

8 August 2008

Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
PO Box 6100,
Parliament House
Canberra
ACT 2600



Dear Peter,

I am pleased to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the Sex Discrimination Act. In making the submission my focus is on the area of employment and draws on my research on gender equality in paid work. Much of this work is directly relevant to the current Inquiry as it explores the ways in which the SDA and other similar anti-discrimination legislation is understood and 'practiced' in the workplace. I have attached a list of relevant publications as an appendix to my submission.

While I believe there is a very strong case for reforming the provisions of the Sex Discrimination Act (SDA), I have not attempted to address all the terms of reference of the Inquiry. In this regard I strongly endorse the collaborative submission to the Inquiry from leading women's organisations and women's equality specialists that was facilitated by the YWCA Australia and the WomenSpeak Network. My submission focuses rather on the critical importance of the broader political and policy framework in strengthening or compromising the effectiveness of legislation such as the SDA and on some key mechanisms for redressing discrimination and advancing progress towards gender equality.

From the outset I wish to express my strong concern that such a limited time has been allowed for this Inquiry, which is set to report by 12 November 2008. It is almost 25 years since the SDA was first enacted. In that time the labour market and women's experience in it has changed profoundly. The last major reviews of the SDA and the context in which it operates took place more than 15 years ago. Those were the Lavarch Inquiry, also conducted by the Senate Standing Committee on Legal and Constitutional Affairs, and the Australian Law Reform Commission's Equality Before the Law Reference. The former Inquiry lasted for two and a half years from 1989 to 1992, while the latter lasted for 22 months from 1993 until 1994.

To ensure the SDA can be renovated to effectively move towards gender equality in the 21st century requires the same sort of extensive discussion, research, education and public consultation. I note for example that the recent Discrimination Law Review in the UK, which has just resulted in proposals for an Equalities Bill on which the Brown government is currently consulting, also took more than two years of wide-ranging research, discussion and consultation. It is important that the Inquiry recommend a more comprehensive analysis of the provisions of the SDA and the ways in which such legislation can be effectively supported to realise the aims of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on which the legislation draws.

If you have any queries about my submission please contact me as below.

With very best wishes,

A handwritten signature in cursive script that reads "Sara Charlesworth".

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Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the Sex Discrimination Act

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The Case for Reform

It is now almost 25 years since the Sex Discrimination Act was first enacted. While prohibition against sex discrimination in the area of employment continues to be the major focus of formal complaints made to the Human Rights and Equal Opportunity Commission (HREOC), participation in, and the nature of, employment has changed dramatically since 1984.

Changes in the nature of women's employment

There has been an increasing participation of women in the paid workforce, including those with children under school age, albeit mainly in poorer quality part-time employment (Preston 2007). The 'price' many women pay to work reduced hours to accommodate work and family responsibilities in terms of casualised conditions and poorer hourly wages has been well documented (see for example Campbell & Charlesworth 2004; Chalmers et al 2005). At the same time conditions of employment have become increasingly deregulated moving from centralised wage fixing to enterprise bargaining in the early 1990s to an increasingly emphasis on individual bargaining and degraded employment minima from the late 1990s on. Casual employment has increased dramatically and now comprises almost a quarter of all employment and a third of female employment in particular. Casual employment is found across all industries, but has particular concentrations in retail, accommodation cafes and restaurants, and cultural and recreational services (Campbell 2007), in which the majority of employees are women. At the same time deregulation of employment conditions has worsened the conditions even for permanent workers, particularly those working on a part-time basis where the pay gap with full-time workers has grown (Campbell 2007).

The interaction of these changes in participation and the nature of employment have led to an increase in gender-based inequalities in the labour market and, in many cases, to more entrenched systemic discrimination within organisations (Preston et al 2006; Maddison & Partridge 2007). These inequalities range from the increasing pay gap between men and women, between full and part-time workers and between those working in feminised industries and those working in male-dominated industries (Preston et al 2006; Peetz 2007) to poorer job quality. The well-being and mental health effects of poor job quality, especially on mothers, are also becoming increasingly recognised (Stazdins et al 2007), with consequent costs for the public purse. The phenomenon of what Preston calls an 'advancement gap', where sex segregation both within industries and organisations and the ghettoisation of part-time employment makes it very difficult for many women to progress and take advantage of

their increasingly levels of education, is also apparent. This advancement gap in turn has negative labour market consequences in terms of redressing skill shortages, especially in non traditional sectors where attraction and retention is a particular problem (Preston 2007). At the same time however the *discriminatory* effects of such changes are increasingly invisible and normalised. This is because to be able to ‘name’ discrimination you have to be able to ‘see’ it (Charlesworth 2007). Seeing discrimination can be very difficult where responsibility for any social risks and disadvantage in employment is shifted on to the individual worker.

The important of the policy, social and industrial context

Workplace understandings of sex discrimination and thus the practical reach of the SDA are very much shaped by the broader social and political context in which it operates. This context can work to support the beneficial aims of the legislation or indeed to frustrate them. The last two decades have seen the ascendancy of the neo-liberal agenda and neo-liberal discourses of economic efficiency, rational choice and managerial discretion (Thornton 2001, 2004). Any focus on equal employment opportunity or gender equality for women, at its height in the 1980s and early 1990s, has gradually receded from policy and political discourse particularly at the federal level. Over the same period women’s policy machinery was largely dismantled, the women’s non-government sector effectively marginalised (Maddison & Partridge 2007: 5) and funding withdrawn from bodies such as HREOC (Maddison & Partridge 2007: 12–15).

The last decade in particular has seen the crowding out of gender (in)equality issues by the problem of work/family imbalance which, interestingly, has been framed as ‘just’ a women’s issue. Arguably, the absence of gender equality discourses in the work/family policy debate means that the gendered nature of access to work/family benefits, the price many women pay for accessing flexibilities like part-time work and the gendered arrangements of paid work and unpaid care in the household are not made visible. Indeed this absence also aids in constructing the disadvantage women experience when trying to balance work and family as a consequence of personal choice rather than as discrimination — a framing of the issue that works to absolve employers and governments of responsibility.

Discrimination is an extremely pliable and contested concept (Thornton 1990, 1-8). What constitutes unfair or less favourable treatment at a particular place or point of time depends on social and workplace norms that intersect with, but are not necessarily captured by, anti-discrimination law. Legislation such as the SDA sets parameters around what needs to be established in cases of direct and indirect discrimination and also, particularly in larger organisations, informs the development of equal employment opportunity (EEO) and anti-discrimination policies and training. Organisational practices around EEO and anti-discrimination measures are also very much affected by the context in which they operate. For example in Australia workplace discourses about discrimination have been influenced by the way the ‘business case’ has been used to promote EEO, and more recently diversity, to employers. The short-term EEO/diversity business case agenda is focused on cost-effectiveness measured in the short term. It is not concerned with the sexual division of labour, power differentials between men and women, or revaluing work at the bottom of the hierarchy. The business interests of employers are assumed to be compatible with EEO and indeed that the good of the business will further the good of all (Fredman 2002: 25). Any

tension between compliance with legal obligations under the SDA and management goals is rarely acknowledged. As a result, the business case for unequal employment opportunity and business advantages in women's disadvantage, such as in the gender pay gap and the poor quality of part-time work, can remain hidden from view.

Yet at the same time apparent concern about discrimination against women has been used by the former federal government and employer groups to argue against the introduction of better working time and leave arrangements that might assist women with their caring responsibilities. For example in submissions to the Australian Industrial Relations Commission (AIRC) in the Family Provisions Test Case, the federal government and major employer groups claimed that women of childbearing age would be discriminated against if the ACTU claims were granted. As the Women's Electoral Lobby pointed out in their submission to the AIRC, such threats work to legitimate, institutionalize and entrench discrimination against women. They encourage women to accept existing levels of discrimination, and to expect retribution if further steps toward equity are pursued. Given it is illegal under the SDA for employers to discriminate against women, governments and employer groups ought to be pressing for compliance with the SDA rather than accepting employers will discriminate against women.

Within this broader context, the way in which the prohibitions against discrimination in the SDA are understood and 'practiced' in workplaces has become far narrower than the legislative provisions themselves. My research suggests that within workplaces there appears to be a 'commonsense' understanding that sex discrimination has to be overt to be considered discrimination, that sex discrimination is an individual experience, and that discrimination has to be intentional. That is an action or treatment is not discrimination if it is not intentionally discriminatory (Charlesworth 2005). Further, in a number of studies (Charlesworth 2002, Charlesworth 2004, Charlesworth 2005) I have shown that typical employer responses to claims of discrimination reveal:

- assumptions that the presence of anti-discrimination and/or EEO policies in a workplace has an *inoculation effect* that somehow operates to make an organisation immune to claims of discrimination. A claim of discrimination is perceived as an affront to policies designed to prevent it. This provides the organisational impetus to define the alleged discrimination away and argue that the behaviour, or detriment complained of, falls outside the parameters of that policy.
- a shifting of the responsibility for any detrimental treatment onto the complainant themselves - as due to the poor performance of the complainant, a 'misunderstanding' by the complainant and/or the consequences of factors outside the workplace. For example, while respondent employers may acknowledge the difficulties in balancing work and family, employer responses to complaints of work/family discrimination often suggest that the family responsibilities of workers are outside the employer's realm of responsibility. As a consequence, those who cannot fit in with the way work is organised become constructed as the problem, with a shift in focus from 'family-hostile' work organisation to the deficits of individual workers.
- assertions, implied or overt, that the primacy of the operational or business requirements of the organisation is a justification for any less favourable treatment.

This is frequently accompanied by a consequent denial of responsibility for any collateral detriment to employees in the pursuit of business interests.

In sum then, the political, social and employment context today is very different from when the SDA was first introduced. Action is needed on many fronts and legislation has an important role to play as a part of a comprehensive strategy for tackling inequality, discrimination and disadvantage (Dickens 2007). What counts, however, is how the legislation is operationalised in practice at the industry level, in organisations and by the bodies responsible for the legislation (HREOC, the Federal Court of Australia (FCA) and the Federal Magistrates Court of Australia (FMCA)). Further, without substantial policy support, appropriate resourcing and explicit political commitment to gender equality by the federal government the effectiveness of any further legislative amendments will be very much limited.

A Gender Equality Act

The changes in the nature of women's employment and the different experiences of different groups of women point to the need for a modernisation of the SDA so that it that can be used to more effectively respond to the working realities for men and women in the changed workplace of the 21st century.

As a starting point I would advocate a change of name to the legislation, from the 'Sex Discrimination Act' to the 'Gender Equality Act'. In the report of recent review of the Victorian Equal Opportunity Act that it has been recommended that that this legislation become the Equality Act to reflect an express commitment not merely to the elimination of discrimination, but to pursuing substantive equality (Department of Justice 2008: 36-37). There would need in turn to be consequent amendments to the section 3 objects of the current SDA moving, for example, from promoting 'recognition and acceptance within the community of the principle of the equality of men and women' to a more proactive promotion of the 'recognition and acceptance within the community of the right to *substantive equality*'. It is also important that the use of the qualifier 'so far as is possible' be removed in respect of the elimination of discrimination.

Renaming the SDA as the Gender Equality Act would arguably create the space to engender community debate about what constitutes substantive equality. Further, as sex discrimination claims become gender equality claims, attention can be drawn in the individual complaint process both to the absence of equality and to the effect of this on individual and group claimants, which can then be linked to positive measures to address the systemic disadvantage from which such claims spring.

A New Policy Framework for Gender Equality

While beyond the scope of the current Inquiry, the time is ripe for a clear articulation by the federal government of a significant commitment to the achievement of gender equality. This needs to go well beyond the inadequate responses that were made by the Office for Women in its 2001 and 2003 reports in respect to the implementation of the Commonwealth **Action Plan on Gender and Development** and by the federal government in its report to the UN

CEDAW Committee in 2003 and its statement in relation to the 2003 report made to the CEDAW Committee in 2006. Indeed I note 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. The Committee also expressed concern that there is no national system of paid maternity leave and that, as a consequence, Australia continues to maintain its reservation to article 11 of CEDAW.

An existing gender equality policy framework which the government could easily adopt into the domestic policy context is that that underpins the AusAid program.¹ Gender equality is stated to be 'an overarching principle of Australia's aid program'. This means that 'gender equality is integral to all Australian government aid policies, programs and initiatives'. This policy framework places emphasis on gender equality *outcomes* including the demonstration of progress towards the improved economic status of women and equal participation in decision making and leadership. In progress towards gender equality, the framework is designed to encourage strategic and well targeted interventions, which are informed by operating principles such as:

- Engaging with both men and women to advance gender equality
- Strengthening accountability mechanisms to increase effectiveness
- Collecting and analysing information to improve gender equality results

Given the clear and unequivocal expectations Australia has of countries that receive Australian aid, it would behove the Australian government to practice what it preaches within Australia itself. The federal government should insist that gender equality is integral to all Australian government policies, programs and initiatives, domestic and international, with the appropriate mechanisms put in place to operationalise this commitment.

Better and More Effective Collection and Dissemination of Data

Equality indicators and benchmarks

Work also remains to be done to establish a series of indicators or benchmarks against which the extent of sex discrimination and the progress towards gender equality can be measured. Australia has fallen behind in the collection of data that would enable the monitoring of women's disadvantage and progress towards gender equality (see Preston et al 2006). Commitment needs to be made both to the collection of appropriate data able to be disaggregated sufficiently to monitor the outcomes for different groups of women as well as to the public dissemination of such data.

¹ see http://www.ausaid.gov.au/publications/pdf/gender_policy.pdf.

There are a number of sets of indicators in use internationally that could be considered when considering movement in gender (in) equality in employment. See for example the gender statistics provided by the United Nations Economic Commission for Europe on Work and the Economy² and the Gender and Work Database at York University in Canada.³ The West Australian Office of Women's Policy also keeps a modest score card which provides data over time against a range of indicators such as the representation of women in public life, perceived health and well-being of senior women as well as various aspects of women's labour force participation.⁴

I support the recommendation in the collaborative submission to the Inquiry from leading women's organisations and women's equality specialists that the Sex Discrimination Commissioner should be given a new statutory responsibility to monitor and report annually to parliament on progress towards gender equality. Further that this new statutory role must be accompanied by additional resources so that they are not competing with the other functions of the Commission.

Supporting action to reduce individual and systemic discrimination

In my view the data published in respect of individual complaints and inquiries made to HREOC is inadequate to enable the public and transparent monitoring of the efficacy of the SDA in redressing discrimination. In particular, relatively little is publicly known in the area of employment about the socio demographic and employment characteristics of complainants or the employers and workplaces about which they make complaints.

There needs to be a serious and committed attempt to collect and publish detailed de-identified 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 employer associations, unions, government and the broader community so that discrimination issues can be tackled in a proactive way. Such information could be used to form the basis of industry-specific anti discrimination and equality strategies in consultation with the appropriate union and employer associations.

The socio-demographic and employment-related data currently collected by Job Watch, a Victorian employment advice agency, from callers to its advice service provides a useful template in the area of employment. Importantly such data needs to be published on the HREOC website with more detailed data made available to a range of bodies and individuals including unions, employer associations, government departments and researchers.

² <http://w3.unece.org/pxweb/DATABASE/STAT/3-GE/03-WorkAndeconomy/03-WorkAndeconomy.asp>.

³ <http://www.genderwork.ca/cms/displaysection.php?sid=30>.

⁴ see <http://www.community.wa.gov.au/NR/rdonlyres/BBC41107-7341-4BDA-9051-7E963566E870/0/DCDRPTWomensReportCardUpdateApril2006.pdf>.

It would be most useful to systematically collect and disseminate data on the main detriments alleged by complainants. For example, in its Annual Reports the NSW Anti-Discrimination Board categorises the type of employment complaints, such as work environment and harassment, dismissal, classification/benefits, recruitment/selection etc. Further, while data relating to legal and other representation of complainants and respondents and to the details of settlements are available on HREOC complaint files, such data are not regularly published. Other data that is available on HREOC complaint files including details on outcomes such as the type of settlement, and, where monetary, the quantum of the settlement. All this data should also in my view be routinely coded and made available in Annual Reports and/or on the HREOC website.

For accountability purposes and education purposes it would also be useful to continue with the HREOC website publication of the summary details of finalised conciliations as HREOC used to do until the end of 2004. These small summaries, while apparently restricted at HREOC to successful outcomes, provide a realistic snapshot of the conciliation process as well as the types and grounds of the discrimination that are the basis of complaints. This is important to the effective functioning of the SDA as my research and consultation in a wide range of industries suggests few employees or employers understand the conciliation process or indeed its potential in resolving grievances.

I note that the very recent Review of the Victorian Equal Opportunity Act 1995 has also recommended that the collection and analysis of quantitative and qualitative data, including that in respect of individual complaints is critical in ensuring the effectiveness of anti-discrimination legislation (Department of Justice 2008).

Resolving Individual Complaints

In this section I draw on the research I have undertaken of formal complaints and complaint-handling processes in HREOC and the VEOHRC as well as other research on discrimination I have undertaken (see for example Charlesworth and Macdonald 2007). In my view and indeed in the view of many of those who assist complainants lodge complaints the current complaint handling system under the SDA can be onerous, too legalistic and too formal. The length of the time taken for complaints to be finalised is also an issue in working to quickly resolve disputes and preserve rather than further damage any existing employment relationship.

A new HREOC complaint handling process

An alternative model that is worth considering is the relatively recent New Zealand Human Rights Commission (NZ HRC) dispute resolution process, which focuses on resolving complaints in the most effective, informal and efficient manner possible in keeping with the Human Rights Act. The case management system aims to ensure that complaints of unlawful discrimination are dealt with effectively and in a timely fashion to reach fair and effective resolutions of complaints at the earliest possible opportunity (NZ HRC 2007: 32). The main steps in this process are as follows:

1. Triage of complaints:
 - Assessment as to whether the Commission is the right agency and/or whether information can help the parties clarify or resolve their complaint.
 - Assessment as to whether it may be within the unlawful discrimination provisions or whether it relates to broader human rights issues.
2. 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).
3. After assessment, complaints are assigned to mediators
 - Mediation depends on the engagement of all parties. Mediators give and receive expectations from parties against timeframes, follow them up and keep all parties informed as to progress or reasons for delay
4. 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.

The flexible dispute resolution process allows a range of interventions. Some complaints are resolved through the provision of information which can enable self help. In 2007, the NZ HRC managed to close 90 percent of complaints within three months of receipt. This compares to an average of 20 percent of complaints under the SDA in the same period.⁵

The system of triage, in particular, has enormous potential. In a recent project on pregnancy discrimination we found that those who are experiencing workplace discrimination require the sort of practical support and non-technical, non-legalistic advice that the NZ system apparently provides in this phase (see Charlesworth & Macdonald 2007). 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. I note that on the NZHRC website the role of the duty mediators in this respect is to:

- Provide informal intervention and try to resolve dispute
- Provide sounding board for discussion of human rights issues
- Gather data for systemic issues
- Encourage attitudinal change

The NZ system is from all reports working well. A similar complaint handling system has just been recommended in the recent Review of the Victorian Equal Opportunity Act 1995 to encourage the early resolution of disputes (Department of Justice 2008).

⁵In 2006/7, 55 percent of complaints lodged under the SDA were finalized in 6 months, with 80 percent of complaints within 9 months.

Linking individual complaint resolution to systemic measures

The individual complaints system under the SDA needs to be linked with measures to address systemic discrimination such as positive action (Charlesworth 2007). This can be achieved in part by the suggestions made above in respect of data collection and by the use of audits of workplace practice where a complaint is lodged. That is, making an equality claim should trigger discussion with the organisation in which the claim has arisen about taking proactive steps to address any systemic disadvantage identified in the claim. This could take place at the start of the complaint process, after under the triage process set out above, when a complaint is settled at conciliation, and/or when a complaint is upheld at hearing. In the United Kingdom, for example, Employment Tribunals have the power to make an 'action recommendation' to ensure steps are taken to improve an employer's policies and practices as they relate to the complaint. I also note that the NSW Administrative Decisions Tribunal can make similar orders.

Useful mechanisms that do not place the burden on individual complainants to take action include; authorising the Sex Discrimination Commissioner (SDC) to initiate inquiries into systemic discrimination in workplaces, industries or occupations and empowering the SDC to intervene in whatever proceeding she thinks fit with the aim of promoting the objects of the SDA. Both these mechanisms have been recommended to the Inquiry in the collaborative submission to the Inquiry from leading women's organisations and women's equality specialists. The recent Review of the Victorian Equal Opportunity Act 1995 has also recommended two other important mechanisms to enforce compliance. Firstly that the Commission should have the power to enter into enforceable undertakings with persons or organisations where, in the opinion of the Commission, an unlawful act is occurring or is likely to occur. Further, that where the undertaking is breached, the Commission should be able to apply to VCAT for enforcement of the undertaking. Secondly the Review recommended, modeled on occupational health and safety legislation, that the Commission should be empowered to issue a compliance notice where an investigation or inquiry has revealed a breach of the requirements of the Act. The notice would set out details of the offending behaviour and the steps to be taken to prevent the unlawful conduct and may include a requirement for the preparation and implementation of an action plan. In the event of non-compliance with a notice, it was recommended that the Commission should be able to apply to VCAT for an order requiring compliance. (Department of Justice 2008, 125-132). Adoption of these two mechanisms would also enhance the operation of the SDA.

While HREOC is the appropriate body to take responsibility for raising the issue of action to address systemic discrimination with organisations and respondents where inquiries and complaints are made, the FCA or the FMCA should be responsible for making orders to address the broader systemic issues that are raised in the course of the determination of a complaint. Links between individual complaints lodged with HREOC and in determinations made by the FCA or the FMCA should be made with other action-based and goal-oriented equality duties, such as those implemented in the United Kingdom's Race, Disability and Gender Equality duties (Charlesworth 2007) briefly outlined below.

Addressing systemic discrimination

There are a number of measures that that could be employed to encourage compliance with the SDA and also to encourage organisational action to eliminate discrimination and to advance gender equality. In this section I focus briefly on two measures namely a gender equality duty and the strategic use of government procurement policy.

Equality duty – public and private sector

The recently implemented Gender Equality Duty in the UK places the legal responsibility on public authorities to promote gender equality and eliminate sex discrimination, in respect of employment, the provision of services and policy making. Public authorities in England, Wales and Scotland are also required to meet special duties to identify and then take steps to eliminate disadvantage and inequality. For example the specific duties require public authorities in England to take the following steps:

- prepare and publish a gender equality scheme, showing how it will meet the authority's general and specific duties and setting out its gender equality objectives;
- consider, in formulating the authority's overall objectives, the need to include objectives that address the causes of any gender pay gap;
- gather and use information on how the authority's policies and practices affect gender equality in the workforce and in the delivery of services;
- consult stakeholders (i.e. employees, service users and others, including trade unions) and take account of relevant information in order to determine the authority's gender equality objectives;
- assess the impact of the authority's current and proposed policies and practices on gender equality;
- implement the actions set out in the authority's scheme within three years, unless it is unreasonable or impracticable to do so; and
- report on the scheme every year and review it at least every three years.

The recent Review of the West Australian *Equal Opportunity Act 1984* also recommended placing a 'gender duty' on public sector employers.

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. The Equal Opportunity for Women in the Workplace Agency under Equal Opportunity for Women in the Workplace Act (EOWWA) 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, as noted in the collaborative submission to the Inquiry from leading women's organisations and women's equality specialists.

There has been considerable debate in the UK about the extension of such equality duties to the private sector. In a recent paper Michael Rubenstein argues persuasively that where such duties cover only the public sector rather than extend also to the private sector, there are a number of negative consequences that fall on employees, business and government. These include:

- to the extent that public sector equality duties mean that public sector workers are more likely to have equal opportunities and less likely to be discriminated against in practice because of the mechanisms accompanying the positive duties, failure to regulate private sector employers to the same extent means that private sector workers are, to that extent, second-class citizens.
- heavy regulation of public sector employers as a result of the positive duties imposes costs on the public sector employer and provides an incentive for public authorities to contract out work to the deregulated private sector.
- light-touch regulation of the private sector places the more progressive private sector employers who wish to adopt high equal opportunities standards at a competitive disadvantage, at least in the short term (Rubenstein 2007: 1-2).

It is worth noting that for almost 20 years in Northern Ireland there has been a statutory requirement on private sector employers to monitor and report on their equality practices in relation to the employment of Catholics. Under the 1989 Fair Employment and Treatment (NI) Order (FETO) if companies fail to meet statutory reporting and workforce monitoring requirements, or instructions to apply affirmative action, sanctions can be placed on employers including exclusion from public authority contracts. As noted by the European Commission's Community Action Program to Combat Discrimination, these requirements have had a greater long term deterrent effect than the sanctions following litigation. They point to a recently published evaluation that assessed the changes that have taken place as a result of the fair employment legislation. That assessment confirmed:

- a substantial improvement in the employment profile of Catholics;
- a considerable increase in the numbers of people working in integrated workplaces, in contrast to continuing segregation in public housing; education, rather than religion, now the main determinant of social mobility;
- employers indicating that strong legislation has helped change practices, and evidence suggesting that affirmative action agreements have helped to redress workplace under-representation (European Commission's Community Action Program to Combat Discrimination 2006).

In ensuring positive duties are implemented and are effective, there needs to be an appropriate compliance regime. Fredman argues for a number of steps in the compliance pyramid, moving from encouragement and support to promote a co-operative rather than adversarial approach, to scrutinizing reports and equality plans and their implementation, with provision for sanctions if appropriate (2005). In my view, HREOC should have the responsibility for scrutinizing reports and equality plans and their implementation relevant to any public and or private sector duties, with the prosecution of any breaches by HREOC a matter to be determined by the FCA or the FMCA.

Government purchasing policy

The federal government's purchasing power should be used to 'buy' gender equality outcomes, by encourage good practice in relation to the elimination of discrimination and the promotion of equality and also to effectively sanction those organizations that breach the SDA. The UK Equalities Review found that there was evidence that using procurement to promote equality in employment is generally accepted by the business community to be a sensible approach for government to take and further that requiring suppliers to follow sound equalities principles, and to adopt the provisions of an updated public sector duty to promote equality, could have a profound impact (cited in Rubenstein 2007: 17-18).

Currently there are some very limited powers under the Commonwealth Government Contract Compliance policy in respect of 'non-compliant' organisations under the EOWA. The policy provides that:

- Commonwealth departments and agencies will not enter into contracts for the purchase of goods and services from non-compliant organisations;
- Employers that have been named in Parliament for non-compliance will not be eligible for grants under specified industry assistance programs.

However given 'non-compliance' with the EOWWA is based on failure to provide a report rather than failure to develop an adequate program, the effect of this policy on equality outcomes in organisations reporting to the EOWWA has been very limited. We note for example that just 16 organisations were deemed non compliant in 2007.

Christopher McCrudden makes a powerful case for using the government's purchasing power for to 'buy' social justice outcomes in the private sector (2007). In particular, he points to the Northern Ireland FETO example as support for the effective use of procurement as a mechanism to enforce anti-discrimination legislation, while also highlighting the role of procurement to advance a wider conception of distributive justice.

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 and as has the rate at which women barristers are briefed.

Resourcing of the SDC and HREOC

There can be no effective legislation without adequate resourcing. I note with dismay that even under the new federal government resources to HREOC have been cut. As noted in the collaborative submission to the Inquiry from leading women's organisations and women's equality specialists, HREOC's appropriation revenue has been decreased by \$5.867 million as a result of the savings identified under the new measure 'Workplace Relations'

reform. This represents a 12.5 per cent drop in the appropriation allowance for HREOC from the original 2007-08 budget.

HREOC needs to be adequately supported to ensure compliance with the SDA and to use the SDA as a basis for the advancement of gender equality in Australia. Likewise the SDC must be adequately resourced in order to carry out her current and any additional duties that might be recommended from this Inquiry.

References

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