The Senate

Standing Committee on Legal and Constitutional Affairs

Effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality

December 2008

ISBN: 978-0-642-71945-4

This document was printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Members
Senator Patricia Crossin, **Chair**, ALP, NT
Senator Guy Barnett, **Deputy Chair**, LP, TAS
Senator Don Farrell, ALP, SA
Senator David Feeney, ALP, VIC
Senator Mary Jo Fisher, LP, SA
Senator Sarah Hanson-Young, AG, SA
Senator Gavin Marshall, ALP, VIC
Senator Russell Trood, LP, QLD

Participating Members
Senator Helen Kroger, LP, VIC

Secretariat

Mr Peter Hallahan	Secretary
Ms Jackie Morris	Inquiry Secretary
Ms Toni Dawes	Principal Research Officer
Mr Tim Watling	Principal Research Officer
Ms Monika Sheppard	Senior Research Officer
Mr Alex Wilson	Research Officer
Ms Hanako Jones	Executive Assistant
Ms Cassimah Mackay	Executive Assistant

Suite S1. 61
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
Email: legcon.sen@aph.gov.au

TABLE OF CONTENTS

ABBREVIATIONS

Act	*Sex Discrimination Act 1984*
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
ADF	Australian Defence Force
ALRC	Australian Law Reform Commission
Amery	*New South Wales v Amery* [2006] HCA 14
Australian Women Lawyers	Women Lawyers Association of New South Wales and Australian Women Lawyers
Bill	Sex Discrimination Bill 1983
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Collaborative submission	Collaborative submission from leading women's organisations and women's equality specialists (submission 60)
EEO	Equal Employment Opportunity
EOWA	Equal Opportunity for Women in the Workplace Agency
EOWW Act	*Equal Opportunity for Women in the Workplace Act 1999*
Equality Before the Law report	*Equality Before the Law: Justice for Women* Part I and *Equality Before the Law: Women's Equality*, Part II
Half Way to Equal report	*Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*
House of Representatives Committee	House of Representatives Standing Committee on Legal and Constitutional Affairs
HREOC	Human Rights and Equal Opportunity Commission also known as the Australian Human Rights Commission from 4 September 2008

HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ILO Convention 100	ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value
ILO Convention 111	ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation
ILO Convention 156	ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities
IVF	In vitro fertilisation
Kelly	*Kelly v TPG Internet Pty Ltd* [2003] FMCA 584
Law Council	Law Council of Australia and the New South Wales Bar Association
McBain	*McBain v State of Victoria* [2000] FCA 1009
NACLC	National Association of Community Legal Centres and the Combined Community Legal Centres Group (NSW)
Ordination of Catholic Women	Ordination of Catholic Women into a Renewed Ordained Ministry
PILCH	Public Interest Law Clearing House
Purvis	*Purvis v New South Wales* [2003] HCA 62
SCAG	Standing Committee of Attorneys-General
SDA	*Sex Discrimination Act 1984*

UN Committee	United Nations Committee on the Elimination of Discrimination against Women
UNIFEM Australia	United Nations Development Fund for Women
Women of the Anglican Church	Women members of the General Synod Standing Committee of the Anglican Church of Australia
Working Women's Centres	Working Women's Centre South Australia, Northern Territory Working Women's Centre and Queensland Working Women's Service
YWCA Australia	Young Women's Christian Association Australia

RECOMMENDATIONS

Recommendation 1

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

Recommendation 2

11.8 The committee recommends that subsection 3(a) of the Act be amended to refer to other international conventions Australia has ratified which create obligations in relation to gender equality.

Recommendation 3

11.10 The committee recommends that the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.

Recommendation 4

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

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

Recommendation 5

11.16 The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.

Recommendation 6

11.17 The committee recommends that section 7B of the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.

Recommendation 7

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

Recommendation 8

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

Recommendation 9

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

Recommendation 10

11.26 The committee recommends that the Act be amended:

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

Recommendation 11

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

Recommendation 12

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

Recommendation 13

11.33 The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.

Recommendation 14

11.34 The committee recommends that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995 (VIC)*.

Recommendation 15

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

Recommendation 16

11.44 The committee recommends that the section 28A of the Act be amended to provide that the circumstances relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:

- **the sex, age and race of the other person;**

- **any impairment that the other person has;**
- **the relationship between the other person and the person engaging in the conduct; and**
- **any other circumstance of the other person.**

Recommendation 17

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

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

Recommendation 18

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

Recommendation 19

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

Recommendation 20

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

Recommendation 21

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

Recommendation 22

11.61 The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the *Sex Discrimination Act 1975 (UK)* so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against

the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

Recommendation 23

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

Recommendation 24

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

Recommendation 25

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

Recommendation 26

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

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

Recommendation 27

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

Recommendation 28

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

Recommendation 29

11.83 The committee recommends that the Act and the HREOC Act should be amended to expand HREOC's powers to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a state or under state laws.

Recommendation 30

11.84 The committee recommends that paragraph 48(1)(gb) of the Act be amended to explicitly confer a function on HREOC of intervening in proceedings relating to family responsibilities discrimination or victimisation.

Recommendation 31

11.85 The committee recommends that subsection 46PV(1) of the HREOC Act be amended to include a function for the special purpose commissioners to appear as amicus curiae in appeals from discrimination decisions made by the Federal Court and the Federal Magistrates Court.

Recommendation 32

11.86 The committee recommends that paragraph 48(1)(gb) of the Act and subsection 46PV(2) of the HREOC Act be amended to empower HREOC to intervene in proceedings, and the special purpose commissioners to act as amicus curiae, as of right.

Recommendation 33

11.87 The committee recommends that the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years.

Recommendation 34

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

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

Recommendation 35

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

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

Recommendation 36

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

Recommendation 37

11.99 The committee recommends that further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to

investigate alleged breaches of the Act, without requiring an individual complaint.

Recommendation 38

11.100 The committee recommends that further consideration be given to amending the Act to give HREOC the power to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the Act.

Recommendation 39

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

Recommendation 40

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

Recommendation 41

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

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

Recommendation 42

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

Recommendation 43

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

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

CHAPTER 1

INTRODUCTION

Reference

1.1 On 26 June 2008, the Senate referred an inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* (the Act[1]) in eliminating discrimination and promoting gender equality, to the Standing Committee on Legal and Constitutional Affairs.

1.2 The Senate directed the committee to inquire into and report on the effectiveness of the Act, with particular reference to:

(a) the scope of the Act, and the manner in which key terms and concepts are defined;

(b) the extent to which the Act implements the non-discrimination obligations of:

(i) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and

(ii) the International Labour Organization (ILO); or

(iii) under other international instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR);

(c) the powers and capacity of the Human Rights and Equal Opportunity Commission (HREOC)[2] and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality;

(d) consistency of the Act with other Commonwealth and state and territory discrimination legislation, including options for harmonisation;

(e) significant judicial rulings on the interpretation of the Act and their consequences;

(f) impact on state and territory laws;

(g) preventing discrimination, including by educative means;

---

1 Note that some witnesses and submissions referred to the Act as 'the SDA'.

2 On 4 September 2008, HREOC announced it had changed its name to the Australian Human Rights Commission. Under the *Human Rights and Equal Opportunity Commission Act 1986* and other relevant legislation, the name of the commission remains the Human Rights and Equal Opportunity Commission. The committee has used the acronym HREOC in this report as most of the evidence received by the committee refers to 'HREOC'.

(h) providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;

(i) addressing discrimination on the ground of family responsibilities;

(j) impact on the economy, productivity and employment (including recruitment processes);

(k) sexual harassment;

(l) effectiveness in addressing intersecting forms of discrimination;

(m) any procedural or technical issues;

(n) scope of existing exemptions; and

(o) other matters relating and incidental to the Act.

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 2, 16 and 30 July 2008. Details of the inquiry were placed on the committee's website. The committee also wrote to over 140 organisations and individuals inviting submissions by 1 August 2008.

1.4 The committee received 81 submissions. These are listed at Appendix 1. All submissions published by the committee were placed on the committee's website.

1.5 The committee held public hearings in Sydney on 9 September 2008, in Melbourne on 10 September 2008 and in Canberra on 11 September 2008. A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://www.aph.gov.au/hansard

Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Structure of the report

1.7 The committee's report is structured in the following way:

- Chapter 2 provides an overview of the Act and its history.
- Chapter 3 considers the objects of the Act and how some key terms are defined by the Act.
- Chapter 4 examines the scope of the Act or the areas in which it provides coverage.
- Chapter 5 looks at the overall effectiveness of the Act and the extent to which it implements Australia's international obligations to eliminate sex discrimination.

- Chapter 6 considers evidence the committee received concerning difficulties with the complaints process under the Act.
- Chapter 7 reviews the exemptions provided for under the Act.
- Chapter 8 considers the economic impact of the Act and, in particular, the impact of inconsistency between the Act and other state, territory and Commonwealth legislation.
- Chapter 9 examines means of preventing sex discrimination.
- Chapter 10 looks at the powers and resources available to the Sex Discrimination Commissioner and HREOC.
- Chapter 11 contains a summary of the views of the committee and its recommendations.

Note on references

1.8 References in this report are to individual submissions as received by the committee, not to a bound volume. References to Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard.

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).

(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 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.

CHAPTER 3

OBJECTS AND DEFINITIONS

3.1 This chapter examines the objects of the Act and how the Act defines some key terms. In looking at these issues, the committee also received evidence concerning the interpretation of the Act by the courts and how that judicial interpretation has affected the operation of the Act.

Objects of the Act

Interpretation of the Act

3.2 Some submissions argued that the courts have narrowly construed the Act and other anti-discrimination legislation. For example, the Women's Electoral Lobby expressed concern that:

> ...a persistently narrow interpretation of the SDA, particularly on the part of the High Court, is undermining the efficacy of the Act. It is notable that, in the 12 years since Wik, not a single discrimination case has succeeded before the High Court. With the exception of Justice Kirby, High Court judges have ignored the beneficent purpose of the Act and the contents of CEDAW, which has frustrated the aims of the legislation.[1]

3.3 To ensure the Act is interpreted consistently with its purpose, the Women's Electoral Lobby recommended that section 3 be amended to provide guidance on how the courts should interpret the Act. Specifically, this amendment would require that the Act be interpreted so as to further the objects of the Act set out in section 3.[2]

3.4 The Sex Discrimination Commissioner advocated inserting an express requirement in the Act that it be interpreted, not just in accordance with CEDAW but also with the ICCPR, ICESCR and the relevant ILO conventions, particularly ILO Convention 156, which relates to discrimination on the basis of family responsibilities.[3] HREOC submitted that:

> The SDA currently does not provide any guidance as to how its provisions are to be interpreted with respect to Australia's international legal obligations.[4]

---

1 *Submission 8*, p. 6. See also Professor Margaret Thornton, *Committee Hansard*, 11 September 2008, p. 39; Collaborative submission from leading women's organisations and women's equality specialists, *Submission 60*, p. 13.

2 *Submission 8*, p. 7. See also Professor Margaret Thornton, *Submission 22*, p. 4; Australian Women's Health Network, *Submission 3*, pp 8-9.

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

4 *Submission 69*, p. 48.

3.5 HREOC acknowledged that, at common law, there are rules of statutory construction which require that domestic legislation should be interpreted consistently with Australia's obligations under international law and that these rules have particular application where a domestic statute gives effect to Australia's obligations under a particular international convention.[5] Despite this, HREOC considered that:

> ...an explicit direction within the SDA to codify this common law principle would help to clarify this point for courts and litigants and help to ensure that the SDA is applied consistently with CEDAW and relevant international obligations under the ICCPR, ICESCR and ILO Conventions in all cases. It would also help to elevate this presumption of statutory construction above the melee of competing presumptions.[6]

Drafting of the objects

3.6 Subsections 3(b), (ba) and (c) of the Act provide that the objects of the Act include elimination of discrimination on various grounds 'so far as is possible'. Several submissions argued that the objects of the Act should not be stated so equivocally and, in particular, should not be qualified by the phrase 'so far as is possible'.[7] For example, the Women's Electoral Lobby argued that:

> It is not a statutory convention within Australian law to proscribe wrongful behaviour and then qualify it with the words 'so far as is possible'. We would not tolerate an injunction "to drive on the left-hand side of the road 'so far as possible'". Most significantly, no such qualification is used in CEDAW, which 'condemns discrimination against women in all its forms' (Art 2). [8]

3.7 Similarly, the collaborative submission from leading women's organisations and women's equality specialists (the Collaborative submission) noted that:

> The Objects clause of the SDA undermines the entire SDA because almost every subsection is equivocal. Section 3(a) states that it will give effect only to 'certain provisions' of CEDAW. The repeated use of the qualifier, 'so far as is possible', appearing in the first line of the Preamble, and repeated in ss3 (b), (ba) and (c), confirms the impression that the SDA is ambivalent about its aims.[9]

3.8 In its submission, HREOC also noted that this qualification is not consistent with CEDAW:

---

5 *Submission 69,* pp 48-49.

6 *Submission 69,* p. 49.

7 Women's Electoral Lobby, *Submission 8,* pp 6-7; Professor Margaret Thornton, *Submission 22*, pp 2 and 6; Community and Public Sector Union – State Public Services Federation, *Submission 24*, pp 2 and 3; Australian Women's Health Network, *Submission 30*, p. 6; Dr Sara Charlesworth, *Submission 39*, p. 4.

8 *Submission 8,* p. 6. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard,* 11 September 2008, p. 58.

9 *Submission 60,* p. 14.

> The term 'so far as is possible' limits the object of the SDA in a way that is not provided under CEDAW. CEDAW provides that state parties are under a general obligation to eliminate discrimination against women. The term 'so far as is possible' reflects that the substantive provisions of the SDA do not go as far as this obligation under CEDAW.[10]

3.9 In summary, HREOC argued that the use of the term 'so far as is possible' results "in a qualified commitment to international obligations, which is inappropriate in respect of an Act of such importance as the SDA" and recommended its removal.[11]

3.10 The Women's Electoral Lobby suggested replacing the phrase 'to eliminate as far as is possible' with 'to prohibit', on the basis that 'to prohibit' is stronger than the phrase 'to eliminate' and is also more commonly used in legal parlance.[12]

Definitions in the Act

Definition of Discrimination

3.11 Many submissions were critical of the existing definition of discrimination under sections 5 to 8 of the Act and, in particular, the use of the distinction between direct and indirect discrimination. For example, Dr Belinda Smith considered that:

> [A] significant limitation of the SDA is the distinction between direct and indirect discrimination. This distinction, largely replicated across all Australian antidiscrimination laws, is artificial, chimerical, difficult to understand and thus difficult to comply with and enforce.[13]

3.12 National Association of Community Legal Centres and the Combined Community Legal Centres Group (NSW) (NACLC) also submitted that:

> The distinction between 'direct' and 'indirect' discrimination is technically complex and difficult to apply. To determine whether a person has been subject to 'direct discrimination', that person needs to work out whether they have received less favourable treatment; to determine if they have been the subject to 'indirect discrimination', that person needs to work out whether the treatment they have received has had a less favourable impact on them. This places the entire burden on the complainant to deal with such a contrived distinction, and [they] risk failing in their complaint if they are unable to argue it.[14]

3.13 The Law Council of Australia and the New South Wales Bar Association (Law Council) suggested that the best approach to simplifying the definitions of

---

10 *Submission 69*, p. 47.

11 HREOC, *Submission 69*, pp 47-48. See also *Committee Hansard*, 9 September 2008, p. 7.

12 *Submission 8*, pp 3 and 6. See also Professor Margaret Thornton, *Submission 22*, p. 2.

13 *Submission 12*, p. 4.

14 *Submission 52*, pp 6-7.

discrimination under the Act would be to remove the distinction between indirect and direct discrimination altogether:

> [T]he definition of both direct discrimination and indirect discrimination under the Act ought to be repealed and replaced with the definition of discrimination against women contained in article 1 of CEDAW. We say this will also address some of the complexities that currently exist in the Sex Discrimination Act.[15]

3.14 In a similar vein, Professor Margaret Thornton recommended that a broader definition of discrimination that adverts to substantive discrimination in a way that more accurately reflects the definition contained in Article 1 of CEDAW is required.[16]

Direct discrimination

3.15 Several submissions argued that direct discrimination is defined too narrowly under the Act because it requires the complainant to show he or she has been treated less favourably, in circumstances that are not materially different, to the way a person of the opposite sex would have been treated. This hypothetical person of the opposite sex is known as 'a comparator'.[17] The Australian Council of Trade Unions (ACTU) notes that:

> The current definition of direct discrimination requiring unfair comparison with a male comparator is problematic where there is no evidence available of a male in the same or similar circumstances. The requirement for a direct male comparison particularly precludes pay inequity claims where male and female workers perform different types of work, or between different workplaces or on the basis of occupational segregation.[18]

3.16 An officer of HREOC submitted that, while a comparator may be useful in some circumstances for determining whether discrimination has occurred, it should not be an element of the definition of discrimination:

> Engaging in a hypothetical comparative exercise as to how someone else may or may not have been treated in same or similar circumstances is often a very useful analytical tool for answering that question of causation. But in our view, including it as a separate element in the definition as a substantive positive duty of an applicant to establish as a question of fact can involve a very artificial distraction from that central inquiry.[19]

3.17 He provided an example of the difficulties associated with the requirement for a comparator:

---

15 *Committee Hansard*, 10 September 2008, p. 49.

16 *Submission 22*, p. 3.

17 Women's Electoral Lobby, *Submission 8,* p. 6; Independent Education Union of Australia, *Submission 49*, p. 3.

18 *Submission 55*, p. 7.

19 *Committee Hansard*, 9 September 2008, p. 9.

> To give an example, the Sex Discrimination Act clarifies that breastfeeding is a characteristic appertaining to women, but if there is a claim of discrimination on the basis of breastfeeding, the comparison is with a man, in the same or similar circumstances. [That] just is not really a fair comparison. Men do not breastfeed and they do not do anything that is even remotely similar to breastfeeding. Yet a claim cannot succeed unless the applicant can positively establish that there is a comparator so that this comparative exercise can be undertaken.[20]

3.18 Similarly, Associate Professor Simon Rice stated that it is "both conceptually and practically difficult for a person to have to prove direct discrimination on the basis of a comparator."[21]

3.19 It was further argued that the interpretation of this comparative element of the definition of direct discrimination by the courts has made it extremely difficult for complaints to make out a case of direct discrimination. For example, Dr Smith argued that the narrow interpretation of similar direct discrimination provisions under the *Disability Discrimination Act 1992* by the High Court, in *Purvis v New South Wales*[22] *(Purvis)*, has 'decimated' the scope of direct discrimination under the Act.[23] The Collaborative submission similarly suggested that the *Purvis* case "raises the burden of proof in direct discrimination complaints to insuperable heights."[24]

3.20 In the *Purvis* case, the High Court considered whether the expulsion of a boy who had suffered a brain injury which caused behavioural problems was direct disability discrimination. The majority of the court held that in determining whether discrimination had occurred the complainant's treatment should be compared with how a student without a disability, who had exhibited similar violent behaviour, would have been treated.[25] Job Watch noted that:

> The minority of McHugh and Kirby JJ held that this behaviour was a manifestation of the disability and therefore should be excluded from the construction of the Comparator. However, the majority of the Court thought that it was the outburst that led to his expulsion and it would seem artificial to remove this aspect from the objective circumstances. The High Court found that the school did not directly discriminate against the student because the school would have also expelled a violent student who did not have an intellectual disability so the student was not treated differently than the Comparator would have been treated.[26]

---

20 *Committee Hansard*, 9 September 2008, p. 9.

21 *Submission 53*, p. 4.

22 [2003] HCA 62.

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

24 *Submission 60*, p. 21.

25 [2003] HCA 62 at 222-232. For a summary of the case see Job Watch, *Submission 62*, pp 25-26.

26 *Submission 62*, pp 25-26.

3.21 Dr Smith submitted that the impact of the decision in *Purvis* is that the direct discrimination provisions will not prevent discrimination on criteria which are closely linked to sex but are not expressly sex:

> In essence the case makes clear that direct discrimination provisions do not prevent employers (education providers, etc) from using criteria that very closely connect or overlap with traits that are supposedly protected by the SDA. For example, while an employer may be prohibited from applying a blanket exclusion of women, direct discrimination provisions allow the employer to choose the candidate who can work 24/7, can do overtime on short notice, will not take extended leave, will not take their entitlement to carer's leave or any other criteria that may have a gendered element but is not expressly 'sex'. ...The indirect discrimination provisions are still available to challenge such criteria, but with all the uncertainty and litigation difficulties that indirect discrimination provisions entail. [27]

3.22 Job Watch also argued that the decision establishes a test for direct discrimination which:

> ...makes it too easy for a respondent to evade liability for direct discrimination by claiming that their discriminatory behaviour was because of a consequence of the complainant's sex or marital status etc and not the sex or marital status itself.[28]

3.23 Job Watch supported amending the Act to alter the way the comparator is constructed by the courts.[29] However, HREOC and Professor Rice suggested that the 'comparator' test for discrimination be replaced altogether by a 'detriment' test similar to that used in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.[30] In essence, this would mean a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because of an attribute such as his or her sex or relationship status.

Indirect discrimination

3.24 As discussed in chapter 2, indirect discrimination occurs where a condition, requirement or practice is imposed that is likely to have the effect of disadvantaging people of one sex, people of a particular marital status or women who are pregnant or potentially pregnant. It is therefore concerned with practices which on the face of it treat everyone equally but which disadvantage particular groups because of the characteristics of those groups. HREOC explained in its submission:

---

27 *Submission 12*, p. 5. See also Professor Margaret Thornton, *Submission 22*, pp 2-3; HREOC, *Submission 69*, p.57.

28 *Submission 62*, p. 26. See also Dr Belinda Smith, 'From Wardley to Purvis: How far has Australian anti-discrimination law come in 30 years?', *Australian Journal of Labour Law*, Vol 21, 2008, pp 3-29 at pp 24-26.

29 *Submission 62*, p. 25.

30 *Submission 53*, p. 4; *Committee Hansard*, 9 September 2008, pp 9-10. See also Law Council, *Submission 59*, p. 15.

> Indirect discrimination targets facially neutral barriers which appear to treat everyone equally, but which disproportionately impact on particular groups (ie women) due to structural, historical, attitudinal, biological and social inequalities and barriers.[31]

3.25 The Collaborative submission explained how indirect discrimination is thus linked to the notion of substantive equality as opposed to formal equality:

> In many areas of life, men and women are differently situated, so requiring same treatment will not ensure equality. For example women cannot always be treated like men in the workforce as they have specific needs as a result of their childbearing function. Substantive equality looks to situations where it is necessary to treat someone differently because they are differently situated, in order to ensure equality. ...
>
> Indirect discrimination, by challenging apparently neutral practices that disadvantage women, or married people, or pregnant people, could provide a path towards substantive equality.[32]

3.26 Some submissions pointed to a need to clarify what constitutes 'indirect discrimination' because this type of discrimination is poorly understood.[33] The Anti-Discrimination Commission Queensland explained that:

> Indirect discrimination ...is a complex notion and not readily identified in terms of the obligations of employers, service providers and the like. At the ADCQ, it is common to hear 'but how can that be discrimination if the policy (or requirement) applies to everyone?'. Little headway can be made in achieving equality where discrimination remains misunderstood, including by those who are victims of it.[34]

3.27 In addition, the Collaborative submission argued that the provisions prohibiting indirect discrimination have not actually operated to promote substantive equality because of the barriers to proving an indirect discrimination claim. In particular, complainants face difficulties, firstly in identifying a condition, requirement or practice, and secondly in relation to the reasonableness test under section 7B.[35]

3.28 HREOC agreed that recent court cases have taken a narrow approach to identifying a condition, requirement or practice and pointed particularly to the cases of

---

31 *Submission 69*, p. 72.

32 *Submission 60*, p. 13.

33 See for example Diversity Council Australia Inc, *Submission 47*, p. 5; Anti-Discrimination Commission Queensland, *Submission 63*, pp 6-7.

34 *Submission 63*, pp 6-7. See also Dr Belinda Smith, *Committee Hansard*, 9 September 2008, p. 68; Victorian Automobile Chamber of Commerce, *Submission 32*, pp 5 and 8.

35 *Submission 60*, p. 13.

Kelly v TPG Internet Pty Ltd[36] (*Kelly*) and the High Court decision in *New South Wales v Amery*[37] (*Amery*).[38] HREOC explained that in *Kelly*:

> [T]he applicant alleged indirect discrimination because of her employer's failure to grant her request for part-time work following her return from maternity leave. Raphael FM rejected this aspect of the claim on the basis that there was no relevant requirement, condition or practice. His Honour reasoned that the refusal of part-time work was merely the refusal of an employment-related benefit, which his Honour distinguished from a requirement, condition or practice of employment.[39]

3.29 The *Amery* case concerned a challenge to different pay scales applicable to long term casual and permanent teachers, on the basis that the lower pay scales available to casual teachers indirectly discriminated against women. This challenge relied not upon subsection 5(2) of the Act but on a similar indirect discrimination provision in the *Anti-Discrimination Act 1977(NSW).* HREOC noted:

> A majority of the High Court held that the applicants had failed to establish a relevant requirement or condition of the position (the NSW legislation does not include 'practices'). The majority distinguished casual and permanent teachers as being separate positions and, accordingly, the pay scales applicable to one position could not be regarded as a condition, requirement or practice in relation to the other position.[40]

3.30 HREOC submitted that:

> One approach to remedying this situation would be to require that an applicant simply establish that the relevant circumstances (including any terms, conditions or practices imposed by the respondent) disadvantaged women (or other relevant groups). ...This would remove the need for technical disputes over whether the respondent has imposed a relevant requirement, condition or practice.[41]

3.31 However, it should be noted that the Law Council considered that the decision in *Amery* is of little relevance to the Act because of the different language used by paragraph 24(1)(b) of the *Anti-Discrimination Act 1977(NSW)* and subsection 5(2) of the Act.[42]

3.32 Section 7B provides that a condition, requirement or practice is not discriminatory if it is 'reasonable in the circumstances'. HREOC suggested that the test under section 7B should be more stringent:

---

36 [2003] FMCA 584.

37 [2006] HCA 14.

38 *Submission 69,* pp 73-74. See also Collaborative submission, *Submission 60,* p. 13.

39 *Submission 69,* p. 73.

40 *Submission 69,* p. 74.

41 *Submission 69,* p. 75.

42 *Submission 59,* p. 16.

> What cases often turn on in indirect discrimination cases is whether the relevant requirement, condition or practice is reasonable. Reasonableness is the relevant threshold.
>
> ...We question whether or not reasonableness is an appropriate standard in this area. The SDA draws on Australia's human rights obligations and, as such, effectively that is a form of protection of human rights. International jurisprudence on limitations of human rights establishes that for a limitation to be justified, it needs to be something more than just reasonable. It needs to be pursuant to a legitimate object and it needs to be proportionate to the achievement of that object.[43]

3.33 The Collaborative submission expressed similar reservations and argued that reasonableness is:

> ...far too open textured a test, as it suggests no objective requirement. It is much lower than comparable tests in the USA (where proportionality and business necessity must be established) and the UK (where the test is 'justified').[44]

3.34 HREOC recommended that the reasonableness test be reviewed with a view to replacing it with a standard that more explicitly requires an assessment of the legitimacy of the object being sought, and the proportionality of the means being adopted to achieve that object.[45]

Definition of other terms

3.35 A number of submissions argued that the definitions of 'marital status' in section 4 and 'family responsibilities' in section 4A discriminate against same sex couples.[46] Essentially, this is because, while both definitions use the term 'de facto spouse', the definition of 'de facto spouse' in section 4 is limited to a partner of the opposite sex.

3.36 The committee notes that the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* amends the definition of 'family responsibilities' in section 4A to provide coverage to same-sex couples in relation to discrimination on the grounds of family responsibilities. However, the Act did not amend the definitions of 'marital status' and 'de facto spouse' in section 4 to

---

43 *Committee Hansard*, 9 September 2008, pp 11-12.

44 *Submission 60,* p. 13. See also HREOC, *Submission 69*, pp 77-78.

45 *Submission 69*, pp 78-79. See also UNIFEM, *Submission 19*, supplementary submission, p. 4.

46 Dr Belinda Smith, *Submission 12,* p. 8; Office of the Anti-Discrimination Commissioner (Tas) *Submission 13*, p. 3; Carers Australia *Submission 33*, p.6; NACLC *Submission 52,* p. 6; HREOC, *Submission 69*, p. 90.

provide same-sex couples with protection against discrimination on the basis of their relationship status.[47] An officer from HREOC explained that:

> The marital status provision at the moment applies to people who are in a de facto relationship, but only if you are in an opposite sex relationship. Our recommendation is simply to extend that protection to people, regardless of whether or not it is a same-sex relationship or an opposite sex relationship.[48]

3.37 Finally, the Anti-Discrimination Commissioner of Tasmania suggested the definition of 'club' in section 4 is too narrow because it is limited to clubs supplying alcohol for consumption on the premises. The Commissioner pointed out that this definition posed a technical barrier to bringing complaints against clubs which do not supply liquor.[49]

47 Explanatory Memorandum Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008, pp 37-38. See also Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 23 September 2008, pp 56-57.

48 HREOC, *Committee Hansard*, 9 September 2008, p. 14.

49 *Submission 13*, p. 2.

CHAPTER 4

SCOPE OF THE ACT

4.1 Much of the evidence the committee received suggested that a significant deficiency of the Act lies in its limited scope. A particularly strong theme was that the Act should provide broader protection from discrimination on the grounds of family responsibilities. Some organisations advocated the inclusion of additional grounds of discrimination. Others went further and suggested that the federal anti-discrimination acts should be replaced with a single national Equality Act.

Limited Scope of the Act

4.2 Several submissions suggested that the Act should contain a broader prohibition on discrimination rather than making discrimination unlawful in particular spheres of public life. For example, the Human Rights Law Centre, argued the effectiveness of the Act is undermined by it being limited to specified spheres of activity:

> The SDA prohibits narrowly defined acts of discrimination in specified fields of activity, namely: work; accommodation; education; the provision of goods, facilities and services; the disposal of land; the activities of clubs; and the administration of Commonwealth laws and programs. Discrimination which occurs outside these spheres, or which does not fall within the SDA's definition of direct or indirect discrimination, is not considered unlawful.
>
> These limitations on the scope of the SDA restrict its effectiveness and are inconsistent with international human rights law.[1]

4.3 An officer of HREOC explained that:

> In relation to coverage, the way that the Act operates is that it does not just say it is unlawful to discriminate in anything. It says it is unlawful to discriminate in particular areas of public life. It puts out a bit of a patchwork of provisions to ensure that, in the relevant areas of public life such as employment, goods and services and education, there is no discrimination.[2]

4.4 HREOC pointed out that one practical consequence of this patchwork approach is that independent contractors and volunteers may not be protected from sex discrimination and sexual harassment by the Act because they may not be able to demonstrate that they fall within the provisions protecting employees:

> For example, in relation to volunteers, currently their protection is unclear because they need to be able to establish that they are an employee before

---

1 *Submission 20*, p. 10. See also NACLC, *Submission 52*, p. 9; Law Council, *Submission 59*, p. 7.

2 *Committee Hansard*, 9 September 2008, pp 16-17. See also *Submission 69*, pp 110-112.

> they are able to be protected. ...If you are attending one afternoon a week at the school tuckshop to help out, you might have some difficulty in convincing a court that you fall within that classic employment relationship. We are saying that you should be entitled to protection under the SDA just as much as ...someone who is being paid.
>
> Likewise because independent contractors are not an employee, they can fall outside the provisions of the Act, even though, for example, if they are on a work site ...they might be subjected to discrimination or sexual harassment. Because they do not have that employment relationship, they might be left without a remedy...[3]

4.5 In addition, subsection 12(1) and section 13 limit the application of the Act in relation to state governments and state instrumentalities. HREOC noted that other federal discrimination legislation is not limited in this way:

> ...[T]here is an exclusion in relation to discrimination in employment and sexual harassment for state governments and state instrumentalities. That is something that is quite unique in the federal discrimination acts. None of the other federal discrimination acts have it. We are suggesting that that should be removed to give those employees protection equal to that of any other employee.[4]

4.6 Finally, while section 17 of the Act prohibits discrimination occurring in relation to partnerships, it only operates in relation to partnerships of 6 or more people. HREOC suggested this limitation was "both arbitrary and unnecessary"[5] and told the committee:

> Companies do not have any limitation. You can be a sole trader or a two-person company and you will still be covered. Likewise partnerships are covered in other aspects of the Act. This limitation of numbers applies in discrimination as to who is made a partner, or is refused benefits of a partner and that sort of thing. In our view it just no longer has relevance and should be removed.[6]

4.7 To provide a general remedy to the difficulties arising from gaps in coverage under the Act, the Human Rights Law Centre argued the Act should include a general prohibition on discrimination.[7] Ms Rachel Ball of the centre told the committee:

> The SDA should aim to eliminate all forms of discrimination. This requires that the scope of the Act be broadened. Currently the SDA is limited in the activities it covers and the types of conduct to which it applies. This limits

---

3 *Committee Hansard*, 9 September 2008, p. 17. See also *Submission 69*, pp 117-120; Mr Ian Scott, Job Watch, *Committee Hansard*, 10 September 2008, p. 37.

4 *Committee Hansard*, 9 September 2008, p. 17. See also *Submission 69*, pp 113-116; Law Council, *Submission 59*, p. 16; Collaborative submission, *Submission 60*, p. 27.

5 *Submission 69*, p. 124.

6 *Committee Hansard*, 9 September 2008, p. 18. See also *Submission 69*, pp 123-124.

7 *Submission 20*, pp 10 and 14-15. See also NACLC, *Submission 52*, p. 9.

> the effectiveness of the Act and allows discrimination in Australia to go unidentified and unaddressed. ...Ways to remedy this problem would include introducing a general prohibition on discrimination as defined in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.[8]

4.8 HREOC more cautiously recommended that the merits of amending the Act to include a general prohibition against discrimination in all areas of public life should be considered.[9] HREOC suggested that this general prohibition would be equivalent to the free-standing prohibition against racial discrimination, in all areas of public life, under section 9 of the *Racial Discrimination Act 1975* and that the experience under the Racial Discrimination Act has shown that such provisions do not impose excessive burdens on the community.[10] HREOC also argued that:

> ...a blanket prohibition against discrimination in all areas of public life could represent an important statement of principle. It would make clear that discrimination offends against fundamental human rights in any area of public life and should not be tolerated. ...
>
> A blanket prohibition against discrimination in all areas of public life would also make the SDA clearer and simpler. It would minimise the need for complex litigation in interpreting the various provisions giving coverage to specific areas of public life. Rather, the general prohibition would operate largely as a 'catch-all' provision.[11]

4.9 HREOC further recommended that the merits of amending the Act to include an equality before the law provision, similar to section 10 of the Racial Discrimination Act, should be considered.[12] Section 10 of the Racial Discrimination Act provides that if persons of a particular race, colour or national or ethnic origin do not enjoy a right, or enjoy a right to a more limited extent, because of a law or a provision of a law, then, notwithstanding anything in that law, the right shall be enjoyed to the same extent.[13] HREOC noted that:

> ...the Preamble to the SDA affirms the right to equal protection and equal benefit of the law without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy. However, the Preamble does not give rise to enforceable legal rights or obligations. It has no application to the discriminatory effects of statutory provisions. The current wording of the Preamble also fails to mention family and carer responsibilities.

---

8 *Committee Hansard*, 10 September 2008, p. 2. See also Women Lawyers Association of New South Wales and Australian Women Lawyers, *Submission 29*, p. 6; Queensland Council of Unions, *Submission 46*, p. 5.

9 *Submission 69*, p. 113.

10 *Submission 69*, p. 112.

11 *Submission 69*, pp 112-113. See also pp 142-143.

12 *Submission 69*, p. 87. See also Human Rights Law Centre, *Submission 20*, pp 17-18.

13 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.19.

> In the interests of ensuring complete and faithful implementation of Australia's international human rights obligations, HREOC considers that the reference to equality before the law in the Preamble of the SDA is insufficient. Rather, it may be appropriate to include the right to equality before the law within the body of the SDA by inclusion of a similar provision to s 10 of the RDA.[14]

4.10 The Law Council made a similar proposal that the Act be amended to include a provision, similar to section 8 of the *Human Rights Act 2004 (ACT)*, providing that women and men are entitled to equality in law including equality before the law, equality under the law, equal protection of the law and equal enjoyment of human rights and fundamental freedoms.[15]

4.11 This inquiry is not the first to consider such proposals. The House of Representatives Committee recommended in the *Half Way to Equal* report that the Act be amended to include a general provision stating that discrimination on the basis of sex, marital status, potential pregnancy and family responsibilities is unlawful.[16] The committee noted that:

> The absence of a general prohibition in relation to discrimination against women in the SDA is in direct contrast to the Commonwealth legislation dealing with discrimination on the grounds of race. As discrimination against an individual on the basis of race or sex should be regarded as a contravention of a basic right, the Committee believes it is desirable to bring the Sex Discrimination Act in line with the general prohibition in the Racial Discrimination Act.[17]

4.12 ALRC made a similar recommendation, in Part 1 of the *Equality Before the Law* report, that the Act should contain a general prohibition on discrimination in accordance with article 1 of CEDAW.[18] However, ALRC warned that:

> ...the exemptions in the SDA would limit the effectiveness of a general prohibition of discrimination. Without their removal the prohibition would remain only of symbolic value.[19]

4.13 The House of Representatives Committee also recommended that a provision allowing for equal protection before the law similar to section 10 of the Racial

---

14 *Submission 69*, p. 86. See also Collaborative submission, *Submission 60*, pp 27-28.

15 *Submission 59*, pp 7-8.

16 House of Representatives Committee, *Half Way to Equal*, pp xlvi- xlvii and 260. Note this recommendation was not supported in the dissenting report of Opposition members of the committee, pp 275-276.

17 House of Representatives Committee, *Half Way to Equal*, pp xlvi and 260.

18 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.1.

19 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.16.

Discrimination Act be inserted in the Act.[20] ALRC supported inclusion of a provision in the Act modelled on section 10 of the Racial Discrimination Act, if exemptions in the Act were removed, particularly those relating to states and territories and acts done under statutory authority.[21] Indeed ALRC went further to argue that equality before the law is 'a limited notion' and that:

> There is a need for a guarantee of equality with a broader definition and a comprehensive operation unconstrained by the particular areas of application and range of exemptions of the SDA.[22]

Coverage of access to assisted reproductive technology, surrogacy and adoption

4.14 While many submissions supported broadening the scope of the Act, Family Voice Australia and the Australian Christian Lobby considered that its scope should be narrowed in relation to access to assisted reproductive technology (such as in vitro fertilisation (IVF)), adoption and surrogacy.[23] These organisations were concerned about the effect of the decision of the Federal Court in *McBain v State of Victoria (McBain)*.[24] The court in *McBain* held that provisions in the *Infertility Treatment Act 1995 (Vic)* which precluded the provision of fertility treatment to single women were inconsistent with the Act because those provisions discriminated on the basis of marital status. Under section 109 of the Constitution, the Victorian provisions were of no effect to the extent of that inconsistency. As a result, the fertility services had to be made available to women regardless of their marital status.[25]

4.15 Mr Benjamin Williams of the Australian Christian Lobby, told the committee:

> ...at this point in time, the SDA is blocking the states and territories from placing restrictions on access to IVF services. We think that is a completely illegitimate block and should be removed, thereby allowing the states themselves to decide on their own parameters for allowing access to IVF and other reproductive services.[26]

4.16 Mr James Wallace of the Australian Christian Lobby argued firstly, that the Act was not intended to have this effect and secondly, that its operation in relation to this issue was an illegitimate interference by the Commonwealth government in an

---

20 House of Representatives Committee, *Half Way to Equal*, pp xlvi- xlvii and 260. Note this recommendation was not supported in the dissenting report of Opposition members of the committee, pp 275-276.

21 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, paras 3.19-3.21.

22 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.21.

23 Australian Christian Lobby, *Submission 71*, pp 1-2; Family Voice Australia, *Submission 73*, p. 2. See also Endeavour Forum, *Submission 36*, p. 1.

24 [2000] FCA 1009. See also *Re McBain* [2002] HCA 16.

25 Similar provisions in South Australian legislation were held to be inoperative by the Full Court of the South Australian Supreme Court. See Equal Opportunity Commission and the Office of Women (SA), *Submission 45*, p. 4; *Pearce v South Australian Health Commission* [1996] SASC 5801.

26 *Committee Hansard*, 11 September 2008, p. 56.

area that was properly the responsibility of the states and territories.[27] Finally, the Lobby submitted that:

> ...the rights of children are paramount in any discussion of reproductive technology. Evidence clearly supports the proposition that children do best when raised by both a mother and a father. Using the Sex Discrimination Act 1984 to challenge this fundamental principle is a social engineering experiment that deliberately fails to give children the most basic building blocks of development....
>
> By granting IVF access to single women and lesbians, the Sex Discrimination Act 1984 has been used as the route to subvert the natural consequences of lifestyle choices or circumstances. ...The problem of discrimination remains if the "right" of adults to have children are placed before the rights of children to have a mother and a father.[28]

4.17 The former Federal Government introduced the Sex Discrimination Amendment Bill (No.1) 2000 in the House Representatives in August 2000 and this committee reported on the provisions of the bill in February 2001.[29] This bill would have amended the Act to allow states and territories to restrict access to fertility services. However, the bill was not passed by the Parliament. The Australian Christian Lobby expressed general agreement with the bill but thought it may need to be broadened to cover alternative parenting arrangements such as adoption by homosexual couples.[30]

4.18 The Equal Opportunity Commission and the Office of Women (SA), considering this issue from a different perspective, suggested that discrimination relating to accessing fertility treatment is an emerging issue:

> In South Australia, there are an increasing number of enquiries from people who feel they are being treated unfairly because they are having treatment for fertility problems. This is an emerging issue as the average age of first time mothers increases. Unfair treatment because of fertility treatment or a lack of flexibility in the workplace to allow women to have treatment does not neatly fall within the matters covered by discrimination law. This is because the person is not disabled, nor is it necessarily discrimination on the grounds of pregnancy or potential pregnancy.[31]

---

27 *Committee Hansard*, 11 September 2008, p. 51.

28 *Submission 71*, p. 2. See also *Committee Hansard*, 11 September 2008, p. 51; Family Voice Australia, *Submission 73*, pp 2-5.

29 Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000*, February 2001, at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/sexdisreport/report/contents.htm (accessed 8 October 2008).

30 *Committee Hansard*, 11 September 2008, pp 51-52.

31 *Submission 45*, p. 4.

Limited protection against discrimination on the grounds of family responsibilities

Incidence of discrimination

4.19 Several submissions provided evidence that discrimination on the grounds of family responsibilities remains prevalent. For example, Legal Aid Queensland stated that the majority of advice and representation they provide to clients relates to:

> ...discrimination on the grounds of pregnancy, family responsibilities or returning to work from maternity leave. We provide advice to women who have been discriminated against on this basis every week.[32]

4.20 Similarly, the Equal Opportunity Commission and the Office of Women (SA) advised the committee that:

> In 2007, the Commission received 35 enquiries where people felt they had been discriminated against because of their caring responsibilities. In the most serious examples, both women and men claimed that they had been fired for requesting flexible work arrangements to care for children with severe disabilities.[33]

4.21 However, Ms Annemarie Ashton of Carers Australia suggested that discrimination on the grounds of family responsibilities is more commonly indirect discrimination:

> ...evidence suggests to us that people are more likely to experience indirect discrimination from the effect of workplace policies and practices, such as being looked over for promotion or being ineligible for benefits or training due to having a status of part-time.[34]

4.22 Dads on the Air submitted that men face particular discrimination on the grounds of family responsibilities:

> Men are still expected to put in long hours and not take time off for family responsibilities. Women may sometimes find it hard to find an employer that gives them the job flexibility to enable them to care for their young children, but most men find it almost impossible.[35]

4.23 The Sex Discrimination Commissioner explained the importance of addressing discrimination on the grounds of family responsibilities:

> [T]here remain major barriers to supporting paid workers, both women and men, to balance their family and carer responsibilities with their paid working lives. Right now women continue to perform the bulk of unpaid

---

32 *Submission 26,* p. 3.

33 *Submission 45*,p. 2.

34 *Committee Hansard*, 11 September 2008, pp 13-14.

35 *Submission 6,* p. 6. See also Ms Annemarie Ashton, Carers Australia, *Committee Hansard*, 11 September 2008, p. 16.

> work, yet enabling the equal sharing between women and men of responsibilities such as caring for our children, elderly parents and loved ones with a disability, is really at the heart of gender equality.
>
> This balancing of paid and unpaid work is a problem that must be solved, both for the health of our working population and for business and the strength of our economy, if we are to ensure a sustainable work force into the future.[36]

Broader protection against discrimination on the grounds of family responsibilities

4.24 The Act currently provides that it is unlawful for an employee to directly discriminate on the grounds of family responsibilities by dismissing an employee.[37] The Sex Discrimination Commissioner explained that:

> ...the Act is limited in terms of the protection from discrimination on the grounds of family responsibilities. It is limited in two ways: it talks only about direct discrimination, and we know that most discrimination that occurs in this area is the result of acts or requirements which, on their face, are neutral, because they equate everyone equally, but they have a disproportionate impact on people with family responsibilities. That is the first limitation...
>
> The second is that you can bring an action under the family responsibilities provision only if you are dismissed or sacked, rather than throughout the duration of your employment.[38]

4.25 The Sex Discrimination Commissioner further explained that, while women are sometimes able to pursue indirect sex discrimination claims, as an alternative to claims of discrimination on the grounds of family responsibilities, this option is not available to men:

> Women can get around that limitation because they can bring an indirect sex discrimination complaint. Judicial notice is taken of the fact that women have caring responsibilities for children—not so much that they have responsibilities for older people, but that they have caring responsibilities for children. No judicial notice is taken of men have caring responsibilities for young children. The limitations in the family responsibilities provision, as are currently set out, really have a greater negative impact on men than they do on women because women can bring the treatment under indirect sex discrimination.[39]

---

36 *Committee Hansard*, 9 September 2008, p. 3. See also Ms Ashton, Carers Australia, *Committee Hansard*, 11 September 2008, pp 15-17; Dr Belinda Smith and Dr Joellen Riley, 'Family-friendly Work Practices and the Law', *Sydney Law Review*, Vol. 26 2004, pp 395-426.

37 Section 7A and subsection 14(3A) of the Act.

38 *Committee Hansard*, 9 September 2008, p. 16.

39 *Committee Hansard*, 9 September 2008, p. 16. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 33; Collaborative submission, *Submission 60*, p. 29.

4.26 The Law Council submitted that the limited operation of the family responsibilities ground of discrimination under the Act is "one of the most significant deficiencies of the legislation."[40] Furthermore, the Law Council argued that formulating claims of family responsibilities discrimination as indirect sex discrimination claims is problematic:

> Claims of indirect sex discrimination by reason of family responsibilities discrimination under section 5(2) of the SD Act necessarily require the court to make a finding, or accept on the basis of 'judicial notice', that women are the primary carers of infants and children.
>
> While this may historically have been accurate, and may remain the case for a large number of women, it perpetuates the stereotype that only or primarily women have or ought to have the care and responsibility for infants and children.[41]

4.27 Submissions to the committee overwhelmingly recommended that subsection 14(3A) of the Act should prohibit discrimination on the grounds of family responsibilities that falls short of dismissal. For example, the Equal Opportunity Commission and the Office of Women (SA) recommended strengthening the provisions under the Act to provide greater protection in circumstances:

> ...where the person is not sacked but is effectively demoted, demeaned or treated unfairly because of their caring responsibilities.[42]

4.28 HREOC similarly recommended amending the Act as soon as possible to ensure that all forms of discrimination on the grounds of family and carer responsibilities are unlawful. In particular, HREOC advocated amendments to:

> • make unlawful discriminatory treatment in all aspects of work, rather than restricting protection to discriminatory treatment in employment that results in dismissal.
>
> • make unlawful indirect family and carer responsibilities discrimination.[43]

---

40 *Submission 59,* p. 24.

41 *Submission 59,* pp 24-25.

42 *Submission 45*,p. 2. See also Dads on the Air, *Submission 6,* pp 6-8; Women's Electoral Lobby, *Submission 8,* pp 12-14, Business and Professional Women Australia, *Submission 11,* p. 3, Dr Belinda Smith, *Submission 12,* p. 8; Non-Custodial Parents Party, *Submission 21,* p. 4; New South Wales Premier, *Submission* 23, p. 1, South Australian Premier's Council for Women, *Submission 18,* p. 2; Carers Australia, *Submission 33,* pp 12-13; NACLC, *Submission 52,* pp 10-11 and 17-18; Associate Professor Simon Rice, *Submission 53,* p. 6; ACTU, *Submission* 55, p. 7; YWCA, *Submission 58,* p. 9; Anti-Discrimination Commission Queensland *Submission 63,* pp 8-9; Families without Women, *Submission 67,* p. 34.

43 HREOC, *Submission 69,* p. 102. See also Dr Belinda Smith, *Committee Hansard*, 9 September 2008, p. 59; Collaborative submission, *Submission 60,* p. 14.

4.29 The Anti-Discrimination Commissioner of Tasmania went further and recommended extending protection from discrimination on this ground beyond employment to areas such as the provision of services and rental accommodation.[44]

4.30 Ms Ashton of Carers Australia argued that a further reason the Act does not provide adequate protection from discrimination to carers is the narrow definition of 'family responsibilities' in section 4A:

> There are several key shortfalls in the current Sex Discrimination Act that do not take into account the totality of caring relationships. Caring relationships cannot depend upon narrow definitions of 'near relative'. ... More than ever, we find people in the community who do not have any family at all around them and they rely on the support of close friends or neighbours for care when they need it.
>
> ...Carers Australia contends that it is the provision of care that matters, not the type of relationship in which that care takes place.[45]

4.31 The Women Lawyers Association of New South Wales and Australian Women Lawyers (Australian Women Lawyers) also supported expanding protection under the Act by replacing references in the Act to 'family responsibilities' with 'responsibilities as a carer' and including other relationships, particularly step relatives, within the definition of 'immediate family' in subsection 4A(2).[46]

4.32 There was not however universal support for expanding the scope of the family responsibilities provisions in the Act. The Australian Chamber of Commerce and Industry (ACCI) noted that the family responsibility provisions in the Act are not the only protection available to employees. ACCI submitted that state and territory anti-discrimination legislation, the *Workplace Relations Act 1996* and entitlements employees have through workplace agreements all play a role in assisting employees to balance work and family responsibilities.[47] Furthermore, in light of the protection against discrimination on the basis of family responsibilities available under other legislation, ACCI argued that it is erroneous to suggest that there is a 'regulatory gap' in relation to the protection available to men against discrimination on the basis of their family responsibilities.[48]

---

44 *Submission 13*, p. 4. See also Associate Professor Simon Rice, *Submission 53*, p. 6.

45 *Committee Hansard*, 11 September 2008, pp 13-14.

46 *Submission 29*, pp 7-9. See also Carers Australia, *Submission 33*, p. 10; Independent Education Union of Australia, *Submission 49*, p. 5; NACLC, *Submission 52*, pp 17-18; ACTU, *Submission 55*, p. 8.

47 *Submission 25*, pp 19-20. For example, paragraph 659(2)(f) of the *Workplace Relations Act* prohibits termination of employment on the basis of an employee's family responsibilities.

48 *Submission 25*, pp 20-21.

Positive duty to accommodate family and carer responsibilities

4.33 In addition to strengthening the prohibition against discrimination on the grounds of family responsibilities, HREOC considered that the Act should impose a positive duty on employers, partnerships and principals to reasonably accommodate the needs of their workers in relation to pregnancy, and family and carer responsibilities. This duty would include an obligation not to 'unreasonably refuse' requests for flexible work arrangements.[49] HREOC argued that the imposition of a positive obligation on employers would involve "a subtle re-positioning of the SDA, rather than a dramatic change" because the prohibition on indirect discrimination already prohibits "the unreasonable imposition of barriers that disadvantage, for example, women with family responsibilities."[50] Nevertheless, HREOC submitted the change would be an important one:

> Firstly, the current obligation is merely implied and may not be immediately apparent to employers and others unless they or their advisers have considerable experience in the operation of the SDA. By making the obligation clear and mandatory, respondents are therefore on clear notice of what they are required to do, rather than having to fathom their obligations from the case law.
>
> Secondly, repositioning the obligation as a positive duty is an important statement of principle that employers must actually take steps to redress discrimination. It is a clear call to action, rather than a muffled warning that doing nothing carries a liability risk.[51]

4.34 In a similar vein, Ms Ashton of Carers Australia argued that:

> ...reformed legislation should include a positive duty upon employers to accommodate fair requests for flexible work arrangements from employees with family and care responsibilities. Anti-discrimination legislation alone has traditionally resulted in little in the way of wide scale reform. A requirement to accommodate will have a much more substantive effect for workers.[52]

4.35 Unions New South Wales also supported a legislative requirement to provide flexible working arrangements that balance work with caring responsibilities.[53]

4.36 The Victorian Attorney-General outlined recent amendments to the *Equal Opportunity Act 1995 (Vic)* which provide greater protection against discrimination on

---

49 HREOC, *Submission 69*, pp 104-109. See also Community and Public Sector Union - State Public Services Federation, *Submission 24*, p. 3; Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family,* Sydney, March 2007, pp 60-65.

50 *Submission 69*, p. 107.

51 *Submission 69*, p. 108.

52 *Committee Hansard*, 11 September 2008, p. 14. See also Collaborative submission, *Submission 60*, p. 15.

53 *Submission 5*, p. 3. See also Anti-Discrimination Commission Queensland, *Submission 63*, pp 8-9 and 14.

the grounds of parental or carer responsibilities in relation to employment and employment related areas.[54] The Attorney-General explained that as a result of these amendments:

> ...an employer, a principal or a firm may not unreasonably refuse to accommodate the parental or carer responsibilities of a person offered employment, an employee, a contract worker, a person invited to be a partner in a firm or a partner in a firm. In determining whether the refusal to accommodate the worker's family responsibilities was unreasonable, all relevant facts and circumstances must be considered, including the needs of the employer's business.[55]

4.37 HREOC has previously recommended introduction of a separate Family Responsibilities and Carers' Rights Act which would incorporate a positive duty on employers to reasonably consider requests for flexible work arrangements to accommodate family and carer responsibilities.[56] Carers Australia supported this approach.[57] Ms Ashton told the committee:

> Carers Australia supports the Human Rights and Equal Opportunity Commission's proposal for a separate specialised family responsibilities and carers' rights act. This act will better enable the recognition of carer responsibilities. It will provide coverage against discriminatory practices in areas within and beyond the workplace.[58]

4.38 In addition to its proposals for immediate amendments to the Act, HREOC suggested that longer term options for reform would be either to insert family and carer responsibilities as a distinct protected ground under a federal Equality Act, or to give consideration to enacting a specialised piece of legislation, such as a separate Family Responsibilities and Carers' Rights Act.[59]

4.39 ACCI did not support amendment of the Act to impose a positive duty on employers to accommodate family and carer responsibilities. ACCI pointed to the proposed National Employment Standards (NES) to be introduced in 2010 which will include a right for employees to request flexible working arrangements and extensions to parental leave.[60] ACCI submitted that there should not be:

---

54 *Submission 43*, p. 2. See also NACLC, *Submission 52*, p. 18; Victorian Equal Opportunity and Human Rights Commission, *Submission 72*, p. 2.

55 *Submission 43*, p. 2.

56 HREOC, *It's About Time: Women, men, work and family*, Sydney, March 2007, recommendations 4 and 6, pp 59 and 64.

57 *Submission 33*, pp 5, 11-12 and 13-14. See also Associate Professor Simon Rice, *Submission 53*, p. 5; HREOC, *Submission 69*, p.103.

58 *Committee Hansard*, 11 September 2008, p. 14.

59 *Submission 69*, pp 103-104.

60 *Submission 25*, p. 21. See also Minister for Employment and Workplace Relations, *The National Employment Standards*, at: http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper_web.pdf (accessed 14 October 2008), pp 12 and 21-22.

> ...any further extension of employee rights in this area, before employers have had an opportunity to understand and manage the additional employee rights that will flow from the introduction of the NES.[61]

4.40 Mr Scott Barklamb of ACCI also expressed concern about how the new obligations under the NES and the Victorian *Equal Opportunity Act 1995* would interact:

> The problem potentially for people in Victoria is that you are going to have a new obligation in the national employment standards and you are going to have this new extra anti-discrimination obligation in Victoria. ...[T]he changes to the Victorian Equal Opportunity Act are potentially in some collision with this new national employment standard. [62]

4.41 By contrast, HREOC submitted that:

> Whilst the new National Employment Standard is a positive development, it is insufficient to address the needs of workers with family responsibilities in a number of respects. In particular, the right to request is confined to children under school age, does not apply to workers unless they have at least 12 months continuous service and also, in the case of casual workers, a reasonable expectation of continuing employment.[63]

Discrimination on the basis of sexual orientation, gender identity, breastfeeding and other grounds

4.42 A number of submissions proposed including additional grounds of discrimination within the Act. The Equal Opportunity Commission and the Office of Women (SA) argued that there should be a comprehensive remedy for discrimination on the grounds of sexual orientation under Commonwealth legislation rather than the current limited protection under sections 31 and 32 of the HREOC Act.[64]

4.43 Sections 31 and 32 of the HREOC Act confer on HREOC a power to inquire into practices which may constitute discrimination and report to the Attorney-General in relation to those inquiries. However, the Attorney-General's Department advised that, while sexuality and gender identity are grounds of discrimination in all state and territory jurisdictions, these are not grounds of discrimination under Commonwealth law.[65]

---

61 *Submission 25*, p. 21.

62 *Committee Hansard*, September 2008, p. 21.

63 *Submission 69*, p. 105.

64 *Submission 45*, p. 4. See also NACLC, *Submission 52*, p. 20; Victorian Equal Opportunity and Human Rights Commission, *Submission 72*, pp 2-3; HREOC, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference*, HRC Report No. 6, 1998 available at: http://www.humanrights.gov.au/pdf/human_rights/discrimination_sexual_pref.pdf (accessed 2 September 2008).

65 *Answers to question on notice*, 22 October 2008, p. 3.

4.44 The Castan Centre for Human Rights Law recommended amending the Act to create specific protection for the rights of transsexual, transgender and intersex people.[66] The centre outlined the variable protection of transsexual, transgender and intersex people from discrimination, available under state and territory legislation, and advocated the Commonwealth providing consistent and comprehensive legislative protection from discrimination for these groups.[67]

4.45 The Australian Coalition for Equality supported providing comprehensive protection against discrimination on the grounds of sexual orientation and gender identity under Commonwealth law but suggested there were drawbacks to including sexuality and gender identity as additional grounds under the Act. In particular, the coalition argued, firstly that the provisions of the Act are dated and not designed to handle this type of discrimination, and secondly that an amendment to the Act would not send out a clear message that discrimination on the grounds of sexual orientation or gender identity is, in and of itself, unacceptable behaviour. Instead, the coalition supported enactment of specific legislation dealing with sexuality and gender identity discrimination.[68]

4.46 The Androgen Insensitivity Syndrome Support Group Australia submitted that people born with intersex conditions continue to face discrimination particularly in relation to their right to marry and protection from irreversible, non-therapeutic medical intervention without court authority.[69] The group did not advocate a specific legislative solution to these issues but sought the elimination of this discrimination.[70]

4.47 Whilst not opposing the inclusion of additional grounds of discrimination under the Act, Christian Schools Australia told the committee that if the scope of the Act was expanded to include additional grounds they may seek a corresponding expansion of the exemption in section 38. Section 38 allows educational institutions established for religious purposes to discriminate for some purposes in the areas of employment and education. The Chief Executive Officer Mr Stephen O'Doherty explained further:

> If the Act started to redefine sex to include chosen gender, as some acts have, that is clearly a matter on which churches have taken a view. That becomes a very important matter in schools employing persons who will be able not only to adhere intellectually but also live by the teachings of the religion in relation to sexuality.
>
> ...If you refresh the language in legislative terms to start using the word 'gender' instead of 'sex', or if you started to include the language of 'chosen gender', that would raise specific flags for Christian schools and other Christian organisations, which I think we would then be asking you to

66 *Submission 51,* p. 10.

67 *Submission 51,* pp 16-24. See also NACLC, *Submission 52,* p. 21.

68 *Submission 80,* p. 3.

69 *Submission 1*, pp 2-5.

70 *Submission 1*, p. 5.

> address separately, or at least ensure that our ability to discriminate included the ability to discriminate on issues such as chosen gender.[71]

4.48 The Queensland Council of Unions recommended amending the Act to include several additional grounds of discrimination. In addition to sexuality and gender identity, the council suggested discrimination on the grounds of lawful sexual activity as a sex worker, parental and relationship status (as distinct from marital status) and breastfeeding should be unlawful.[72]

4.49 HREOC also recommended inclusion of breastfeeding as a separate protected ground under the Act. The Act currently provides that breastfeeding is a characteristic that appertains generally to women and it is therefore intended that discrimination on this basis will be captured under the definition of direct sex discrimination.[73] However the Act does not make breastfeeding a separate ground of discrimination in its own right. The Sex Discrimination Commissioner explained:

> The way the SDA is currently drafted, it would seem that the intent is that breastfeeding discrimination is already covered. It is just that it is in a more indirect way that you get there. What we are suggesting is that it should just be put up front and made clear that breastfeeding is a protected attribute.[74]

Addressing intersecting forms of discrimination

4.50 The committee received evidence that existing federal anti-discrimination legislation, including the Act, has a limited capacity to address discrimination on intersecting grounds, such as sex and race, or sex, disability and age. NACLC explained that the experience of intersecting forms of discrimination, or discrimination on multiple grounds, is not merely the sum of its parts:

> An analogy that has often been used to explain this intersectionality is that of a cake. Each of its constituent elements – flour, sugar, eggs, milk, cocoa and so on – are fundamentally different from the eventual combined product of a chocolate cake. Further, the individual ingredients can no longer be separated out and identified. The cake is not merely the accumulation of various ingredients. It is an entirely new entity. Similarly the experience of discrimination where the victim is an African Muslim woman is fundamentally different from that of an Anglo-Saxon woman or an African man. The discrimination experienced is not merely sex discrimination plus race discrimination plus religious discrimination. It is a new and unique experience of discrimination based on the intersection of her multiple identities.[75]

---

71 *Committee Hansard*, 9 September 2008, p. 56.

72 *Submission 46,* p. 2.

73 Subsection 5(1A) of the Act.

74 *Committee Hansard*, 9 September 2008, p. 12. See also *Submission 69*, pp 89-90; Anti-Discrimination Commission Queensland, *Submission 63*, p. 9.

75 *Submission 52,* pp 19-20. See also Ms Caroline Lambert, *Committee Hansard,* 11 September 2008, p. 58.

4.51 The National Foundation for Australian Women submitted that the Act needs to provide better protection against discrimination based on gender and other grounds. The Foundation noted that there is no capacity for the court to look at the whole act of discrimination where the discrimination occurs for a range of reasons.[76] Ms Shirley Southgate of NACLC discussed this issue in the context of complaints by women from non-English speaking backgrounds:

> The experience of discrimination for a woman from a non-English speaking background is a separate and unique experience to that of an English speaking woman. There is no capacity within the legislation to say, 'This is a whole unique experience.'
>
> You might be able to say, 'I have a complaint under the Race Discrimination Act, and I have a complaint under the Sex Discrimination Act', but you cannot say, 'As they intersect it becomes a different experience.' There is no capacity for the courts to take that into account.[77]

4.52 Associate Professor Beth Gaze also identified this as shortcoming of the Act:

> The case law indicates that claims by women in these categories (who could be regarded as affected by multiple discrimination grounds, or 'intersectionality') are rarely litigated. It is very difficult to work out what these women would have to prove to establish their claims if the claim involves combined ground discrimination.[78]

4.53 The Law Council explained that these difficulties arise from the structure of federal anti-discrimination legislation:

> Because federal anti-discrimination legislation addresses discrimination by way of four separate pieces of legislation, plus the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*, each law is designed to address discrimination on the basis of only one type of difference or characteristic (or attribute appertaining to that characteristic).
>
> The SD Act is for example formulated to address only discrimination on the basis of sex, marital status, pregnancy, potential pregnancy, family responsibilities and sexual harassment. It is not capable of taking into account any variation of the experience of only sex discrimination, such as discrimination on the grounds of both sex and race or sex and disability.[79]

4.54 The Anti-Discrimination Commission Queensland noted that the ALRC *Equality Before the Law* report identified these difficulties and recommended

---

76 *Submission 15,* p. 8. See also Law Council, *Submission 59*, p.30; Anti-Discrimination Commission Queensland, *Submission 63*, pp 11-12.

77 *Committee Hansard*, 9 September 2008, p. 32.

78 *Submission 50*, p. 2. See also Collaborative submission, *Submission 60*, p. 15.

79 *Submission 59*, p. 30.

amending Commonwealth discrimination legislation to enable HREOC to deal with complaints that fall across different discrimination legislation.[80]

4.55 The Law Council more specifically recommended amending either subsection 46PO(4) of the HREOC Act, or each federal anti-discrimination Act[81] so that:

> ...in cases where complainants allege discrimination on multiple grounds, such as on the grounds of both race and sex, or on the grounds of both disability and sex, the 'multiple discriminations' can be appropriately addressed. Such legislative amendment ought to include guidance to the court to take into account the experience of multiple differences in awarding remedies.[82]

4.56 The Human Rights Law Centre similarly supported amending the Act to require HREOC or the court to consider joining related complaints made on the grounds of discrimination covered by separate federal anti-discrimination legislation.[83]

An Equality Act?

4.57 Some submissions argued that the whole structure of federal anti-discrimination legislation needs to be changed to effectively address discrimination on intersecting grounds. For example, Australian Women Lawyers submitted that replacing the existing separate pieces of federal anti-discrimination legislation with a single Equality Act would be a more effective mechanism for dealing with intersecting forms of discrimination.[84]

4.58 NACLC advocated enacting a single national Equality Act for broader reasons:

> Under the current pieces of Commonwealth anti-discrimination legislation, limited grounds of protection from discrimination are provided. In order to provide broader protection and freedom from discrimination, and implement Australia's international treaty obligations ...it is submitted that a single Equality Act would be a preferable legislative mechanism. Clearly, a single Act would provide a means of harmonising the processes for

---

80 *Submission 63*, pp 11-12. See ALRC, *Equality Before the Law: Justice for Women,* ALRC 69 Part I, recommendation 3.9.

81 That is the Act, the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

82 *Submission 59,* pp 30-31.

83 *Submission 20,* pp 5 and 26-27.

84 *Submission 29,* pp 5-6 and 17. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 32; Women's Legal Services Australia, *Submission 44*, p. 2; ACTU, *Submission 55*, p. 11.

> promoting equality, addressing systemic discrimination and inequality, and dealing with individual complaints.[85]

4.59 In addition, Ms Eastman of the Law Council identified practical benefits which would flow from replacing the existing anti-discrimination acts with an Equality Act:

> I think from a practical perspective—and I speak from a practitioner's perspective—to have all of the relevant anti-discrimination provisions in one act at a federal level would certainly make the process much easier for applicants, respondents and practitioners because there is not a consistency in the terms of all of the federal acts, which is race, age, sex and disability, although each of those areas have their own special considerations. But there is certainly a real benefit in having some clear national standards.[86]

4.60 However Professor Margaret Thornton cautioned that a difficulty with the Equality Act model is that it treats all forms of discrimination as the same:

> One of the problems with a so-called omnibus act having a whole range of grounds within the legislation—sex, race, sexuality, age, disability and so on—is that they end up being treated as mirror images of the other. That, I think, can have a distorting effect. We see this happen with state acts, which do follow the omnibus model. I suppose it is both a strength and a weakness of the federal legislation that it has adopted a different model of having the discreet pieces of legislation so that one is not necessarily seen as a mirror image of the other...[87]

4.61 ALRC considered the merits of an Equality Act in detail as part of its inquiry into equality before the law. HREOC noted that, in the *Equality Before the Law* report, ALRC recommended enactment of an Equality Act to guarantee men and women equality before the law, with the ultimate aim of entrenching a constitutional guarantee of equality.[88] However, the ALRC proposal was for legislation to complement rather than replace existing anti-discrimination legislation.[89]

4.62 HREOC suggested that the merits of introducing a comprehensive Equality Act for Australia should be examined by a separate inquiry.[90] The Sex Discrimination Commissioner explained the rationale for this approach:

---

85 *Submission 52*, p. 39. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 59.

86 *Committee Hansard*, 10 September 2008, p. 53. See also Mr Ian Scott, JobWatch, *Committee Hansard*, 10 September 2008, p. 43.

87 *Committee Hansard*, 11 September 2008, p. 44. See also Miss Elnaz Nikibin, UNIFEM Australia, *Committee Hansard*, 9 September 2008, p.42.

88 *Submission 69*, pp 259-260; ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, recommendations 4.1 to 4.8.

89 ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, para 4.46.

90 *Submission 69*, pp 259-267.

> An equality act would involve incorporating the Sex Discrimination Act with other federal discrimination laws, such as the Disability Discrimination Act, into one piece of legislation. This would be a major reform, so it needs adequate time to be investigated. We therefore propose that this committee support a national inquiry into the merits of adopting an equality act. That would deliver a considered view on whether having a single federal equality act is indeed preferable to the current situation of separate federal acts.[91]

4.63 HREOC recommended more generally that a two stage process be adopted to reform of the Act. The first stage would involve improving institutional arrangements and immediate amendments to strengthen the Act. The second stage would involve a national inquiry to look at issues which will require further consultation.[92] The Sex Discrimination Commissioner elaborated:

> ...we are recommending a two-stage process of national reform to the Sex Discrimination Act to be completed over three years. There are changes to the Sex Discrimination Act that can be made now to significantly strengthen the effectiveness of the law. To that extent, we make 54 recommendations for immediate implementation, and that is our stage one. However, we consider that some of the reforms to the Act require a more extended period of consultation to achieve the right outcome.[93]

4.64 Several witnesses expressed support for a two stage approach to reforming the Act. For example, Ms Eastman of the Law Council:

> [I]n general we would be supportive of a two-stage process if the first stage was to look at issues that could be the subject of immediate amendment and immediate application in terms of the operation of the Act.[94]

4.65 Dr Belinda Smith noted that such an approach would allow Australia to thoroughly consider the innovative approaches to addressing inequality adopted in other countries:

> I support the HREOC proposal that this be a two-stage inquiry and that there are things that could and should be done immediately. But there are a lot of things that I think we could learn from these other countries that have developed other regulatory frameworks and have had them in place long enough to see some of the results. But we need to do research and we need to have public debate to think about how they might work in Australia.[95]

---

91 *Committee Hansard*, 9 September 2008, p. 3. See also Collaborative submission, *Submission 60*, pp 37-39; *Submission 69*, p. 260.

92 *Submission 69*, pp 8-13.

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

94 *Committee Hansard*, 10 September 2008, p. 51. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 30; Ms Rosalind Strong and Miss Elnaz Nikibin, UNIFEM Australia, *Committee Hansard*, 9 September 2008, pp 41-42; Dr Marie Joyce, Ordination of Catholic Women, *Committee Hansard*, 11 September 2008, p. 29.

95 *Committee Hansard*, 9 September 2008, p. 59.

CHAPTER 5

EFFECTIVENESS OF THE ACT

5.1 This chapter considers evidence regarding the overall effectiveness of the Act and the extent to which it implements Australia's international obligations to eliminate sex discrimination as well as looking more specifically at the effectiveness of the Act in preventing discrimination against men and sexual harassment.

Overall effect of the Act

5.2 In general, evidence to the committee suggested that the Act has had an impact on the most overt forms of sex discrimination but has been less successful in addressing systemic discrimination.[1] 'Systemic discrimination' refers to policies, practices or patterns of behaviour, which are absorbed into the institutions and structure of society, that create or perpetuate disadvantage for a particular group.[2]

5.3 The submission from HREOC contended that:

> [W]hilst the SDA has been successful in contributing to reducing direct discrimination..., there has been less progress on addressing systemic discrimination or achieving substantive gender equality. There is clearly much more that could be done.[3]

5.4 On the basis of consultation conducted through her national listening tour, the Sex Discrimination Commissioner summarised the position as follows:

> My firm conclusion from that tour was that while we had good experience in terms of reducing overt discrimination, or a lot of the formal discrimination against women, our progress towards achieving true gender equality in Australia has stalled. I became convinced that, as a nation, we need to re-energise our efforts to find innovative solutions to the systemic gender inequality that persists in many people's daily lives.[4]

5.5 In response to a question from the committee concerning the overall progress made in addressing gender equality, Professor Margaret Thornton said:

---

1 The committee notes however that one submission suggested that gender equality may have reached an acceptable level already: Dr Stan Jeffrey KSJ, *Submission 4*, p. 1. While two submissions expressed opposition to CEDAW: Endeavour Forum, *Submission 36*, p. 1; Mr Ross Mitchell, *Submission 81*, p. 2.

2 HREOC, *Submission 69*, p. 36; ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.29; Ontario Human Rights Commission, *Racism and Racial Discrimination - Systemic Discrimination*, Fact Sheet, at http://www.ohrc.on.ca/en/resources/factsheets/systemic (accessed 28 October 2008). HREOC gave examples of systemic sex discrimination including the gap between women and men's earnings due to the lack of value ascribed to what is commonly characterised as 'women's work'.

3 *Submission 69*, pp 219-220. See also Emily's List, *Submission 61*, p. 2.

4 *Committee Hansard*, 9 September 2008, p. 2. See also *Submission 69*, p. 35.

> Certainly, there has been some progress with where women are located within the workplace, for example, in terms of authoritative and professional positions. On its face, that looks quite positive. If you take a position that focuses on numbers, it looks quite good. But I would suggest that much more than numbers are involved. One has to look beneath the surface at the substantive aspects.[5]

5.6 This assessment of 'some progress' was shared by other witnesses including Mr Mathew Tinkler of PILCH:

> [T]he Sex Discrimination Act, although well intentioned and having made some very positive steps, really fails to prevent and eliminate sex discrimination in Australia and, in doing so, Australia fails to meet some of its human rights obligations.[6]

5.7 The Australian Baha'i Community suggested that the focus of the Act on providing redress for individual complaints has limited its ability to address discrimination:

> The significance of the Commonwealth *Sex Discrimination Act 1984* in giving force to many of Australia's obligations under CEDAW should not be underestimated. While the Act plays a useful role for the individual complainant, however, particularly in redressing complaints of discrimination in employment and of sexual harassment, it is not without its limitations. With its focus on identified acts of discrimination within specified spheres of activity, the Act addresses discrimination as an isolated incident rather than as a systemic problem.[7]

5.8 A less qualified assessment was made by Mr Daniel Mammone of ACCI who suggested that the Act has contributed to significant changes within Australian industry:

> The Sex Discrimination Act is an important part of the overall framework of Commonwealth anti-discrimination laws which, taken as a whole, imposes significant legal obligations on industry and which have contributed to significant changes in human resource practice within industry over the last 20 years. The underlying objectives and assumptions of anti-discrimination law that employees deserve equal treatment in employment enjoy an extremely high level of support within Australian industry.[8]

5.9 Submissions from unions also noted that the Act represents a significant achievement in terms of addressing sex discrimination. For example, the Australian Education Union, stated that the Act is:

---

5 *Committee Hansard*, 11 September 2008, pp 38-39.

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

7 *Submission 16*, p. 2. See also Independent Education Union of Australia, *Submission 49*, p. 2.

8 *Committee Hansard*, 10 September 2008, p. 11.

> ...a crucial and landmark piece of legislation and its ability to create an avenue for complaints of sex discrimination to be heard and resolved is a great achievement.[9]

5.10 While the ACTU stated that the Act has "played an important role in protecting women from discrimination".[10]

5.11 However, these two submissions argued that the Act has been less successful in addressing structural disadvantage and effecting cultural change.[11] In more concrete terms, the ACTU stated that "women still fare worse than men on a number of key measures of equality in employment".[12]

5.12 Academic commentary on the Act also paints a complex picture on the issue of its overall effect. For example, whilst arguing that the Act embodies a particularly weak regulatory model, Dr Belinda Smith suggests that the Act has nevertheless played a normative role in relation to sex discrimination. She asserts that:

> Generation Y will not put up with what their mothers and fathers might have accepted. The battle line has at least moved forward – it is no longer drawn over blatant and intentional exclusion, but has moved to more indirect and structural forms of discrimination.[13]

5.13 This echo of the theme of 'some progress but more to be done' seems consistent with the views of Associate Professor Beth Gaze who wrote on the twentieth anniversary of the Act:

> [W]hile I wouldn't want to be without the SDA, it has aged over the 20 years since enactment. Although it has fundamentally changed our legal and social environment, other changes have undermined some of the gains. It needs revitalising to continue to drive the case for women's equality in the modern context.[14]

Extent to which the Act implements international obligations

5.14 Most of the evidence presented to the committee argued that the Act only partially implements Australia's international obligations in relation to gender equality. Ms Edwina MacDonald of NACLC outlined those obligations:

---

9 *Submission 17*, p. 1. See also Diversity Council Australia Inc, *Submission 47*, p. 4.

10 *Submission 55*, p. 2.

11 *Submission 17*, p. 1.

12 *Submission 55*, p. 2.

13 Dr Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?' in C Arup, et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, p. 116.

14 Associate Professor Beth Gaze, 'The Sex Discrimination Act After Twenty Years: Achievements, Disillusionment and Alternatives', *UNSW Law Journal*, vol 27(3), 2004, pp 914-921 at p. 921. See also Australian Women Lawyers, *Submission 29*, p. 3.

> Australia's obligations with respect to gender equality go beyond CEDAW, which codifies women's rights to non-discrimination and equality with men. Australia is also obliged to ensure the equal right of men and women to the enjoyment of civil, political, economic, social and cultural rights under the ICCPR and also ICESCR. In addition, Australia is also a signatory to ILO treaties that create obligations with respect to reconciling work and family.[15]

5.15 She then submitted that:

> [T]hese obligations provide an effective human rights framework within which substantive equality for women and men can be achieved. However, at present it is our view that Australia is not meeting all those obligations through the Sex Discrimination Act, or through other legislation.[16]

5.16 HREOC supported the assessment that the Act does not fully implement Australia's international obligations:

> [I]t has always been acknowledged that the [Act] did not fully implement all obligations under CEDAW nor other relevant international legal obligations in the International Covenant on Civil and Political Rights ('ICCPR') , the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and International Labour Organisation ('ILO') Conventions.[17]

5.17 Similarly, Australian Women Lawyers, submitted that the Act "remains only a partial response to women's legal inequality".[18]

5.18 The Australian Women's Health Network explained the limitations of the Act:

> Clearly, the SDA, restricted as it is to individual complaints and the public sphere, falls far short of being able to influence the attainment and enjoyment of the fundamental freedoms that CEDAW envisages.[19]

5.19 The Human Rights Law Centre noted that the Act does not implement CEDAW in its totality and contrasted this with the implementation of the International Convention on the Elimination of all forms of Racial Discrimination by the *Racial Discrimination Act 1975*:

> Australia's cautious approach to the domestic implementation of CEDAW is in contrast to the approach taken by the Racial Discrimination Act 1975 (Cth) (RDA), which aims to give full effect to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and closely follows the language of that Convention. Ironically, the different approaches taken in regards to racial discrimination and discrimination

---

15 *Committee Hansard*, 9 September 2008, pp 30-31.

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

17 *Submission 69*, p. 46.

18 *Submission 29*, pp 3-4.

19 *Submission 30*, p. 7. See also Women's Electoral Lobby, *Submission 8*, p. 2.

> against women exemplifies the entrenched discrimination that CEDAW is directed at eliminating.[20]

5.20 Against this evidence that the Act represents only a partial implementation of CEDAW, an officer of the Attorney-General's Department noted that the Act is not the only way in which Australia addresses its obligations under the convention:

> [T]he Sex Discrimination Act is a key plank that meets Australia's obligations under the CEDAW, but it is not the only law or program that ensures that we meet those obligations. [21]

5.21 He argued that other Commonwealth legislation including the EOWW Act needs to be considered as well as legislation at a state and territory level.[22]

5.22 The UN Committee certainly adopts this broader approach in its consideration of whether states are meeting their obligations under CEDAW. Nevertheless, in 2006, the UN Committee criticised Australia's implementation of CEDAW in several areas.[23] Dr Sara Charlesworth noted some of the UN Committee's concerns:

> Australia's implementation of CEDAW was criticised by the Committee in a number of respects including the lack of adequate structures and mechanisms to ensure effective coordination and consistent application of the Convention in all states and territories, the absence of an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men, the lack of sufficient statistical data, disaggregated by sex and ethnicity on the practical realization of equality between women and men in all areas covered by the Convention, and information on the impact and results achieved of legal and policy measures taken.[24]

Areas of continuing discrimination and inequality

5.23 Significant evidence was presented to the committee of continuing areas of sex discrimination or substantive inequality which have not been overcome despite the passing of the Act. Most of this evidence concerned discrimination which was employment related including a lack of pay equity, limited access to paid parental leave, and women being under-represented in particular professions and leadership positions.

---

20 *Submission 20,* pp 7-8. See also HREOC, *Submission 69*, p. 8.

21 *Committee Hansard*, 11 September 2008, p. 5.

22 *Committee Hansard*, 11 September 2008, p. 5. See also ACCI, *Submission 25*, p. 33.

23 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.

24 *Submission 39,* p. 5. See also NACLC, *Submission 52*, p. 9; Collaborative submission, *Submission 60*, p. 10; Australian Catholic Religious Against Trafficking in Humans, *Submission 78*, p. 2.

Complaints

5.24 The number of complaints made under the Act is not necessarily an accurate indication of the level of discrimination since people facing discrimination may decide not to pursue complaints under the Act for a wide variety of reasons. For example, they may decide to pursue claims under state or territory anti-discrimination legislation rather than under federal legislation or, in the case of employment discrimination, they may pursue a claim under industrial relations laws. Conversely, an increase in the number of complaints may simply be evidence of an increase in the awareness of rights and the willingness to assert them rather than an increase in discrimination itself.

5.25 Nevertheless, it is interesting that the statistics in relation to complaints received by HREOC show an increase in the number of sex discrimination complaints over the last two years. HREOC advised that:

> Complaints received under the SDA have remained consistent at around 350 complaints a year since 2002-03, increasing by 36% in the 2006-07 reporting year and remaining at this increased level in the current year.
>
> ...It is predominantly women who make complaints of discrimination and harassment under the SDA. Since 2002-03, women have represented at least 82% of complainants.[25]

5.26 HREOC further advised the committee that:

> ...the vast majority of complaints made under the SDA relate to the area of employment. The next main area of complaint is the provision of goods and services. The largest ground of complaint is sex discrimination and this has increased over the past three years. The next most frequent ground of complaint is pregnancy discrimination followed by sexual harassment.[26]

5.27 However, Professor Thornton told the committee that her more general research on complaints under anti-discrimination legislation across the country suggested both a decline in the number of complaints and the number of complaints going to a formal hearing.[27]

5.28 Notably, Job Watch which provides a free telephone advice service to Victorian workers including advice in relation to sex discrimination and sexual harassment did not consider that the incidence of discrimination and harassment was declining.[28] Mr Ian Scott of Job Watch told the committee:

> Over the last five years, JobWatch has received approximately 850 calls per year in relation to sex based discrimination, and about 90 per cent of those

---

25 *Submission 69*, p. 187. See also Women's Electoral Lobby, *Submission 8*, p. 12.

26 *Submission 69*, p. 191.

27 *Committee Hansard*, 11 September 2008, p. 41. See also paragraph 6.17.

28 Mr Ian Scott, Job Watch, *Committee Hansard*, 10 September 2008, p. 44.

> callers were women. ...We say that sex based discrimination is still a problem and a problem that mainly relates to women.[29]

5.29 Job Watch assisted the committee by providing a statistical breakdown of the calls it receives in relation to sex discrimination. Amongst other things, that breakdown demonstrated that most callers are in the 25 to 34 years age group (52.6 percent) or the 35 to 44 years age group (27.8 percent) and that:

> The main types of sex discrimination inquiries JobWatch receives relate to maternity leave, parental and carer status discrimination closely followed by sexual harassment, pregnancy and breast feeding discrimination... Over the last 12 months there has been an increase in all inquiries, except sexual harassment, but the largest increase has occurred in parental and carer status discrimination.[30]

5.30 The Working Women's Centre South Australia, Northern Territory Working Women's Centre and Queensland Working Women's Service (the Working Women's Centres) also provide direct advice to women on work related issues. The Working Women's Centres advised that:

> In 2007 the three Centres provided information to over 6000 women with approximately 14% of these calls relating to issues about maternity entitlements, pregnancy, sex and family responsibility discrimination, returning to work, child care and balancing work and family.[31]

5.31 The Queensland Working Women's Service and Northern Territory Working Women's Centre both reported receiving an increasing number of inquiries regarding both pregnancy and work and family discrimination. While, the South Australian Working Women's Centre noted a slight increase in enquiries about maternity entitlements in 2007-08.[32]

Pay equity

5.32 One key area of substantive inequality is the continuing gap between male and female earnings. The Business and Professional Women Australia noted that:

> [W]omen in Australia are earning up to 17% less than men, and retiring on less than a third of male savings. This is despite the fact that in the last 25 years there have been substantial changes in women's economic circumstances. *Australian Social Trends* reports that the proportion of women earning their own incomes has risen, and levels of economic autonomy experienced by women have increased. However, women's

---

29 *Committee Hansard*, 10 September 2008, p. 35. See also Hawkesbury Nepean Community Legal Centre, *Submission 77*, p. 2.

30 *Submission 62*, pp 6 and 8.

31 *Submission 56*, p. 2. See also Shop, Distributive and Allied Employees' Association, *Submission 42*, p. 6.

32 *Submission 56*, p. 2.

> relative economic position, as measured by their share of total gross personal income, has remained largely unchanged.[33]

5.33 HREOC provided more detail on the causes and practical consequences of the gender pay gap for women:

> Currently, women working full-time earn 16 per cent less than men. The gender pay gap is even greater when women's part-time and casual earnings are considered, with women earning two thirds what men earn overall. Women are more likely to be working under minimum employment conditions and be engaged in low paid, casual and part time work. Australian women are overrepresented in low paid industries with high levels of part time work such as retail, hospitality and personal services.
>
> The gender pay gap has a number of critical flow-on effects. Women, having earned less than men and carried a significantly greater share of unpaid work, have significantly less retirement savings compared to men. Current superannuation payouts for women are one third of those for men.[34]

5.34 Surprisingly, there appears to be a pay gap between men and women even after factors such as differences in occupations, qualifications and experience are taken into account. An officer of the Department of Education, Employment and Workplace Relations recently gave evidence to the House of Representatives Standing Committee on Employment and Workplace Relations inquiry into pay equity on this issue. She noted that :

> In terms of gender pay gaps, the gap in Australia is commensurate with the average across the OECD countries and has followed a similar trajectory over time. ...The OECD also reported one quarter of this pay gap remains unexplained, even after considering the impact of direct and indirect factors, such as education, experience, occupation, motivation, expectations and field of study.[35]

5.35 Similarly, the Law Council noted that:

> From the very beginning of their careers within the legal profession, men are paid more than women. For example, in New South Wales when the incomes of solicitors with less than one years experience were compared in 2002, men on average earned $8,200 more than their female counterparts. In 2007 little has changed, the estimated mean income of male solicitors admitted between one and five years was calculated to be $70,300 while that of female practitioners was $63,500.[36]

---

33 *Submission 11*, p. 2.

34 *Submission 69*, p. 30. See also Australian Women's Health Network, *Submission 30*, p. 3; Queensland Council of Unions, *Submission 46*, p. 7.

35 *House of Representatives Standing Committee on Employment and Workplace Relations Hansard*, 18 September 2008, p. 1.

36 *Submission 59*, p.21. See also Ms Penny Thew, Law Council, *Committee Hansard*, 10 September 2008, p. 60.

5.36 The Australian Education Union pointed to structural discrimination contributing to the lack of pay equity between men and women including an undervaluing of the work that women have traditionally done and concentration of women in lower paid positions. Mr Angelo Gavrielatos, Federal President of the Union, told the committee:

> [W]ithin our own industry, whilst 70 per cent-plus of our workforce are women they are underrepresented in terms of the higher earning rungs of our profession. Those people who went to fields of administration or principalship, et cetera; women are underrepresented in those higher rungs of the profession and certainly overrepresented, if you like, in the lower paid rungs of our industry.[37]

5.37 Unions New South Wales submitted that the Act does not ensure pay equity for work of comparable value:

> This means that whilst men and women who do the same job have some degree of recourse under the Act if there is a disparity in their pay, the Act fails to note the genderised nature of many industries and thus allows for a systematic undervaluing of some work, particularly that performed by women. A key example of this is the significant disparity in pay between apprentice hairdressers and apprentice car mechanics, despite them having to undertake comparable training and purchase comparable trade tools.[38]

5.38 To remedy this, Unions New South Wales suggested that the Act be amended to require that an award made by an industrial relations commission, or an agreement recognised by a commission, must provide for equal remuneration for men and women doing work of equal or comparable value.[39] Similarly, the United Nations Development Fund for Women (UNIFEM Australia) argued that equal pay for equal work should be a specific objective of the Act and legally required by the Act in more explicit terms.[40]

Discrimination within professions

5.39 It appears that the experience of discrimination is not limited to women in precarious or low paid employment. For example, the Association of Professional Engineers, Scientists and Managers Australia submitted that the existing legislation has not eliminated sex discrimination or discrimination on the basis of family responsibilities within the technical professions. The Association outlined areas of discrimination including a lack of pay equity and women being under-represented at senior levels in the professions.[41] The association noted that:

---

37 *Committee Hansard*, 10 September 2008, p. 62.

38 *Submission 5*, p. 2. See also Association of Professional Engineers, Scientists and Managers Australia, *Submission 48*, p. 6; HREOC, *Submission 69*, pp 31-32.

39 *Submission 5*, p. 2.

40 *Submission 19*, pp 3-4. See also *Committee Hansard*, 9 September 2008, p. 40.

41 *Submission 48*, pp 3-6.

> Indications are that despite existing sex discrimination legislation the prevalence and impact of direct discrimination [on] women in technical professions is extensive. A survey of women engineers conducted by Engineers Australia in 2007 found that 42.3% of women respondents had experienced discrimination in their role as an engineer (predominantly gender based), which had increased from 36% in 1999.[42]

5.40 The Law Council provided similar evidence in relation to the experience of women in the legal profession.[43] In particular, the Law Council noted that:

> While the number of women entering the profession has increased there has not been a corresponding rise in the numbers of women attaining law firm partnerships. A 2006 survey of partnership appointment found that at 24 of Australia's leading law firms, women make up on average just 18.1% or 429 of 2364 partners.[44]

5.41 Ms Penny Thew of the Law Council also pointed to the attrition of women from the legal industry as a factor preventing any increase in the proportion of female lawyers:

> Even though the number of women entering the bar in particular has increased in the very recent past, the level of women at the bar remains fairly static over the last five to seven years in any event. That is in New South Wales, and I understand it is the same in relation to the legal industry generally in New South Wales.[45]

Paid parental leave

5.42 UNIFEM Australia explained that the provision of universal paid maternity leave is a distinct international obligation under CEDAW and pointed out that:

> Australia is one of the only two OECD Countries that does not have a requirement for paid maternity leave: Maternity leave is not mandated by the SDA, but is left to the discretion of the employer.[46]

5.43 HREOC's submission noted that the absence of a legislative requirement means that:

> Paid maternity leave is accessed by only around one third of employed pregnant women. The use of paid paternity or parental leave by male partners is even lower at 25 per cent.[47]

---

42 *Submission 48,* p. 3.

43 *Submission 59,* pp 19-22.

44 *Submission 59,* p. 20.

45 *Committee Hansard,* 10 September 2008, p. 59.

46 *Submission, 19,* pp 2-3.

47 *Submission 69,* p. 33.

5.44 UNIFEM Australia recommended that the Australian Government remove its reservation to CEDAW in relation to maternity leave.[48] Mrs Rosalind Strong the President of UNIFEM Australia submitted that a system of paid maternity leave should be implemented urgently:

> We believe that there should be wide consultation within the community, not just with industry, in relation to that matter. We also think that contemporary notions of equality include shared responsibility for care giving, so the issue of paid maternity leave should be extended to include paid paternity leave.[49]

5.45 Some submissions made specific proposals for the introduction of a requirement for paid parental leave. Unions New South Wales recommended there be a legislative requirement for paid parental leave for a minimum of six months.[50] While the Young Women's Christian Association (YWCA) Australia advocated nine months of paid parental leave funded by both government and employers to provide 75-80% replacement of earnings.[51]

5.46 The committee notes that the Productivity Commission released a draft report on 29 September 2008 as part of its inquiry into paid parental leave. The draft report sets out a proposal for a statutory, paid parental leave scheme which would provide a maximum of 18 weeks of paid leave to be shared between parents, with an additional 2 weeks of paternity leave for the father or same sex partner.[52] The scheme would be largely taxpayer funded, available to employed parents and provide payments at the adult minimum wage for most eligible employees.[53] The commission has invited submissions on the draft report and is due to report in February 2009.

Representation of women in leadership positions

5.47 The submission from HREOC pointed to the representation of women in leadership positions as another area in which inequality persists:

> In Australia, women continue to be significantly under-represented in senior leadership positions across business, government and the community, despite Australia leading the world [in] levels of educational attainment for women. For the top 200 companies listed on the Australian Stock Exchange at 1 February 2006, women held only 8.7 per cent of board directorships. Women make up 25 per cent of the House of Representatives in the Parliament of Australia. The statistics of women's representation in

48 *Submission, 19,* p. 3.

49 *Committee Hansard*, 9 September 2008, pp 39-40.

50 *Submission 5,* pp 3-4.

51 *Submission 58,* p. 8.

52 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 20 October 2008), p. 2.1.

53 Productivity Commission, p. 2.1

> leadership positions are indicative of the barriers faced by women to equal participation and progression in the workplace.[54]

5.48 The Business and Professional Women Australia also raised this issue and argued that:

> [S]tructural change is needed to ensure that women fill a greater number of senior positions in both government and private enterprise. Women continue to lag behind in both remuneration and in corporate leadership...[55]

5.49 UNIFEM Australia noted that the Act does not include any "mechanism to increase the representation of women in both elected and appointed public offices until they are present in Australian public life in numbers proportionate to their representation in the community and their desire for involvement".[56] Mrs Strong of UNIFEM Australia told the committee:

> Currently the Sex Discrimination Act is silent on this issue, although it is an element of CEDAW. We seek a clause that recognises the role of women in leadership in political, community and business life. We recognise that this is likely to be a symbolic clause but, by having a reference in the Act, we think it would be a strengthening of the situation in Australia which, at the moment, relies mostly on goodwill and the good faith of government or organisations...[57]

Sexual Harassment

5.50 Evidence to the committee suggested that sexual harassment is an area of continuing discrimination. The committee was also told that the sexual harassment provisions in the Act are deficient in several respects.

Incidence of sexual harassment

5.51 Several witnesses and submissions provided evidence that sexual harassment remains a significant problem in Australian workplaces even in its most blatant forms. The Sex Discrimination Commissioner noted that sexual harassment was a key theme emerging from her listening tour.[58] The submission from HREOC expanded on this:

> The Commissioner also heard many experiences of sexual harassment, ranging across industries and professions. One woman commented on her experience of repeated unwelcome sexual advances where she lives in close quarters to her male colleagues:

---

54 *Submission 69*, p. 31.

55 *Submission 11*, p. 3. See also Professor Marian Sawer, *Committee Hansard*, 11 September 2008, p. 41.

56 *Submission 19*, p. 6.

57 *Committee Hansard*, 9 September 2008, p. 40. See also p. 44.

58 *Committee Hansard*, 9 September 2008, p. 18.

> I've been living [in these work quarters] for three years and I've had knocks on my door at night with guys saying, "Guess you're feeling a bit lonely, love?" It shouldn't happen. I've been sitting with a group of males and one will ask, "Don't you think it's my turn [for sex] tonight?"[59]

5.52 Legal Aid Queensland stated that sexual harassment is a common complaint from clients, particularly in private sector organisations and small businesses, and provided the following examples of sexual harassment cases:

> *Case example 1: client was employed by café as a waitress and experienced sexual harassment from the chef and owner. They made lewd suggestions about her appearance, asked her about her love life, left pornography lying around, and threw a bucket of water at the top of her torso whilst at a work function.*
>
> Case example 2: young female client worked for butcher and was regularly slapped on the bottom by the butcher. Butcher could not see that this behaviour was inappropriate or sexist.[60]

5.53 Similarly, the Public Interest Law Clearing House (PILCH) considered that "sexual harassment remains prevalent in Australia and there is little awareness of the incidence, nature and consequences of sexual harassment."[61]

5.54 A national telephone survey commissioned by HREOC in 2003 found that 28 per cent of women and seven per cent of men had experienced sexual harassment in the workplace.[62] The HREOC survey also indicated the prevalence of particular types of sexual harassment:

> Victims of sexual harassment report experiencing a broad range of behaviours including serious criminal offences such as sexual or physical assault. The 2003 HREOC telephone survey found that of those who experienced sexual harassment in the workplace in the last five years 94 per cent experienced crude or offensive behaviour; 85 per cent experienced unwanted sexual attention; 43 per cent experienced sexist behaviours; 20 percent experienced sexual assault; 19 per cent experienced sexual coercion; and 62 percent experienced physical harassment.[63]

5.55 The Association of Professional Engineers, Scientists and Managers, Australia submitted that sexual harassment continues to be an issue for many women working in the technical professions and pointed to a recent Engineers Australia survey in which

---

59 *Submission 69*, p. 35. See also p. 191.

60 *Submission 26*, pp 3-4.

61 *Submission 31*, p. 3. See also pp 11-14; HREOC, *Committee Hansard*, 9 September 2008, p. 4; Women's Forum Australia, *Submission 64*, pp 12-13.

62 *Submission 69*, p. 132.

63 *Submission 69*, pp 132-133.

22% of women engineer respondents answered that they had experienced sexual harassment, and 28% bullying, whilst working as an engineer.[64]

5.56 In addition, some submissions suggested that there is significant under-reporting of sexual harassment. For example, the ACTU noted:

> A recent survey conducted by the Shop Assistant's Union (SDAEA) found that over one third of respondents who had experienced sexual harassment in the workplace did not report it, largely because they thought it would be ignored by management.[65]

5.57 On the basis of the experience of the Working Women's Centres, the Collaborative submission supported the view that the number of complaints of sexual harassment may only be the "tip of the iceberg". The submission explained why there is such significant underreporting of sexual harassment:

> Many women contacting the [Working Women's Centres], in particular young, lower skilled and precariously employed women, report to the centres that they feel that they have no alternative than to resign or take periods of leave after experiencing sexual harassment, especially when it is ongoing. The [Working Women's Centres] have also documented numerous cases where the woman has complained internally and the ultimate result is that she is compensated or paid out to terminate her employment but the harasser has remained employed in the organisation and in some cases promoted or moved sideways.[66]

5.58 NACLC also pointed to the difficulties women who do pursue sexual harassment complaints face:

> Community legal centres report that the vast majority of complaints or queries about sexual harassment arise in the context of employment. Further, it seems common that sexual harassment in the workplace leads to the woman who complains of harassment leaving the workplace. At Kingsford Legal Centre, none of the clients represented or advised on an ongoing basis have continued in their workplace after making a complaint of sexual harassment.[67]

5.59 As the 2003 HREOC survey demonstrates, sexual harassment is not exclusively directed at women.[68] Furthermore, the Equal Opportunity Commission and the Office of Women (SA) advised that the commission is receiving increasing

---

64 *Submission 48*, p. 7.

65 *Submission 55*, p. 11. See also PILCH, *Submission 31*, supplementary submission, p. 1; Shop, Distributive and Allied Employees' Association, *Submission 42*, p. 6; HREOC, *Submission 69*, p. 133.

66 *Submission 60*, p. 33. See also Emily's List, *Submission 61*, pp 2-3.

67 *Submission 52*, p. 19. See also PILCH, *Submission 31*, supplementary submission, p. 2; HREOC, *Submission 69*, p. 132.

68 See also HREOC, *Submission 69*, p. 132.

numbers of sexual harassment complaints from men who have been harassed by other men.[69]

Deficiencies in the sexual harassment provisions of the Act

5.60 The Sex Discrimination Commissioner pointed to deficiencies in the existing legislative protection from sexual harassment and recommended extending coverage in two areas: firstly in relation to workers who are harassed by customers or clients and secondly in relation to educational institutions. With respect to workers, the Commissioner told the committee:

> At the minute, if I am a customer and I am harassed by a worker, I have protection; but if I am a worker and the client or customer harasses me, there is no protection for me as a worker.[70]

5.61 The submission from HREOC noted that:

> [M]any workers are just as vulnerable to sexual harassment by customers as by fellow employees or supervisors. In response to sexual harassment (or conduct escalating towards sexual harassment) by an important customer or client, many workers may feel reluctant to take assertive action out of fear of the repercussions from the employer. The customer may be in a position to exploit a significan[t] imbalance of power between him or her and the worker, particularly if the client is important to the business or directly impacts on the worker's salary.[71]

5.62 HREOC recommended that Act be amended to "protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment."[72]

5.63 With respect to educational institutions, the Sex Discrimination Commissioner explained that:

> [U]nder the Act, the harasser needs to be an adult student, which is 16 years or over. But if I harass two students, one who is 16 and one who is 15 years and 9 months, the 16-year-old victim has protection whereas the 15 years and 9 months year old student does not have protection. We are saying we should remove the age limit for the victim. We are not exactly sure why the victim has an age limit.[73]

5.64 Finally, the Commissioner explained that under section 28F of the Act:

---

69 *Submission 45,* p. 3. See also Victorian Automobile Chamber of Commerce, *Submission 32*, p. 7.

70 *Committee Hansard*, 9 September 2008, p.18.

71 *Submission 69,* p. 139.

72 *Submission 69,* p. 140.

73 *Committee Hansard*, 9 September 2008, p.19. See also *Submission 69,* pp 140-141.

> [T]here is currently a requirement that the harasser must be at the same educational institution as the victim. If I go to the school sports carnival and a lot of neighbouring schools are there and I am harassed by a student or a teacher from another school, then I do not have any protection. We are saying that we should remove the requirement that the harasser must be at the same educational institution as the victim.[74]

5.65 However, the Association of Independent Schools of South Australia expressed some reservations about expanding the coverage of the sexual harassment provisions with respect to education institutions. The Association noted that schools have existing procedures for handling allegations of student to student sexual harassment and suggested that HREOC handling such cases may not be in the best interests of either student.[75]

5.66 The Law Council submitted that the Act does not provide comprehensive protection against sexual harassment. In relation to the legal profession, the Law Council noted that the Act may not apply to harassment that occurs between:

- witnesses and lawyers;
- lawyers and judicial officers or court staff;
- solicitors and barristers; or
- barristers.[76]

5.67 Rather than seeking to plug these gaps, the Law Council proposed that the Act be amended by replacing the existing provisions, which prohibit sexual harassment in particular areas of public life, with a provision making sexual harassment unlawful per se. The Law Council recommended that this provision be similar to section 118 of the *Anti-Discrimination Act 1991 (Qld)* which simply provides: A person must not sexually harass another person.[77]

5.68 The Anti-Discrimination Commissioner of Tasmania recommended that the definition of sexual harassment in section 28A of the Act be broadened. In particular, the Commissioner suggested that the definition should include the displaying of material related to a prescribed attribute (such as sex) so that the definition encompasses the displaying of offensive pornographic material.[78]

5.69 Professor Thornton submitted that subsection 28A(1) of the Act should be amended to remove the requirement that the person harassed would be 'offended,

---

74 *Committee Hansard*, 9 September 2008, p.19. See also *Submission 69*, pp 141-142.

75 *Submission 75*, p. 2.

76 *Submission 59*, pp 27-28.

77 *Submission 59*, p. 29. See also HREOC, *Submission 69*, pp 142-143.

78 *Submission 13*, p. 4. See also Working Women's Centres, *Submission 56*, p. 6.

humiliated or intimidated' and replace it with a requirement 'that the person harassed would find the conduct unwelcome'.[79] She argued that:

> [T]he requirement that the person harassed would be 'offended, humiliated or intimidated' contains questionable moralistic overtones. While sexual harassment undoubtedly contributes to the inequality of women at work, the phrasing of the SDA requires the person harassed to present themselves as exceptionally fragile and vulnerable. One of the descriptors may be appropriate in some cases, but not in others. Most significantly, it plays down the discriminatory effect of the conduct.[80]

5.70 The Working Women's Centres were also critical of the definition of sexual harassment in section 28A. They argued that:

> For a complaint of sexual harassment to be upheld, the Act requires that a reasonable person would have anticipated that offence, humiliation or intimidation would have occurred. The nature of this requirement is limiting in that the reasonable person is required to anticipate that the person actually would be offended. This is a much stricter test than some state legislation.[81]

5.71 In particular, the Working Women's Centres preferred the definition under section 119 of the *Anti-Discrimination Act 1991 (Qld)* which provides that "the person engaging in the conduct ...does so in circumstances where a reasonable person would have anticipated the *possibility* that the other person would be offended, humiliated or intimidated by the conduct" (emphasis added).[82]

5.72 The Law Council and HREOC articulated similar concerns and also supported broadening the definition of sexual harassment in this way.[83] In addition, they argued that the Act should include a provision equivalent to section 120 of the *Anti-Discrimination Act 1991 (Qld).* Section 120 provides that the circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated include:

- the sex, age and race of the other person;
- any impairment that the other person has;
- the relationship between the other person and the person engaging in the conduct; and
- any other circumstance of the other person.[84]

---

79 *Submission 22,* p. 6.

80 *Submission 22,* p. 5. See also Collaborative submission, *Submission 60*, pp 33-34.

81 *Submission 56,* p. 5.

82 *Submission 56,* p. 5.

83 *Submission 59,* pp 28-29; *Submission 69,* pp 137-138.

84 *Submission 59,* p. 29; *Submission 69,* pp137-138.

5.73 HREOC submitted that the advantage of incorporating a statutory guide to assessing reasonableness is that it:

> ...clearly directs the court to assess the reasonableness of the impugned conduct by reference to the individual circumstances and characteristics of the victim. This takes into account any gender, race, cultural, age or other relevant circumstances or factors that might help to explain why the individual victim regarded the conduct as unwelcome and inappropriate. By contrast, the SDA contains only a vague reference to 'having regard to all the circumstances'. [85]

5.74 Finally, Ms Michele Panayi of PILCH argued that the identity of the victim in sexual harassment cases should be protected as a matter of course:

> [U]nder the Federal Magistrates Court Act, an application can be made to a federal magistrate seeking that the identity of a witness or a party to the litigation be suppressed. However, from the information I have received from experts in the field, that is not easy to obtain. From the very beginning, a person who is going through this is extremely traumatised and extremely anxious. They need legal advice at the beginning to the effect that, 'If you go through this process, it will be okay; you will be de-identified.'[86]

Violence

5.75 The committee did not receive extensive evidence in relation to the incidence and consequences of violence against women. However, HREOC submitted that violence against women remains a major human rights issue facing Australia:

> Research has found that nearly one in five women has experienced sexual violence since the age of fifteen. An international study found that around one in three Australian women have experienced violence from an intimate partner in their lifetime.[87]

5.76 Women's Forum Australia argued that prostitution and pornography contribute to violence against women:

> [T]he activities of the sex industry, which have become normalised and entrenched in society, along with other forms of objectification of women and girls, are major contributors to shaping the attitudes of men and boys, distorting their views of women and girls, contributing to calloused attitudes, harassment and violence.[88]

5.77 The Australian Women's Health Network pointed to the health consequences of violence against women:

---

85 *Submission 69*, pp 137-138. See also Law Council, *Submission 59*, p. 29.

86 *Committee Hansard*, 10 September 2008, p. 26.

87 *Submission 69*, p. 34.

88 *Submission 64*, p. 3.

> [A] study in Victoria in 2004 found that intimate partner violence, based as it is in gender inequality, contributed 9 per cent to the total disease burden for Victorian women aged between 15 and 44 years and 3 per cent for all Victorian women. Astonishingly, perhaps, partner violence was the leading contributor to death, disability and illness for women aged between 15 and 44 years, ahead of well recognised risk factors, such as high blood pressure, smoking and obesity.[89]

5.78 The Working Women's Centres also raised the issue of violence against women and suggested that the Act should ensure that women are not discriminated against in the workplace as a consequence of domestic violence against them:

> [H]einous crimes are regularly committed against women by their partners (and at times other family members) resulting in them being injured (physically, emotionally and/or psychologically), causing lateness to work, interfering in their work by constant phoning, following them to their workplace and entering the site, preventing them from attending work or impacting on their work in other ways to such an extent that their employers institute performance reviews. The Act should encompass provisions for making it illegal to dismiss or disadvantage an employee on the grounds of being a victim of domestic violence.[90]

Addressing discrimination against men

5.79 Some submissions argued that the Act has been more successful in addressing discrimination against women than against men. These submissions pointed to areas such as poorer educational outcomes for boys and higher rates of male suicide as evidence of discrimination against men.[91] For example, the Lone Fathers Association of Australia argued that:

> Australia's schools and universities are to a significant extent failing boys and young men. National policy for the education of girls (1987) made a point of neglecting boys' needs. 15 years after the first examination of boys' education issues, the situation continues to worsen, with only 75% of boys completing year 12 in Australia, compared with 81% for girls...[92]

5.80 While Dads on the Air submitted that:

> Males have much higher illness, injury, accident and death rates and die 5 years earlier than females, yet research funding for male health is less than one-third of that for female health.
>
> Males suicide at almost four times the rate of females. More males kill themselves each year than the entire Australian road toll.

---

89 *Submission 30*, p. 3. See also Women's Forum Australia, *Submission 64*, p. 1.

90 *Submission 56*, pp 6-7.

91 Mr Richard A Greenwood, *Submission 3*, p. 2; Dads on the Air, *Submission 6*; Lone Fathers Association Australia, *Submission 54;* Families without Women, *Submission 67*, pp 6 and 9.

92 *Submission 54*, p. 6.

> More than twice as many males as females experience work-related injuries and illnesses, and over ninety percent of work-related deaths are males.[93]

5.81 Several submissions argued that there is particular discrimination against men in their role as fathers.[94] Dads on the Air submitted that this discrimination is evident in parental leave arrangements which are inequitable to men and thus reinforce the notion of fathers as breadwinners not 'hands-on dads'.[95]

5.82 Similarly, the Equal Opportunity Commission and the Office of Women (SA) noted that many fathers face discriminatory views when they seek to have their parental responsibilities taken into account such as when they request extended leave to care for a child.[96]

5.83 The Human Rights Law Centre pointed out that to effectively address discrimination against women the Act must also address discrimination against men. Ms Rachel Ball of the Centre explained that to achieve equality for women:

> ...you need to also address inequality that men experience. The example that is often given is of the stereotype that women are mainly responsible for the care and responsibilities of children and that men are responsible for going to work, and if that stereotype is perpetuated to the detriment of both men and women the result is that women generally will be the ones who end up needing to give up the opportunity to participate more fully in public and economic life.[97]

5.84 HREOC explained that the Act currently does not provide the same protection from sex discrimination for men:

> Section 9 of the SDA draws on all the available heads of Commonwealth legislative power to give the SDA its broadest possible effect as far as it is constitutionally possible to do so. All of those heads of power are expressed in gender neutral terms, so they apply equally to men and women. If a claim is against a corporation, a man has protection equal to that of a woman. The only exception to that is section 9 (10), and essentially that gives effect to the external affairs power. In relying on the external affairs power, the government has given effect only to CEDAW.
>
> Because CEDAW is expressed for the protection of women only, if you are in an area where no other head of constitutional legislative power applies, such as in an unincorporated body or a state government, a woman will

93 *Submission 6*, p. 2. See also Mr Ross Mitchell, *Submission 81*, p. 2.

94 Dads on the Air, *Submission 6*; Non-Custodial Parents Party, *Submission 21*; Lone Fathers Association Australia *Submission 54*; Families without Women, *Submission 67*.

95 *Submission 6*, p. 2.

96 *Submission 45*, p. 3. See also Australian Women Lawyers, *Submission 29*, pp 4-5.

97 *Committee Hansard*, 10 September 2008, p. 3.

> have protection because CEDAW will give her protection, whereas a man will not.[98]

5.85 An officer of the Attorney-General's Department provided an example of the more limited operation of the Act in relation to discrimination against men:

> [A] university was found to be a trading corporation, so a man was able to take a sex discrimination complaint against that university. But a group of men who took a complaint against an unincorporated golf club, for example, found that the Sex Discrimination Act did not provide them with a remedy ...because the constitutional power of the Commonwealth did not extend to unincorporated associations. That does not mean to say that, under Australian law, they do not have any remedy at all. It is very likely ... that, if they took an action under the state or territory law ...they would be able to get a remedy or have their complaint heard.[99]

5.86 Dads on the Air submitted that the Act should be gender neutral and be aimed at gender equality not just equality for women.[100] The Sex Discrimination Commissioner made a similar recommendation to the committee:

> At the moment there are a number of ways in which the Sex Discrimination Act does not provide equal protection for both men and women. This is understandable, recognising that in 1984 the Sex Discrimination Act was enacted primarily to implement our international obligations under CEDAW. However, in 2008, we consider that to promote substantive gender equality in this country it is essential that the SDA applies equally for the benefit of both women and men...[101]

5.87 To ensure that the Act provides equal protection to men, HREOC proposed amending subsection 9(10) so that, instead of relying on the external affairs power just to give effect to CEDAW, it would give effect to other international obligations Australia has in relation to sex discrimination under ICCPR, ICESCR and the relevant ILO conventions.[102]

---

98 *Committee Hansard*, 9 September 2008, p. 8. See also Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 11 September 2008, p. 9; Attorney-General's Department, *Answers to question on notice*, 22 October 2008, p. 2.

99 *Committee Hansard*, 11 September 2008, p. 6.

100 *Submission 6*, p. 3. See also Non-Custodial Parents Party, *Submission 21*, pp 2-4; Adrian Smyth, *Submission 28*; Neville Edwards, *Submission 34*; Lone Fathers Association Australia *Submission 54* pp 4-8; Helmut Roth, *Submission 66*; Families without Women, *Submission 67*.

101 *Committee Hansard*, 9 September 2008, p. 4.

102 *Committee Hansard*, 9 September 2008, p. 8. See also Ms Kate Eastman, Law Council, *Committee Hansard*, 10 September 2008, p. 58.

CHAPTER 6

COMPLAINTS PROCESS

6.1 The terms of reference required the committee to examine whether the Act provides effective remedies including examining the effectiveness, efficiency and fairness of the complaints process. The committee received detailed evidence concerning the inherent limitations of the individual complaints system as well as the practical difficulties involved in pursuing complaints and how these might be addressed.

Limitations of the individual complaints model

6.2 A recurring theme in the evidence was that the Act is ineffective in addressing systemic discrimination because it adopts an enforcement model based upon individual complaints and remedies. For example, Mr Mathew Tinkler of PILCH submitted that the existing Act:

> ...treats discriminatory conduct as a personal dispute between two parties rather than as an unacceptable act. Also, it relies upon the ability of an individual, in particular, to understand a fairly complex area of law, to elect to make a complaint and then to pursue a remedy, while also assuming that the individual has the resources and the capacity to do that.[1]

6.3 Similarly, the Queensland Council of Unions considered the exclusive adoption of an individual complaint model the greatest limitation on the capacity of the Act to advance gender equality.[2]

6.4 The Women's Electoral Lobby also discussed the intrinsic difficulties in using an individual complaint mechanism as means of eliminating systemic discrimination:

> [T]he complaints-based model relies upon victims identifying and standing up for their rights and prompting social change through individual litigation and its subsequent ripple effect. It assumes that victims have the time, security and resources to pursue such litigation, despite the financial and psychological costs of pursuing a complaint in the public interest against a corporate respondent.[3]

6.5 Dr Belinda Smith argued that the model of enforcement via complaints by affected individuals, with only compensatory damages, is fundamentally weak and cannot address systemic discrimination.[4] She told the committee:

---

1 *Committee Hansard*, 10 September 2008, p. 24.

2 *Submission 46,* p. 7. See also Public Interest Law Clearing House *Submission 31*, p. 3; ACTU *Submission 55*, pp 3 and 5.

3 *Submission 8*, pp 7-8.

4 *Submission 12,* pp 5-6, 9-10.

> I do not think we are ever going to get at systemic discrimination if we always leave it up to the disadvantaged victim to bring these claims. We need an agency that has some capacity to support applicants or to initiate claims themselves.[5]

6.6 The Collaborative submission pointed out that the complaints system adopted by the Act also assumes that there will be a single respondent who can be identified and held accountable for each act of discrimination but that this is not necessarily the case. The submission stated:

> As discrimination is woven into the historic fabric of society, it is frequently impossible to identify a single respondent who can be held responsible for a specific act of discrimination. Unless an unbroken causal thread connects the complainant and respondent with the act of discrimination, the complaint fails.[6]

Issues regarding the complaints process

Introduction

6.7 Much of the evidence to the inquiry concerned the practical operation of the complaints process. HREOC submitted that:

> In comparison with judicial determination, the HREOC complaint process with its focus on informal dispute resolution, provides an accessible, timely and cost efficient way for parties to deal with discrimination related disputes. While the complaint process has a necessary focus on individual remedy, it also operates as a significant educative force and a means to achieve outcomes that contribute to the broader social change objectives of anti-discrimination law.[7]

6.8 In particular, HREOC argued that the conciliation process allows for a wide range of negotiated outcomes and for early intervention in disputes:

> [O]utcomes achieved through conciliation extend beyond those likely to be awarded in a judicial process. Outcomes can include training and/or changes to policy and procedures which have benefits for similarly situated individuals and groups and contribute to furthering the social change objectives of the SDA. Additionally, conciliation allows for early intervention in disputes which means that employment relationships can be restored or maintained and effective, practical remedies can be achieved without the need for formal and often lengthy legal proceedings.[8]

---

5 *Committee Hansard*, 9 September 2008, p. 60. See also Australian Women's Health Network, *Submission 30*, p. 5; Human Rights Law Centre, *Submission 20*, pp 19-21; NACLC, *Submission 52*, p. 24; Collaborative submission, *Submission 60*, pp 17-18.

6 *Submission 60*, p. 17. See also Women's Electoral Lobby, *Submission 8*, p. 7.

7 *Submission 69*, p. 181.

8 *Submission 69*, pp 194-195.

6.9 HREOC advised that in 2007-08 48 per cent of complaints under the Act were finalised within 6 months and 94 per cent within 12 months.[9] This represents the time from receipt of the complaint to finalisation by HREOC.

6.10 However, HREOC's complaint handling is only part of the process as far as the parties are concerned since complaints which cannot be conciliated may then be pursued in the Federal Court or the Federal Magistrates Court. HREOC explained that:

> [W]here a complaint has been terminated by HREOC, irrespective of the reason for termination, the affected person can make an application to the court for the allegations in their complaint to be heard and determined.[10]

6.11 HREOC advised that:

> Over the past six reporting years, on average, 28% of terminated complaints under the SDA were pursued to court. The SDA has the highest number of applications to the courts as a proportion of terminated complaints.[11]

Difficulties for complainants

6.12 In this context, much of the evidence to the committee was highly critical of the complaints process. For example, the Association of Professional Engineers, Scientists and Managers Australia stated that pursuing a complaint:

> ...can result in victimisation, may be a difficult, time consuming and emotionally challenging process and, even if resulting in a positive outcome, the process may take too long to provide a practicable and useful solution to the complaint.[12]

6.13 Similarly, the Shop, Distributive and Allied Employees' Association submitted that the complaints process is too long, too legalistic, too costly, does not deliver justice to complainants and does not address systemic discrimination.[13]

6.14 Ms Catharine Bowtell of the ACTU told the committee that one of the key problems is the time taken to resolve complaints:

> If you compare anti-discrimination timeframes with workplace relations timeframes, you can lodge an unfair dismissal complaint with a New South Wales tribunal at the moment and you will be conciliated within three weeks. If it is not resolved at conciliation, it will be listed for hearing within another three weeks. If you look at the way anti-discrimination complaints

---

9 *Submission 69,* p. 199.

10 *Submission 69,* p. 195.

11 *Submission 69,* p. 196.

12 *Submission 48,* pp 8-9. See also Ms Michelle Panayi, PILCH, *Committee Hansard,* 10 September 2008, pp 32-33.

13 *Submission 42,* pp 2, 7 and 10. See also Queensland Council of Unions *Submission 46,* p. 3; Independent Education Union of Australia, *Submission 49*, p. 6.

> are handled, it is probably 12 months from lodging the complaint to getting anywhere near the court. Then you have the formalities of court proceedings, which means that it is probably 18 months to two years from complaint to outcome for a complainant.[14]

6.15 Ms Bowtell explained the importance of quickly resolving sex discrimination complaints related to employment:

> [I]f you are looking to address a workplace based complaint, the most important thing you can do is to keep people in work. If the complaint is not resolved—that is, they have been either dismissed or suffered a detriment—and that is not resolved until some time down the track, you do not have any remedial outcomes in the workplace, because the complainant is separated from the workplace. Her outcome is not seen by her colleagues and so on, so it does not have that flow-on effect that a rapid response can have where things are fixed, everyone is back, relationships are back to normal and work can continue.[15]

6.16 Miss Elnaz Nikibin of UNIFEM Australia considered that a fundamental difficulty with pursuing a complaint under the Act is the risk of liability for the costs of the respondent:

> You might have the costs to pay for a lawyer to represent you, but it is a much heavier burden if you have to pay for the costs of the other side if you lose. That is not covered by legal aid and it would not be covered by lawyers acting on a pro bono basis. Even if we offered a free legal service the costs of paying the other side's representatives is enough to turn someone away from pursuing a claim under the Sex Discrimination Act.[16]

6.17 The Women's Electoral Lobby also argued that the cost of pursuing complaints deters potential complainants, especially since claims that cannot be conciliated have been dealt with by the Federal Court and the Federal Magistrates Court.[17] Professor Thornton told the committee that research she was conducting in relation to anti-discrimination legislation across the country suggested there was a decline in the lodgement of complaints as well as a decline in the number of complaints proceeding to a formal hearing. She attributed this to the difficulties now confronting complainants:

> We have had a shift away from specialised tribunals to generalist tribunals. That means that the normal rule is that loser pays in terms of costs, so the individual complainant then is less likely to initiate a formal hearing. This has happened at the federal level, for example. Compare that with a

---

14 *Committee Hansard*, 9 September 2008, p. 73.

15 *Committee Hansard*, 9 September 2008, p. 73.

16 *Committee Hansard*, 9 September 2008, pp 45-46. See also Australian Women's Health Network, *Submission 30*, p. 10.

17 *Submission 8*, pp 11-12. See also PILCH, *Submission 31*, p. 17; NACLC, *Submission 52*, pp 12 and 26.

> specialist tribunal that was set up to operate within a particular jurisdiction, where the individual could appear without being legally represented.[18]

6.18 Mr Ian Scott of Job Watch noted in relation to Victoria, that the drawbacks of the federal jurisdiction mean that sex discrimination claims, particularly test cases, are more regularly pursued under state legislation:

> In the federal jurisdiction, costs follow the event once the matter goes to the Federal Court. ...If it was what we would call a test case, which might relate to systemic discrimination or whether someone is covered by the Act, our advice to our client might be, 'We'll go through the state jurisdiction because your case is risky and, generally speaking, if you lose in the Victorian system, each party bears its own costs.'[19]

6.19 This appears to be consistent with the experience in other jurisdictions. Legal Aid Queensland submitted that the Commonwealth complaints process is slower and more formal than the complaints process under Queensland's anti-discrimination legislation and, as a result, it is common for their legal practitioners to pursue sex discrimination complaints under the state legislation.[20]

6.20 A further issue raised in relation to the complaints process concerned the power imbalance between the parties. The Australian Women's Health Network considered that:

> Probably the most unfair aspect of the complaints process is the inequality of the power relationship between the complainant and the respondent. This is particularly pertinent during mediation processes where the parties must sit across the table from each other.[21]

6.21 PILCH expressed similar concerns particularly in relation to sexual harassment complaints. PILCH submitted that:

> [M]any victims of sexual harassment have little confidence in the complaints based system, which may, in some cases, exacerbate the trauma associated with sexual harassment.[22]

6.22 Ms Michelle Panayi of PILCH expanded on the difficulties sexual harassment complaints face:

---

18 *Committee Hansard*, 11 September 2008, p. 41.

19 *Committee Hansard*, 10 September 2008, p. 37. See also pp 36 and 40; and Victorian Automobile Chamber of Commerce, *Submission 32*, p. 6, regarding the small proportion of complaints pursued through HREOC in Victoria.

20 *Submission 26*, pp 4-5. See also Queensland Council of Unions *Submission 46*, pp 2-3; NACLC, *Submission 52*, p. 26.

21 *Submission 30*, p. 10. See also Shop, Distributive and Allied Employees' Association *Submission 42*, pp 7-8; Independent Education Union of Australia, *Submission 49*, pp 6-7; PILCH, *Submission 31*, pp 16-17.

22 *Submission 31*, p. 3. See also *Submission 31*, pp 11 and 15-16; NACLC, *Submission 52*, p. 19.

> The other reason that it is very difficult for victims to go through the external complaints process is that they fear they will lose their jobs. They fear the publicity that the case attracts. They feel that no one will want them if they know this has happened to them or they have spoken out about it. Victims of sexual harassment can be likened to whistleblowers where they can be seen as troublemakers. They are concerned about the impact that their going through this process will have on their future career.[23]

Issues for respondents

6.23 The Victorian Automobile Chamber of Commerce (VACC) noted that the time and costs involved in defending a complaint are also significant and that employers therefore sometimes feel compelled to make a payment on commercial grounds.[24]

6.24 ACCI also submitted that many employers simply settle claims, regardless of the strength of the applicant's case, in order to avoid the costs of litigation:

> It is well known that many employers simply settle claims (in cases where either party is unsure whether they have legal grounds to initiate or defend proceedings) to make them "go away" (similar to what occurs in unfair dismissal jurisdictions). In most cases, legal advisors will recommend this as the most prudent approach to avoid the costs of litigation.[25]

6.25 In addition, Mr Scott Barklamb of ACCI told the committee that companies have a further incentive to settle even speculative claims because of the possible damage to the company's reputation:

> A lot of very major companies make very significant efforts and investments in this area. ...They take their reputational efforts in this area very seriously. When claims emerge, often speculatively, as we have said, as part of a dismissal or performance management-type processes, there is an extra effort to settle. They are not necessarily ...making solely a financial calculation. There is a reputational calculation involved. Even if the company believes its processes were entirely compliant and would navigate the litigation successfully there is an extra incentive to settle.[26]

Suggested changes to the complaints process

6.26 Many witnesses and submissions made specific proposals for changes to the complaints process. These included:

- providing more assistance to complainants;
- broadening the standing provisions;

---

23 *Committee Hansard*, 10 September 2008, p. 26.

24 *Submission 32*, p. 5.

25 *Submission* 25, p. 11.

26 *Committee Hansard*, 10 September 2008, p. 14.

- extending the time limits for lodging complaints;
- altering the burden of proof;
- expanding the remedies available to complainants;
- limiting liability for costs; and
- improving complaint handling procedures.

6.27 In considering these proposals, it is important to note that the complaints process under the Act is shared with other federal anti-discrimination legislation including the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. As an officer of the Attorney-General's Department pointed out to the committee:

> Whatever changes are made in relation to how you handle a sex discrimination complaint might apply equally to other areas, such as disability or race.[27]

Legal representation for complainants

6.28 The committee received consistent evidence that most complainants experience difficulty obtaining legal representation in sex discrimination and sexual harassment matters. Mr Mathew Tinkler of PILCH submitted:

> In our experience, very few victims of sex discrimination and sexual harassment have the means to afford representation and even fewer qualify for a grant of Legal Aid. We also say that the sensitive nature of sexual harassment and its impact upon a complainant mean that the formality of legal representation is often desirable for many victims.[28]

6.29 The National Foundation for Australian Women pointed to existing legal aid guidelines as a barrier to complainants obtaining legal representation:

> Legal Aid guidelines are currently very restrictive. It is extremely difficult to get legal aid to commence an action under the SDA. Individuals are often in a complex area of law dealing with well-resourced and experienced respondents.[29]

6.30 Similarly, Associate Professor Beth Gaze noted that legal aid is difficult to obtain and that this has particular impact on women in marginalised groups:

> Despite the power in the HREOC Act for the Attorney-General to provide legal aid in unlawful discrimination matters, it appears that virtually no such aid is provided, either by the Attorney or in the legal aid system, and that in many cases women must negotiate the complaints, conciliation and adjudication system unrepresented. Legal aid is very difficult to obtain in

---

27 *Committee Hansard*, 11 September 2008, p. 8.

28 *Committee Hansard*, 10 September 2008, p. 24.

29 *Submission 15*, p. 7.

> such cases because it is necessary to pass an extra merits test that is very difficult to satisfy, is not imposed in other areas of law, and suggests that there is no general public interest in the enforcement of human rights laws and respect for the human rights of all members of society. These features affect most adversely the women in the most vulnerable positions: indigenous women, migrant and ethnic minority women, women with disabilities, pregnant women and poor and low skilled women.[30]

6.31 Legal Aid New South Wales explained that, under the existing Commonwealth legal aid guidelines, applicants for legal aid in discrimination matters are required to show a strong prospect of substantial benefit being gained by both the applicant, and the public or a section of the public. Legal Aid New South Wales argued that "this is an unduly high threshold for remedial or beneficial legislation."[31]

6.32 Professor Thornton suggested that the lack of legal aid to complainants has skewed the interpretation of the Act:

> One of the difficulties is in the jurisprudence that emerges from this jurisdiction. As suggested, very few cases have gone on to public hearing, unless it is a well-to-do respondent. Often a state government or a multinational has challenged a decision in a complainant's favour at the lower level. As a result of domination by powerful respondents, the jurisprudence has become skewed in a particular way so that the focus tends to be on the form of the legislation rather than on the substance...
>
> To keep skewing the interpretation of the legislation in a particular way over time, I think, is not at all beneficial for complainants. For it to be possible to have legal aid in this regard, I think, would help redress the balance.[32]

6.33 Several submissions recommended broadening legal aid guidelines to provide individual complainants with greater access to legal advice and representation.[33] National Legal Aid advised that the existing agreements between the legal aid commissions and the Commonwealth, which incorporate the Commonwealth legal aid guidelines, expire on 31 December 2008 and that negotiation of the new agreements has commenced.[34]

---

30 *Submission 50,* p. 2.

31 *Submission 68,* p. 2. See also National Legal Aid, *Submission 76,* p. 2; Guideline 4.1, Civil Law Guidelines, *Agreement between the Commonwealth of Australia and Legal Aid Commission of New South Wales for the provision of legal assistance services,* March 2005, p. 91.

32 *Committee Hansard*, 11 September 2008, p. 43. See also Collaborative submission, *Submission 60,* p. 24.

33 Women's Electoral Lobby, *Submission 8,* p. 12; National Foundation for Australian Women, *Submission 15,* p. 7; Australian Education Union, *Submissio*n 17, pp 5-6; Legal Aid New South Wales, *Submission 68,* p. 2; National Legal Aid, *Submission 76,* p. 2.

34 *Submission 76,* p. 2.

6.34 HREOC made a related recommendation that funding provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to assist people make complaints under federal anti-discrimination law should be increased. HREOC argued that these specialist advocacy and legal centres are "an important point of contact and support for people wanting to make complaints to HREOC."[35]

6.35 Other organisations argued that complainants should be provided with legal advocacy and advice either through HREOC or a new body established for this purpose.[36] For example, Ms Bowtell of the ACTU submitted:

> We would like to see a body able to assist complainants with their litigation. It could be a separately funded agency. It depends to some extent on how much HREOC is responsible for compliance as to whether it can also assist with prosecutions. But there can be models whereby a separately funded legal unit can consider public interest-type litigation on behalf of complainants or representative action on behalf of complainants.[37]

6.36 The proposals for broadening the powers of HREOC in relation to advocacy and enforcement of the Act are discussed in more detail in Chapter 10.

6.37 Finally, Mr Geoffrey McMahon suggested that there is a need for better protection of individuals who report or witness discrimination and harassment, akin to whistleblower protection. He pointed out that the tactics of perpetrators of discrimination and harassment include denial, delaying action, defaming the complainant and destroying evidence. In his view, it is therefore necessary to provide a "shield" for individuals who report discrimination and that this function should be performed by a separate agency to the agency responsible for investigation and enforcement ("the sword").[38]

Standing to bring complaints

6.38 At present, under subsection 46P(2) of the HREOC Act a complaint can be lodged with HREOC on behalf of an affected person or persons. However, under subsection 46PO(1) of the HREOC Act court proceedings can only be commenced by an affected person. The former President of HREOC, Mr John von Doussa explained to the committee:

> At the moment a complaint can be brought by an individual who is aggrieved or by some body or an organisation on behalf of that person, and the commission will look at the complaint. But if it is not resolved when it

35 *Submission 69*, p. 203. See also PILCH *Submission 31*, p. 34.

36 See for example, Shop, Distributive and Allied Employees' Association *Submission* 42, p. 7; Queensland Council of Unions *Submission 46*, p. 6; PILCH *Submission 31*, pp 5 and 34; NACLC *Submission 52*, p. 13.

37 *Committee Hansard*, 9 September 2008, p. 73.

38 *Submission 40*.

> comes to the point of issuing proceedings, it is only the aggrieved person who can issue the proceedings.[39]

6.39 This means that public interest organisations are unable to pursue proceedings in the Federal Court or the Federal Magistrates Court on behalf of an individual complainant. HREOC argued that:

> [T]here are sound reasons of public policy to enable appropriate organisations with a legitimate interest in a particular subject-matter to commence discrimination proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons.[40]

6.40 While Part IVA of the *Federal Court of Australia Act 1976* permits representative proceedings in some circumstances, HREOC argued that:

> [T]he rules are technical and complex, compounded by the fact that the requirements at the HREOC and Federal Court stages are not consistent. ...Furthermore, the Federal Magistrates Court does not permit representative proceedings, which limits such proceedings to the more expensive Federal Court jurisdiction. Indeed, to date very few representative proceedings have been commenced under any of the Federal discrimination Acts.[41]

6.41 HREOC recommended that the provisions under the HREOC Act relating to standing to bring claims under the Act (and other federal discrimination Acts) should be amended to widen the scope for proceedings to be brought by public interest-based organisations.[42]

Limitation periods

6.42 Currently, the President of HREOC has a discretion, under paragraph 48PH(1)(b) of the HREOC Act, to terminate a complaint lodged more than 12 months after the alleged discrimination. PILCH noted that this limitation period is problematic in sexual harassment cases where complainants often delay making a complaint due to fear of retaliation or as a result of suffering mental illnesses or disorders caused by the harassment.[43]

6.43 However, ACCI pointed out that a complainant can still lodge a complaint directly with the Federal Court or the Federal Magistrates Court and submitted that it is unclear whether the 6 year limitation period generally provided for under state and territory legislation applies to claims lodged directly with the courts. It is likely that section 79 of the *Judiciary Act 1903* means that such limitation periods are applicable.

---

39 *Committee Hansard*, 9 September 2008, p. 29.

40 *Submission 69*, p. 207.

41 *Submission 69*, pp 206-207.

42 *Submission 69*, p. 209. See also Legal Aid New South Wales, *Submission 68*, p. 4.

43 *Submission 31*, pp 24-25. See also Human Rights Law Centre, *Submission 20*, pp 50-51.

Nevertheless, ACCI recommended an absolute limitation period be applicable to claims under federal anti-discrimination legislation.[44]

6.44 Where a complaint is terminated by the President of HREOC, a complainant has 28 days to lodge proceedings in the Federal Court or the Federal Magistrates Court though the court has a discretion to allow further time.[45] HREOC argued that:

> ...28 days is an insufficient period for applicants to seek appropriate advice as to whether to commence court proceedings, and to arrange legal assistance, especially given that:
>
> - victims of discrimination and sexual harassment are typically from socially disadvantaged groups;
> - a significant portion of complainants who lodge complaints under the SDA with HREOC are not legally represented;
> - access to free legal advice and representation in relation to discrimination matters is limited; and
> - once proceedings are commenced, applicants face an inherent risk of an adverse costs order.[46]

6.45 For these reasons, HREOC suggested that this 28 day period should be increased to 60 days.[47]

Burden of proof

6.46 Some organisations argued that the burden of demonstrating that discrimination has occurred should not fall entirely upon the complainant. The Collaborative submission explained the difficulties complainants experience because they bear the burden of proof:

> Proving that the ground of any less favourable treatment was sex, marital status or pregnancy or potential pregnancy can be very difficult, as all evidence of the reason for the action lies with the employer. Unless an employer explicitly states that the reason for an action is the sex, marital status or pregnancy of the person affected..., it will often be hard to convince a court why the action was taken. The law provides no assistance to complainants to prove their case, and often they will have to rely on the court drawing inferences from circumstantial evidence, or even form the absence of any evidence at all.[48]

---

44 *Submission 25*, pp 15-16.

45 Subsection 46PO(2) of the HREOC Act.

46 *Submission 69*, p. 204. See also p. 195.

47 *Committee Hansard*, 9 September 2008, p. 22. See also *Submission 69*, p. 204.

48 *Submission 60*, p. 12. See also Mr Brook Hely, *Committee Hansard*, 9 September 2008, p. 11; Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 62.

6.47 Associate Professor Simon Rice also pointed to the difficulties involved in proving that a respondent's conduct was caused by discrimination:

> A complainant must therefore prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as fact, on balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.[49]

6.48 HREOC proposed three options for altering the burden of proof to make establishing causation more achievable:

> The first option is to give guidance under the SDA on relevant common law principles that already apply. It is not effectively changing the law. It would just be reflecting what the common law principles are about drawing adverse inferences when a party has the means to put evidence before the court and they have failed to do so.
>
> The second option is drawing on the experience in the UK and throughout Europe. That is a shifting evidential onus whereby once an applicant ...can establish a prima facie case that there is a relationship between their attribute and the treatment, the evidential onus shifts to the respondent to explain why they acted as they did. The third option ...is a complete reversal of onus.[50]

6.49 The second option identified by HREOC would involve inserting in the Act a provision similar to section 63A of the *Sex Discrimination Act 1975 (UK)* which in paraphrased form provides:

> Where ...the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—
>
> (a) has committed an act of discrimination against the complainant...
>
> the tribunal shall uphold the complaint unless the respondent proves that he did not commit ...that act.[51]

6.50 HREOC explained that this provision implements a directive of the European Union on the burden of proof in sex discrimination cases. HREOC quoted the explanation given by the Equality and Human Rights Commission (UK) of the effect of section 63A:

> The effect of s.63A of the SDA is that the [employment tribunal] **must** find unlawful discrimination where the claimant proves facts from which the

---

49 *Submission* 53, p. 4.

50 *Committee Hansard*, 9 September 2008, p. 11. See also *Submission 69*, pp 65-71.

51 See HREOC, *Submission 69*, p. 69.

> [employment tribunal] could conclude - in the absence of an adequate explanation from the respondent - that the respondent has unlawfully discriminated, unless the respondent provides a non-discriminatory explanation for the act complained of. (emphasis in original)[52]

6.51 Associate Professor Simon Rice favoured this option of a shifting burden of proof. He noted that:

> A shifting burden is well-known and well-established in areas of Australian law, most relevantly in anti-discrimination provisions in workplace relations law. Section 809 of the Workplace Relations Act (Cth) is only the latest enactment of a provision that can be traced back through s298V Workplace Relations Act 1988 (Cth) and s 334 Industrial Relations Act (Cth) to s 5 of the Conciliation and Arbitration Act 1904 (Cth). ...
>
> In light of the significant international recognition of a shifting burden as a preferable method of inquiring into alleged discrimination, and the century-long operation of such a provision in workplace discrimination legislation in Australia, I submit the SDA should be amended to shift the burden of proof in terms similar to those in the UK SDA and s809 Workplace Relations Act (Cth).[53]

Amount of damages

6.52 HREOC publishes details of the amounts awarded to successful complainants by the Federal Court and the Federal Magistrates Court in sex discrimination and sexual harassment cases since April 2000. The overall awards in sex discrimination cases range from $750 to $41,000. In sexual harassment cases, the range is from $1,000 to $28,000, apart from one case in which a complainant who had been subjected to rape, harassment and victimisation was awarded $390,000.[54]

6.53 The committee received conflicting evidence regarding the adequacy of these damages awards. VACC suggested there should be a statutory ceiling on damages awarded for pain, humiliation and suffering caused by sex discrimination.[55] Similarly, Mr Scott Barklamb of ACCI noted that small to medium sized enterprises are not subject to different damages or different obligations in relation to sex discrimination and that the damages awards can be quite significant for those enterprises.[56]

6.54 On the other hand, the Collaborative submission stated that:

> Except in a few exceptional cases, remedies granted under the SDA have been very low, and arguably do not fully compensate women for their loss,

---

52 *Submission 69*, p. 69.

53 *Submission* 53, p. 5. See also Collaborative submission, *Submission 60*, pp 12-13.

54 HREOC, *Federal Discrimination Law*, at http://www.hreoc.gov.au/legal/FDL/index.html (accessed 27 October 2008), Chapter 7, Tables 2 and 3. See also Job Watch, *Submission 62*, pp 33-35; Diversity Council of Australia, *Submission 47*, pp 8-9.

55 *Submission 32*, p. 5.

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

> especially where discrimination or harassment leads to termination of employment. ...
>
> While awards for back pay are common, awards for pain and suffering, and for front pay are often not given, or are unjustifiably low. Pain and suffering awards are often only several thousand dollars, which is quite inadequate in a matter where a complainant has had to persist with litigation in which her competence, personality and motives may have been subject to attack and where she has had to risk the possibility of paying the respondents costs if she lost.[57]

6.55 Similarly, NACLC submitted that the damages awarded by the courts in sex discrimination and sexual harassment matters are "extraordinarily low".[58] NACLC argued that these low awards are manifestly inadequate to compensate for the loss suffered and that this discourages women from pursuing claims under the Act:

> For some women who experience sex discrimination and sexual harassment, the inadequacy of the remedy makes it not worth bringing a formal complaint, or seeing it through to its conclusion at hearing, particularly given the financial and emotional cost of bring a successful action, much less the risk of costs for an unsuccessful one. Thus the lack of an appropriate remedy discourages complaints, or at the very least acts as a disincentive for women to use the SDA to address discrimination.[59]

6.56 The Law Council noted that a further impact of low monetary awards may be to trivialise the nature of the conduct prohibited by the Act:

> The historically low levels of compensation generally awarded under the SD Act have been criticised as being reflective of a view that discrimination against women, and sexual harassment in particular, is unimportant. It has been observed that low levels of monetary compensation trivialise the serious nature of the conduct involved in complaints of sex discrimination and the often devastating impact on the complainant.[60]

6.57 NACLC recommended that damages awarded for discrimination matters should be increased to a comparable level to tort claims.[61] However, the Law Council did not support a general approach of assessing damages along the lines of personal injuries claims, arguing instead that "the measure of damages has to be appropriate to discrimination claims." The Law Council suggested instead that subsection 46PO(4) of the HREOC Act could be amended to provide that, in unlawful discrimination cases which involve termination of employment, damages should be assessed having regard

---

57 *Submission 60*, p. 24.

58 *Submission 52*, p. 22.

59 *Submission 52*, p. 22. See also Job Watch, *Submission 62*, p. 27.

60 *Submission 59*, p. 23.

61 *Submission 52*, pp 22-23 and 29. See also PILCH, *Submission 31*, pp 3 and 17-19; Job Watch, *Submission 62*, p. 27; Mr Ian Scott, Job Watch, *Committee Hansard*, 10 September 2008, p. 41.

to the common law principles which apply to awards of damages in termination of employment cases.[62]

Remedies

6.58 Some evidence to the committee argued more broadly that the existing remedies available for breaches of the Act are inadequate. For example, the Women's Electoral Lobby explained that the remedies available under the Act have no capacity to produce systemic changes:

> Even if an employer is found to have discriminated, they will only be ordered to compensate the victim. The courts lack power to order systemic corrective orders—such as a change in policy, the introduction of a compliance program that might prevent further discrimination, or an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant—or to set reform standards. In this way, the laws are more focussed on redressing, not preventing harm or promoting equality.[63]

6.59 Similarly, Dr Smith told the committee that:

> To make the system more sophisticated and preventative ...we need a range of remedies and sanctions, not merely compensation. Under the existing system, it does not matter whether an employer has discriminated 10 times blatantly, egregiously and intentionally, the court can still not order anything but redress for the victim. It cannot say, 'You need to develop a policy. You need to take this legislation seriously. You need a whack over the head.' It cannot do any of that. It is all about what you have caused to the victim post facto.[64]

6.60 The Collaborative submission also noted that the remedies provided for under the Act "do not address systemic issues such as requiring employers to change their systems, to prevent similar discrimination occurring in future."[65] The submission went on to argue that:

> Systemic remedies should be explicitly part of the court's powers and courts should be directed in awarding remedies to do what is necessary not only to compensate the particular complainant but to ensure that any discriminatory practices identified are changed so that others will not be similarly affected.[66]

6.61 Professor Thornton made a similar recommendation that subsection 46PO(4) of the HREOC Act should be amended to allow for court orders requiring respondents

---

62 *Submission 59*, pp 23-24.

63 *Submission 8*, p. 8.

64 *Committee Hansard*, 9 September 2008, p. 60.

65 *Submission 60*, p. 24.

66 *Submission 60*, p. 25. See also Dr Sara Charlesworth, *Submission 39*, p. 9.

to discontinue discriminatory practices or to perform acts that aim to create a non-discriminatory environment.[67]

6.62 Dr Smith argued that the sanctions available for breaches of the Act should be expanded not only to include corrective and preventative orders, but also punitive damages or public penalties for egregious acts of discrimination.[68] However, Ms Bowtell of the ACTU submitted that the focus should be on preventative orders rather than adopting the US approach of awarding punitive damages:

> [O]ur preference is not so much for punitive damages but for broad orders that go beyond compensating the individual to organisational change at the workplace. It is preventative orders rather than punitive orders. That would be our preference.[69]

Costs orders

6.63 NACLC noted that the risk of having to pay the respondent's costs, if a complaint is unsuccessful, is a significant barrier to the pursuit of complaints under the Act:

> For those clients who have the capacity to earn an income, or any assets to lose, the risk of an adverse costs order in the Federal Court or Federal Magistrates Court if they lose is a risk they cannot afford to take.[70]

6.64 To address this issue of costs deterring complainants, NACLC recommended that there should be routine capping of costs in unlawful discrimination matters dealt with by the Federal Court and the Federal Magistrates Court.[71] Order 62A of the *Federal Court Rules* permits the Federal Court to make such an order but NACLC noted that this mechanism has not been successfully used. NACLC submitted that:

> Clearly a costs capping mechanism can be used successfully, as has been demonstrated in migration matters where costs have been routinely capped. Such a process could easily be applied to unlawful discrimination matters.[72]

6.65 Alternatively, UNIFEM Australia recommended that the Act (or other appropriate legislation) contain a provision that, as a general rule, costs will be borne by each party.[73] Job Watch also recommended replacing the current rule that costs follow the event with a rule that, in all but the most exceptional circumstances, each party will bear its own costs.[74] Job Watch acknowledged that respondents have a right not to be burdened with unmeritorious or vexatious claims but submitted that an

---

67 *Submission 22,* p. 5.

68 *Submission 12,* p. 9.

69 *Committee Hansard*, 9 September 2008, p. 76.

70 *Submission 52,* p. 26.

71 *Submission 52,* pp 27 and 29.

72 *Submission 52,* p. 26.

73 *Submission 19,* p. 9. See also *Committee Hansard*, 9 September 2008, p. 46.

74 *Submission 62*, pp 24-25.

appropriate balance between the rights of respondents and complaints could be struck by prohibiting a costs order against a party unless the party:

- issued proceedings which were vexatious or frivolous; or
- acted unreasonably during the proceedings, including by failing to accept a reasonable offer of settlement, causing the other party to incur costs.[75]

6.66 Mr Scott of Job Watch explained how this approach operates in the Victorian Civil and Administrative Tribunal (VCAT):

> There is a list of things that VCAT can take into account when considering to make a cost order ordering the losing party to contribute to the winning party's costs. It is usually things like: frivolous or vexatious complaint; no reasonable prospect of success; and unnecessary delays, such as not attending hearings...[76]

Complaint handling

6.67 In relation to the process for handling complaints, NACLC submitted that:

> While conciliation conferences are a great assistance to many complainants and respondents to reach a mutually satisfactory outcome, such a conference is not always appropriate. [77]

6.68 In particular NACLC argued, firstly, that if the conciliation process is overly lengthy this increases the burden on already stressed complainants. Secondly, in sexual harassment cases, it is inappropriate and potentially damaging to have the complainant sit in the same room as the respondent to negotiate a settlement.[78]

6.69 NACLC suggested that there should be the capacity for HREOC to undertake expedited conciliation or for a matter to be directly referred to a hearing where conciliation is inappropriate.[79] However, HREOC stated that:

> Conciliation may be attempted at any time during the complaint process, including very early in the process. An early conciliation model is frequently used in complaints lodged under the SDA which raise issues about negotiation of flexible work arrangements, returning to work after a period of maternity leave or where parties are in an ongoing relationship or have already tried to resolve the matter directly.[80]

6.70 Furthermore, HREOC noted that:

---

75 *Submission 62*, p. 24.

76 *Committee Hansard*, 10 September 2008, p. 40.

77 *Submission 52*, p. 24.

78 *Submission 52*, p. 24.

79 *Submission 52*, p. 24.

80 *Submission 69*, p. 322.

> The appropriateness of attempting conciliation is assessed on a case by case basis and it is not undertaken with every complaint.[81]

6.71 Finally, HREOC argued that the format of conciliation can be structured to address issues such as a power imbalance between the parties:

> While the majority of HREOC's conciliation processes are conducted in the form of a face–to-meeting between the parties, it will not always be necessary or appropriate to bring the parties together and in some cases, this may be inappropriate and will frustrate resolution. For example, where there is a significant power imbalance between the parties, where one of the parties is emotionally vulnerable or where a face-to-face meeting may exacerbate feelings of distress and anxiety, alternative conciliation formats are employed. These alternative formats include in-person shuttle, which involves the parties being at the same location and the conciliator conveying messages between the parties, telephone shuttle negotiations and teleconferences.[82]

6.72 Dr Sara Charlesworth suggested Australia consider adopting a dispute resolution process similar to that used by the New Zealand Human Rights Commission with the focus being on resolving complaints in the most effective, efficient and informal manner.[83] Dr Charlesworth described the four main stages in this dispute resolution process as follows:

(a) Triage of complaints which involves assessment as to whether the Commission is the right agency and whether information can help the parties clarify or resolve their complaint.

(b) Complaints that relate to unlawful discrimination are either passed to the duty mediator (to start to deal with on the day); or acknowledged and assessed further (if the nature of the complaint suggests that immediate intervention will not be productive).

(c) After assessment, complaints are assigned to mediators.

(d) Where matters are unresolved after mediation, they are referred to the Human Rights Review Tribunal. At this stage, the Office of Human Rights Proceedings, an independent part of the Human Rights Commission, may also be involved in providing legal representation to complainants.[84]

6.73 Dr Charlesworth argued that the New Zealand complaint handling process has a number of advantages:

> The system of triage, in particular, has enormous potential. In a recent project on pregnancy discrimination we found that those who are

---

81 *Submission 69*, p. 320.

82 *Submission 69*, pp 322-323.

83 *Submission 39*, pp 7-8.

84 *Submission 39*, p. 8.

> experiencing workplace discrimination require the sort of practical support and non-technical, non-legalistic advice that the NZ system apparently provides in this phase... The role of the Duty Mediators is also an innovative one that would, especially in the employment context, facilitate the speedy resolution of disputes in an informal way that works to maintain rather than exacerbate any rupture of the employment relationship.[85]

6.74 An alternative proposal was put by union groups, including the ACTU. They recommended that the Australian Industrial Relations Commission, or the proposed body Fair Work Australia, should deal with complaints of workplace discrimination and harassment or have shared jurisdiction with HREOC and the Federal Court.[86] For example, the ACTU submitted that:

> Given the significant majority of discrimination complaints are employment related, and the proven capacity of the [Australian Industrial Relations Commission] to resolve complaints effectively and efficiently, the ACTU would support the referral or shared jurisdiction of employment related complaints with Fair Work Australia...
>
> Employees and their trade unions have conventionally seen the Workplace Relations Act and the Australian Industrial Relations Commission ...as preferable mechanisms for dealing with workplace disputes about discrimination.[87]

6.75 However, there was some evidence suggesting that the existing complaint handling processes are adequate. For example, Mr Ian Scott of Job Watch told the committee:

> In my experience of HREOC—which is limited because I often go to the state jurisdiction—I have found their conciliators to be very professional, very good at their job, and willing to go maybe beyond duty to help the parties come to an agreement. From that perspective, it is very good.[88]

6.76 In addition, HREOC submitted that feedback from complainants and respondents on its complaints handling service was overwhelmingly positive. HREOC provided a summary of the 2007-08 customer satisfaction survey results for complaints under the Act which included findings that:

- 78% of parties felt that HREOC dealt with the complaint in a timely manner.
- 94% of parties did not consider staff to be biased.
- 93% of parties were satisfied with the service they received.

---

85 *Submission 39*, p. 8. See also Collaborative submission, *Submission 60*, pp 25-26.

86 ACTU, *Submission 55*, pp 15-16. See similar proposals from the Shop, Distributive and Allied Employees' Association *Submission 42*, pp 9-10; and Queensland Council of Unions *Submission 46*, pp 4-5.

87 *Submission 55*, pp 15-16.

88 *Committee Hansard*, 10 September 2008, p. 37. See also ACCI, *Submission 25*, p. 11.

- 64% of parties rated the service they received as very good or excellent.[89]

6.77 Furthermore, HREOC noted that:

> Complaints under the SDA have a consistently high rate of conciliation which has increased to 53% in the last reporting year.[90]

Reporting on complaints and outcomes

6.78 Several submissions recommended publication of more detailed de-identified information concerning complaints received by HREOC and their outcomes.[91] The Women's Electoral Lobby noted that the outcomes of conciliated complaints are generally confidential and that this limits the availability of information required for the purposes of educating potential complainants and respondents in order to reduce discrimination.[92] Professor Thornton explained that:

> [C]onciliation is the main mode of dispute resolution in this jurisdiction. That means that about 98 per cent of complaints never go beyond the conciliation level and there is agreement that conciliation occur behind closed doors.
>
> ...Material is published now—it is a little bit better than it used to be—that tends to focus on statistics and so on. I think having more material available to help other complainants would serve a very important educative function. What is the point of having a jurisdiction that operates almost entirely in private, behind closed doors, and then has very little money to communicate to the general public the outcome of those decisions or settlements that have been ...effected that way?[93]

6.79 Dr Charlesworth also submitted that there would be benefits in publishing more detailed information on inquiries and complaints:

> There needs to be a serious and committed attempt to collect and publish detailed deidentified data on the inquiries and complaints made to HREOC. This would enable both the monitoring of the efficacy of the SDA and HREOC processes and practices. Good data collection and analysis is vital not only for reporting and accountability purposes, but also for monitoring trends in complaints and for the education and research activities undertaken by HREOC. Such data can form the basis of feedback to

89 *Submission 69*, p. 198.

90 *Submission 69*, p. 193.

91 Women's Electoral Lobby *Submission 8*, p. 11. See also Shop, Distributive and Allied Employees' Association *Submission 42*, pp 4 and 11; Queensland Council of Unions *Submission 46*, pp 6-7; ACTU *Submission 55*, p. 14; Collaborative submission, *Submission 60*, pp 26-27 and 28.

92 *Submission 8*, pp 10-11.

93 *Committee Hansard*, 11 September 2008, p. 43.

> employer associations, unions, government and the broader community so that discrimination issues can be tackled in a proactive way.[94]

6.80 HREOC gave evidence that some de-identified information is already published:

> [T]he general confidentiality of the conciliation process or any terms of agreement that may be entered into by the parties does not prevent HREOC from providing public information in a de-identified form about issues raised in complaints and outcomes obtained through conciliation. HREOC has developed a conciliation register that provides de-identified summaries of conciliated complaints. HREOC also publishes de-identified case studies in its annual report, on its webpage and in policy documents.[95]

94 *Submission 39*, p. 6.

95 *Submission 69*, pp 324-325.

CHAPTER 7

EXEMPTIONS

Introduction

7.1 Sections 30 to 47 of the Act provide for a number of exemptions from the operation of the Act or circumstances in which different treatment on the basis of protected characteristics such as sex, marital status or pregnancy is permitted. Sections 30 to 43 create permanent exemptions in the following areas:

- sex discrimination due to a genuine occupational requirement (section 30);
- with respect to pregnancy or childbirth (section 31);
- services for members of one sex (section 32);
- accommodation for employees or students (section 34);
- residential care of children (section 35);
- charities (section 36);
- religious bodies (section 37);
- educational institutions established for religious purposes (section 38);
- voluntary bodies (section 39);
- acts done under statutory authority (section 40);
- insurance (section 41);
- new superannuation fund conditions (section 41A);
- existing superannuation fund conditions (section 41B);
- sport (section 42); and
- combat duties (section 43).[1]

7.2 Under section 44 of the Act, HREOC is also empowered to grant temporary exemptions from the operation of the prohibitions on discrimination for a period of up to five years.

7.3 The committee heard from a diverse range of individuals and organisations who supported the removal or restriction of these exemptions. Other groups argued fervently for the retention of particular exemptions. In addition, some witnesses advocated an alternative approach to the existing specific exemptions: namely a general limitations clause which would permit discrimination within reasonable limits.

---

1 HREOC, *Submission 69*, pp 154-155.

Permanent exemptions

7.4 Some submissions were critical of the provision of permanent exemptions under the Act and suggested that some or all of the exemptions should be removed, for example, NACLC argued that:

> Exemptions compromise women's rights under CEDAW and other international instruments. Areas that enjoy exemptions are not required to take any steps in eliminating discrimination against women.[2]

7.5 NACLC further submitted that:

> If sporting or religious bodies were granted permanent exemptions from the prohibition of discrimination of the grounds of disability or race there would be vocal condemnation. Such permanent exemptions from sex discrimination prohibitions are equally unacceptable and should be equally condemned.[3]

7.6 Similarly, Ms Melanie Schleiger of the Human Rights Law Centre told the committee that:

> The current blanket exemptions are arbitrary, unreasonable, based on gender stereotypes and unquestioned. An automatic exemption enables certain rights and interests to trump the right to freedom from discrimination without requiring any consideration of how competing rights should be balanced. We submit that the automatic exemptions and exceptions should be removed from the SDA. This does not mean that there would be an absolute right to gender equality. This right could still be restricted in accordance with human rights limitation principles that require that the limitation be proportionate and appropriate.[4]

7.7 Criticism of the permanent exemptions is not new. The Sex Discrimination Commissioner conducted a review of some of the permanent exemptions between 1990 and 1992. She recommended the removal of the exemptions relating to educational institutions established for religious purposes, voluntary bodies and sport.[5] In 1994, the ALRC *Equality Before the Law* report noted:

---

2 *Submission 52*, p. 9. See also *Committee Hansard*, 9 September 2008, p. 35; Women's Legal Services Australia, *Submission 44*, p. 2.

3 *Submission 52*, p. 32. See also Job Watch, *Submission 62*, p. 31; Women's Legal Services Australia, *Submission 44*, p. 2.

4 *Committee Hansard*, 10 September 2008, p. 2. See also pp 4-6; Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 34.

5 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.12 and 3.73; HREOC, *Submission 69*, p. 163.

> The inclusion of many of the exemptions was part of the compromise and negotiation process in having the Act passed. Their continuance, after ten years of the Act's operation, limits the effectiveness of the SDA.[6]

7.8 HREOC did not support the immediate repeal of exemptions but recommended instead that all permanent exemptions which limit gender equality should be made subject to a three year sunset clause. HREOC suggested that the permanent exemptions then be reviewed during a separate inquiry to see whether they should be retained, narrowed or removed.[7] The Sex Discrimination Commissioner explained the need for additional consultation in relation to the exemptions:

> [W]e are recommending that we have a three-year sunset clause on all the permanent exemptions during which time there will be full consultation. We will have the voices of various stakeholders heard and a determination will be made as to whether or not these exemptions should remain as is, should be narrowed, or should be removed.
>
> In a lot of the exemptions, the right to equality is inherently qualified to the extent that it is necessary to strike an appropriate balance with another human right. We think that just removing all the permanent exemptions would be a significant change to the federal equality laws.[8]

7.9 HREOC suggested that this inquiry could also consider whether the permanent exemptions should be replaced by a general limitations provision.[9]

General limitations clause as an alternative to specific exemptions

7.10 The current approach under the Act is to set out specific circumstances in which otherwise discriminatory conduct is permissible. Associate Professor Simon Rice explained that the alternative to providing for specific exemptions is to have a general limitations clause:

> There is an alternative approach to exceptions that avoids multiple and inconsistent provisions, and that conforms with a human rights-based approach to the SDA: permit discriminatory conduct within 'reasonable limits'. This test is the usual approach to exempting conduct from human rights guarantees...[10]

7.11 Associate Professor Rice elaborated on how a reasonable limits clause would operate:

---

6 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.68; HREOC, *Submission 69*, p. 156. See also Ms Schleiger, Human Rights Law Centre, *Committee Hansard*, 10 September 2008, p. 4; Women's Electoral Lobby, *Submission 8*, p. 5.

7 *Submission 69*, pp 151 and 163-164.

8 *Committee Hansard*, 9 September 2008, p. 21. See also *Submission 69*, p. 163

9 *Submission 69*, pp 151 and 163-164.

10 *Submission 53*, p. 7.

> [E]xceptions and exemptions for discriminatory conduct would be permitted after assessing (1) the importance of the objective to be achieved by the discriminatory conduct, (2) whether the conduct was necessary to achieve that objective, (3) whether there were available alternatives to the discriminatory conduct, and (4) [t]he degree of proportionality between the effects of the discriminatory [conduct] and its objective.[11]

7.12 The Human Rights Law Centre argued that a general limitations clause allows for a more detailed and considered approach to balancing human rights.[12] The centre provided the committee with examples of how general limitations provisions have operated in other jurisdictions including Canada, New Zealand and South Africa.[13] Ms Scheilger of the Human Rights Law Centre also gave a hypothetical example of how the clause would operate in practice:

> Take, for example, if a church wanted to exclude women from a particular role in the church. You would look first look at the nature of the right being limited, which would be the right to equality. Then you would look at the reason for restricting women from that role, which would possibly be freedom of religion. You would then look to the connection between the restriction on the right to equality and the purpose of that restriction and you would then consider whether that is a proportionate and reasonable restriction. You would also look to whether it is the least restrictive way of achieving the purpose of freedom of religion.[14]

7.13 Professor Rice argued that a key advantage to the approach of replacing the specific exemptions with a general limitations clause is that "no person or organisation is excluded or protected from the scope of the Act, and all have the opportunity to make a case for excepted conduct."[15]

7.14 Conversely, HREOC submitted that one of the disadvantages of fixed permanent exemptions is that they are inflexible:

> Whilst providing a degree of certainty, permanent exemptions also carry the risk of excluding too much or too little depending on the circumstances. Indeed, some commentators have observed that, in circumstances where an appropriate exemption does not apply, the courts have at times adopted an overly restrictive interpretation of the definition of discrimination to avoid unjust or impractical results on the particular facts, although with adverse consequences for discrimination jurisprudence in the longer term.[16]

---

11 *Submission 53*, p. 7. See also Ms Cassandra Goldie, HREOC, *Committee Hansard*, 9 September 2008, p. 25; Human Rights Law Centre, *Answers to questions on notice*, 19 September 2008, pp 2-3.

12 Ms Scheilger, *Committee Hansard*, 10 September 2008, p. 5.

13 *Answers to questions on notice*, 19 September 2008, pp 3-9.

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

15 *Submission 53*, p. 7.

16 *Submission 69*, p. 162.

7.15 Ms Kate Eastman on behalf of the Law Council noted that the issue of exemptions is a difficult one. She also suggested that the disadvantage of permanent exemptions lies in their inflexibility:

> What might have been an appropriate exemption 25 years ago does not necessarily reflect current standards or expectations either of employers, employees or more generally in the areas where the Sex Discrimination Act operates. There is that difficulty about having specific exemptions to deal with particular issues, meaning that the Act might operate inflexibly or inappropriately and not be able to adapt to ever-changing conditions. That is the benefit of having a general exemption clause.[17]

7.16 On the other hand, Ms Eastman acknowledged that the disadvantage of a general limitations clause is that it is vague and requires consideration on a case by case basis.[18] HREOC made a similar observation that the advantage of the existing approach under the Act is that "it seeks to provide a degree of clarity and certainty in advance, so that individuals and businesses can adequately regulate their affairs."[19]

Exemptions for religious organisations

7.17 Other submissions and witnesses expressed views about specific exemptions. The bulk of this evidence concerned the exemptions for religious organisations under sections 37 and 38 of the Act. HREOC explained that:

> There are two permanent exemptions under Division II Part 4 of the SDA which are of a religious nature. Section 37 exempts religious bodies from the operation of the Act and s 38 exempts educational institutions established for religious purposes in some areas of employment from the operation of the Act.
>
> These exemptions exist at the intersection of two fundamental human rights, namely the right to practice a religion and belief and the right not to be discriminated against on the basis of sex, marital status, pregnancy or potential pregnancy.[20]

7.18 Several organisations considered that there should not be an automatic exemption for religious organisations. Women members of the General Synod Standing Committee of the Anglican Church of Australia (Women of the Anglican Church) mounted several arguments against these exemptions:

> [W]e seek the removal of automatic exemptions for religious bodies, because they entrench discrimination against women who belong to one of the last remaining significant male-dominated sectors of Australian society. As the exemptions are automatic, religious bodies are not required to justify exemption, or demonstrate if and how they are promoting the equality of

17 *Committee Hansard*, 10 September 2008, p. 54.

18 *Committee Hansard*, 10 September 2008, p. 54.

19 HREOC, *Submission 69*, p. 162.

20 *Submission 69*, p. 165.

> women as far as is possible within the parameters of their doctrines, tenets or beliefs.[21]

7.19 Secondly, Women of the Anglican Church suggested that the exemptions may not be consistent with the Christian faith:

> Automatic exemption is uncomfortable for many Christians because of the implicit assumption that we desire or need it because discrimination is entrenched at the very heart of our faith. On the contrary, discrimination on the basis of sex, race or any other differentiating marker runs counter to the strong thrust of New Testament teaching which supports the intrinsic equality of all human beings.[22]

7.20 Finally, Women of the Anglican Church argued that the automatic exemptions leave female clergy without protection against gender based discrimination:

> While women are now officially accorded full equality in terms of doctrines, tenets and beliefs in the overwhelming majority of dioceses in the Anglican Church of Australia, there is anecdotal evidence that women clergy are at times discriminated against in employment because of their gender in ways that would not be acceptable under the Act if religious bodies were not exempt.[23]

7.21 Women of the Anglican Church noted that this is an issue not only for women employed by the Anglican Church but also for women employed by other churches in both ordained and non-ordained positions:

> More than 1000 women clergy, numbers of female ordination candidates, and many more non-ordained female church workers around Australia are left without any legal protection against gender-based discrimination in their employment because of the Act's exemption for religious bodies.[24]

7.22 Ordination of Catholic Women into a Renewed Ordained Ministry (Ordination of Catholic Women) also supported removal of the automatic exemptions for religious organisations. Dr Marie Joyce of the Ordination of Catholic Women explained that:

> [T]he process of applying for an exemption would put the people who at the moment enjoy those exemptions in a position of having to think through differently and make a clear rationale and justification for their claims in a way that is not required at the moment.[25]

---

21 *Submission 7*, p. 1. See also Australian Women's Health Network *Submission 30*, p. 11; NACLC, *Submission 52*, p. 32.

22 *Submission 7*, p. 3.

23 *Submission 7*, p. 3.

24 *Submission 7*, p. 3.

25 *Committee Hansard*, 11 September 2008, p. 30.

7.23 Dr Joyce also argued that, while the exemption in section 37 does not present a legal obstacle to the ordination of Catholic women, it provides cultural support for the existing position of the Catholic Church and enables the Church to persist in stereotyped and discriminatory views.[26]

7.24 In a similar vein, the Collaborative submission argued that the automatic nature of the exemptions has significant flow on effects. The submission stated:

> [T]here is no incentive for an exempted religious body to ensure that it provides significant, let alone mandatory, levels of representation for women in areas that do not conflict with its doctrines, tenets or beliefs. An example would be representation levels of women on lay church bodies. ...
>
> Automatic exemption allows religious bodies to resist re-examination of their beliefs regarding the role of women. If exemption had to be applied for at regular intervals, re-examination would be required from time to time, and female adherents would take encouragement to challenge the status of current beliefs.[27]

7.25 UNIFEM Australia argued that the exemptions for religious organisations are inconsistent with CEDAW, particularly article 5, which requires state parties to take all appropriate measures to eliminate "customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[28] Miss Elnaz Nikibin of UNIFEM also pointed to a conflict between these exemptions and article 11 of CEDAW which recognises that women have the right to work and not to be discriminated against during employment. She argued that the exemptions are not consistent with these obligations under CEDAW because they allow religious institutions to dismiss an individual based on marital status, sex or pregnancy.[29]

7.26 Equally strong views were expressed by organisations seeking the retention of the exemptions for religious organisations. Mr James Wallace, the Managing Director of the Australian Christian Lobby, argued that retention of the exemptions was necessary in order to protect freedom of religion. He noted that freedom of religion is a right protected by international law and submitted that:

> The Sex Discrimination Act is a balancing act between the right to freedom of religion and the right to equal treatment of men and women. Exemptions in sections 37 and 38 effectively strike that balance, providing a necessary safeguard for religious bodies and education institutions established for religious purposes to conduct their business, as the Act says, in accordance with the doctrines, tenets, beliefs or teachings of the particular religion or creed. ...Our second recommendation, therefore, is that the exemptions in

---

26 *Committee Hansard*, 11 September 2008, p. 32.

27 *Submission 60*, p. 35. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 60.

28 *Submission 19*, p. 8.

29 *Committee Hansard*, 9 September 2008, p. 43.

> sections 37 and 38 must remain in the Sex Discrimination Act. They allow religious organisations to engage in their own theological debates and religious observances without the 'illegitimate' interference of government.[30]

7.27 In relation to the practical impact that removal of the exemptions would have, Mr Wallace told the committee that:

> [T]here is a real concern among a lot of churches that, with the various people applying for jobs in their schools and churches, they might be required to admit into those staffs, for instance, not only people whose theology is inconsistent with that belief system, ...but also people whose way of life may not be consistent with that theology. I know there is a real fear amongst schools and church denominations that they could lose this right to control who works in their schools and churches.[31]

7.28 Clearly, reconciling the right to equality with other rights such as the right to freedom of religion is a complex issue. That complexity was reflected in the submission from the Muslim Women's National Network of Australia which noted:

> [T]here is considerable discrimination against women in the operation of mosques and mosque associations, and many Muslim women seek changes and greater equality in these areas. However, the repealing of the exemptions provided to religious bodies under the Commonwealth Sex Discrimination Act would also remove various beneficial provisions for Muslim women.[32]

7.29 Specifically, the Muslim Women's National Network explained that Islamic schools expect staff to adhere to Islamic values including by not living in a de facto relationship and, ideally, would seek to educate boys and girls separately.[33]

7.30 Nevertheless, Ms Edwina Macdonald of NACLC suggested that the permanent exemptions are not the best approach for resolving the tension between the right to equality and the right to freedom of religion:

> No human right is absolute. They must all be viewed in relation to one another. ...By having a permanent exemption for religion you are prioritising the right to freedom of religion over the right to live free from discrimination. We suggest that you get rid of the permanent exemptions but that you retain a process, or a balancing act must take place. Rather than just saying, 'The freedom to religion will always trump the freedom to live free from discrimination', you can look at it on a case-by-case basis.
>
> ...We are not saying that there would never be a case where the right to religious freedom might mean that the right to live free from discrimination

30 *Committee Hansard*, 11 September 2008, p. 47.

31 *Committee Hansard*, 11 September 2008, p. 50.

32 *Submission 65*, p. 2.

33 *Submission 65*, p. 3.

> needs to be balanced. It is just that there needs to be a process so that we can look at that rather than saying 'In all circumstances this right will be superior.'[34]

7.31 Similarly, Ms Schleiger of the Human Rights Law Centre told the committee:

> The removal of the exemptions and the protection of freedom of religion are not mutually exclusive options. Under international human rights law there is not a hierarchy of rights. ...[O]ur major concern with the current blanket exemptions is that they do not require any justification for favouring the right to freedom of religion over equality in certain circumstances. It is just a given that that will occur even if that is not necessarily a reasonable and proportionate outcome.[35]

Section 38 - Educational institutions

7.32 There were specific criticisms of the exemption under section 38 for educational institutions established for religious purposes. The Australian Education Union was one of several organisations which advocated removal of the exemption in section 38.[36] The union noted that the exemption has been used to dismiss teachers who live in de-facto relationships; and to dismiss gay and lesbian teachers.[37]

7.33 The Collaborative submission argued that, as religious educational institutions are the recipients of public funds, they should not be permitted to discriminate on the grounds of sex:

> It is unacceptable for educational institutions conducted by religious organisations (the preponderance of private schools) to discriminate on the ground of sex in respect of either employment or education when such institutions are the recipients of significant public funding. It is noted that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the spirit of the SDA and CEDAW about the position of women and girls in contemporary Australian society. As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding be permitted to discriminate on any of the legislatively proscribed grounds.[38]

7.34 The Independent Education Union of Australia was particularly critical of the breadth of the exemption in section 38 and argued that:

---

34 *Committee Hansard*, 9 September 2008, p. 35.

35 *Committee Hansard*, 10 September 2008, pp 4-5. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 60.

36 *Submission 17*, p. 8. See also Mr Angelo Gavrielatos, Australian Education Union , *Committee Hansard*, 10 September 2008, p. 65; YWCA, *Submission* 58, p. 6; Anti-Discrimination Commission Queensland, *Submission* 63, p. 5.

37 *Submission 17*, p. 8.

38 *Submission 60*, p. 36. See also Mr Angelo Gavrielatos, Australian Education Union , *Committee Hansard*, 10 September 2008, p. 65.

> People should not be required to forgo their ordinary human rights when they commence employment in religious schools.[39]

7.35 On the other hand, Christian Schools Australia and the Association of Independent Schools of South Australia argued that maintaining the exemption in section 38 is necessary to protect religious freedom.[40] The Chief Executive Officer of Christian Schools Australia Mr Stephen O'Doherty told the committee that:

> International covenants place a high priority on children having the freedom to be able to be brought up within the belief structure of their family. Australia is a signatory to those international covenants. In our view it would be a very sad day if an Australian government tipped the balance against the right of children and their parents to live freely and to be educated freely within the teachings of a religion, whether it be Christianity, the Islamic faith, Judaism, or the other religions that flourish in Australia.[41]

7.36 In addition, Mr O'Doherty clarified the scope of the exemption under section 38:

> The exemption that is offered to religious schools, the Christians schools that we represent, is very limited. It applies only to employment and to dismissal, that is, the act of employing somebody or the act, if necessary, of dismissing somebody. The submissions before you that talk about the broad nature of exemption and allowing Christian schools to discriminate against individuals in the daily course of events or in their employment are not true.
>
> ...[I]t is not lawful for a Christian school to discriminate in relation to conditions of employment, to deny employees access, or to limit their access to promotion, transfer, training or any of those sorts of things that go to making up how a community works. The exemption applies only to employment and dismissal.[42]

7.37 Mr O'Doherty also explained that the exemption in section 38 is not relied upon to discriminate on the basis of sex or pregnancy:

> [T]he area of contention for Christian schools in employment matters is not to do with a person's sex, whether he or she is male or female, and it is not to do with whether or not persons are pregnant or otherwise. The real issue we are talking about ...is in the area of moral behaviour as it relates to the genuine requirement of a Christian school to employ people who can truly

---

39 *Submission 49*, p. 7; *Submission 75*, pp 6-7.

40 *Submission 27*, pp 3-6. See also Mr Colin Clifford, Jubilee Christian College, *Submission 35*; Mr Donald Leys, Condell Park Christian School, *Submission 37*; Mr Ronald Christie, Associate Pastor, Condell Park Bible Church, *Submission 38*.

41 *Committee Hansard*, 9 September 2008, p. 50.

42 *Committee Hansard*, 9 September 2008, pp 47-48. See also p. 55.

> act in a way that is consistent with the beliefs that they are required to teach.[43]

7.38 Rather, Mr O'Doherty explained that it is the marital status of employees and potential employees which is of concern to Christian schools because of the moral teachings of churches relating to marriage.[44]

7.39 Finally, Mr O'Doherty responded to queries as to why it is necessary for the exemption to encompass not only teaching staff but also ancillary staff such as gardeners and cleaners:

> The reason for that breadth—it relates to teachers, administrators, as well as ancillary staff and so on—is because of a belief within our style of education, our pedagogical approach, that the entire community is responsible for sharing the faith, living by the faith, and therefore transmitting what is known as the informal curriculum to students, not just the printed words or the moral teaching but the reality of living by that moral teaching in day-to-day life.[45]

Drafting issues

7.40 The Anti-Discrimination Commissioner of Tasmania raised specific concerns regarding the drafting of sections 37 and 38. The Commissioner drew attention to the phrasing in subsection 37(d) and section 38 which allow discrimination where it is necessary "to avoid injury to the religious susceptibilities of adherents of that religion". The Commissioner considered that this phrasing was too broad because it may permit discrimination on the basis that an act will injure the religious susceptibilities of *some* adherents of a religion.[46]

7.41 The Ordination of Catholic Women was similarly critical of the drafting of section 37 arguing that "the provision is far broader than is necessary to avoid injury to the religious susceptibilities of any rational adherents of the Catholic religion."[47] The Ordination of Catholic Women noted that the Sex Discrimination Bill 1983, as originally drafted, referred to "the religious susceptibilities of *the* adherents of that religion" and submitted that:

> [T]here is a great difference between 'the adherents' in the early versions and 'adherents' in the final version, namely, the difference between the great bulk of adherents and any number more than one.[48]

---

43 *Committee Hansard*, 9 September 2008, p. 48. See also p. 56.

44 *Committee Hansard*, 9 September 2008, p. 56. See also Association of Independent Schools of South Australia, *Submission 75*, p. 3.

45 *Committee Hansard*, 9 September 2008, p. 51.

46 *Submission 13*, p. 5. See also Ordination of Catholic Women, *Submission 9*, part 2 and UNIFEM *Submission 19*, p. 8.

47 *Submission 9*, part 2, p. 2.

48 *Submission 9*, part 2, p. 2.

7.42 On the other hand, Australian Christian Schools expressed concern that the existing drafting of section 38 may not be broad enough.[49] These concerns arose out of a decision of the New South Wales Administrative Decisions Tribunal in a case that considered the exemption for religious bodies under section 56 of the *Anti-Discrimination Act 1977 (NSW).* The case involved a refusal by the Wesley Mission to accept an application from a gay couple to become foster carers. In that case, the tribunal interpreted the particular religion as meaning Christianity and not the particular denomination operating the foster care service.[50] The committee notes however that section 56 of the *Anti-Discrimination Act 1977 (NSW)* refers to acts or practices that are necessary "to avoid injury to the religious susceptibilities of *the* adherents of that religion" and thus is drafted more narrowly than the section 38 of the Act.

7.43 UNIFEM Australia also argued that the exemptions for religious organisations are far too broad.[51] Miss Nikibin of UNIFEM submitted that at the very least the drafting of the provisions should be limited, proportionate and clearer and, in particular, section 38 should not include discrimination on the grounds of pregnancy or sex.[52]

7.44 The Independent Education Union submitted that section 38 should require that the discrimination be not just 'in good faith' but that it be reasonable in the circumstances:

> The concept of "good faith" is subjective, too wide ranging, [and] is a major exception to the application of the prohibitions otherwise imposed by the legislation.
>
> The IEUA believe that it is imperative that, if there must be exemptions relating to the area of employment, they be clearly and narrowly articulated, [and] they incorporate concepts of "reasonableness" (not merely "good faith")...
>
> [W]here exemptions do exist in legislation, they should not be open to interpretation which is so broad that they undermine the human rights which the legislation is intending to protect.[53]

7.45 The Independent Education Union further argued that: "Employees' private lives should remain private" and thus the exemption should relate only to an

---

49 Mr Mark Spencer, Christian Schools Australia, *Committee Hansard*, 9 September 2008, pp 53-54; *Submission 27*, pp 6-7. See also Mr Colin Clifford, Jubilee Christian College, *Submission 35*.

50 *OV and anor* v *QZ and anor (No.2)* [2008] NSWADT 115 at 119.

51 Mrs Rosalind Strong, UNIFEM Australia, *Committee Hansard*, 11 September 2008, p. 42.

52 *Committee Hansard*, 9 September 2008, p. 43.

53 *Submission 49*, p. 8.

employee's conduct during a selection process, in the course of their work or in doing something connected with their employment.[54]

7.46 ALRC recommended removal of the exemption in section 38 in *Equality Before the Law* report. However, if the exemption was to be retained ALRC recommended:

> At the very least the exemption should be removed in relation to discrimination on the ground of sex and pregnancy. The exemption for discrimination on the ground of marital status, if it is to be retained, should be amended to require a test of reasonableness.[55]

Combat duties exemption

7.47 Section 43 of the Act permits discrimination against women on the grounds of sex, in relation to employment in the Australian Defence Force (ADF), in positions which involve the performance of combat duties. The Department of Defence noted that the restriction on women serving in *combat-related* roles was removed in 1995 and that:

> Most of the barriers to women being employed across a range of ADF job categories have been removed over the past 15 to 20 years. Many women are now serving in command positions and on military operations overseas, and more are reaching senior star-rank levels. Women are now eligible to serve in approximately 90 per cent of employment categories, up from 73 per cent in 2003.[56]

7.48 The Department also advised that the Royal Australian Air Force is currently examining the restriction on women entering ground combat roles.[57] The Department nevertheless argued for the retention of the combat roles exemption:

> Whilst Defence has been progressively broadening women's roles in the ADF, current policy still restricts the employment of women in some employment categories that involve or have the potential to involve direct combat duties. The s43 exemption provides Defence with the manning flexibility to meet current and emerging operational and capability requirements. Accordingly, the exemption is still required.[58]

7.49 There was some support for retention of this exemption from other organisations. For example, Mr James Wallace of the Australian Christian Lobby argued that the combat effectiveness of units such as special forces relies upon the exclusion of women:

---

54 *Submission 49*, p. 8.

55 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.11.

56 *Submission 74*, p. 2.

57 *Submission 74*, p. 3.

58 *Submission 74*, p. 2.

> [T]he combat effectiveness of those groups relies on morale, and morale—I am sorry to say, for all the feminists—relies on the mateship bond between these fellows. They will die for each other, and they all know it. As the Israelis found out in 1973, if you inject into that scenario one female or, I have to say, even two homosexuals and you suddenly have a love relationship, that breaks down the morale or the compact, if you like, between the members of that group and it definitely affects the combat capability of that group.[59]

7.50 However, several submissions supported removal of the exemption in section 43.[60] Mr Jyonah Jericho argued that the existing ban against women accessing combat roles and other roles in the ADF is unjust, unethical and unnecessary.[61] He submitted that:

> It is a myth that all women are not suitable for combat, just as it is a myth that all men are suitable for combat. Arguments about men and women's suitability for frontline military service are grounded in stereotypical assumptions about the psychological and physiological makeup of women and men. It is naïve and ignorant to believe all women possess petite bodies and pacifist mindsets. It is equally absurd to believe all men are athletic warriors...[62]

7.51 Mr Jericho also noted that the argument that integrating women into frontline combat roles would undermine the morale and the efficiency of combat units is similar to the arguments which were used to exclude minority groups from the ADF including homosexuals and Indigenous Australians. He submitted that: "There is no evidence that integrating minorities into the ADF has ever undermined the institutions' morale or productivity."[63]

Exemptions for voluntary bodies and sport

7.52 The exemptions for voluntary bodies (section 39) and for sport (section 42) were the subject of specific criticism. ALRC recommended removal of both these exemptions in the *Equality Before the Law* report endorsing a previous recommendation of the Sex Discrimination Commissioner.[64]

7.53 Section 39 provides for an exemption for 'voluntary bodies' from the prohibitions on discrimination in Division 1 and 2 of Part II, in connection with:

- the admission of persons as members; or

---

59 *Committee Hansard*, 11 September 2008, p. 56. See also Endeavour Forum, *Submission 36*, p. 2.

60 See Jyonah Jericho, *Submission 2*; Non-Custodial Parents Party, *Submission 21*, p. 5; Dads on the Air, *Submission 6*, pp 8-9.

61 *Submission 2*, p. 1.

62 *Submission 2*, p. 3.

63 *Submission 2*, pp 7-8.

64 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.13.

- the provision of benefits, facilities and services to members. [65]

7.54 This exemption does not apply to 'clubs' which are defined in section 4 as an association of not less than 30 persons, associated for social, literary, cultural, political, sporting, athletic or other purposes, that:

- provides and maintains its facilities, in whole or in part, from the funds of the association; and
- sells or supplies liquor for consumption on its premises. [66]

7.55 However, subsection 25(3) creates a specific exception to allow single sex 'clubs' to discriminate on the basis of sex in relation to applications for membership.

7.56 Several submissions recommended the repeal of section 39. For example, the Anti-Discrimination Commission Queensland argued that voluntary organisations should not be prioritised over the human rights goals of anti-discrimination law and strongly supported removal of the exemption in section 39.[67]

7.57 Miss Nikibin of UNIFEM Australia expressed particular concern about how broadly the exemption in section 39 is cast:

> Section 38 specifically outlines that a religious institution can discriminate based on marital status, sex or pregnancy if it is in accordance with its religious creed or beliefs, whereas section 39 does not limit this discrimination provided it is in accordance with the constitution of the volunteer body or the membership requirements. It simply states that it is not unlawful for a volunteer body to discriminate against a person on the ground of a person's sex, marital status, or pregnancy in the admission of persons as a member or in the provision of benefits.
>
> That leaves it quite broad, in that it enables a voluntary body to choose to discriminate on the basis of a person's marital status, even if it is taking both married and unmarried people within its organisation, but it chooses to discriminate against one person on that basis.[68]

7.58 Section 42 of the Act currently provides competitive sporting activities with an exemption, with respect to discrimination on the basis of sex, whenever the strength, stamina or physique of competitors is relevant. The Human Rights Law Centre argued that:

> This exemption results in the exclusion of women from sports competitions even if they have the skill and merit to compete with men. This exemption is incompatible with Australia's obligations under CEDAW to provide

65 HREOC, *Submission 69*, p. 174.

66 HREOC, *Submission 69*, p. 174.

67 *Submission 63*, p. 3. See also Anti-Discrimination Commissioner of Tasmania, *Submission 13*, pp 5-6; Human Rights Law Centre, *Submission 20*, pp 40-41; NACLC, *Submission 52*, p. 36.

68 *Committee Hansard*, 9 September 2008, p. 43. See also p. 45.

> women with the same opportunities to participate actively in sports and physical education...[69]

7.59 The exemption under section 42 does not apply to sporting activities involving children under 12 years of age. NACLC noted that section 42 is relied upon by some sporting bodies to prevent females from participating with males once they are over a particular age. NACLC gave the example of Australian rules football competitions prohibiting females from participating in male competition once they are over the age of 14.[70] NACLC submitted that factors such as merit, capability and strength can be used to determine participation in sport and that there is thus no justification for retaining the permanent exemption based on gender in section 42.[71] Ms Shirley Southgate of NACLC expanded on this argument in her evidence to the committee:

> [P]eople should play on merit and capacity. That should not necessarily be determined by an arbitrary age cut-off. For example, already in New South Wales older boys are allowed to play in under-age rugby teams because of their size and weight. That is where their ability sits them, and vice versa. Some youngsters at nine who are bigger than me probably ought to be playing in the under twelves. ...How do we put people in the appropriate place to play? What are the appropriate questions to ask? Sex is not the only question that would be appropriate in that sort of circumstance. What are their physical attributes and what is their capacity?[72]

Other permanent exemptions

7.60 A number of submissions recommended the removal of other specific exemptions. The permanent exemptions for accommodation provided for employees or students (section 34), charities (section 36), acts done under statutory authority (section 40) and superannuation fund conditions (sections 41A and 41B) were all the subject of criticism.[73]

7.61 In addition, HREOC argued that the 'exemptions' in sections 31 and 32 would be more accurately characterised as provisions which clarify that certain differential treatment is not discriminatory. The Sex Discrimination Commissioner explained that:

> Some permanent exemptions promote substantial gender equality by allowing for differential treatment. If we look at section 31 in the Act, it allows the granting of privileges in connection with pregnancy or

---

69 *Submission 20*, p. 42.

70 *Submission 52*, p. 33.

71 *Submission 52*, pp 35-36.

72 *Committee Hansard*, 9 September 2008, p. 36.

73 Anti-Discrimination Commissioner of Tasmania, *Submission 13*, pp 5-6; Human Rights Law Centre, *Submission 20*, pp 5-6; Associate Professor Beth Gaze, *Submission 50*, p. 5; Anti-Discrimination Commission Queensland, *Submission 63*, pp 4-6.

> childbirth. For example, organisations can roll out paid maternity leave schemes, and that is not seen to be discriminatory under the Act.[74]

7.62 Similarly, section 32 exempts services which by their nature can only be provided to members of one sex. HREOC explained that:

> This section enables, for example, specialist services for amnio centisis, or for vasectomies, to address health needs which are unique to women, or to men. This section is also consistent with CEDAW and is not an exemption to the obligation to promote gender equality.[75]

7.63 HREOC recommended that these provisions should be removed from Part II Division 4 of the Act which deals with exemptions and instead be consolidated with section 7D which provides that temporary special measures are not discriminatory.[76]

Exemptions granted by HREOC

7.64 Some submissions argued that the power of HREOC to grant temporary exemptions under section 44 of the Act should be more limited. For example, NACLC argued that these exemptions should only be granted for periods of up to 12 months where the applicant "demonstrates that no other practicable or reasonable step, other than the exemption can be taken."[77]

7.65 Professor Thornton supported circumscribing section 44 by requiring that any exemption granted under that provision must promote the objects of the Act.[78]

7.66 HREOC advised that it has developed guidelines for the granting of temporary exemptions under the Act. Under those guidelines, HREOC does consider the objects of the Act when determining whether to grant an exemption.[79] Nevertheless, HREOC also supported an amendment to the Act to confirm that the power to grant exemptions should be exercised in accordance with the objects of the Act.[80]

---

74 *Committee Hansard*, 9 September 2008, p. 21. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 34.

75 *Submission 69*, p. 158.

76 *Submission 69*, p. 159. See also Human Rights Law Centre, *Submission 20*, p. 30.

77 *Submission 52*, p. 38.

78 *Submission 22*, p. 7. See also Collaborative submission, *Submission 60*, p. 36.

79 *Submission 69*, p. 156.

80 *Submission 69*, p. 157.

CHAPTER 8

IMPACT ON THE ECONOMY

8.1 The committee received evidence suggesting that, while the Act imposes some economic costs, eliminating sex discrimination and sexual harassment has economic benefits both for individual businesses and the Australian economy as a whole. However, some submissions and witnesses expressed concern about the complexity of the existing system of anti-discrimination legislation. There was particular concern about the complexity produced through each jurisdiction having its own anti-discrimination legislation. To address this, some organisations expressed in principal support for harmonising anti-discrimination laws. In addition, business groups argued that there is inconsistency between the obligations of employers under anti-discrimination laws and their obligations under unfair dismissal laws.

Impact on individual businesses

8.2 ACCI submitted that implementing anti-discrimination and anti-harassment measures "has not been done without imposing significant costs and challenges for employers."[1] ACCI stated that:

> [S]ome of the costs imposed by anti-discrimination laws on business are in training and educating staff, responding to and investigating complaints and engaging legal and specialist assistance where necessary, in addition to the costs that arise from any litigation.[2]

8.3 Nevertheless, ACCI noted that "[t]here is a strong business case for diverse and inclusive workplace cultures which possess clear norms against discrimination."[3] In particular, ACCI acknowledged that there are:

> ...benefits to employers in achieving recognition as an employer with a discrimination-free culture. Those benefits can accrue in staff well being, high quality job applicants, productivity, lower absenteeism, fewer conflict issues requiring resolution, and higher rates of retention.[4]

8.4 Several other submissions also pointed to the economic benefits of removing discrimination in workplaces. For example, Australian Women Lawyers noted the benefits of introducing flexible work measures include improved staff retention, increased productivity and reduced absenteeism.[5]

---

1 *Submission 25*, p. 3.

2 *Submission 25*, p. 3.

3 *Submission 25*, p. 2.

4 *Submission 25*, p. 3.

5 *Submission 29*, p. 16. See also Carers Australia *Submission 33*, pp 7-8 and 12; Diversity Council Australia Inc *Submission 47*, pp 7-11.

8.5 The Diversity Council of Australia provided several specific examples of companies obtaining significant commercial benefits through the introduction of initiatives such as paid parental leave, more flexible work practices and work-based childcare.[6] More generally, the council noted research by the Catalyst organisation that:

> ...indicates that Fortune 500 companies with the highest representation of women board directors attained significantly higher financial performance, on average, than those with the lowest representations of women board directors. This related to return on equity (companies with the highest percentages of women board directors outperformed those with the least by 53%), return on sales (by 42%), and return on invested capital (by 66%).[7]

8.6 The Diversity Council of Australia also noted the corollary that the failure to eliminate discrimination imposes significant costs on businesses. The council pointed to direct costs such as legal fees and damages awards but noted that:

> Less easy to quantify are the "hidden" costs, including, for example unplanned absenteeism, reduction in work team cohesion and productivity, reduction in staff morale, lost management/employee time (investigations, hearings etc.), resignations and labour replacement costs, workplace accidents, stress and illness claims, damage to the company's reputation, and/or political and industrial relations impacts.[8]

8.7 Ms Penny Thew of the Law Council of Australia told the committee that legal firms are aware of the costs involved in failing to address sex discrimination:

> From my experience for at least the last 10 or 15 years I think the firms have been getting that input themselves, that the cost to them of losing female employees at the five, or seven or nine-year mark and continually replacing them, as many of the firms around edge of the cities do, is very high. There is the cost of losing the relationships that those solicitors had with the clients.[9]

8.8 In relation to the cost of sexual harassment to businesses, HREOC submitted that:

> [T]here is a strong business imperative to eliminate sexual harassment. Sexual harassment presents a significant cost to employers through lost productivity, absenteeism, workers compensation, staff turnover, drop in staff morale and reputational damage.[10]

---

6 *Submission 47*, pp 10-11. See also Carers Australia, *Submission 33*, pp 7-8; Collaborative submission, *Submission 60*, p. 32.

7 *Submission 47*, p. 10.

8 *Submission 47*, p. 8. See also Collaborative submission, *Submission 60*, p. 31.

9 *Committee Hansard*, 10 September 2008, p. 59.

10 *Submission 69*, pp 131-132.

8.9 HREOC conducted a review of sexual harassment in employment complaints in 2002 and found that only 7 per cent of complainants were still working for the organisation where the alleged harassment occurred.[11] Referring to this review, Mr Mathew Tinkler of PILCH noted:

> A 2002 survey by HREOC suggested that ...only seven per cent of people who had made a complaint had returned to the employer to which the complaint related to. In terms of business, 93 per cent of people ...are leaving the business. So there is a real commercial and business imperative to improve the way we handle this. It is not in business's interest to lose its well-trained employees.[12]

Overall economic impact

8.10 The Diversity Council of Australia argued that beyond the costs and benefits to individual businesses there are wider economic implications of failing to eliminate discrimination:

> Not only does discrimination adversely impact upon individuals, groups, and organisations, it also incurs costs to the broader community. The United Nations estimates that discrimination against women has cost Asia-Pacific billions of dollars every year. The Economic and Social Survey for Asia and the Pacific 2007 identified that barriers to employment for women cost the region $42 billion to $47 billion annually. Other research has demonstrated a direct relationship between higher sex discrimination in particular nations and lower output per capita.[13]

8.11 More specifically, HREOC submitted that the Act has had a positive impact on the Australian economy:

> The SDA has made a substantial contribution to Australia's increasing productivity and economic prosperity in the last 24 years. In particular, legal protection from discrimination in the workplace, implemented through access to complaints mechanisms, and through HREOC's education and awareness-raising activities, has assisted in removing barriers to workforce participation for women.[14]

8.12 HREOC pointed out that increasing participation by women in the workforce is closely linked to economic growth:

> Enabling skilled women workers to participate in and retain labour force attachment – particularly following childbirth – is essential in order to get a maximum return on Australia's significant public and private investment in women's education and training.

---

11 *Submission 69*, p. 132.

12 *Committee Hansard*, 10 September 2008, p. 30.

13 *Submission 47*, p. 9.

14 *Submission 69*, p. 251.

> The OECD has noted that workforce participation of women is a key economic issue for Australia. As well as boosting Australia's overall labour market participation rate, women's increased workforce participation has boosted family living standards and, by driving up the demand for goods and services and expanding the size of the domestic market, enabled the Australian economy to continue to grow.
>
> ...At a time of skills shortages across a number of industries, women workers are invaluable to the current labour market.[15]

8.13 Similarly, the Association of Professional Engineers, Scientists and Managers Australia argued that there is an economic imperative to retain skilled and experienced women in the technical professions but that this is unlikely to be achieved unless all forms of discrimination including systemic discrimination are eliminated.[16]

Lack of consistency between federal, state and territory anti-discrimination laws

Impact of inconsistency

8.14 Submissions from business groups suggested that the lack of consistency between federal, state and territory anti-discrimination legislation as well as inconsistency with obligations imposed by other legislation causes considerable difficulty for businesses. VACC noted that:

> [C]urrent differences between the Federal and State sex discrimination legislation impose a myriad of regulatory obligations that can be challenging and confusing for small and medium size businesses. The existence of multiple regulatory jurisdictions and the inconsistencies in State and Federal legislation encourage forum shopping and create uncertainties.[17]

8.15 Mr Daniel Mammone of ACCI also submitted that the complex array of anti-discrimination obligations under federal, state and territory laws poses a problem for employers:

> The main problems that employers face is that they may have a set of circumstances that will give rise to a possible multiple legal action, one part of which could be a possible breach of the SDA. Others could be breaches of contract agreements. ...The same set of circumstances can give a claimant the possible opportunity to take action, say, in Victoria at the Victorian Equal Opportunity Commission under the Victorian act or under the SDA perhaps. If they have been dismissed they may also take proceedings, in some cases, to the [Australian Industrial Relations Commission] for unfair dismissal proceedings or commence proceedings at

---

15 *Submission 69*, p. 252. See also ACTU, *Submission 55*, p. 3. On the related issue of workforce participation of carers see Carers Australia, *Submission 33*, pp 7-8 and 14-15.

16 *Submission 48*, p. 8. See also HREOC *Submission 69*, p. 252.

17 *Submission 32*, p. 5. See also ACCI, *Submission 25*, pp 3 and 7.

> the Federal Magistrates Court or the Federal Court for unlawful termination ...depending on the factual matrix. ...[I]t is concerning that an employer has to navigate through that legal minefield.[18]

8.16 In addition, ACCI pointed to the difficulties employers face reconciling their obligations under anti-discrimination legislation with the laws prohibiting unfair dismissal or unlawful termination.[19] ACCI provided five examples of cases in which employers were ordered to reinstate employees who had been sacked as a result of the employer seeking to enforce its policies in relation to sexual harassment. These were two decisions of the Australian Industrial Relations Commission and three decisions made by the New South Wales Industrial Relations Commission.[20] ACCI stated that:

> There is considerable authority now from the decisions of tribunals (e.g. the Australian Industrial Relations Commission) to suggest that even when an allegation of sexual harassment is sustained on the basis of a thorough investigation, and the conduct is serious, this will not mean that termination of the employment of the harasser will be considered fair or reasonable by a tribunal. This is a highly invidious position for an employer to be in.[21]

8.17 ACCI argued that this is a form of 'double jeopardy' for employers. Mr Mammone told the committee:

> This is a real concern because employers are trying to comply with their anti-discrimination legal obligations but at the same time they do not know whether they will be made subject to further litigation down the track.[22]

8.18 Mr Barklamb of ACCI suggested that there should be a presumption of fairness where a dismissal is the result of an employer seeking to meet its obligations with respect to sexual harassment:

> It would be useful to us if action were taken in direct response to formal complaints for harassment or actions that are being taken by us in furtherance of compliance with other areas of law had some presumption towards fairness in dismissal or were matters that any determining body was directed to take into account.[23]

8.19 In response to questions from the committee on this issue, the Attorney-General's Department advised that two of the cases referred to by ACCI, which were determined by the Australian Industrial Relations Commission, had been overturned on appeal. While in two of the cases determined by the New South Wales Industrial

---

18 *Committee Hansard*, 10 September 2008, p. 11. See also *Submission 25*, pp 12-13.

19 *Committee Hansard*, 10 September 2008, p. 12.

20 *Submission 25*, pp 13-14 and 27-28.

21 *Submission 25*, p. 26.

22 *Committee Hansard*, 10 September 2008, p. 14.

23 *Committee Hansard*, 10 September 2008, p. 15. See also p. 16.

Relations Commission, the commission had expressed reluctance to make the finding that the employees had been unfairly dismissed.[24] The Department submitted that:

> Generally, in all the cases outlined in ACCI's submission, the applicable Commission considered a range of factors, including longevity of service, behavioural record of the employee and the gravity of the misconduct. The law attempts to balance the rights of employees to be protected against discrimination and harassment in the workplace with the right of employees to be protected from being dismissed unfairly.[25]

Options for harmonisation

8.20 There was qualified support for harmonisation of anti-discrimination legislation in the evidence received by the committee. HREOC outlined the benefits to be gained from the harmonisation of equality and discrimination laws for both applicants and respondents:

> Under the existing state of affairs, whilst the various laws are largely similar, some significant differences exist. Accordingly, individuals face a difficult decision as to where to commence their action without prejudicing their prospects of success, which is complicated further by restrictions against swapping between jurisdictions mid-stream. Likewise, respondent organisations and bodies, particular[ly] those that operate in more than one State or Territory, face the complex task of ensuring that their actions, policies and operations comply with overlapping obligations under multiple pieces of legislation that all seek to address the same social wrong.[26]

8.21 However, given existing differences in state, territory and Commonwealth anti-discrimination legislation as to grounds and coverage, some organisations cautioned against harmonisation that produces 'a lowest common denominator' approach.[27] For example, Ms Kate Eastman of the Law Council noted that some provisions in state and territory legislation provide greater protection than Commonwealth anti-discrimination legislation. She told the committee:

> I think that the states would probably be concerned about losing those provisions that work effectively and appropriately in their jurisdictions. I have particularly in mind the Northern Territory act, which of course has special provisions to deal with its Indigenous community. Much consideration has been given to ensuring that the Northern Territory act is responsive to those particular issues in the territory. I think this process of

---

24 Attorney-General's Department, *Answers to questions on notice*, 22 October 2008, p. 4.

25 Attorney-General's Department, *Answers to questions on notice*, 22 October 2008, p. 4.

26 *Submission 69*, pp 256-257. See also Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 11 September 2008, p. 10.

27 National Foundation for Australian Women, *Submission 15*, p. 8; Shop, Distributive and Allied Employees' Association, *Submission 42*, p. 4; ACTU, *Submission 55*, p. 16; HREOC, *Submission 69*, p. 258.

> harmonisation needs to look at the best features of all of the legislation, not just a lowest common denominator approach to harmonisation.[28]

8.22 Consistent with this view, the Anti-Discrimination Commissioner of Tasmania noted that Tasmanian legislation provides broader protection against discrimination than Commonwealth legislation and supported harmonisation provided comprehensive protection is maintained.[29]

8.23 Similarly, the New South Wales Government considered that efforts to harmonise anti-discrimination laws should not limit existing protection provided against discrimination.[30] The government's submission outlined the broader protection available under the *Anti-Discrimination Act 1977 (NSW)* in relation to carer responsibilities and transgender people and stated:

> The New South Wales Government considers it essential that any reforms to anti-discrimination law to promote consistency across jurisdictions do not operate to limit existing protections from discrimination, including those provided to transgender persons and carers under NSW legislation.[31]

8.24 ACCI considered that harmonisation or simplification of anti-discrimination laws may produce regulatory and equity benefits.[32] While cautioning that related reviews and inquiries should be allowed to finalise before any wide ranging reform of anti-discrimination laws, ACCI acknowledged that:

> [T]here is merit in considering a review of the existing structure of Federal and State/Territory discrimination laws to identify opportunities to rationalise, harmonise or streamline where appropriate.[33]

8.25 As noted in chapter 2, SCAG has established a working group which will advise Ministers on the harmonisation of state, territory and Commonwealth anti-discrimination laws. The working group has representatives from all jurisdictions apart from South Australia.[34] An officer of the Attorney-General's Department advised the committee that the working group is considering options for harmonisation of anti-discrimination laws in three stages:

> Stage 1 is options that could be identified and progressed in a ...non-legislative manner fairly quickly. We are looking at bringing those options to ministers later this year. Stage 2 is more medium-term, slightly less-significant legislative and procedural reforms and they are ...into the next

---

28 *Committee Hansard*, 10 September 2008, p. 53

29 *Submission 13*, pp 2-3. See also Queensland Council of Unions *Submission 46*, p. 1; Office of the Equal Opportunity Commissioner and the Office of Women (SA), *Submission 45*, p. 4.

30 *Submission 23*, p. 2.

31 *Submission 23*, p. 2.

32 *Submission 25*, pp 3-4.

33 *Submission 25*, p. 7.

34 Attorney-General's Department, *Answers to questions on notice*, 22 October 2008, p. 2.

> year. Stage 3 is to identify longer-term more structural, more substantive options to reform the discrimination laws.[35]

8.26 In light of the SCAG review of options for harmonisation, ACCI submitted that the committee should defer making any conclusive findings or recommendations in relation to harmonisation or proposing a particular model for harmonised anti-discrimination laws.[36]

35 *Committee Hansard*, 11 September 2008, p. 3.

36 *Submission 25*, pp 5-6.

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)*.[1] 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.[2]

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.[3]

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

---

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.[4]

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.[5]

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.[6]

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.[7]

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

---

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. [8]

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... [9]

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.[10]

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.[11]

9.12 HREOC supported amending the Act to impose a positive duty to take reasonable steps to eliminate sex discrimination and promote gender equality.[12] 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.[13]

---

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.[14]

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*.[15] 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.[16]

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.[17]

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.[18]

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.

---

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''.[19] 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.[20]

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.[21]

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.[22]

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

---

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.[23]

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.[24]

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.[25]

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.[26] 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.[27]

---

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.[28]

9.25 The Australian Education Union proposed that HREOC be given an increased 'educative role' supported by increased resources.[29] 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.[30]

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.[31]

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.[32]

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:

---

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...[33]

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.[34]

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.[35]

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

---

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.

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

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.[37]

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.[38] 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.[39]

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.[40] 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.[41]

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

---

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.[42]

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.[43]

42 *Submission 50*, p. 3.

43 *Submission 69*, p. 250.

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 S*ubmission 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 NACLC 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 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.

CHAPTER 11

SUMMARY OF THE VIEWS OF COMMITTEE MEMBERS

11.1 While the committee has received extensive evidence of areas in which the Act could be improved, it is notable that the submissions to this inquiry were overwhelmingly supportive of the Act and its objects. That represents a very dramatic shift in public attitudes since the controversial passage of the Act nearly 25 years ago. It is not possible to disentangle from other factors what contribution the Act has made to this widespread acceptance of the goal of gender equality, but it seems likely to have been a substantial one. As commentators including Dr Smith have pointed out, legislation plays a normative role: it acts as a powerful symbol of what behaviour society regards as unacceptable, what we value and what we aspire to.[1]

11.2 The committee shares the view expressed by the Sex Discrimination Commissioner that:

> [T]he Sex Discrimination Act matters. It matters as a tool for driving systemic and cultural change which is needed if we are to live in a country where men and women enjoy true gender equality in their daily lives. The Act has been in operation for nearly 25 years. Like most law, it is time to renew it to ensure that it continues to be an effective platform for progressing gender equality.[2]

11.3 Some submissions suggested that the time frame of this inquiry was too short and others argued that some changes to the Act require further consultation.[3] The committee believes that a review of the Act was timely and that there are clearly a number of immediate changes which could be made to improve the Act. However, the committee accepts that other changes are more complex and require further consultation and consideration. The committee has therefore grouped its recommendations according to whether they are:

- changes which ought to occur immediately;
- changes which require further consultation but should be considered over the next 12 months; or

---

1 Dr Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?' in C Arup, et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, p. 116.

2 *Committee Hansard*, 9 September 2008, p. 4.

3 See for example Women Lawyers Association of NSW and Australian Women Lawyers, *Submission 29*, p. 3; Collaborative submission, *Submission 60*, p. 1; Muslim Women's National Network of Australia, *Submission 65*, p. 3.

- longer term changes which require significant further consultation and consideration.

11.4 The committee has not made recommendations regarding implementation of a paid parental leave system. While the committee supports such a system, it considers that the draft report and recommendations of the Productivity Commission have more than adequately addressed this issue.

Suggested changes for immediate implementation

Objects

11.5 The committee believes that the Act should set out an unequivocal commitment to the elimination of sex discrimination and sexual harassment. The qualification of the commitment to eliminate discrimination in the preamble to the Act and the objects in section 3 by the phrase 'as far as is possible' is unhelpful at best. At worst, it suggests only a half-hearted conviction that eliminating discrimination is desirable and achievable.

11.6 The objects of the Act currently include giving effect to CEDAW which is directed primarily at the elimination of discrimination against women. The objects do not refer to ICCPR, ICESCR or the ILO conventions which create obligations in relation to eliminating sex discrimination and promoting gender equality.[4] In the committee's view, it is important that the Act represents a commitment to achieving gender equality rather than the narrower goal of eliminating discrimination against women. The objects of the Act should therefore explicitly refer to these other international conventions which create obligations in relation to gender equality.

Recommendation 1

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

Recommendation 2

11.8 The committee recommends that subsection 3(a) of the Act be amended to refer to other international conventions Australia has ratified which create obligations in relation to gender equality.

Interpretation and definitions

11.9 The committee is concerned by evidence it received suggesting that the courts have adopted a narrow approach to interpretation of the Act. A key purpose of the Act is to implement Australia's international obligations to eliminate sex discrimination. The committee agrees that the Act ought to be interpreted broadly given its beneficial

4 ILO Convention 100, ILO Convention 111 and ILO Convention 156.

purpose and, in particular, that interpretation of the Act should be consistent with Australia's international obligations. There is already a presumption at common law that domestic legislation should be interpreted consistently with Australia's obligations under international law. However, as HREOC pointed out, there are a plethora of competing interpretative principles. The committee therefore considers that there should be an express requirement under the Act for the courts to interpret the provisions of the Act consistently with the international conventions it seeks to implement.

Recommendation 3

11.10 The committee recommends that the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.

11.11 The committee considers that the definition of 'de facto spouse' in section 4 of the Act should be amended to include same-sex couples. This would protect same-sex couples from discrimination on the basis of their relationship status. In its inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008, the committee received submissions expressing concern that amendments to social security and tax legislation to remove discrimination against same-sex couples will require those couples to declare their relationship status. This includes many elderly couples who may not previously have declared their relationship to others. In this context, the committee is particularly concerned to ensure that the Act provides protection to same-sex couples from discrimination based upon their relationship status.

11.12 Evidence to the committee clearly demonstrated the difficulties in making out a complaint of discrimination under the Act caused by the current definitions of discrimination. In particular, the requirement for complainants to show that they were treated less favourably than a comparator seems to add unnecessary complexity to consideration of whether the treatment of the complainant was discriminatory. It appears both simpler and more in keeping with the purpose of the Act to use a definition of direct discrimination similar to that under paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)* which simply requires the applicant to show that he or she has been treated unfavourably because of a protected attribute (such as sex, marital status or pregnancy). The committee has accordingly recommended amendment of the definitions of direct discrimination in sections 5 to 7A of the Act to replace the comparator test with a test of unfavourable treatment.

11.13 The committee also supports replacing the reasonableness test in relation to indirect discrimination with a test requiring that the condition, requirement or practice be legitimate and proportionate. Comparable jurisdictions including the United States and the United Kingdom provide for a more stringent test than reasonableness. The committee considers that something more than reasonableness should be required where practices are likely to disadvantage one sex, people of a particular marital status

or pregnant women. Specifically, conditions, requirements or practices that disadvantage such groups should only be imposed in pursuit of a legitimate object and where they are proportionate, in the sense that they are the least restrictive means of achieving that object.

11.14 The committee notes concerns about the narrow interpretation of the phrase 'condition, requirement or practice' in the *Kelly* case but, with respect, considers that this case did not interpret that phrase correctly: a decision by an employer to refuse to provide part-time work is surely an employment practice and not merely the withholding of a benefit from an employee. Evidence to the committee also pointed to the High Court decision in *Amery* but that decision concerned an equivalent provision under the *Anti-Discrimination Act 1977 (NSW)* which is not worded in the same way as the indirect discrimination provisions in the Act and, in particular, refers only to 'a requirement or condition' and not to 'practices'.

Recommendation 4

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

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

Recommendation 5

11.16 The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.

Recommendation 6

11.17 The committee recommends that section 7B of the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.

Scope of the Act

11.18 The committee strongly believes that the Act should provide equal protection to men from sex discrimination. This is important for both practical and symbolic reasons. On a practical level, removing discrimination against men in relation to their role as parents and carers is important in the process of recasting gender roles in a manner which is more equitable to both men and women. Furthermore, public support for the Act increasingly depends upon it being directed, not just at eliminating discrimination against women, but at the broader goal of gender equality. The

committee therefore recommends that subsection 9(10) of the Act be amended to refer not only to CEDAW but also to Australia's other international obligations with respect to gender equality. This will ensure that the Act provides equal coverage to men and women. The committee notes that a similar amendment to the Act was made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* to provide a constitutional basis for the provisions extending protection against discrimination on the basis of family responsibilities to same-sex couples.

Recommendation 7

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

11.20 The committee is concerned by evidence it received of specific gaps in coverage under the Act. At present, it is doubtful whether the Act protects volunteers and independent contractors from sex discrimination and sexual harassment. In addition, the Act expressly excludes from coverage partnerships with fewer than six partners, and the Crown in right of the states and state instrumentalities.

11.21 While it is true that some complainants may be able to rely on state and territory legislation for a remedy, the committee does not consider that coverage under the federal Act should be so partial or depend upon such arbitrary distinctions. The committee has therefore recommended amendments to the Act to remove the most significant gaps in coverage identified by the inquiry.

11.22 Moreover, the existing patchwork approach to coverage under the Act appears both unnecessarily complex and undesirable. The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in all areas of public life equivalent to section 9 of the *Racial Discrimination Act 1975*. Similarly, the committee supports proposals that the Act be amended to include a general equality before the law provision equivalent to section 10 of the *Racial Discrimination Act 1975.*

11.23 While HREOC has suggested that these changes be the subject of further consultation, the committee is mindful that it is now 14 years since ALRC made similar recommendations. In addition, the operation of similar provisions under the *Racial Discrimination Act 1975* for over thirty years does not suggest that there are likely to be any unforeseen problems with the introduction of similar protection from sex discrimination and sexual harassment in public life. As a matter of principle, it is difficult to justify providing narrower protection from sex discrimination than the protection afforded from discrimination on the basis of race. Further, the absence of general protection provisions in the Act sends an unfortunate message that sex discrimination and sexual harassment are primarily private matters which should only be prohibited in narrowly specified public spheres.

Recommendation 8

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

Recommendation 9

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

Recommendation 10

11.26 The committee recommends that the Act be amended:

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

Recommendation 11

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

11.28 The committee acknowledges that the intent of the Act is to protect women from discrimination based upon them breastfeeding. This is achieved by providing in subsection 5(1A) that breastfeeding is a characteristic that appertains generally to women. This seems a somewhat circuitous path. It would be desirable for the Act to provide for specific protection against discrimination on the ground of breastfeeding in order to send a clear message that discrimination on this basis is prohibited.

Recommendation 12

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

11.30 Evidence to the committee overwhelmingly supported the view that the protection against discrimination on the basis of family responsibilities under the Act is too limited. The current protection is limited to direct discrimination resulting in termination. This excludes the most common types of discrimination on this ground such as employees being denied training or promotion, or being demoted or otherwise treated less favourably as a result of their family responsibilities.

11.31 The committee also notes the evidence it received demonstrating that a failure to strike an appropriate balance between work and caring responsibilities has negative consequences for the health of carers and for their workforce participation. Striking such a balance is also important to overcoming some entrenched aspects of gender discrimination which continue to lock women into the role of carer and men into the role of bread-winner to the detriment of both sexes. The committee recommends

broadening protection against discrimination on this ground. Specifically, both direct and indirect discrimination should be prohibited and protection should extend to all aspects of employment – not just termination.

11.32 In addition, the committee supports providing for a positive duty on employers not to unreasonably refuse requests for flexible working arrangements to accommodate family or carer responsibilities. The committee notes ACCI's submission that the NES will provide a similar right to employees and that this change should be bedded down before any expansion of the positive duty on employers. However, the NES will not apply to all employees and does not extend protection to parents and carers generally but only to those caring for children under school age. Furthermore, the committee accepts HREOC's view that the indirect discrimination provisions in the Act already prohibit the unreasonable imposition of work practices that disadvantage women with family responsibilities. As a result, the change proposed by the committee would simply recast this duty in positive terms and extend it to men with family responsibilities.

Recommendation 13

11.33 The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.

Recommendation 14

11.34 The committee recommends that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995 (VIC)*.

11.35 The committee does not recommend narrowing the scope of the Act to allow states and territories to discriminate, on the basis of marital status, in relation to access to assisted reproductive technology, adoption and surrogacy. The committee acknowledges that such proposals are motivated by the sincere religious convictions of groups such as the Australian Christian Lobby and their belief that the welfare of children is best served by being raised by a mother and father. However, a bill to enact these changes was previously subject to extensive scrutiny by this committee and the Parliament.[5] Ultimately, that bill was not passed even after the previous government obtained a majority in the Senate. There are clearly a wide diversity of views in relation to this issue and evidence to the committee's previous inquiry shows that many within the community would view such an amendment as discriminatory. In addition, it is likely that such an amendment would be contrary to Australia's obligations under CEDAW – the very convention the Act was enacted to implement.

5 Sex Discrimination Amendment Bill (No.1) 2000.

Sexual harassment

11.36 The committee heard evidence that the existing definition of 'sexual harassment' is too narrow because it requires that a reasonable person would have anticipated that the person harassed *would be* offended, humiliated or intimidated by the conduct. Under this definition, the Act seems to permit, for example, unwelcome conduct of a sexual nature where a person realises that it is possible the other person will be humiliated by that conduct but thinks the odds are against it and decides to run the risk. The committee prefers the definition under section 119 of the *Anti-Discrimination Act 1991 (QLD)* which requires that a 'reasonable person would have anticipated the *possibility* that the other person would be offended, humiliated or intimidated by the conduct' (emphasis added).

11.37 The committee considers that it would be desirable for the Act to provide additional guidance on what factors are relevant circumstances to be considered in assessing whether a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated by the conduct. Specifically, the Act should include a provision equivalent to section 120 of the Anti-Discrimination Act 1991 (Qld). Section 120 provides that the relevant circumstances include the individual characteristics of the person harassed including factors such as the person's age, race and sex. Such a provision would ensure that the courts apply the sexual harassment provisions having particular regard to characteristics of the person harassed which have an impact upon how the person experiences the unwelcome conduct.

11.38 The inquiry received evidence of gaps in coverage under the sexual harassment provisions, particularly in relation to harassment occurring in educational institutions and workplaces. In relation to educational institutions, there is not currently protection under the Act if the student harassed is under 16 years of age, or if he or she is harassed by someone from a different educational institution.

11.39 The committee notes the evidence of the Association of Independent Schools of South Australia that schools have existing procedures for handling sexual harassment involving students and the Association's concerns that HREOC may not best placed to handle such cases in the best interests of both students. However, the committee is confident that HREOC's existing complaint handling procedures have sufficient flexibility to deal appropriately with such sensitive issues. Furthermore, the availability of protection under the Act does not preclude schools continuing to use their internal procedures for resolving such matters; it merely provides an additional option where a matter is not satisfactorily resolved under those procedures. Accordingly, the committee considers that the Act should protect all students regardless of age from sexual harassment. There should also be protection for students harassed by a teacher or student from another educational institution.

11.40 There are other gaps in the coverage of the sexual harassment provisions of the Act that relate to workplaces. The committee accepts that sexual harassment of workers by clients or customers is clearly possible and that harassment may also occur

in the context of professional relationships, such as between solicitors and barristers. The committee therefore recommends that the Act be amended to provide protection to workers who are harassed by clients, customers or other persons they have contact with through their employment, rather than being limited to harassment by workplace participants.

11.41 This amendment should place liability for the harassment upon the individual harasser. The committee is cognisant that the amendment would marginally broaden the potential liability of employers because of the operation of section 106 of the Act which imposes vicarious liability on employers for the actions of their employees. For example, an employer may be vicariously liable for an employee solicitor harassing a barrister. However, in practical terms, it seems unlikely that any additional steps would be required of employers beyond those needed to meet their existing obligation to take all reasonable steps to ensure their employees do not engage in harassment of other employees or workplace participants.[6]

11.42 The committee notes with concern the evidence it received from ACCI about employers dismissing employees in an effort to enforce their sexual harassment policies but subsequently being required to reinstate those employees as a result of unfair dismissal proceedings. The committee acknowledges that striking an appropriate balance between the rights of workers to be protected from sexual harassment and the right of workers not to be dismissed unfairly is a complex task both for employers and for industrial relations commissions. The committee also notes advice from the Attorney-General's Department that two of the case ACCI referred to were overturned on appeal. Given the introduction of the Fair Work Bill 2008 on 25 November 2008 and, thus the likelihood of significant changes to federal industrial relations legislation in the near future, the committee makes no recommendation on this issue.

Recommendation 15

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

Recommendation 16

11.44 The committee recommends that the section 28A of the Act be amended to provide that the circumstances relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:

- **the sex, age and race of the other person;**
- **any impairment that the other person has;**

6 See section 28B and subsection 106(2) of the Act.

- **the relationship between the other person and the person engaging in the conduct; and**
- **any other circumstance of the other person.**

Recommendation 17

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

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

Recommendation 18

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

Complaints process

11.47 The committee is conscious that the complaints process for sex discrimination and sexual harassment claims is shared with other federal anti-discrimination legislation. It seems very likely that much of the evidence the committee received regarding the difficulties in pursuing complaints under the Act has equal application to complaints under the other federal anti-discrimination laws. The committee has therefore framed most of the recommendations in this section generally rather than limiting their application to claims under the Act. However, given the wider implications of proposed amendments related to the complaints process, the committee has taken a conservative approach to these recommendations.

11.48 The committee accepts the evidence it received that a clear deficiency of the existing Act and other federal anti-discrimination legislation is its inability to deal with claims of discrimination on intersecting grounds. The committee believes there is some merit in the proposal to address this difficulty by replacing the existing anti-discrimination acts with a single Equality Act. However, this is a change which clearly requires further consultation.

11.49 As an interim approach, the Act and other anti-discrimination laws should provide for the joining of complaints which allege discrimination on grounds prohibited by separate anti-discrimination acts. In essence, the committee adopts recommendation 3.9 of the ALRC *Equality Before the Law* report that the Act or the HREOC Act should be amended to provide that, where a complainant formulates his or her complaint on the basis of different grounds of discrimination covered by separate federal legislation, then HREOC or the court must consider joining the

complaints under the relevant pieces of legislation.[7] The committee notes that the *Age Discrimination Act 2004* was passed after ALRC made its recommendation and should be included within the scope of this proposed amendment.

11.50 Evidence to the committee clearly demonstrated that individuals seeking to enforce their rights under the Act confront a series of almost insuperable difficulties not the least of which is obtaining legal representation. The committee therefore makes two recommendations aimed at improving representation and support for complainants.

11.51 Firstly, the committee agrees that public interest organisations should have standing to pursue sex discrimination or sexual harassment complaints on behalf of complainants in the Federal Court or the Federal Magistrates Court. This would have the added benefit of making the standing provisions for lodging an application in the courts consistent with the standing requirements for lodging a complaint with HREOC.

11.52 Secondly, the committee supports increasing funding to legal aid commissions and organisations which providing free or low cost advice in relation to sex discrimination or sexual harassment matters. The committee envisages that this additional funding would significantly enhance the effectiveness of the Act as these organisations will often be able to resolve matters which might otherwise escalate into complaints simply through the provision of accurate advice about what the Act requires.

11.53 The committee notes the evidence it received in relation to the difficulties posed by the restrictive tests applicable to the funding of discrimination matters under existing legal aid guidelines. The committee draws this evidence to the attention of the Attorney-General's Department so that this issue can be addressed in the context of the current negotiations for new legal aid agreements with the legal aid commissions.

11.54 The committee accepts HREOC's advice that the existing time allowed, after termination of a complaint, for the complainant to lodge an application with the Federal Court or the Federal Magistrates Court is too short. This seems an unnecessary hurdle for complainants and the committee therefore recommends increasing the time allowed for complainants to lodge applications with the Federal Court or Federal Magistrates Court from 28 days to 60 days.

11.55 A further hurdle for complainants is demonstrating that the reason for the respondent's conduct was the complainant's sex, marital status, pregnancy or family responsibilities. Almost invariably, respondents will be in a better position to produce evidence in relation to the reason for their conduct than applicants. As a result, the committee considers that a shifting burden of proof would be more appropriate in sex discrimination cases. The committee therefore recommends that a provision be inserted in the Act in similar terms to section 63A of the *Sex Discrimination Act 1975*

7 ALRC, *Equality Before the Law: Justice for Women,* ALRC 69 Part I, recommendation 3.9.

(UK). This would mean that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

11.56 At present, the remedies available for breaches of the Act focus upon redressing the harm caused to particular individuals by acts of discrimination or harassment by providing those individuals with damages or, in cases involving termination of employment, reinstatement. However, discrimination rarely affects a single individual in isolation. No doubt the hope when the Act was passed was that individual complaints would have a ripple effect producing broader compliance with obligations under the Act. The committee believes that a key means of ensuring that individual complaints do have such an effect would be to broaden the existing remedies available to include corrective and preventative orders. In particular, there should be the capacity for the courts to order the respondent to perform any reasonable act or course of conduct aimed at ensuring future compliance with the Act.

11.57 The committee is concerned by evidence it received that complainants are deterred from pursuing claims in the courts because of the risk that they will be liable for the costs of the respondent. It was suggested that either costs should routinely be capped or that parties should generally bear their own costs. However, the committee notes that there is existing provision for the Federal Court and the Federal Magistrates Court to make orders capping costs. Further, a rule that each party will generally bear its own costs would have both advantages and disadvantages for complainants in that those who are successful would generally be left to pay their own legal fees. More fundamentally, the committee considers that this issue would be better addressed through changes to allow for enforcement of the Act by a public body rather than changes to the general rules in relation to costs.

Recommendation 19

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

Recommendation 20

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

Recommendation 21

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

Recommendation 22

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

Recommendation 23

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

Recommendation 24

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

Exemptions

11.64 The committee is attracted to the idea of a general limitations clause replacing the existing permanent exemptions. Such an approach is clearly more flexible and allows for a more nuanced approach to balancing of rights and interests where these are in conflict. While the committee acknowledges that this approach provides less certainty, Australia would have the experience of other jurisdictions to draw upon and HREOC would be able to play a role in educating the public about the practical application of the provision. Most importantly, it would allow the Act to evolve with prevailing community attitudes rather than freezing the exceptions at a particular point in time.

11.65 Nevertheless, the committee accepts that this would be a major change to the Act and it warrants more in depth consultation than has been possible in the course of this inquiry, particularly in light of the diverse range of groups likely to be affected. The committee has therefore recommended that further consideration be given to replacing the permanent exemptions under the Act with a general limitations clause and that there be additional consultation on this issue over the next 12 months (see recommendation 36).

11.66 If the exemptions are not replaced by a general limitations clause then the committee considers that the drafting of the exemption relating to religious educational organisations in section 38 should be reviewed. The purpose of the exemption in section 38 is to protect religious freedom. However, Christian Schools Australia noted that the exemption in section 38 is not used by its members to discriminate on the basis of sex and pregnancy but only on the basis of marital status. The Independent Education Union also suggested that, in addition to being in 'good faith', discrimination under section 38 should be 'reasonable'.

11.67 The committee has therefore recommended that there be further consultation regarding the drafting of section 38 with a view to ensuring that:

- protection of the right to freedom of religion is maintained; and
- the provision limits the rights of employees and students to be protected from sex discrimination as little as possible (see recommendation 35).

11.68 The committee considers that there are a number of changes to the exemptions which should be implemented immediately. The committee heard persuasive arguments for the removal of the exemption relating to voluntary organisations (section 39). Both ALRC and a previous Sex Discrimination Commissioner have recommended the removal of this exemption. The committee supports this view and notes that if this permanent exemption was removed it would still be possible for organisations to apply to HREOC for temporary exemptions if necessary. However, the committee is conscious that this approach may have particular impact on voluntary organisations with single-sex membership.[8] As a result the committee recommends that consideration should be given to broadening the definition of 'clubs' in section 4 so that the prohibitions on discrimination under section 25 apply to a broader range of organisations and those organisations will have the benefit of the exception in subsection 25(3) which permits single-sex clubs.

11.69 The committee acknowledges that strong arguments were made for the removal of other exemptions particularly the exemptions relating to sport (section 42) and combat duties (section 43). While the committee has not recommended the immediate removal of these exemptions, it considers that those arguments reinforce the case for replacing all of the permanent exemptions with a general limitations clause.

11.70 As a technical matter, the committee agrees that the incorporation of sections 31 and 32 in Division 4 of Part II which deals with exemptions to the operation of the Act is likely to add to confusion about when differential treatment is permitted, or even required, in the interests of equality.[9] The committee agrees that these provisions

---

8 This would particularly be the case if the committee's recommendation that a general prohibition on discrimination is implemented.

9 Section 31 clarifies that it is not discriminatory to provide women with rights or privileges in connection with pregnancy or childbirth. Section 32 provides that the prohibitions on discrimination do not apply to services which by their nature can only be provided to one sex.

should more logically be placed alongside the provisions which define discrimination, in particular, section 7D which deals with temporary special measures.

11.71 Finally, the committee agrees that HREOC should exercise its power to grant temporary exemptions in accordance with the objects of the Act. This is simply codifying the existing approach HREOC takes under its guidelines. Nevertheless, it is important that this power should not be described so broadly as to permit the granting of exemptions which might undermine the fundamental purposes of the Act.

Recommendation 25

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

Recommendation 26

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

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

Recommendation 27

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

Recommendation 28

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

Powers of HREOC and the Sex Discrimination Commissioner

11.76 The committee is persuaded by the evidence it received indicating that there are deficiencies in the existing powers of the HREOC and the Sex Discrimination Commissioner to enforce the obligations created by the Act. Some of these are technical matters related to the drafting of various provisions in the Act and the HREOC Act which can be quickly remedied. Others are more fundamental issues linked to the enforcement model adopted by the Act which require additional consultation to identify the best solution.

11.77 The committee accepts that the most fundamental limitation of the Act is its reliance on enforcement through individuals pursuing complaints. The committee considers that there is merit in the proposal that the Sex Discrimination Commissioner

be empowered to initiate an investigation of alleged breaches of the Act and have a range of powers aimed at resolving any breaches of the Act she identifies without the necessity for court action. The committee also supports HREOC being empowered to pursue enforcement of the Act in the Federal Court or the Federal Magistrates Court where resolution through these mechanisms is not possible.

11.78 Providing additional powers to the commissioner and HREOC, would not prevent the continued use of more cooperative approaches such as education programs and informal advice on the requirements of the Act. Furthermore, the committee envisages that the use of these powers to initiate investigation and enforcement of breaches of the Act would be limited to the most serious and persistent cases of sex discrimination. However, these changes would represent a fundamental change to the Act. The committee is particularly concerned about how these new functions would interact with HREOC's conciliation function. As a result, the committee suggests that these proposed changes be the subject of additional consultation to ensure that the most effective means of improving enforcement mechanisms under the Act is adopted.

11.79 HREOC's powers to conduct formal inquiries are limited to inquiries into Commonwealth laws or actions done by the Commonwealth or its territories. This limitation seems both unnecessary and artificial. More importantly, it hamstrings the capacity of HREOC to examine the more intractable or systemic areas of sex discrimination which generally cross the boundaries between the Commonwealth and the states. The committee believes that Australia's national human rights institution should have broad ranging formal inquiry powers that enable it to identify and suggest solutions to these remaining areas of gender inequality. Some evidence to the committee suggested vesting the Sex Discrimination Commissioner with an inquiry function but, in light of the existing function of HREOC to conduct inquiries, the committee believes that it would be more logical to expand HREOC's existing powers.

11.80 The committee also considers that HREOC should have the power to intervene and the Sex Discrimination Commissioner to act as amicus curiae as of right. It would seem appropriate to allow HREOC and the commissioner to determine whether a case is sufficiently important, in terms of the human rights issues it raises, to warrant their intervention. Furthermore, providing for a right to intervene or act as amicus acknowledges that there is a public interest in eliminating discrimination and that discrimination is not merely a private matter. In any case, HREOC and the commissioner are constrained by resources to use these powers sparingly.

11.81 In addition, these functions appear to be limited in two technical respects and the committee considers that these limitations should be removed. Firstly, HREOC should explicitly have the power to intervene in court proceedings relating to family responsibilities discrimination or victimisation. Secondly, the special purpose commissioners should be empowered to appear as amicus curiae in appeals from discrimination decisions made by the Federal Court and Federal Magistrates Court as well as the proceedings at first instance.

11.82 Finally, the committee considers that there should be a requirement for the Sex Discrimination Commissioner to report to Parliament every four years. These reports should precede Australia's reports to the UN committee by twelve months. This would demonstrate the Australian Government's commitment to independent monitoring and assessment of progress towards gender equality. In addition, it would ensure that reports are produced against a timeframe in which it is reasonable to expect measurable progress. Most importantly, it would allow for an assessment of whether existing legislation and programs are succeeding in eliminating discrimination and allow for adjustments if they are not. The committee believes it is important that these reports be mandatory to ensure that this function is not 'crowded out' by more immediate concerns such as complaint handling.

Recommendation 29

11.83 The committee recommends that the Act and the HREOC Act should be amended to expand HREOC's powers to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a state or under state laws.

Recommendation 30

11.84 The committee recommends that paragraph 48(1)(gb) of the Act be amended to explicitly confer a function on HREOC of intervening in proceedings relating to family responsibilities discrimination or victimisation.

Recommendation 31

11.85 The committee recommends that subsection 46PV(1) of the HREOC Act be amended to include a function for the special purpose commissioners to appear as amicus curiae in appeals from discrimination decisions made by the Federal Court and the Federal Magistrates Court.

Recommendation 32

11.86 The committee recommends that paragraph 48(1)(gb) of the Act and subsection 46PV(2) of the HREOC Act be amended to empower HREOC to intervene in proceedings, and the special purpose commissioners to act as amicus curiae, as of right.

Recommendation 33

11.87 The committee recommends that the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years.

Resources for HREOC

11.88 The committee is conscious that implementation of some of its recommendations involves a significant additional workload for HREOC both in

terms of initial public education regarding changes to the Act as well as ongoing work in relation to the broader powers to intervene in court proceedings and conduct inquiries, and the requirement for the Sex Discrimination Commissioner to prepare reports. Furthermore, the committee is concerned by evidence from HREOC that existing reductions in its funding will limit the work HREOC can undertake in educating the public about the Act.

11.89 The committee accepts the evidence from business groups that businesses are keen to comply with their obligations under the Act for financial, reputational and ethical reasons and that providing businesses, particularly small and medium sized businesses, with additional advice and support to meet their obligations is an effective way of promoting equality. As a result, ensuring HREOC efforts in relation to its public education functions are not compromised by a lack of funding ought to be a high priority. For all of these reasons, the committee recommends that HREOC should be provided with additional resources including additional ongoing funding.

Recommendation 34

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

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

Recommendations requiring further consultation

11.91 As already noted, there are several medium term changes which require further consultation. The committee has already discussed the need for additional consultation in relation to proposals:

- to remove the permanent exemptions from the Act and replace these provisions with a general limitations clause; and
- to empower the Sex Discrimination Commissioner and HREOC to pursue enforcement of the Act without the need for an individual complaint.

11.92 The evidence regarding empowering HREOC to promulgate legally binding standards indicated some of the complex considerations involved in adopting such an approach. In particular, there is a risk that such standards may be overly prescriptive or inflexible. On the other hand, the advantages of binding standards include providing greater certainty about what is required to ensure compliance with the obligations imposed by the Act. The committee considers that a power to issue binding standards, if used judiciously, would be a useful additional tool for HREOC to employ to encourage and facilitate compliance with the Act.

11.93 The committee also considers that there is a clear need to strengthen the positive obligations to eliminate discrimination imposed by the EOWW Act. Legislation aimed at promoting equal opportunity for women in the workplace should require something more than the development of a program and reporting on that program: it should require progress. In the committee's view, it would be worthwhile considering the creation of broad positive duties:

- to promote equality and remove discrimination
- to take reasonable steps to avoid sexual harassment.

11.94 In particular, the positive duties under the *Equality Act 2006 (UK)* may provide a useful model which could be adopted and applied either to public sector organisations or to both the public and private sector.

11.95 There is also a need to examine the relationship between the Act and the EOWW Act. There may well be advantages to incorporating the obligations under the EOWW Act within the Act and combining the functions of EOWA and HREOC.

11.96 While it is the committee's view that these changes require additional consultation, there are models available in other jurisdictions or under other federal anti-discrimination legislation for each of these proposals. It should therefore be possible to complete this consultation within 12 months. Given the largely technical nature of these proposed changes, the committee has recommended that the Attorney-General's Department conduct the consultation.

Recommendation 35

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

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

Recommendation 36

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

Recommendation 37

11.99 The committee recommends that further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.

Recommendation 38

11.100 The committee recommends that further consideration be given to amending the Act to give HREOC the power to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the Act.

Recommendation 39

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

Recommendation 40

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

Recommendation 41

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

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

Recommendation 42

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

Broader review of Commonwealth anti-discrimination law

11.105 Some evidence to the committee advocated changes which require much broader and more in depth consultation than has been possible during the course of this inquiry. Foremost among these is the proposal that the Act and other federal anti-discrimination laws be replaced by a single Equality Act.

11.106 The merits of introducing a single Equality Act may be one of options for harmonisation which will be examined through the SCAG process. However, the committee considers that such a significant change warrants a public inquiry and that HREOC is best placed to conduct that inquiry.

11.107 The committee received some evidence about both the benefits and disadvantages of a single omnibus act. That evidence highlighted the complexity of

the issues involved and the broad range of groups likely to be affected by such a change. The committee is also mindful that some of the existing anti-discrimination acts have an iconic status for some groups in the community. As a result, the mechanics of how anti-discrimination law operates are not the only consideration.

11.108 Such an inquiry should also consider whether federal anti-discrimination law should provide protection from discrimination on additional grounds including sexuality and gender identity.

11.109 Further the inquiry could more generally consider the enforcement model adopted under the Act and other anti-discrimination legislation and examine the merits of alternative approaches such as whether there should be provision for civil fines for egregious instances of sex discrimination or sexual harassment.

11.110 When the Act was passed, it placed Australia at the forefront of countries seeking to redress centuries of discrimination against women. However, two decades have seen the Act overtaken by more innovative approaches to addressing discrimination both overseas and in our own states and territories. A national inquiry will provide us with an opportunity to re-invigorate all of Australia's anti-discrimination laws and place them at the vanguard of legislative schemes that promote equality.

Recommendation 43

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

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

Senator Trish Crossin

Chair

Dissenting report by Liberal Senators

1.1 The evidence gathered during this inquiry is an inadequate base for most of the far-reaching recommendations made in the Chair's Report. Liberal Senators therefore cannot support the majority of the recommendations in the Chair's Report. To the extent we support any of those recommendations, we identify them later in this dissenting report. Liberal Senators also consider that there was little to no evidence of widespread or systemic discrimination that is not able to be adequately addressed by existing legislation, including the *Sex Discrimination Act 1984*.

1.2 This dissenting report addresses the inquiry and report consideration processes, and then focuses on some of the recommendations made in the Chair's Report.

A limited inquiry

1.3 Liberal senators are of the view that the process of testing and challenging evidence is an important part of any inquiry process. This is particularly the case in an inquiry of this nature, recommendations from which could, if adopted, result in far reaching changes and significant costs to business. As such, propositions for change must be thoroughly tested and their implications carefully examined before they are advanced as recommendations. Liberal Senators are not convinced that this process was sufficiently rigorous during this inquiry. As such, the evidence available does not provide a sufficiently credible foundation on which the committee majority can responsibly base or justify many of its recommendations for amending the Act.

1.4 Particularly given the extensive ambit of the Chair's Report, Liberal Senators question whether there was a sufficiently broad representation of views in the public hearing process. In particular, the perspective of the business community was significantly under represented. The credible but sole representative of this important interest group at the public hearings was the Australian Chamber of Commerce and Industry (ACCI). A wider business perspective should have been obtained before proceeding to formulate recommendations of the nature of those in the Chair's Report, especially as a number of the recommendations proposed, if adopted, may lead to significant costs, obligations and liabilities.

1.5 Further, the committee did not hear from a sufficiently broad range of religious or educational organisations, which stand to be significantly affected if the recommendations in the Chair's Report are translated into legislation.

Inadequate time for conducting the inquiry and considering the Chair's Report

1.6 Senators should be permitted a reasonable period of time to conduct inquiries and then to read, confer about and carefully consider the implications of any recommendations proposed by the Chair.

1.7 Liberal Senators understand and accept the imperative to conclude some inquiries within a set time frame. However, such a constraint has not been suggested and does not exist in relation to this inquiry.

1.8 Liberal Senators consider that the committee should have been given a more reasonable timeframe to consider and discuss the Chair's Report, both privately and in the committee. An extensive and complex report of this nature, with potentially significant recommendations for change to important legislation, requires a more extensive and measured approach.

Overall view

1.9 It is the view of Liberal Senators that the inquiry received inadequate evidence to support any argument that the Act requires fundamental changes. There is an insufficient foundation for the bulk of the changes proposed by the Chair's Report.

1.10 It is clear that the Act has helped to reduce discrimination against women. Women's workforce participation, wages and representation in leadership positions have all improved since 1984. For example, the Diversity Council of Australia noted:

> While direct evidence of the social and societal impacts of the implementation of the provisions of the Act have not been tracked in any meaningful way, indirect evidence of the positive impact of the Act in DCA's specific area of interest – employment market participation - can be found in the increase in women's workforce participation, from 49% in 1984 to more than 58% in 2006, and the reduction (albeit slight) in the gender pay gap from 18.2% in 1984 to 15.2% in 2004.[1]

1.11 Moreover, in terms of international comparisons, Australia has an enviable record in relation to gender equality. The United Nations Development Programme Gender Related Development Index ranked Australia second in its 2007-08 report.[2] The index measures the extent to which countries are delivering equality for men and women by looking at factors including educational enrolment, income and life expectancy.

1.12 However, it is important to recognise the limits of what can be achieved through legislation. Some of the proposals to the committee, particularly those related to imposing positive duties to promote equality, represent misguided attempts at social engineering. Those proposals go beyond the proper and constructive role of legislation by suggesting that the Act should not only prohibit discrimination but that it should also compel employers and others to proactively embrace the cause of gender equality.

1.13 Some change requires the gradual shifting of cultural mores and beliefs. Amending legislation does not necessarily produce these changes needed to influence hearts and minds. As Mr Scott Barklamb of ACCI pointed out to the committee, in

---

1 *Submission 47*, p. 3.

2 United Nations Development Programme, *Human Development Report 2007-2008*, at http://hdr.undp.org/en/media/HDR_20072008_GDI.pdf (accessed 2 December 2008), p. 326.

this context those changes occur not because of regulatory requirements but because of the daily experience of individuals:

> [I]t 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.[3]

Interpretation of the Act

1.14 Liberal Senators do not support recommendation 3 which would impose a requirement that the courts interpret the Act in accordance with six international conventions.[4] The interpretation of these conventions can change over time in the light of rulings by the various treaties bodies. Ordinary rules of interpretation already require the courts to take relevant international law into account where the meaning of a statute is ambiguous. However, including a new interpretive clause in the Act itself may open up new uncertainties in its interpretation. Such uncertainty is inappropriate and counter-productive in an Act which imposes duties on employers and others.

Issues arising from overly broad interpretations of the Act

1.15 The inquiry received evidence that there are some impractical results arising from an overly broad interpretation of the Act. These include:

- educational institutions being unable to adopt measures to encourage men to take up or remain in teaching; and
- the inability of the states and territories to limit access to assisted reproductive technology, adoption and surrogacy on the grounds of what is in the best interests of the child.

1.16 These difficulties and recommendations for resolving them are discussed in more detail below.

Measures to redress gender imbalance in teaching

1.17 Liberal Senators are concerned by evidence that educational outcomes for boys are lagging behind outcomes for girls[5] and consider that redressing the imbalance between male and female teachers is a key means of improving outcomes for boys.

1.18 At present, the Act prohibits targeted initiatives aimed at increasing the number of male teachers on the basis that they discriminate against women. Liberal

---

3 *Committee Hansard*, 10 September 2008, p. 20.

4 CEDAW, ICCPR, ICESCR and ILO Conventions 100, 111 and 156.

5 Ministerial Council on Education, Employment, Training and Youth Affairs, *National Report on Schooling in Australia 2006: Preliminary Paper - 2006 National Benchmark Results for Reading, Writing and Numeracy, Years 3, 5 and 7* at: http://www.mceetya.edu.au/verve/_resources/Benchmarks_2006_Years35and7-Final.pdf (accessed 3 December 2008), pp 12, 23 and 34; House of Representatives Standing Committee on Education and Training, *Boys: getting it right - Report on the inquiry into the education of boys*, at http://www.aph.gov.au/house/committee/edt/Eofb/report/fullrpt.pdf (accessed 3 December 2008), October 2002.

Senators noted the view expressed by Mr James Wallace of the Australian Christian Lobby that the Act should not prevent common sense approaches to addressing the shortage of male teachers:

> I do not think an act of this nature should be so loose or so prescriptive in its intent to remove sexual discrimination against women ...to cause a situation where a state government, for instance, cannot offer scholarships specifically to males to get more of them into schools. Clearly, we need more male teachers in schools. Once again, this is about restoring the intent of the bill. It is not about allowing it to be used as it probably would be in that case ...by a very active feminist movement...[6]

1.19 Liberal Senators also noted the submission made by Family Voice Australia that the Act should be amended as proposed (by the Coalition) by the Sex Discrimination Amendment (Teaching Profession) Bill 2004. This would involve inserting a section to provide that:

> ...a person may offer scholarships for persons of a particular gender in respect of participation in a teaching course. The section would apply only if the purpose of doing so is to redress a gender imbalance in teaching—that is, an imbalance in the ratio of male to female teachers in schools in Australia or in a category of schools or in a particular school.[7]

1.20 Accordingly Liberal Senators consider there is merit in the principle espoused above.

Access to assisted reproductive technology, surrogacy and adoption

1.21 *McBain v State of Victoria (McBain)*[8] determined that the Act prevents the states and territories from restricting access to IVF services for single women and lesbians.

1.22 Whilst not necessarily agreeing with all the sentiments expressed, Liberal Senators note:

(a) the views of the Australian Christian Lobby that:

> ...the rights of children are paramount in any discussion of reproductive technology. Evidence clearly supports the proposition that children do best when raised by both a mother and a father. Using the Sex Discrimination Act 1984 to challenge this fundamental principle is a social engineering experiment that deliberately fails to give children the most basic building blocks of development...[9]

---

6 *Committee Hansard*, 11 September 2008, pp 52-53.

7 Family Voice Australia, *Submission 73*, pp 5-6. See also *Sex Discrimination Amendment (Teaching Profession) Bill 2004: Explanatory Memorandum*, at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/sexdisc_04/info/em.pdf (accessed 3 December 2008), p. 2.

8 [2000] FCA 1009. See also *Re McBain* [2002] HCA 16.

9 *Submission 71*, p. 2. See also *Committee Hansard*, 11 September 2008, p. 51; Family Voice Australia, *Submission 73*, pp 2-5.

(b) Mr Wallace's opinion that the *McBain* case represents an unfortunate instance of judicial activism.[10]

1.23 A consequence of recommendations in the Chair's report would be to provide adults with access to assisted reproductive technology, adoption and surrogacy on equal terms, regardless of sex, marital or – if recommendation 4 were to be implemented – relationship status. Any restrictions to access would be able to be challenged under the Act.

1.24 Liberal Senators consider that, all things being equal and as part of our federal system of government, State and territory parliaments should be able to make or amend such laws on the basis that the best interests of the child concerned are the overriding consideration.

Proposals to broaden the operation of the Act and facilitate complaints

1.25 Liberal Senators note that there was no evidence given to the inquiry of any systemic or widespread discrimination on the grounds of gender, pregnancy, marital status or family responsibilities that is not adequately addressed by existing legislation, including the Act.

1.26 There is little to no legislative gap in coverage with respect to sex discrimination and sexual harassment. On the contrary, there are overlapping and, in some cases inconsistent obligations, under federal, state and territory anti-discrimination legislation as well as workplace relations legislation. It goes without saying that this causes considerable difficulty for businesses particularly for small and medium size businesses.[11] Mr Daniel Mammone of ACCI gave evidence that there is a complex array of anti-discrimination obligations under federal, state and territory laws. This means that a single set of circumstances may expose employers to the possibility of legal action, in various jurisdictions, alleging breaches of the Act, breaches of state or territory anti-discrimination legislation, unfair dismissal, unlawful termination or breach of contract. He described this situation as a 'legal minefield'.[12] ACCI's comprehensive submission noted in summary that:

> [I]t does not appear that, in practical terms, there is a significant 'regulatory' gap that requires addressing.[13]

1.27 Despite this evidence, several of the recommendations proposed by the majority report would amend the Act to:

- expand its scope (recommendations 4, 8-11, 13-14 and 18);
- broaden the definitions of discrimination (recommendations 5-6); and
- broaden the definition of sexual harassment (recommendations 15-16).

---

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

11 VACC, *Submission 32*, p. 5; ACCI, *Submission 25*, pp 3 and 7.

12 *Committee Hansard*, 10 September 2008, p. 11. See also *Submission 25*, pp 12-13.

13 *Submission 25*, p. 35.

1.28 In addition, the majority has made recommendations aimed at facilitating claims under the Act and expanding the remedies available in discrimination cases. These include:

- providing for a shifting onus of proof in sex discrimination cases (recommendation 22);
- expanding the remedies available under the Human Rights and Equal Opportunity HREOC Act where a court determines discrimination has occurred to include corrective and preventative orders (recommendation 23); and
- increasing funding to organisations which provide complainants with legal advice in sex discrimination and sexual harassment matters (recommendation 24).

1.29 Liberal Senators are concerned that the combined effect of these recommendations will be to impose significant compliance costs on employers and to encourage and facilitate unfounded claims. In the absence of any clear basis for these changes, or evidence of systemic or obvious failure of the current legislative regime across the federation, these recommendations are not supported.

1.30 Business organisations told the committee that many employers already feel compelled to settle speculative claims under the Act, irrespective of the strength of the applicant's case, in order to avoid the costs of litigation or damage to their reputation.[14] In unnecessarily and inappropriately broadening the scope of the Act and the definitions of discrimination and harassment, the recommendations of the Chair's Report would simply exacerbate this problem.

1.31 More specifically, Liberal Senators do not support recommendation 4 which would add a new ground of discrimination on the basis of 'relationship status' to the Act. There is no specific provision in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which imposes an obligation on Australia to provide protection against discrimination on this ground. Nor do any of the additional conventions, which recommendation 2 proposes to add to subsection 3(a) of the Act, specifically require the elimination of discrimination on the grounds of 'relationship status'.

1.32 Nor do Liberal Senators support recommendation 11 which, contrary to the federal nature of the Australian constitution, would amend the Act to provide that the Crown in right of the states and state instrumentalities are bound by the provisions of the Act. There is no need for such an amendment given that all states and territories have their own anti-discrimination legislation.

1.33 Similarly, the arguments in the majority report for inserting a general prohibition on sex discrimination or sexual harassment in any area of public life and a general equality before the law provision (recommendations 8 and 9) seem based

14 Mr Scott Barklamb, ACCI, *Committee Hansard*, 10 September 2008, p. 14; ACCI, *Submission 25*, p. 11; VACC, *Submission 32*, p. 5.

more upon symbolic considerations than the resolution of any specific practical problems with the operation of the Act. Accordingly, Liberal Senators do not support those recommendations.

Exemptions

1.34 The passage of the Act involved a prolonged period of negotiation regarding appropriate exemptions from the prohibitions on discrimination under the Act. Those negotiations involved a complex balancing of different rights and interests. Liberal Senators consider that, as a result of this rigorous process, the Act strikes an appropriate balance between the right to equality and other rights such as the right to freedom of religion. By contrast, after comparatively preremptory consideration, the majority of the committee have proposed significant changes to the existing exemptions.

1.35 The majority report also proposed the removal of section 39 which creates an exemption for voluntary organisations. Voluntary organisations make a major contribution to our community. This is evidenced in a range of reports from the Australian Government and Volunteering Australia.[15] Removing the exemption in section 39 would require these organisations to comply with the prohibitions on discrimination in Divisions 1 and 2 of Part II of the Act. This may impose significant compliance costs on such organisations that would only serve to lessen their ability to sustain this contribution. Furthermore, there was no evidence that discrimination by voluntary organisations in relation to membership is a widespread problem. Rather the arguments for removal of this exemption rested almost entirely on an ideological objection to the provision and the theoretical possibility of such discrimination occurring.

1.36 As a result, Liberal Senators do not support recommendation 25 which would remove the exemption for voluntary organisations. Similarly, Liberal Senators do not support recommendation 26 which would broaden the definition of 'clubs' in section 4 and thus apply the prohibition on discrimination with respect to membership of clubs to a wider range of organisations.[16]

1.37 Liberal Senators do not oppose the intent of recommendation 36 which proposes that further consideration be given to replacing the permanent exemptions with a more flexible general limitations clause.[17] However, this is a significant proposed change to the Act which would require very careful consideration and more extensive consultation with affected groups than is envisaged by recommendation 36.

---

15 Volunteering Australia, *The current picture of volunteering in Australia: International Year of the Volunteers Follow-up Report to the UN General Assembly*, at http://www.volunteeringaustralia.org/files/0564UX9WRW/2008_UN_Report_Final.pdf (accessed 3 December 2008), June 2008, p. 2; Australian Bureau of Statistics, *Voluntary Work Australia 2006*, Cat No 4441.0 at: http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C52862862C082577CA25731000198615/$File/44410_2006.pdf (accessed 3 December 2008), July 2007.

16 Section 25 of the Act.

17 Such a provision would permit discriminatory conduct within reasonable limits.

In addition Liberal Senators support maintaining an exemption for combat duties and also for sporting organisations and disagree with the view expressed in the Chair's report that there were strong arguments for the removal of such exemptions. Liberal Senators also recognise the importance of retaining appropriate exemptions for religious organisations and do not support recommendation 35. Freedom of religion is a fundamental human right and any restriction on freedom of religion should be limited to what is required to achieve a legitimate public purpose.

Powers of HREOC and the Sex Discrimination Commissioner

1.38 The majority propose immediate changes to the Act and the HREOC Act which would:

- expand the powers of HREOC to conduct inquiries and intervene in court proceedings, and the powers of the special purpose commissioners to act as amicus curiae (recommendations 29-32); and
- increase the resources provided to HREOC (recommendation 34).

1.39 In addition, the majority report suggests that consideration should be given to:

- investing the Sex Discrimination Commissioner and HREOC with investigative and enforcement powers (recommendations 37-38);
- allowing HREOC to issue legally binding standards under the Act (recommendation 39).

1.40 Liberal Senators believe that HREOC and the Sex Discrimination Commissioner already have adequate powers and resources to fulfil their legislative responsibilities and that there is thus no sound basis for these recommendations.

1.41 Evidence to the committee clearly demonstrated that businesses are keen to comply with their obligations under the Act for reputational, ethical and commercial reasons.[18] In this context, there is simply no justification for adopting a more punitive approach to enforcement of the Act. Despite this, the majority report recommends that consideration be given to investing the Sex Discrimination Commissioner and HREOC with investigative and enforcement powers. No clear argument was expounded as to why such an approach is necessary when in the words of Mr Daniel Mammone of ACCI:

> The underlying objectives and assumptions of anti-discrimination law that employees deserve equal treatment in employment enjoy an extremely high level of support within Australian industry.[19]

1.42 Similarly, recommendation 39 proposes that consideration be given to empowering HREOC to promulgate legally binding standards under the Act. HREOC acknowledged that there are some disadvantages to issuing binding standards but considered that on balance such a power would be useful.[20] One argument HREOC

---

18 Mr Daniel Mammone, ACCI, *Committee Hansard*, 10 September 2008, p. 14.

19 *Committee Hansard*, 10 September 2008, p. 11.

20 HREOC, *Submission 69*, pp 244-245.

made in support of such a power was that it would provide greater clarity to employers and others about their obligations under the Act.[21] However, HREOC already has the power to issue non-binding standards which can fulfil this educative function. Liberal Senators consider that fixed standards are too inflexible and would in fact inhibit the capacity of employers and others to develop innovative approaches to eliminating discrimination and promoting gender equality.

Positive duties

1.43 The majority report recommends that consideration be given to imposing positive duties on public sector organisations, employers and others to eliminate discrimination and harassment, and promote equality (recommendation 40). Liberal Senators consider that this proposal would impose an additional regulatory burden on Australian businesses for little or no gain. ACCI told the committee that implementing anti-discrimination and anti-harassment measures 'has not been done without imposing significant costs and challenges for employers.'[22] Yet the majority report gives scant consideration to the additional compliance costs broader or more onerous obligations under the Act would impose on business.

1.44 Furthermore, Liberal Senators agree with the assessment of ACCI that if such an amorphous obligation is imposed on the private sector it will be difficult for businesses to know precisely what their legal obligations are, let alone how to comply with them.[23]

1.45 The more specific proposals that employers and others be required to develop gender equality plans fail to take into account the complex range of factors required to produce cultural change within organisations. Requiring the production of a plan will not produce non-discriminatory attitudes and a valuing of diversity within the workplace. As Mr Scott Barklamb of ACCI pointed out, there is a risk that such plans:

> ...will simply become an exercise in compliance and will not contribute to further cultural change and awareness ...but will also be potentially resented because they cost money or will be quite narrowly complied with and put away.[24]

1.46 Finally, ACCI pointed to the difficulties employers face reconciling their existing obligations under anti-discrimination legislation with the laws prohibiting unfair dismissal or unlawful termination.[25] ACCI's evidence regarding cases in which employers were ordered to reinstate employees who had been sacked as a result of the employer seeking to enforce its policies in relation to sexual harassment is instructive.[26] It shows how the layering of regulatory obligations on employers can

---

21 HREOC, *Submission 69*, p. 243.

22 *Submission 25*, p. 3.

23 Mr Daniel Mammone, ACCI, *Committee Hansard*, 10 September 2008, p. 15.

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

25 *Committee Hansard*, 10 September 2008, p. 12.

26 *Submission 25*, pp 13-14 and 27-28.

produce conflicting obligations. ACCI described this position as invidious;[27] Liberal Senators would argue it represents a *Catch 22* since employers who do not act decisively to prevent sexual harassment will be vicariously liable for any harassment which occurs, whilst those that do are exposed to liability for unfair dismissal or unlawful termination.[28]

1.47 Liberal Senators note ACCI's proposal that there should be a presumption of fairness where a dismissal is the result of an employer seeking to meet its obligations with respect to preventing sexual harassment or sex discrimination.[29]

1.48 Liberal Senators consider there is merit in the principle espoused above.

Accession to Optional Protocol to CEDAW

1.49 Liberal Senators support the dissenting report of Opposition members of the Joint Standing Committee on Treaties which opposes accession to the Optional Protocol to CEDAW.[30] Accession would mean that organisations and individuals can complain to the UN Committee about alleged violations of CEDAW. The government announced after the tabling of the Joint Standing Committee's report that it has commenced the process required to accede to the Optional Protocol.[31] Liberal Senators agree that rights for women in Australia are better advanced:

> ...through the continued development of our own robust legal frameworks rather than being accountable to a panel whose recommendations have never been fully implemented by any country to which such recommendations have been made.[32]

1.50 No evidence was received by this inquiry to justify providing an overarching level of appeal to an unaccountable UN body. On the contrary, it is clear that the avenues available under Commonwealth, state and territory laws for hearing and determining complaints of sex discrimination are more than adequate.

Conclusion

1.51 Liberal Senators support the following changes proposed by the majority report which are largely administrative or technical in nature:

- redrafting the objects of the Act to refer to other international conventions which create obligations in relation to gender equality (recommendation 2);

---

27 *Submission 25*, p. 26.

28 *Committee Hansard*, 10 September 2008, p. 14.

29 *Committee Hansard*, 10 September 2008, p. 15. See also p. 16.

30 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.htm (accessed 3 December 2008), pp 85-88

31 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).

32 Joint Standing Committee on Treaties, p. 87.

- amending subsection 9(10) to refer to other international conventions which create obligations in relation to gender equality so that the Act provides equal coverage to men and women (recommendation 7);
- amending the Act to make breastfeeding a specific ground of discrimination (recommendation 12) on the condition it is reasonable in the circumstances;
- ensuring that the sexual harassment provisions protect students regardless of their age and regardless of whether they are harassed by someone from the same or another educational institution (recommendation 17);
- amending the HREOC Act to provide that where related complaints allege discrimination on different grounds, which are covered by separate federal anti-discrimination legislation, HREOC or the court must consider joining the complaints (recommendation 19);
- increasing the time limit for lodging an application with the courts from 28 days to 60 days after termination of a complaint (recommendation 21);
- locating existing sections 31 and 32 with the provisions dealing with the definitions of discrimination rather than the provisions dealing with exemptions (recommendation 27);
- amending the Act to require HREOC to exercise its power to grant temporary exemptions under the Act in accordance with the objects of the Act (recommendation 28);
- requiring the Sex Discrimination Commissioner to monitor and to report on progress towards eliminating sex discrimination (recommendation 33); and
- consider the merit of examining the relationship between the Act and the EOWW Act and the possible advantages of incorporating the obligations and combining the functions of EOWA and HREOC (recommendation 41).

1.52 However, we do not support the balance of the recommendations made in the Chair's report, which are at best unnecessary and at worst counter-productive with many unintended consequences. Many of them are far-reaching in scope and are simply not supported by the evidence put to our committee. Rather than adopt a constructive approach of supporting the efforts of businesses, educational, volunteer, religious and other organisations and other potentially affected parties to continue to build a culture to eliminate harassment and discrimination, the majority report is reminiscent of the confrontational gender politics of the past. The private and public sector and the community at large have long since moved on.

1.53 Liberal Senators suggest that consideration be given to loosening the shackles on the private and public sector and others to enable them to develop more innovative approaches to issues, such as eliminating harassment and balancing work and family responsibilities, rather than burdening them with further layers of counter-productive regulation.

1.54 The majority’s final recommendation calls for a national inquiry to consider replacing federal anti-discrimination statutes with a single Equality Act. Given the lack of any compelling evidence of deficiencies in the existing legislative scheme

(particularly in light of additional protection available under state and territory legislation), there is no evidentiary basis for this recommendation.

Senator Guy Barnett
Deputy Chair

Senator Mary Jo Fisher

Senator Russell Trood

Senator Helen Kroger

Additional comments by Senator Hanson-Young

Australian Greens

Introduction

1.1 The Australian Greens commend the Chair and Committee Secretariat on the comprehensive nature of the Committee's report.

1.2 We believe that the inquiry into the Commonwealth *Sex Discrimination Act 1984* (SDA) has provided the committee with the opportunity to recommend to the Government ways to strengthen and tighten the federal SDA to ensure that we are eliminating discrimination – on all levels - and promoting gender equality.

1.3 However, the Greens have a number of additional concerns which we consider should be addressed to ensure that Australia's international obligations with respect to gender and equality are completely realised.

Background

1.4 The issue of gender equality and sexual discrimination has been at the forefront of Greens policy for years.

1.5 We have argued for women to have the right to equal respect, responsibilities and rewards in society; the right to equal access and participation in decision-making processes in all areas of political, social, intellectual and economic endeavour; the right to freedom from violence; the right to equal pay for work of equal value, and to have their unpaid caring responsibilities acknowledged and properly valued throughout their lifetime; the right to make informed, supported choices about all aspects of their lives, including sexual identity, health, reproductive health processes, birthing and child-bearing, and how they balance participation in paid work with caring responsibilities.

1.6 The Australian Greens further believe that freedom of sexual orientation and gender identity are fundamental human rights.[1] The need for acceptance and celebration of diversity, including sexual orientation and gender diversity, is essential for genuine social justice and equality.

---

[1] United Nations Universal Declaration of Human Rights http://www.unhchr.ch/udhr/lang/eng.htm

Same-Sex recognition

1.7 The Australian Greens strongly support the recommendation from The Australian Coalition for Equality, for the inclusion of registered relationships in the definition of relationships within the SDA.

1.8 While the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* has made amendments to recognise same-sex couples in federal law, the Australian Greens have some concerns about the approach taken when amending the Commonwealth SDA.

1.9 While the Greens are indeed supportive of the amendments removing discrimination against same-sex couples on the basis of family responsibilities, we are concerned that the provisions of the SDA relating to discrimination on the basis of marital status have not been amended.

1.10 Section 6 of the SDA explicitly prohibits discrimination on the grounds of marital status, which is defined as being:

(a) single;

(b) married;

(c) married but living separately and apart from one's spouse;

(d) divorced;

(e) widowed; or

(f) the de facto spouse of another person

1.11 The Greens are concerned that the definition of de facto spouse that is separately defined, only recognises opposite-sex couples, which effectively only provides protection from discrimination for people in an opposite-sex relationship. The Greens believe that that the SDA should be amended to provide equal protection to both same-sex and opposite-sex couples from discrimination on the basis of being in a de facto relationship, and also include another subsection identifying registered relationships.

Recommendation 1

- **The Greens recommend that the *Sex Discrimination Act 1984* be amended to replace the term "marital status" with "couple status".**
- **The Greens further recommend that the definition of de facto relationship outlined in the recent *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, be adopted into the SDA, with a category that also recognises registered relationships as another form of a relationship.**

1.12 There are currently no federal laws which provide comprehensive protection from discrimination on the grounds of sexual orientation and gender identity.

1.13 The Australian Greens believe that the Government should support the establishment of a comprehensive sexual orientation and gender identity anti-discrimination Act to ensure for the protection for all Australians.

1.14 In line with the evidence provided to the Legal and Constitutional Committee, we believe that this could either be done by amendment to the SDA, or by the enactment of a new sexual orientation and gender identity-specific anti-discrimination instrument, with the latter being our preference.

Recommendation 2

1.15 The Australian Greens believe the most appropriate avenue to prevent discrimination on the grounds of sexual orientation and gender identity is to establish a new a new sexual orientation and gender identity-specific anti-discrimination instrument. This would not only address gaps in state and territory law, but it would also send out a clear message about the equal importance of tackling sexual orientation and gender identity discrimination.

Provision for parental leave

1.16 Australia is a signatory to the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), yet entered into two reservations in relation to the participation in direct armed combat and the provision for paid maternity leave.

1.17 The provision of 14 weeks paid maternity leave, with a compulsory minimum period of six weeks immediately after the birth, is the international standard for paid maternity leave, as outlined within the International Labour Organisation Maternity Leave Convention.

1.18 Despite Australia entering into a reservation to CEDAW on the issue of maternity leave, the International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains an international obligation to provide paid maternity leave, yet no reservation has been registered by the Australian government in relation to this provision. Thus, the Australian government is obligated to provide paid maternity leave for working women.

Recommendation 3

1.19 The Australian Greens recommend that the Government urgently act on introducing a nationally-funded paid maternity leave scheme. While we would support the introduction of a paid maternity leave scheme, the Greens believe that twenty-six weeks of paid parental leave shared between both parents is what we should be aiming for, a figure that is backed by a broad range of stakeholder organisations, from unions, to women's groups and health organisations.

Reporting dates for Sex Discrimination Commissioner:

1.20 In order to ensure renewed progress towards gender equality, new agendas are needed as well as new monitoring mechanisms to ensure that attention is paid to any shortfalls.

1.21 While the Committee recognises that the need for the Sex Discrimination Commissioner to report to Parliament in respect to the progress towards eliminating discrimination and achieving gender equality, it is disappointing that the report only believes this should occur every four years.

1.22 The Australian Greens believe that in order to ensure that new monitoring mechanisms are established to ensure that there are no longer any shortfalls in relation to gender equality; the Sex Discrimination Commissioner should monitor and report annually to parliament on this progress.

1.23 The Greens further believe that to ensure that the reports are not lost on being tabled in Parliament, there should be a statutory responsibility for the Government to respond to them within 15 sitting days.

Recommendation 4

- **The Australian Greens believe that the Sex Discrimination Commissioner be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality.**
- **The Australian Greens further recommend that the Government respond within 15 sitting days to such reports.**

Female employees and religious discrimination:

1.24 During the course of the inquiry, the Committee heard evidence, on a number of occasions, that section 37 of the Sex Discrimination Act appears to deny female clergy and non-ordained female employees of religious organisations protection against discrimination on the basis of their sex, specifically in relation to their employment.

Recommendation 5

- **The Australian Greens recommend that section 37 of the Act be amended to ensure that female clergy and non-ordained female employees of religious organisations are protected from discrimination on the basis of their sex in relation to their employment.**
- **We further recommend that section 38 of the Act be amended to remove the exemption in relation to discrimination on the grounds of sex and pregnancy.**

Sarah Hanson-Young
Senator for South Australia

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Androgen Insensitivity Syndrome Support Group Australia (AISSGA)
2	Jyonah Jericho
3	Mr Richard Greenwood
4	Dr Stan Jeffery KSJ
5	Unions NSW
6	Dads on the Air
7	Women Members of the Anglican Church of Australia General Synod Standing Committee
8	Women's Electoral Lobby Australia
9-part 1 & 2	Ordination of Catholic Women Into a Renewed Ordained Ministry
10	Malcolm & Rosemary Prior
11	Business and Professional Women Australia
12	Dr Belinda Smith, Faculty of Law, University of Sydney
13	Office of the Anti-Discrimination Commissioner
14	Women's Health Victoria
15	National Foundation for Australian Women
16	Australian Baha'i Community
17	Australian Education Union
18	South Australian Premier's Council for Women
19	United Nations Development Fund for Women
20	Human Rights Law Resource Centre
21	Non-Custodial Parents Party (Equal Parenting)
22	Professor Margaret Thornton, ANU College of Law, Australian National University
23	New South Wales Premier
24	Community and Public Sector Union, State Public Services Federation Group
25	Australian Chamber of Commerce and Industry

26	Legal Aid Queensland
27	Christian Schools Australia
28	Adrian Smyth
29	Women's Lawyers' Association of New South Wales and Australian Women Lawyers
30	Australian Women's Health Network
31-part 1 & 2	Public Interest Law Clearing House
32	Victorian Automobile Chamber of Commerce
33	Carers Australia
34	Neville Edwards
35	Colin Clifford, Principal, Jubilee Christian College
36	Endeavour Forum
37	Donald Leys - Principal, Condell Park Christian School
38	Ronald Christie - , Associate Pastor, Condell Park Bible Church
39	Dr Sara Charlesworth - Centre for Applied Social Research- RMIT University
40	Gregory Michael McMahon
41	Equal Employment Opportunity Network of Australasia
42	Shop, Distribution and Allied Employees Association
43	Victorian Attorney-General - Rob Hulls MP
44	Women's Legal Services Australia
45	South Australian Equal Opportunity Commission and the Office for Women (SA)
46	Queensland Council of Unions
47	Diversity Council Australia
48	Association of Professional Engineers, Scientists and Managers, Australia
49	Independent Education Union of Australia
50	Associate Professor Beth Gaze, Melbourne University Law School
51	Castan Centre for Human Rights Law, Monash University
52	National Association of Community Legal Centres, Combined Community Legal Centres Group (NSW), Kingsford Legal Centre
53	Associate Professor Simon Rice OAM, ANU College of Law
54	Lone Fathers Association Australia
55	Australian Council of Trade Unions

56	Working Women's Centre SA
57	WA Equal Opportunity Commission
58	YWCA Australia
59	Law Council of Australia
60	Collaborative submission from leading women's organisations and women's equality specialists
61	Emily's List
62	Job Watch Inc
63	Anti-Discrimination Commission Queensland
64	Women's Forum Australia
65	Muslim Women's National Network of Australia
66	Helmut Roth
67	Families Without Women
68	Legal Aid New South Wales
69	Human Rights and Equal Opportunity Commission
70	Confidential
71	Australian Christian Lobby
72	Victorian Equal Opportunity and Human Rights Commission
73	FamilyVoice Australia
74	Department of Defence
75	Association of Independent Schools of South Australia (AISSA)
76	National Legal Aid
77	Hawkesbury Nepean Community Legal Centre Inc
78	Australian Catholic Religious Against Trafficking in Humans (ACRATH)
79	Equal Opportunity for Women in the Workplance Agency (EOWA)
80	Australian Coalition for Equality
81	Mr Ross Mitchell

ADDITIONAL INFORMATION RECEIVED

1 Human Rights Law Resource Centre: answers to Questions on Notice, received 19 September 2008

2 Documents tabled by the Ordination of Catholic Women Into a Renewed Ordained Ministry at a public hearing in Canberra on 11 September 2008:

- Excerpts from the Catholic Social Justice Statement 2000
- Executive summary of Woman and Man, One in Christ Jesus: Report on the Participation of Women in the Catholic Church in Australia prepared by the Research Management Group
- Duty bound to lead latest OCW publication spelling out their positions to Bishops

3 Publications tabled by Dr Belinda Smith at a public hearing in Sydney on 9 September 2008:

- Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) 36(2) Federal Law Review 1
- Belinda Smith 'From Wardley to Purvis: How far has Australian anti-discrimination law come in 30 years?' (2008) 21 Australian Journal of Labour Law 3-29
- Belinda Smith, "Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict", (2006) 28(4) Sydney Law Review 689-732
- Belinda Smith, "A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?" in C Arup, et al (eds), Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships, Federation Press: Sydney (2006), 105-124
- Belinda Smith & Joellen Riley, "Family-friendly Work Practices and the Law" (2004) 26 Sydney Law Review 395-426

4 Attorney-General's Department: answers to Questions on Notice, received 22 October 2008

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Tuesday 9 September

BOWTELL, Ms Catharine, Senior Industrial Officer
Australian Council of Trade Unions

BRODERICK, Ms Elizabeth, Federal Sex Discrimination Commissioner
Australian Human Rights Commission

GOLDIE, Ms Cassandra, Director, Sex and Age Discrimination Unit
Australian Human Rights Commission

HELY, Mr Brook, Senior Legal Officer
Australian Human Rights Commission

MACDONALD, Ms Edwina, Law Reform Coordinator, Womens Legal Services Australia
National Association of Community Legal Centres

McKAY, Ms Julie, Executive Officer
UNIFEM Australia

NIKIBIN, Miss Elnaz, Lawyer
UNIFEM Australia

O'DOHERTY, Mr Stephen, Chief Executive Officer
Christian Schools Australia

SHEER, Miss Noa, Intern
UNIFEM Australia

SMITH, Dr Belinda
Private capacity

SOUTHGATE, Ms Shirley, Principal Solicitor/Acting Director, Kingsford Legal Centre
National Association of Community Legal Centres

SPENCER, Mr Mark, Director, School Administration Support
Christian Schools Australia

STRONG, Mrs Rosalind Maybanke, President
UNIFEM Australia

Von DOUSSA, Mr John, Immediate Past President
Australian Human Rights Commission

Melbourne, Wednesday 10 September

BALL, Ms Rachel, Lawyer
Human Rights Law Resource Centre

BARKLAMB, Mr Scott Cameron, Director, Workplace Policy
Australian Chamber of Commerce and Industry

DAVIS, Ms Catherine, Federal Women's Officer
Australian Education Union

EASTMAN, Ms Kate, Counsel
Law Council of Australia and the New South Wales Bar Association

GAVRIELATOS, Mr Angelo, Federal President
Australian Education Union

MAMMONE, Mr Daniel, Senior Advisor, Legal and Industrial Affairs
Australian Chamber of Commerce and Industry

MOULDS, Ms Sarah Petronella, Policy Lawyer
Law Council of Australia

PANAYI, Ms Michelle, Manager of the Law Institute Legal Assistance Scheme
Public Interest Law Clearing House

SCHLEIGER, Ms Melanie, Lawyer
Human Rights Law Resource Centre

SCOTT, Mr Ian Edward, Lawyer
Job Watch Inc.

THEW, Ms Penny, Counsel
Law Council of Australia

TINKLER, Mr Mathew, Acting Executive Director
Public Interest Law Clearing House

Canberra, Thursday 11 September

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch
Attorney-General's Department

ASHTON, Ms Annemarie, Policy Advisor
Carers ACT

DUNNICLIFF-HAGAN, Ms Ruth (Patricia)
Ordination of Catholic Women

GREGORY, Mr Kevin Noel
Ordination of Catholic Women

GREGORY, Ms Josephine, Co-convenor
Ordination of Catholic Women

HATTON, Ms Marilyn, National Convenor
Ordination of Catholic Women

INGLIS, Ms Shivaun, Network Coordinator
Womenspeak

JOYCE, Dr Marie Rose, Co-Convenor (Victoria)
Ordination of Catholic Women

LAMBERT, Ms Caroline, Executive Director
YWCA Australia

SAWER, Professor Marian
Women's Electoral Lobby

THORNTON, Professor Margaret
Women's Electoral Lobby

WALLACE, Mr James, Managing Director
Australian Christian Lobby

WILLIAMS, Mr Benjamin Peter, Research Officer
Australian Christian Lobby