broad formal inquiry function, similar to paragraph 11(1)(f) of the

6 Ronnit Redman, ‘Litigating for Gender Equality: The Amicus Role of the Sex Discrimination Commissioner’, *UNSW Law Journal*, vol 27(3), 2004, pp 849-857 at p. 855.

7 *Submission 69*, p. 222. See also definitions of ‘act’, ‘practice’, ‘enactment’ and ‘Territory’ in subsection 3(1) of the HREOC Act.

8 Subsection 30(1) of the HREOC Act; HREOC, *Submission 69*, p. 222.

9 Subsection 33(c) of the HREOC Act; HREOC, *Submission 69*, pp 222-223.

10 *Committee Hansard*, 9 September 2008, p. 23.

HREOC Act, but which applies generally to issues relevant to eliminating sex discrimination and promoting gender equality.¹¹

10.13 Some organisations suggested that the Sex Discrimination Commissioner should be empowered to conduct inquiries. For example, the Law Council argued that an appropriate approach to addressing systemic discrimination would include empowering the Sex Discrimination Commissioner to investigate systemic or pervasive discriminatory practices at her own initiative and without needing to rely upon a formal individual complaint.¹² The Law Council suggested that the commissioner should be able to report to the Attorney-General in relation to any organisation that fails to implement recommendations made by the commissioner pursuant to an investigation of that organisation.¹³

10.14 Similarly, Professor Margaret Thornton submitted that, if the intractable areas of systemic discrimination are to be addressed, the powers of the Sex Discrimination Commissioner need to be strengthened, particularly through a power to initiate non-complaint-based inquiries:

In order to move beyond the limitations of the individualised complaint that lie close to the surface, it is necessary to empower the [Sex Discrimination Commissioner] to initiate inquiries into systemic, classwide or structural discrimination. I stress that the [Sex Discrimination Commissioner] be adequately funded in order to conduct inquiries; such a task cannot be undertaken on a shoestring. If the cost of such inquiries is to come from a one-line budget, priority will inevitably be given to routine complaint handling.¹⁴

10.15 Ms Shirley Southgate of NACLAC argued that one of the benefits of broadening the existing inquiry powers would be to shift the burden off individual complainants. She suggested that HREOC would be able to monitor matters that come before it and:

...if there are trends that highlight particular problems, the commission, and in particular the Sex Discrimination Commissioner, has the capacity to say, 'I can see that this is a difficulty.'

If they have the power to initiate their own inquiry and that inquiry potentially leads through to the process of litigation, if necessary, they have the capacity to say, 'This is a systemic problem that we have seen.' It might involve an industry [or] maybe one respondent. The commissioner then has

11 HREOC, *Submission 69*, p. 224.

12 Ms Penny Thew, Law Council, *Committee Hansard*, 10 September 2008, p. 49; *Submission 59*, p. 12. See also Mr Angelo Gavrielatos, Australian Education Union, *Committee Hansard*, 10 September 2008, p. 61; Australian Education Union, *Submission 17*, pp 4-5.

13 *Submission 59*, p. 12. See also ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.5.

14 *Submission 22*, pp 3-4. See also, Women's Electoral Lobby, *Submission 8*, p. 7-8.

the capacity to look at that as a system difficulty rather than to allow individual complainants to bear the burden time and again.¹⁵

Enforcement powers

10.16 As discussed in chapter 6, enforcement of the Act currently relies upon individuals pursuing complaints. HREOC noted that:

Under the SDA and the HREOC Act, neither HREOC nor the Commissioner currently has power to take compliance action for an alleged breach of the SDA. Enforcement of the SDA is dependent upon an individual or their representative lodging a complaint.¹⁶

10.17 HREOC submitted that:

[T]he use of the SDA as an effective tool for eliminating discrimination would be strengthened by providing HREOC and the Commissioner with the power to commence an investigation regarding an alleged breach of the SDA, without requiring an individual to lodge a complaint.¹⁷

10.18 Dr Belinda Smith argued that the absence of enforcement powers for HREOC distinguishes the Act both from the enforcement schemes under analogous Australian legislation and from anti-discrimination schemes in comparable overseas jurisdictions:

The power to enforce compliance with the SDA's prohibition on discrimination is limited to victims, who are granted a right to sue for redress. The Human Rights and Equal Opportunity Commission ...has no power to initiate investigations of non-compliance, no explicit power to support complainants in breach proceedings, and no power to enforce judgements or settlement agreements that have been made. The absence of an agency with such enforcement powers distinguishes the anti-discrimination regulatory scheme from both other Australian workplace regulation – e.g. award compliance and occupational health and safety (OHS) – and from US and UK anti-discrimination schemes, where agencies have and use such powers strategically (although limited by resources).¹⁸

10.19 Dr Smith recommended the Act be amended to provide for enforcement of breaches of the Act by HREOC or an independent body.¹⁹

10.20 Similarly, Legal Aid Queensland submitted that:

Remedies for discrimination should not be solely on the basis of individual complaint. Regulatory regimes in other areas, such as competition policy or

15 *Committee Hansard*, 9 September 2008, p. 31.

16 *Submission 69*, p. 225.

17 *Submission 69*, p. 225.

18 Dr Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?', 2006, p. 111. See also ACTU, *Submission 55*, p. 10.

19 *Submission 12*, pp 8-9. See also National Foundation for Australian Women, *Submission 15*, pp 6-7.

financial regulation, include a role for a regulator to bring prosecutions against those who commit serious breaches and where prosecution will have a broader public benefit.²⁰

10.21 The ACTU also supported a public role in prosecution and enforcement of the Act. Ms Bowtell of the ACTU told the committee:

[I]t is our submission that it is time to reconceptualise how we deal with discrimination law in Australia and to move away from the individual complaints based model to a model which ...us[es] a broader range of regulatory tools to ensure that the behavioural change that we are seeking in the workplace occurs.²¹

10.22 More specifically, the ACTU argued that the regulatory tools available under the Act should be similar to those available under occupational health and safety laws and consumer protection laws:

The use of investigative powers, issuing of improvement notices, and the enforcement of the positive duty to provide a safe working environment under Occupational Health and Safety law contrast with the lack of similar regulatory tools under the SDA.

Similarly, the powers vested in the Australian Competition, and Consumer Commission ...to enforce compliance with the Trade Practices Act 1974 ...include information gathering..., assisting organisations to resolve low level or accidental contraventions, formal public settlements and enforceable undertakings, initiating litigation proceedings against organisations or individuals, intervening in private court proceedings where appropriate and monitoring and enforcing court orders.

There is no justification that sex discrimination be treated with less gravitas and afforded fewer powers of prevention and enforcement than occupational health and safety law or consumer protection law.²²

10.23 The Human Rights Law Centre also suggested that HREOC should have the power to investigate breaches of the Act including the power to access and inspect premises.²³ The centre argued that:

HREOC officers should be empowered with broader powers of investigation, such as to enter premises and access information. While the HREOC Act enables HREOC to require a person to produce documents and information, there is no power of entry, such as that which is contained in the various workplace health and safety regimes of the States and Territories.

Such powers are available in at least Canada, UK, Ireland and other European countries... Further, the availability and use of such powers in

20 *Submission 26*, p. 5

21 *Committee Hansard*, 9 September 2008, p. 71.

22 *Submission 55*, p. 12.

23 *Submission 20*, pp 6, 22 and 60.

other areas of law in Australia, such as occupational health and safety, has at least partly contributed to a far greater 'compliance culture' in those areas.²⁴

10.24 A slightly different proposal from PILCH is that the Act be amended to empower an enforcement agency to investigate individual complaints of sexual harassment and to make findings and recommendations in relation to such matters.²⁵ PILCH also recommended that consideration be given to removing the conciliation role of HREOC in favour of this investigative or arbitral role. PILCH noted that court sanctioned mediation could still occur where a complaint was pursued in the Federal Magistrates Court or the Federal Court and that this would avoid two-tiered mediation.²⁶

10.25 Of course, proposals for HREOC to make binding determinations about individual complaints would have to be considered in the context of the constitutional limitations which prevent bodies other than courts from exercising federal judicial power.²⁷

10.26 HREOC pointed out that human rights commissions in New Zealand, Canada and the United Kingdom all have powers to initiate investigations into unlawful discrimination and, where necessary, seek enforcement of human rights obligations by a court or tribunal. HREOC supported an expansion of the Sex Discrimination Commissioner's powers under the Act to include initiation of investigations into allegations of widespread breaches of the Act or systemic discrimination.²⁸ Specifically, HREOC proposed that:

[T]he Commissioner have the power to commence an investigation. The Commissioner may identify a potential breach of the SDA either through an inquiry, or upon notification from third parties. The Commissioner would be given to power to:

- investigate the allegations
- carry out negotiations
- enter into settlement arrangements
- agree enforceable undertakings
- issue compliance notices.²⁹

10.27 HREOC further recommended that:

24 *Submission 20*, p. 60.

25 *Submission 31*, pp 4-5, 29-31.

26 *Submission 31*, pp 5, 22 and 32. NACLC, *Submission 52*, makes a similar proposal at pp 24-25.

27 See paragraph 2.43.

28 *Submission 69*, pp 225-229.

29 *Submission 69*, p. 226. See also Mr John von Doussa, *Committee Hansard*, 9 September 2008, p. 23.

If a complaint cannot be satisfactorily resolved through the use of these new powers of the Commissioner, HREOC proposes that the Commissioner could refer the matter to HREOC as a whole. HREOC would then decide whether to commence legal action in the Federal Court or Federal Magistrates Court, and have the power to do so.³⁰

10.28 However, Mr Daniel Mammone of ACCI suggested that increasing HREOC's coercive powers was not the most effective way of bringing about change:

[W]e noticed that our colleagues at the ACTU and others have raised this notion that the HREOC or a body should be 'beefed up', for want of a better word, with [coercive] powers. The ACTU basically said that HREOC should have powers akin to the ACCC, with coercive information-gathering powers and so on...

We do not think that would assist small- to medium-size businesses in having that cultural change or complying with obligations in this area, particularly if the obligations are changed to some sort of amorphous positive duty. ...If a body walks around with a big stick behind its back with those powers, we believe that is not a positive step forward.³¹

10.29 Mr Scott Barklamb of ACCI suggested that, rather than strengthening the enforcement powers of HREOC or the compliance obligations of employers, what is required is greater powers for employers to address harassment and discrimination:

[E]merging generations of management are quite familiar with, firstly, their own life experience; secondly, the moral imperatives towards diversity and opportunity and fair treatment; and, thirdly, the legal risks of not properly managing this area. Faced with harassment, the idea of closing ranks around people is probably a lot of the time a thing of the past. People really want to take action when the alarm bells are rung on sexual harassment or discrimination. That is the sort of demand we hear about quite regularly. It is just about empowering employers properly to be able to do so.³²

10.30 Mr Barklamb also rejected the comparison between the enforcement mechanisms available under occupational health and safety laws and anti-discrimination laws:

Surely sound, equitable treatment in workplaces has to be able to be navigated with commonsense, decent treatment and the sorts of values that are exhibited on the street? You should only be getting into trouble with these laws with poor behaviours, attitudes, deficiencies or the like. There is a complete contrast, in our view, to safety. There are inherently risky activities in manufacturing, transport—any number of things—that need a

30 *Submission 69*, p. 226.

31 *Committee Hansard*, 10 September 2008, p. 19.

32 *Committee Hansard*, 10 September 2008, p. 22.

positive plan to be undertaken safely. Work inherently does not need a positive plan to be undertaken in a non-discriminatory manner.³³

10.31 Finally, Associate Professor Beth Gaze cautioned that, while amending the Act to provide for systemic enforcement of obligations under the Act by a government body is desirable:

[A] more lengthy review of options would be needed to ensure that such measures are carefully chosen and designed to maximise impact.³⁴

Intervening in court cases and acting as amicus curiae

10.32 Under section 46PV of the HREOC Act, special-purpose commissioners, including the Sex Discrimination Commissioner, have the function of assisting the Federal Court and Federal Magistrates Court as amicus curiae in unlawful discrimination proceedings.³⁵ In addition, HREOC is empowered under paragraph 48(1)(gb) of the Act to intervene in “proceedings that involve issues of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment.”³⁶ Both of these powers are subject to the court concerned granting leave for HREOC or the Sex Discrimination Commissioner to appear.

10.33 Mr von Doussa recommended expansion of these powers to allow HREOC or the Commissioner to appear as of right:

[A]t the moment we have a power which enables us to apply to a court to appear as amicus curiae or to intervene, but it is dependent upon the court accepting us. The Victorian legislation gives a vested right to appear. We are suggesting that this should be upgraded so that we have a right to appear, or the commissioners have a right to appear as amicus curiae.³⁷

10.34 HREOC recommended expansion of these powers in two other respects:

- firstly, amending section 46PV of the HREOC Act to include a function for the special purpose commissioners to appear as amicus curiae in *appeals* from discrimination decisions made by the Federal Court and Federal Magistrates Court; and
- secondly, redrafting paragraph 48(1)(gb) of the Act to operate more broadly so that it explicitly encompasses claims relating to family responsibilities discrimination or victimisation.³⁸

33 *Committee Hansard*, 10 September 2008, p. 19.

34 *Submission 50*, p. 2.

35 *Submission 69*, pp 231 and 233.

36 *Submission 69*, p. 232. HREOC also has broad intervention powers under paragraph 11(1)(o) of the HREOC Act.

37 *Committee Hansard*, 9 September 2008, p. 24.

38 *Submission 69*, p. 235.

10.35 The Women's Electoral Lobby noted that the amicus curiae function under the HREOC Act is confined to intervention in the Federal Court and the Federal Magistrates Court and submitted that:

[T]he Sex Discrimination Commissioner should not be so constrained. She should be able to apply to make representations before State courts and tribunals.³⁹

10.36 Similarly, the ACTU submitted that Sex Discrimination Commissioner's existing amicus curiae powers:

...should be extended to include proceedings dealing with the setting of minimum wage rates and before State courts and tribunals.⁴⁰

Legally binding standards

10.37 Under paragraph 48(1)(ga) of the Act, HREOC currently has the power to prepare and publish guidelines regarding compliance with the Act. However these guidelines are not legally binding.⁴¹ HREOC explained that:

[G]uidelines under s 48(1)(ga) are not legally binding nor do they have any specific legal significance in complaints proceedings in determining whether a person or organization is in breach of the SDA. Neither the Commissioner nor HREOC has any existing power to enforce compliance with guidelines which have been published nor do employers or others who comply with guidelines have [any] explicit assurance that following a guideline will protect them from or assist them in responding to a complaint of unlawful discrimination.⁴²

10.38 In 1994, ALRC recommended in its *Equality Before the Law* report that the Attorney-General have a power to issue legally binding standards to further the objectives of the Act. ALRC recommended that the power should be equivalent to the power under section 31 of the *Disability Discrimination Act 1992*.⁴³ ALRC noted that:

Standard setting would be a useful way to promote the objectives of the SDA, encourage compliance with its provisions and to indicate best practices under the Act.⁴⁴

10.39 ALRC recommended the standards should be developed in consultation with the Sex Discrimination Commissioner and should be able to be disallowed or amended by either House of Parliament.⁴⁵

39 *Submission 8*, p. 7. See also Collaborative submission, *Submission 60*, p. 17.

40 *Submission 55*, p. 10.

41 *Submission 69*, p. 240.

42 *Submission 69*, p. 241.

43 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.4. See also Anti-Discrimination Commission Queensland *Submission 63*, p. 9.

44 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.45.

45 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.4.

10.40 Several submissions recommended amending the Act to provide for HREOC, rather than the Attorney-General, to issue legally binding standards or codes of conduct which set out in more detail what is required to comply with the Act. For example, Dr Smith recommended that HREOC have the power to develop statutory codes to provide compliance guidance to employers and other organisations:

The Human Rights and Equal Opportunity Commission should be empowered to develop statutory codes to provide compliance guidance, akin to those provided for in the UK. If employers and other organizations are expected to comply with anti-discrimination legislation, they should be provided with clearer guidance as to what constitutes discrimination and harassment, rather than having to rely only upon guidance of courts in judgments that are generally inaccessible other than to lawyers. HREOC has done an impressive job of providing educational materials, but it should be further resourced and empowered to provide evidentiary guidelines rather than merely information that has no legal authority.⁴⁶

10.41 PILCH made a similar suggestion that HREOC should have the power to make binding codes of conduct regarding the requirements of the Act:

One of the key means of promoting equality and eliminating sex discrimination is to educate decision makers and the general community to ensure a greater understanding of the nature and illegality of all forms of sex discrimination. Binding codes of conduct and guidelines prepared by the [Commission] with its extensive expertise in the area are, in our submission, another means of bringing an immediacy to the promotion of equality to the Australian Community.⁴⁷

10.42 Similarly, Ms Thew of the Law Council suggested that one of the key ways of addressing systemic discrimination would be to empower the Sex Discrimination Commissioner or HREOC to develop industry standards. She argued that these would overcome the limitations of the individual complaints mechanism and assist in eradicating specific types of discrimination across entire industries.⁴⁸

10.43 HREOC noted that there are some disadvantages in issuing binding standards including that it may freeze compliance at a minimum standard rather than encouraging best practice.⁴⁹ On the positive side, HREOC noted that:

The benefit of a legally-enforceable standard is that it would provide an additional mechanism for promoting substantive equality, through addressing systemic discrimination, such as the failure to have specific policies in place, or to follow minimum procedures to provide protection from unlawful discrimination under the SDA. A standard would also

46 *Submission 12*, pp 8-9. See also Australian Education Union, *Submission 17*, p. 5; Human Rights Law Centre, *Submission 20*, pp 6 and 23; Anti-Discrimination Commission (QLD) *Submission 63*, pp 9-10.

47 *Submission 31*, p. 34.

48 *Committee Hansard*, 10 September 2008, p. 52.

49 *Submission 69*, p. 244.

provide greater clarity for employers and other bodies about their obligations under the SDA. Compliance with a standard could also be of positive benefit to employers and others if it was to operate as either a defence to a complaint, or as evidence in favour of having complied with the SDA.⁵⁰

10.44 On balance, HREOC considered that such a power would be “a useful addition to the range of options available to eliminate discrimination and promote equality.”⁵¹ HREOC recommended that creating a power to issue legally binding standards should be considered as a longer term option for reform of the Act.⁵²

Monitoring and reporting

10.45 A large number of organisations and individuals advocated amending the Act to require the Sex Discrimination Commissioner to monitor and report to Parliament on progress towards gender equality.⁵³

10.46 Ms Caroline Lambert, the Executive Director of YWCA Australia, argued:

By having such a requirement to report, we would achieve a moment to sit down and take the pulse of equality in Australia and ask ourselves what measures we will use to assess whether or not we are achieving equality in our community. ...It would give a bit more structure to the process. It would also be a very useful function in terms of our quadrennial reporting to the UN Committee on the Elimination of Discrimination against Women, if they could see that the Australian parliament had assessed 10 factors towards equality.⁵⁴

10.47 Professor Marion Sawyer also supported a duty for the Sex Discrimination Commissioner to monitor and report on progress towards gender equality but noted the duty must be accompanied by additional resources:

We propose in our submission a new statutory duty for the Sex Discrimination Commissioner to monitor progress against key performance indicators and to report annually to parliament against those indicators. We note that this new statutory function must be accompanied by new resources and that resources not be stripped away from other essential functions, including complaint handling, education, inquiries and interventions.⁵⁵

50 *Submission 69*, p. 243.

51 *Submission 69*, p. 244.

52 *Submission 69*, p. 245.

53 Women’s Electoral Lobby, *Submission 8*, p. 9; Australian Baha’i Community, *Submission 16*, p. 3; National Foundation for Australian Women, *Submission 15*, pp 3 and 7; Australian Education Union, *Submission 17*, p. 4; Australian Women’s Health Network, *Submission 30*, p. 8; Dr Sara Charlesworth, *Submission 39*, p. 6; NACLC *Submission 52*, p. 16.

54 *Committee Hansard*, 11 September 2008, p. 63.

55 *Committee Hansard*, 11 September 2008, p. 36.

10.48 A related proposal from the National Foundation for Australian Women was that the government develop a national action plan for women and commit sufficient resources to allow development and collection of statistics that monitor progress against the plan.⁵⁶ Similarly, the Australian Education Union suggested there is a need for greater capacity to independently monitor and report against key indicators.⁵⁷

10.49 Mr von Doussa noted that HREOC supported the Sex Discrimination Commissioner being given a monitoring and reporting function but did not take a position on whether there should be a duty for the commissioner to report annually:

[W]e suggest that there be an independent monitoring and reporting function given that is similar to the social justice report. There should be a power to make an annual report. We have left it open whether you think there ought to be a duty to do it, as the Social Justice Commissioner has. We make the point that it is a complex issue. In Victoria, they did not require an annual report from the Equal Opportunity and Human Rights Commission on the ground that it would be too expensive. We acknowledge that it is a big exercise to do a major report every year ...but it would be a very beneficial exercise if it were done.⁵⁸

Interaction between HREOC and EOWA

10.50 Some submissions considered the interaction between the prohibitions on discrimination under the Act and the obligations in relation to equal opportunity in the workplace under the EOWW Act. The EOWW Act creates positive obligations for employers of 100 people or more, and higher education institutions, to develop and implement workplace programs to ensure women have equality of opportunity.⁵⁹ Employers are required to report annually on these programs.⁶⁰ The ACTU submitted that there is “a lack of cohesion” between the Act and the EOWW Act which has:

...resulted in a significant lack of coordination between preventative measures and sanctions for breaches of the Sex Discrimination Act. This has severely undermined any capacity for linking affirmative action measures as a means of addressing sex discrimination.⁶¹

10.51 Further Ms Bowtell of the ACTU noted that the existing enforcement mechanisms under the EOWW Act are deficient:

The sanction for failure to report is being named in parliament. But there is no auditing of the quality of the reports. There is also no auditing of the

56 *Submission 15*, pp 2-3 and 8

57 Mr Gavrielatos, *Committee Hansard*, 10 September 2008, p. 61; *Submission 17*, pp 3-4. See also Dr Sara Charlesworth, *Submission 39*, regarding the need for better data collection to monitor women’s disadvantage and progress towards gender equality at pp 5-6.

58 *Committee Hansard*, 9 September 2008, p. 24.

59 Sections 6 and 8 of the EOWW Act.

60 Sections 13 and 13A of the EOWW Act.

61 *Submission 55*, p. 10.

requirement to consult with stakeholders in the development of the report. Without the full armoury, reporting for reporting's sake is not something we would support.⁶²

10.52 Professor Thornton expressed a similar view:

Certainly, I think the [EOWW Act] could be strengthened. It has been described as being dentureless or toothless legislation at the moment. It is largely up to business what they do. It is little more than self-regulation that is mandated under that act. The agency does not have the resources or the power to follow up what is happening within workplaces.⁶³

10.53 Ms Lambert of YWCA Australia suggested that the linkage between the activities of EOWA and the Sex Discrimination Commissioner could be improved:

[T]here is a lot of opportunity to strengthen interactions between the agencies. EOWA have a vast resource of information that they gather from employers who voluntarily report. ...[B]ecause they have that information, they are able to see trends that are emerging. It would be very useful and would strengthen our machineries for the advancement of women if we could enable the director of the agency to bring to the attention of the Sex Discrimination Commissioner those trends that they see emerging. That would enable her to launch an inquiry into the systemic elements of discrimination that are being experienced by women in the workplace.⁶⁴

10.54 EOWA however did not support an expansion of its powers to include referring matters to the Sex Discrimination Commissioner for inquiry:

The approach underpinned by the EOWW Act is one of persuasion and education and not punitive action. Conferring such a power on the Director may cause significant negative response from reporting organisations and negatively impact on progress already achieved ...whilst also confusing the two organisations' roles and responsibilities.⁶⁵

10.55 The National Foundation for Australian Women advocated applying the obligations under the EOWW Act to enterprises which employ fewer than 100 staff on the basis that the majority of Australian women work for small and medium sized businesses.⁶⁶ While the Community and Public Sector Union suggested that the Sex Discrimination Commissioner should be given statutory power to monitor, audit and report to Parliament on gender equality in workplaces with over 50 employees.⁶⁷

62 *Committee Hansard*, 9 September 2008, p. 75.

63 *Committee Hansard*, 11 September 2008, p. 44.

64 *Committee Hansard*, 11 September 2008, p. 62. See also Collaborative submission, *Submission 60*, p. 18.

65 *Submission 79*, p. 13.

66 *Submission 15*, pp 5-7.

67 *Submission 24*, p. 3. See also Australian Women Lawyers *Submission 29*, pp 12-13.

10.56 In addition, the National Foundation for Australian Women submitted that it would be worthwhile considering the benefits of merging the EOWA affirmative action functions into HREOC as well as placing the affirmative action obligations, currently imposed by the EOWW Act, within the Act.⁶⁸

10.57 However, EOWA argued that feedback from major stakeholders demonstrated that its work was having a positive impact in terms of changing attitudes and educating businesses about equal employment opportunity issues. EOWA submitted that:

EOWA is concerned that in combining the functions of EOWA and the Sex Discrimination Unit in the Australian Human Rights Commission, the concept of equal opportunity in employment would be lost or diluted amongst a myriad of other complex and legalistic discrimination issues.⁶⁹

Resources for HREOC

10.58 Evidence to the committee suggested that HREOC requires additional funding to ensure it can effectively carry out all of its functions under the Act.⁷⁰ HREOC provided the committee with background information on its existing funding:

HREOC's appropriation revenue in 2008-09 is \$13.55 million. This is approximately 12.5% less than the budget appropriation for 2007-08. This is the greatest decrease in HREOC's budget since 1996 when HREOC's total funding base was reduced by 40% over four years. The effect of the decrease in 1996 was that staffing across HREOC had to be reduced by approximately 60%.⁷¹

10.59 HREOC further noted that there has been an increase in the number of complaints it is handling and that this will reduce its capacity to carry out other functions:

[W]hile the number of complaints being brought to HREOC under federal anti-discrimination law has continued to increase over recent years, additional funds that had been provided to HREOC to manage this increase in demand, have been cut. This decrease in funding will impact on HREOC's ability to continue to provide an efficient and effective complaint service. It will also limit the work HREOC can undertake to educate the public about the law and the complaint process.⁷²

68 *Submission 15*, pp 5-6.

69 *Submission 79*, pp 17-18.

70 See for example Legal Aid Queensland, *Submission 26*, pp 1-2 and 4; Dr Sara Charlesworth, *Submission 39*, pp 12-13; Queensland Council of Unions, *Submission 46*, p. 6.

71 *Submission 69*, p. 217. See also Professor Sawyer, Women's Electoral Lobby, *Committee Hansard*, 11 September 2008, p. 37.

72 *Submission 69*, p. 182. See also pp 202 and 220.

10.60 Some submissions argued that HREOC requires additional resources particularly for its complaint handling functions.⁷³ Legal Aid Queensland submitted that:

It is hard to assess the effectiveness of the Act when we are aware that the Human Rights and Equal Opportunity Commission (HREOC) has been chronically under-funded over the last ten years. This reduces the ability of any agency to function and this inevitably has had an impact on the effectiveness of the legislation as a mechanism for eliminating all forms of discrimination against women.⁷⁴

10.61 Legal Aid Queensland pointed out that one consequence of this lack of funding is that it is harder to utilise the complaints mechanism under the Act:

- HREOC has only one office in Sydney for the whole of Australia. It previously had an office co-located with the Anti-Discrimination Commission in Queensland and this worked well. It is now harder for litigants to use the Commonwealth jurisdiction.
- It takes too long to process a complaint as a result of one office in Australia dealing with all of the complaints. It is quicker and easier to use the state system.
- The fact that there is no office in Queensland means that there is no practical support for litigants to lodge and continue with complaints. This discourages people from making complaints.⁷⁵

10.62 Similarly, the Diversity Council Australia suggested there is a need for improved access to the HREOC conciliation process in regional areas.⁷⁶

10.63 Submissions from women's groups supported having a separate specialist Age Discrimination Commissioner and providing additional resources for the Sex Discrimination Commissioner to carry out an expanded role.⁷⁷ Professor Sawyer told the committee that if the Sex Discrimination Commissioner was to have an expanded role there was a particular need for a separate Age Discrimination Commissioner:

We also note that the enhanced role being proposed for the Sex Discrimination Commissioner in monitoring progress towards gender equality means that the current additional role being carried by the commissioner in relation to age discrimination would no longer be viable. We propose that age discrimination, which is a large and growing portfolio,

73 Legal Aid Queensland, *Submission 26*, p. 4; Queensland Council of Unions, *Submission 46*, p. 6.

74 *Submission 26*, p. 1.

75 *Submission 26*, p. 4.

76 *Submission 47*, p. 6.

77 Women's Electoral Lobby, *Submission 8*, pp 8-10; National Foundation for Australian Women, *Submission 15*, pp 3 and 10; Australian Women's Health Network, *Submission 30*, p. 8.

be reallocated to a specialist commissioner with statutory responsibility for
it.⁷⁸

78 *Committee Hansard*, 11 September 2008, p. 37.