



Australian Education Union

Federal Office

Ground Floor, 120 Clarendon Street, Southbank, Victoria, 3006
PO Box 1158, South Melbourne, Victoria, 3205
Federal Secretary : Susan Hopgood
Federal President : Angelo Gavrielatos

Phone : +61 (0)3 9693 1800
Fax : +61 (0)3 9693 1805
Email : aeu@aeufederal.org.au
Web : www.aeufederal.org.au

13 February 2012

Assistant Secretary
Human Rights Policy Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

Email : antidiscrimination@ag.gov.au

Dear Sir/Madam,

Re : AEU Submission to the Consolidation of Anti-Discrimination Legislation

Please find attached the final version of the Australian Education Union's response to the Commonwealth's Consolidation of Anti-Discrimination Legislation discussion paper.

This submission can now be considered public.

Please contact me if you have any questions in relation to this submission.

Yours sincerely,

Susan Hopgood
Federal Secretary



Australian Education Union

Submission to the Consolidation of Commonwealth Anti-Discrimination Laws Consultation

February 2012

Angelo Gavrielatos
Federal President

Australian Education Union
PO Box 1158
South Melbourne VIC 3205

Susan Hopgood
Federal Secretary

Telephone: +61 (0)3 9693 1800
Facsimile: +61 (0)3 9693 1805
Web: www.aeufederal.org.au
E-mail: aeu@aeufederal.org.au

Introduction

The Australian Education Union represents approximately 186,000 teachers and education workers in Australia's public early childhood education centres, schools and TAFE Institutes.

The AEU participated in one of the NGO roundtable discussions with the Consolidation Project Team of the Attorney General's Human Rights Policy Branch in late November and we again welcome the opportunity to contribute our views to this process.

From the outset we note that the intention by the Commonwealth Government to ensure anti-discrimination law is consistent federally, is a worthwhile exercise.

The Government's discussion paper states that anti-discrimination law has become too complex and that one motive for consolidating laws is to ensure people are able to easily understand their rights and obligations. The AEU agrees with this sentiment however in any law reform process involving the protection of human rights, we are keen to ensure that this opportunity should clarify and maximise (but never reduce/diminish) protections.

We do however express our disappointment that this process has taken so long, given that the AEU (like many other unions and community organisations) participated in the inquiry into the Sex Discrimination Act well over 3 years ago and that many of the inquiry's positive recommendations have not been enacted, whilst the consolidation process takes place.

The AEU's submission therefore will make a number of points relating to some particular questions being asked by the consolidation process however is attaching our original submission (to the Sex Discrimination Act inquiry 2008) as well as directing the Attorney General's office to a number of AEU policies ("*Aboriginal and Torres Strait Islander Education*", "*Gender Equity*", "*Community Development and Employment Projects (CDEP) Scheme for Aboriginal Peoples and Torres Strait Islanders*," "*TAFE Policy for Aboriginal and Torres Strait Islander Peoples*," which can be found at <http://www.aeufederal.org.au/Policy/index2.html> as the basis of, and background to, our comments.

Furthermore, the AEU is broadly supportive of the submissions made by the Australian Council of Trade Unions (ACTU), the Australian Human Rights Commission, the Australian Domestic and Family Violence Clearinghouse (ADFVC), as well as the Equality Rights Alliance.

This submission will respond to some of the key questions regarding:

- the meaning of and definitions ("direct" and "indirect") for discrimination;
- the protected attributes;
- intersectional discrimination;
- the burden of proof;
- special measures;
- exceptions and exemptions;
- protected areas of public life, and
- complaints and compliance.

General Observations

In general, the AEU is supportive of the consolidation of anti-discrimination legislation federally. One Act, with the assurance that the credibility of the previous four acts are maintained, might achieve the Government's stated aims of greater access, consistency, ease of understanding and cost-effectiveness, but the AEU senses there may be a level of uncertainty about preventing any reduction in existing protections or appropriate enhancements.

This is said because a major focus of many contributions to the Sex Discrimination Act inquiry (the AEU's submission included) highlighted the need for the Act and the Commissioner to have greater ability to address structural inequality in particular areas of employment or other sectors of the community where it's seen fit. These recommendations should be implemented through the consolidation process. It seemed particularly important for these interventions to be made because at the time individual complainants' faith in the system was very low, and no comments to the contrary were raised at recent NGO consultations.

If it remains the case that individuals' satisfaction with anti-discrimination processes is poor, then the role of Commissioners as advocates, and for specialist rather than generalist Commissioners (in areas of Aboriginal and Torres Straight Islanders, Age, Disability, Race and Sex) is valid and crucial.

When discrimination in general, and particular forms of discrimination are still misunderstood (by courts, let alone the community at large), streamlining legislation requires a sensitivity and responsiveness to discrimination on specific grounds as well as compounded/intersectional discrimination. This point is expanded upon later in this submission.

A public education campaign to raise awareness of the new laws and contemporary understanding of discrimination, is essential.

Meaning of Discrimination

The Discussion Paper seeks views on the best way to define discrimination. Many organisations support a simplified single definition of discrimination which removes or at least clarifies the limitations of terms like 'direct' and 'indirect' discrimination and that moves away from the need for a "comparator test" in proving discrimination. As understandings of discrimination have developed over time, both the Disability Discrimination Act and the Fair Work Act have moved away from requiring a comparator and both notions of an "unfavourable treatment" test in the Disability Discrimination Act and of "adverse action" in the Fair Work Act are more appropriate.

A consolidated anti-discrimination law should come into line with the Fair Work Act in that adverse action has application to pre-employment, does reverse the burden of proof and its remedies include injunctions, compensation and pecuniary penalties.

The 2008 review into the Sex Discrimination Act already recommended that the comparator test be removed, as does the definition proposed by the Discrimination Law Experts' Group which maintains the distinction between direct and indirect discrimination but ensures that the two concepts are not mutually exclusive:

“Discrimination includes:

- (a) treating a person unfavourably on the basis of a protected attribute;
- (b) imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person; or
- (c) failing to make reasonable adjustments if the effect is that the aggrieved person experiences unfavourable treatment under (a) or is disadvantaged under (b)

The conduct described in 2(a) and (b) is not mutually exclusive.”

There may be other, similar, definitions which satisfy a contemporary understanding of discrimination and a number of international instruments might be useful here, (such as the ILO Convention 111 on Discrimination and the UN Convention on the Elimination of All forms of Discrimination Against Women). But essentially the definition must express that less favourable treatment has occurred, establish a reason for why the treatment occurred and then determine if the treatment could ever be acceptable (noting that in the case of traditionally “direct” discrimination, this is never acceptable.) The AEU is satisfied that the proposal by the Discrimination Law Experts would be an improvement.

Protected Attributes

The 2008 inquiry into the Sex Discrimination Act, and other bodies before that, has already argued that carer and family responsibilities should be included as a protected attribute from discrimination, and it remains the view of the AEU that this change be supported. The AEU is also supportive of the proposal that the definition of ‘carer’ and ‘family responsibilities’ be broadened to include domestic relationships and cultural understandings of family, including kinship groups.

Similarly, much work has been undertaken recently by the Australian Human Rights Commission, the Australian Law Reform Commission and the Australian Domestic and Family Violence Clearinghouse to promote community understanding of the notion (prevalence and cost) of domestic violence and have all proposed that Commonwealth law should prohibit discrimination on the ground of domestic and family violence.

The AEU supports the Australian Domestic and Family Violence Clearinghouse’s submission on this matter which “strongly recommend[s] that an express protection for victims of domestic violence is included in the consolidated Act. There are two key reasons why this is necessary: (i) to address the double-harm experienced by victims of domestic violence who are discriminated against on the basis of their experience of violence in addition to experiencing the violence itself; and (ii) to streamline existing protections, providing for clarity and consistency and ameliorating the extent to which existing legal protections are inadequate.”

The Federal Government has committed to introducing new protections against sexual orientation and gender identity discrimination as part of this process. Whilst the sentiment of this commitment is commendable, the AEU understands that a preferred term amongst their community of “gender expression” be used. The Government’s intention behind using this term could be covered in the explanatory notes or in the bill’s second reading.

Compounded/Intersectional Discrimination

Stemming from discussions regarding protected attributes is the need to comment on compounded or intersectional discrimination. The term ‘intersectional discrimination’ recognises that some people experience discrimination on the basis of more than one aspect of their identity.

Intersectional discrimination cannot be distinguished as the sum of its parts; rather it is a compounded discrimination which is unique compared to discrimination based on a single factor.

For example, a single Aboriginal woman with young children, who has experienced domestic violence, seeking private rental accommodation could be discriminated against on the basis of her sex, marital status, race or family responsibilities, compounded by prejudice towards victims of domestic violence.

Additionally, intersectional discrimination is also of particular concern to people in the transgender community and in this sense the AEU are supportive of the views put by TransGender Victoria in this regard.

The AEU is concerned that without scope in the consolidated Act to bring a complaint based on discrimination on a combination of grounds, vulnerable complainants experiencing compounded discrimination will be precluded from seeking redress. Alternatively, individuals experiencing multiple forms of discrimination should not have any avenues to pursue their complaints removed by the consolidation of anti-discrimination acts, should they fail on one ground. This area of inconsistency should be addressed in the consolidated Act.

In this sense it the recommendation by the ERA that “the complainant should not have to prove which attribute is the cause of the disadvantage, provided they can establish that they were subject to discrimination on the basis of one, or more of the attributes set forth in the relevant section” is wise.

The Burden of Proof

The burden of proof is a strong threshold issue for many stakeholders throughout this law reform process. Lawyers, industrial advocates and other community legal organisations appear to be united in their support to redress the power imbalance inherent in discrimination law by reversing the burden of proof in a consolidated anti-discrimination act.

In other words, there should be a “reverse” onus of proof. In the UK, it is understood that the recognition of a power imbalance is in part satisfied by a “questions process” in which the complainant is able to quiz the perpetrator and if an answer is not given (about the motivation/justification or intent behind less favourable treatment) it is viewed unfavourably at trial. It would seem that in removing a critical barrier to complainants bringing cases of discrimination forward in fear of the burden of evidentiary requirements, greater access to discrimination justice (a motivation of the Government for the consolidation process) could be afforded.

Special Measures

The AEU stated its position regarding special measures previously in the submission to the Sex Discrimination Act inquiry. We again emphasise the importance of recognition in discrimination law that in some instances insistence on identical treatment may in fact entrench discrimination and prevent achievement of equality, and that positive measures to ensure equal enjoyment of human rights should be permitted in appropriate circumstances, rather than being regarded as impermissible discrimination.

We wish to add that a consolidated act should include a positive duty (on public sector bodies) to eliminate discrimination and promote equality. The AEU supports the view that as the laws stand, redress for discrimination is limited because it is reliant on the victim taking action, whereas a positive duty is a more proactive model.

The AEU also recognises that the Disability Discrimination Act (DDA) includes the notion of public organisations having to make “reasonable adjustments” to accommodate a disability which in the case of employment would help and employee to:

- have equal opportunity to be considered for selection, appointment, promotion, transfer, training or other employment opportunity
- perform the requirements of the job
- enjoy equal terms and conditions of employment.

For employees with carer and family responsibilities, their ability to perform the requirements of their job (with equal opportunity to do so), requires that a consolidated anti-discrimination act extends to them, a reasonable adjustments requirement.

Exceptions and Exemptions

Whilst the AEU understands the need for special measures as a proactive step in affording equal opportunity, the AEU agrees with others that as long as automatic exceptions exist, the discrimination law is fundamentally flawed and compromised.

The Equality Rights Alliance (ERA) observes that the “number and extent of exceptions to the Sex Discrimination Act attest to the weak commitment on the part of the legislature to the non-discrimination principle and contrast sharply with the RDA, which contains no provision for exceptions. This is particularly a problem in regard to the wide exceptions for religious organisations.”

The AEU shares the concerns that as the exemptions are automatic, religious bodies are not required to justify exemptions, or demonstrate if and how they are promoting equality as far as is possible, within the parameters of their doctrines, tenets or beliefs.

The AEU, as other unions and other bodies do from time to time, has applied for exemptions from anti-discrimination acts in order to ensure certain union positions are autonomous to the group being represented, (for example an Aboriginal and Torres Strait Islander Education Officer). In these instances, the decision to seek an exemption needs to be justified and can be challenged. In the case of one union whose affirmative action rules for women were challenged unsuccessfully, establishing how an exemption gives effect *to* equality rather than entrenching inequality is paramount. In the case of religious bodies however, this justification does not occur, nor is the exemption aimed at promoting equality.

The AEU too notes that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the principles of anti-discrimination laws, perhaps particularly about the position of women and girls, or that of non-heterosexual people in contemporary Australian society. An exception for religious organisations which would enable them to discriminate on the basis of sexual orientation or gender identity should not be included in the consolidated Act.

The AEU wishes to emphasise here that our position has not altered regarding exemptions for clubs and religions (particularly educational institutions established for religious purposes). Ss 37 and 38(1)(2) of the Sex Discrimination Act, being exemptions, for purposes of employment should be removed. There should be no permanent exceptions either.

Furthermore we agree, that at a minimum, proof of the existence of non-discriminatory policies should be a precondition to the receipt of public funds.

It is a blight on the history of progressive law reform, that changes to anti-discrimination laws in Victoria in 2010 to finally prohibit such discrimination, were repealed by the Liberal Baillieu Government in 2011 before they ever came into effect.

Protected Areas of Public Life

Aside from agreeing that volunteers should be covered by anti-discrimination legislation, (as the 2008 SDA inquiry recommended) the AEU wishes to emphasise our support for another recommendation from the Sex Discrimination Act inquiry to cover students whilst at an inter-school sport event (from fellow students and/or from teachers from other schools).

It is sadly not uncommon for students to be subjected to anti-social, inappropriate and for all intents and purposes ‘unlawful’ behaviour throughout their academic and social lives. Not only has the internet, mobile technology and social media expanded the social networks of students beyond the school gate but extra-curricular activities such as inter-school sport competitions, have expanded teachers’ duty of care towards their students and thus so too should legal protections from discrimination.

Complaints and Compliance

At the heart of the review of the Sex Discrimination Act and that of any consolidation of anti-discrimination laws lays the needs of those who've experienced discrimination (not just the complainants who do take their case to court) and the community's will to eradicate discrimination from public life. In this vein, many recommendations from the SDA review address the complaints process itself, as well as the roles of public officials and offices established to prevent and remedy discrimination. Again, the AEU directs the Attorney General's office to our previous submission on these matters.

Importantly we recognise that another threshold issue for many stakeholders is the cost to complainants. The AEU believes discrimination should be a no cost jurisdiction.

Systemic change is required to remove the burden from individuals (cost being prohibitive is one burden, but equally, appearing before court and providing evidence often against an organisation with greater resources and legal expertise, is another) but systemic change should also be prompted by the severity of remedies and the strong message sent by the community that discrimination will not be treated lightly.

The AEU therefore agrees with the Equality Rights Alliance's recommendation 25, that ensure compensation and punitive damages could be awarded to successful complainants, thus acting as a strong deterrent.

Unions have long understood that individuals' interests are better served when they do not stand alone in a struggle for justice. For this reason, and again in an attempt to correct the imbalance inherent in the current system, the AEU is supportive of the recommendation from the 2008 SDA inquiry to grant standing to representative bodies (like unions and public interest organisations) to represent complainants.

The AEU's submission to the Sex Discrimination Act review addressed our concern for the system's lack of systemic remedies and the need to increase the powers of the Australian Human Rights Commissioners to initiate investigations. The ERA's recommendations 27 and 30 should therefore be implemented, as should their recommendations 31-35 (dealing with the powers of the Sex Discrimination Commissioner) as they are reflective of similar recommendations made by the 2008 parliamentary inquiry into the SDA.

Finally, for any systemic and long term change in community attitudes to occur there must be additional support and resources for a public education and awareness campaign. As such we support recommendations that the AHRC should receive increased funding to enable the collection, publication and use of de-identified complaint data for research purposes as an education mechanism for both potential complainants and respondents. We also support working women's centres, community legal centres, specialist low cost legal services and legal aid to receive increased funding so they have the resources to provide advice about matters under the consolidated Act.

Recommendations

Recommendation 1

That the definition of discrimination used in the consolidated act be:

Discrimination includes:

- (a) treating a person unfavourably on the basis of a protected attribute;
- (b) imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person;
or
- (c) failing to make reasonable adjustments if the effect is that the aggrieved person experiences unfavourable treatment under (a) or is disadvantaged under (b)

The conduct described in 2(a) and (b) is not mutually exclusive.

Recommendation 2

That carer and family responsibilities be included as a protected attribute and that the definition of ‘carer’ and ‘family responsibilities’ be broadened to include domestic relationships and cultural understandings of family, including kinship groups.

Recommendation 3

That Commonwealth law should prohibit discrimination on the ground of domestic and family violence.

Recommendation 4

That “gender expression” be the term used as the new protection against sexual orientation and gender identity discrimination.

Recommendation 5

That a complainant should not have to prove which attribute is the cause of the disadvantage, provided they can establish that they were subject to discrimination on the basis of one, or more of the attributes, set forth in the relevant section.

Recommendation 6

That the consolidated act reverses the burden of proof from the complainant to the respondents.

Recommendation 7

That the consolidated act should include a positive duty (on public sector bodies) to eliminate discrimination and promote equality.

Recommendation 8

That a reasonable adjustments requirement be extended to employees with carer and family responsibilities.

Recommendation 9

That an exception for religious organisations which would enable them to discriminate on the basis of sexual expression should not be included in the consolidated Act and the exceptions for religious organisation in ss 37 and 38 of the SDA should be removed for purposes of employment. There should be no permanent exceptions.

Recommendation 10

The consolidated Act should ensure that the provision of compensation properly values the loss suffered in sex discrimination cases – including future loss of pay and career advancement. Damages should not be limited to compensation. The nature of the loss may establish the basis for punitive damages which will contribute to the systemic change required to avoid future discrimination. The jurisdiction should be no-costs, with the exception of vexatious complaints

Recommendation 11

That standing be granted to representative bodies (like unions and public interest organisations) to represent complainants in discrimination cases.

Recommendation 12

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.

Recommendation 13

The AHRC and/or the Sex Discrimination Commissioner should have the power to initiate inquiries into systemic discrimination in the consolidated Act and exercising this power should not rely on the lodgement of an individual complaint.

Recommendation 14

The Sex Discrimination Commissioner should be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality. Government should be required to respond within one month to such reports, which should focus on key performance indicators.

Recommendation 15

A discrete unit should be established within the AHRC to undertake the research required for the monitoring and reporting role and the AHRC should receive increased funding to enable it to effectively perform its additional monitoring and enforcement roles under the consolidated Act.

Recommendation 16

The Sex Discrimination Commissioner should be able to appear as an amicus curiae in appeals from decisions made by the Federal Court and the Federal Magistrates Court about the consolidated Act.

Recommendation 17

The Sex Discrimination Commissioner should be able to exercise her amicus curiae function and be able to intervene in matters beyond the Federal Court and the Federal Magistrates Court which involve sex discrimination, pay equity or relate to gender equity.

Recommendation 18

The consolidated Act should apply to the Crown in right of the States and Territories without exception.

Recommendation 19

That the AHRC should receive increased funding to enable the collection, publication and use of de-identified complaint data for research purposes as an education mechanism for both potential complainants and respondents.

Recommendation 20

That working women's centres, community legal centres, specialist low cost legal services and legal aid to receive increased funding so they have the resources to provide advice about matters under the consolidated Act.

Australian Education Union



Submission

to the

Senate Legal and Constitutional Affairs Committee

**Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act
1984 in eliminating discrimination and promoting gender equality**

July 2008

Angelo Gavrielatos
Federal President

Australian Education Union
Ground Floor
120 Clarendon Street
Southbank VIC 3006

Susan Hopgood
Federal Secretary

Telephone: 61 3 9693 1800
Facsimile: 61 3 9693 1805
E-mail: aeu@aeufederal.org.au

TABLE OF CONTENTS

1. Introduction	1
2. Ability to address structural disadvantage and effect greater cultural change	2
3. Specific references to the operation of the Act	6
4. The SDA and implications for the education sector.....	7
5. Conclusion.....	10
References	11

1. Introduction

- 1.1 The Australian Education Union has a membership of over 170,000 educators who work in public schools, colleges, early childhood and vocational settings in all states and territories of Australia. Members include teachers and allied educational staff, principals and administrators mainly in government school and TAFE systems.
- 1.2 The AEU represents its members industrially and professionally in diverse forums. This includes the maintenance of comprehensive industrial protection and representation through industrial awards and agreements in all industrial tribunals in Australia. This involves industrial research, negotiation and advocacy over a wide range of matters including salaries and teaching and learning conditions.
- 1.3 The Australian Education Union makes the following submission to the Senate Inquiry into the Sex Discrimination Act (SDA), fully supportive of the Act and its fundamental importance to Australian women and in upholding our international obligations of basic human rights.
- 1.4 There are a number of observations the AEU wishes to make about the operation and effectiveness of the Sex Discrimination Act but our submission will not address every issue in the Terms of Reference.
- 1.5 Broadly, the AEU considers the SDA 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. It is our view that under this review, any changes to the act should only be improvements to provide for greater gender equality and not to remove any current rights. We believe it is important to retain the ability for individuals to lodge complaints and for current remedies to remain. However, the AEU is aware that much sex discrimination is of a systemic rather than individualist nature and the SDA hasn't had as much of an impact in rectifying fundamental inequities amongst men and women in this country.
- 1.6 As a union representing a feminised industry, we have much concern for the systemic and structural disadvantage many women face in Australia and the impact this has on their economic and social wellbeing. Our submission therefore comments more on suggestions to strengthen the SDA's ability to address structural disadvantage and effect greater cultural change, as well as some specific references to the operation of the Act, rulings by HREOC and their impact particularly on the education sector.

2. Ability to address structural disadvantage and effect greater cultural change

The scope of the Act, and the manner in which key terms and concepts are defined;

- 2.1 Acknowledging the limitation of legislation to effect lasting and widespread cultural change, there is an ongoing need for Government to address systemic disadvantage women face. Such issues include the continuing gap between women's and men's weekly and indeed lifetime earnings, the undervaluing of paid and unpaid work women undertake, the prevalence of violence towards women by men, the sexualisation/exploitation of women (and increasingly children) and women's restricted career prospects (due to caring responsibilities).
- 2.2 These issues are less about the individual experiences of women against their employer, spouse or other community member, they are the result of collective judgement upon and experience of groups of women - generations of women - which is formed by inherently patriarchal societal norms.
- 2.3 In the past, and in considering improvements to legislative avenues to outlaw discriminatory treatment of women, it has been suggested that a general statement of the prohibition of discrimination against women in the SDA would be of symbolic importance. The AEU would support such a statement that holds discrimination against women as not being condoned by the Australian society and that is built upon the provisions of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which defines discrimination against women in a purposive sense and establishes the substantive and positive right of women to equality and the enjoyment of human rights.

e.g. " 'discrimination against women' shall mean 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."

Recommendation 1

That the Sex Discrimination Act be amended to include a general statement of the prohibition of discrimination against women, following the definition used by CEDAW.

- 2.4 In line with the sentiments above, it is also opportune for the Government in reviewing the SDA (and the timing of its intentions to ratify the CEDAW Optional Protocol) to ensure that the SDA is well aligned with international instruments.

The extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organisation or under other international instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

- 2.5 Australia has been a party to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1983. Under CEDAW, Australia is obliged to ensure equality between men and women to eliminate discrimination in all areas, including the law; attitudes, prejudices and stereotypes; family matters; politics and public life; economic life; work conditions; access to welfare, health care and education. In its reports on the implementation of CEDAW, Australia has described how it implements its obligations through a range of Commonwealth and State and Territory laws and programs. However, many women's organisations in the past have regarded the reports provided to the UN as masking a deeper analysis of ongoing gender inequities in Australia.
- 2.6 The Australian Government is now considering whether to become a party to the Optional Protocol to CEDAW. If the Government is serious about ratifying the CEDAW Optional Protocol which would allow Australian women an international avenue to seek a resolution to claims of discrimination, then the Government must take greater responsibility through domestic legislation to reduce systemic disadvantage and reduce the grounds on which women may experience discrimination.
- 2.7 As well as alignment, there should be a greater capacity for monitoring and reporting, against key indicators, Australia's progress towards gender equality. For too long gender has been an invisible policy concern for the Federal Government. Data collections by the Office for Women, the Australian Bureau of Statistics and more recently the Office of the Employment Advocate and the Department of Employment and Workplace Relations have reduced or included minimal references to gender specific breakdowns. (Preston et al, 2006).
- 2.8 Curtin University of Technology (Preston et al, 2006) research reports the need to reinstate previous or extend current data collections to account for the specific indicators of women's disadvantage and expose them. Preston says in particular:
- the ABS *Average Weekly Earnings (Catalogue 6302.0)* needs to provide details about earnings within different wage setting jurisdictions, employment contract and occupational categories.
 - The ABS *Employee Earnings and Hours (6306.0)* could be more useful if run more regularly and to be constructed on a time series basis which would make comparing the occupational and industry levels easier and could assist gender pay equity inquiry.

- The Office for the Employment Advocate report, Agreement Making in Australia under the Workplace Relations Act, was not disaggregated by gender in any meaningful way at all.
- 2.9 Over the last ten years, we have seen that if targeted policy supported by rich gender specific data is not facilitated by Government and instead a flawed notion of mainstreaming is relied upon, complex issues do not get resolved. Rather they quickly become invisible with stakeholders rendered voiceless and disempowered.
- 2.10 Without regular monitoring and reporting against key indicators, Australian governments are not held accountable to their obligations to achieve substantive gender equality in key areas of public and private life e.g. workforce participation and promotion, pay equity, leadership, sexual harassment and other forms of gender-based violence. Annual independent reporting would be a key public education and awareness-raising process, as well as ensuring the richest possible information is drawn upon when reporting to and complying with international obligations and conventions.

Recommendation 2

That the Sex Discrimination Act should be amended to provide the Sex Discrimination Commissioner and HREOC with a statutory responsibility to independently monitor and report to parliament on gender equality.

The powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality;

- 2.11 Further to the points made above, it is clear that the independence of the Sex Discrimination Commissioner and of the Human Rights and Equal Opportunity Commission as a whole is critical to ensure reporting on discrimination continues when the policy will is weak.
- 2.12 Again, for any cultural change to occur towards greater gender equality in areas of historic and structural/systemic disadvantage, education, leadership and advocacy amongst the broader community is essential. We therefore believe it is time to extend the powers of the Sex Discrimination Commissioner to investigate gender issues without formal complaint and that the educative role of HREOC and resources to conduct test cases should be a priority outcome of this inquiry.

Recommendation 3

That the Sex Discrimination Commissioner should have the power and resources to investigate systemic/structural discrimination on her own initiative (without a need for a formal complaint) and report to Parliament with recommendations for policy change to improve gender equality.

Recommendation 4

That the Sex Discrimination Act should be amended to strengthen HREOC's education role and ability to conduct test cases.

- 2.13 The SDA currently only provides for adoption of discretionary guidelines 'for the avoidance of discrimination'. HREOC has no power to mandate the application of positive duties, nor to enforce compliance. However the operation of the Disability Discrimination Act includes standards which require a 'positive compliance' approach. This creates the environment that anti-discrimination measures are a rule rather than being viewed as a special measure. Standards in the DDA have been said to reduce litigation/complaints and may well be a positive inclusion into the SDA. These standards could include recruitment and promotion in employment, staff training in discrimination awareness, procedures for complaints or strategies for workplace culture change.

Recommendation 5

That the Sex Discrimination Act should be amended to include standards, along the lines of the Disability Discrimination Act, to encourage positive compliance and greater enforceability of measures to reduce inequality particularly in the workplace.

Providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;

- 2.14 In 1998 (Clifford) and 2005 HREOC reported on issues with the anti-discrimination complaints process. Some of the issues included long delays (conciliation taking from 6-9 months), unsatisfactory conciliation and arbitrary outcomes due to the level of inquiry by the Commissioner varying on a case by case basis.
- 2.15 Since 2000 complaints that could not be resolved via conciliation only have the option of a court-based determination process, either through the Federal Court or the Federal Magistrates Court, where costs can be awarded.
- 2.16 HREOC reported (2005) that there was a rise in legal representation in all action under federal anti-discrimination legislation (Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act) from 11% in 1998 to 23% by the end of 2004 which again incur costs. Complainants under the SDA had utilised legal representation from 22% of cases in 1998, to 33% by the end of 2004, which is consistently higher than those for other discrimination matters.
- 2.17 The involvement of court-based determination and the rise in legal representation being used caused concern that potential complainants would be discouraged by financial implications and decline to report discrimination.

- 2.18 Further, in 2005 when the Federal industrial relations law (*WorkChoices*) changed and removed unfair dismissal there was concern that unlawful dismissals and indeed unlawful discrimination would go unchecked because this left anti-discrimination law as the only avenue, though costly, for justice. Previously, dismissal and discriminatory treatment at work could also be challenged via the Industrial Relations Commission, with the representation of unions and though unlawful discrimination may have occurred, often the remedy was via unfair dismissal laws. The choice for employees became the possibility of having costs awarded against them should they be unsuccessful in proving unlawful discrimination, and with the added reality of the cost of legal representation, the move to court-based determination did prove a barrier to justice.

Recommendation 6

That the Government should consider whether court-based determination is the most suitable form for discrimination complaints and either make changes to this avenue or increase the ability for individuals to receive Legal Aid when accessing anti-discrimination law.

3. Specific references to the operation of the Act

Significant judicial rulings on the interpretation of the Act and their consequences;

- 3.1 In 2002 the Catholic Education Office applied for an exemption under the SDA to allow them to offer male only primary teaching scholarships. This became a very public and complex debate regarding the purpose of the SDA, the effect of short-term exemptions or the need for legislative amendment.
- 3.2 The debate exposed a basic lack of understanding the nature of discrimination (direct and indirect), the purpose and proper operation of exemptions to the SDA and what ought be the resilience of such anti-discrimination legislation against change. It also exemplified the public acceptance of stereotypes when regarding feminised professions and their status, being the type of systemic discrimination which HREOC or the SDC should have the power to challenge in a more meaningful way through the SDA.
- 3.3 The AEU argued there was no need to amend the Sex Discrimination Act to allow for “positive discrimination” in the case of male teachers and that short term exemptions weakened the purpose of the legislation, creating confusing and oft misapplied justifications for the very discrimination the legislation is set up to outlaw.
- 3.4 The issue of male teacher numbers and of the teacher shortage in general can be remedied much more significantly and on a longer term by industrial and other promotional means, rather than a small number of scholarships and watering down important legislation.

- 3.5 The Human Rights and Equal Opportunity Commission, when assessing the Catholic Education Office's bid for an exemption to the Sex Discrimination Act to offer scholarships to male would-be teachers, said, 'neither the means of offering scholarships, nor the ends of producing better boys' literacy performance' could be proven to justify granting the exemption.
- 3.6 The AEU supports the extensive arguments put by the then Sex Discrimination Commissioner (12/04/04). Importantly, the discrimination inherent in the SDA amendment proposal, was greater than the original concern that the scholarships would be only open to men. Because, as Ms Goward explains, "the simple fact is that young men are not attracted to teaching because they can earn better money elsewhere. As 'women's work' it has never been remunerated properly....Front loading the pay of male teacher students through a scholarship, effectively relieving them of the HECS burden their female counterparts will carry into their professional careers, entrenches this inequity and has not been demonstrated to address the disparity in numbers of male and female teachers long term."
- 3.7 As a legislative process, the proposed amendment to the Sex Discrimination Act, even though the opportunity is created for initiatives for either gender to redress imbalance where it exists, is still a flawed concept and the ruling given by the Human Rights and Equal Opportunity Commission in February 2003 exposed these flaws.
- 3.8 It is clear that without strong education around the notion of discrimination and how the systemic undervaluing of so-called feminised work can perpetuate stereotypes in the public mind inequalities will remain unchallenged. The example of the debates surrounding the Catholic Education Office's application for an exemption to the SDA, (and resultant move to legislative amendment to the SDA) highlights the ongoing need for HREOC to have a strong educative role and resources.

4. The SDA and implications for the education sector

- 4.1 As seen in the example of the Catholic Education Office, misunderstandings around the purpose of the SDA and the nature of discrimination, (which lead parties to seek exemptions), highlight how the existence of exemptions can limit the effectiveness of the SDA.
- 4.2 Currently, it is lawful to discriminate under the SDA in certain cases regarding voluntary bodies, educational institutions established for religious purposes, sporting clubs etc. Private and religious schools are able to discriminate on the basis of sex, marital status or pregnancy, either regarding its teaching workforce or indeed student intake, and the AEU believes they have not been reticent to make use of these indulgences.

- 4.3 The exemption has been used by the Catholic Education Office to dismiss teachers who live in de-facto relationships; to dismiss teachers who are gay or lesbian; and by private schools to decline the enrolment of disabled students, or to target the employment of teachers of particular genders.
- 4.4 Discrimination in this fashion goes against the spirit of legislation in this country and if exemptions are viewed necessary following the inquiry into the SDA then there must be consideration given to the scope of bodies allowed exemption and the grounds applicable. Particularly considering the employment rights of educators, the SDA should significantly narrow the criteria for exemptions to employment practices.

Recommendation 7

That the SDA be amended to exclude educational institutions established for religious purposes from exemptions allowable under the act, for employment purposes.

Preventing discrimination, including by educative means;

- 4.5 The AEU understands that schools must provide human rights education and develop students' celebration of diversity if as a society we are serious about preventing discrimination.
- 4.6 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.
- 4.7 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.

Recommendation 8

That the Federal Government increase the educative role of HREOC with appropriate resourcing and to better manage the interaction between HREOC and education departments, school leadership and the union.

Sexual harassment;

- 4.8 Part of the importance of community awareness around human rights and anti-discrimination is about changing cultures that still support gender stereotypes and in turn act as barriers to gender equality. Women's experiences of the legal system, in connection with sexual harassment or sexual assault, often expose outdated and offensive attitudes.

- 4.9 Sexual harassment is deemed illegal by the SDA, yet community attitudes vary in terms of the gravity of the offense and the understanding not just of what constitutes sexual harassment but the impact it has on a victim.
- 4.10 Women's access to justice in response to breaches of the SDA is mitigated by the attitudes and awareness of those working within the legal system and even those reporting cases.
- 4.11 The Project for Legal Action Against Sexual Assault (ALRC, 1994) tells the unacceptable treatment of one woman who had been raped by two work colleagues and of her experience in the court room at the committal proceedings.

“In the court room, I gave evidence for four hours. They asked me why I did not fight back, why I had so many drinks, why I had asked them to help me find a taxi and not someone else. Apart from the (sexual assault) counsellor . . . I was the only woman in the room. ...The DPP said my evidence didn't stand up, that my story didn't hold, that I was a bad witness. What finally got me, was I never got to tell my story. It was as if what happened to me did not matter, they were so preoccupied with the words I chose to express it. I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way.”

- 4.12 Whilst this example relates to sexual assault it tells of the victimization experienced at the hands of ignorance.

Any procedural or technical issues;

- 4.13 The AEU wants to make it clear that we wholly support (section 7D) the provision in the Act for ‘special measures’ to address inequality. This provision ‘recognises that certain special measures may have to be taken to overcome discrimination and achieve equality and it is one aspect of the law we have often needed to use. As a union which understands the need for affirmative action in the form of women’s officers, rules to ensure women’s equal representation on decision making bodies and exclusive committees we are heartened that a recent challenge to this part of the SDA was rejected and that special measures do indeed continue to be valid.
- 4.14 Specifically, section 7D was considered for the first time by the Federal Court in *Jacomb v Australian Municipal Administrative Clerical & Services Union* (‘*Jacomb*’). In this case, the rules of a union provided that certain elected positions on the branch executive and at the state conference were available only to women. The male applicant alleged that the rules discriminated against men and were unlawful under the SDA.

- 4.15 The essence of the applicant's objection to the rules was that the union policy of ensuring 50 per cent representation of women in the governance of the union (which was the basis of the quotas within the rules) exceeded the proportional representation of women in certain of the union branches. Consequently, women were guaranteed representation in particular branches of the union in excess of their membership to the disadvantage of men. The union successfully defended the proceedings on the basis that the rules complained of were special measures within the meaning of s 7D of the SDA.
- 4.16 Crennan was satisfied that the union believed substantive equality between its male and female members had not been achieved and that addressing this problem required women being represented in the governance and high echelons of the union so as to achieve genuine power sharing. Crennan commented that it 'was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under s 7D (subs 7D(3)).
- 4.17 Being a union which represents a majority of women who still encounter sex discrimination within the workplace and policies, it is important that we continue to raise issues and make representations exclusive to women. The ongoing operation of the special measures provision allows the union to do so with confidence that we are not discriminating.

5. Conclusion

- 5.1 The review of the Sex Discrimination Act offers the Government and Australian women to be sure that sex discrimination is eradicated in the most thorough way possible. To bring Australian processes and policy objective into line with International standards and protocols should be a priority as should the strengthening of investigative and educative powers of the Sex Discrimination Commissioner and her complaints unit.
- 5.2 The AEU supports the fundamental objective of the Act and believes that any change must be by way of strengthening the ability for the law to disallow any weakening of the notion of anti-discrimination. Special measures to achieve gender equality must remain and any exemptions to the Act must only be allowed in the most rigorously tested of circumstances.
- 5.3 Above all, gender should not be a barrier to participation, wellbeing, economic or physical security and any reform to the SDA must be about empowering individuals and institutions to move towards gender equality not to undermine it.

References

Australian Law Reform Commission (1994) Part I *Equality before the Law: Justice for Women*. <http://www.austlii.edu.au/au/other/alrc/publications/reports/69part1/>

Chapter 2. Gender inequality

Chapter 3. Strengthening the Sex Discrimination Act 1984

Australian Law Reform Commission (1994) Part II, *Equality before the Law: Women's Equality*. <http://www.austlii.edu.au/au/other/alrc/publications/reports/69part2/>

Chapter 3. Understanding equality

Chapter 4. An Equality Act

Chapter 5. The impact of an: Equality Act on government

Chapter 6. The impact of an Equality Act on courts

AEU (2004) “*Submission To The Senate Legal And Constitutional Legislation Committee Inquiry Into The Provisions Of The Sex Discrimination Amendment (Teaching Profession) 2004.*”

HREOC (2004) “*Summary of Notice of Decision - Catholic Education Office - Application for Exemption from certain provisions of the Sex Discrimination Act 1984.*” http://www.humanrights.gov.au/legal/exemptions/sda_exemption/exemption/summary.html

Clifford, R., (1998), “*A review of outcomes of complaints under the Sex Discrimination Act 1984*”.

http://www.hreoc.gov.au/complaints_information/publications/sda_outcomes.html

HREOC, (2005) “*Five Years On: An Update On The Complaint Handling Work Of The Human Rights And Equal Opportunity Commission*”

http://www.hreoc.gov.au/complaints_information/publications/five_years_on.html

Clarke, A. (2002), “*Anti-discrimination laws need fine-tuning*” NSWTF Education Online. http://www.nswtf.org.au/edu_online/40/anti.html

Preston, A., Jefferson, T., & Seymour, R., (2006) “*Women’s pay and conditions in an era of changing workplace regulations: Towards a “Women’s Employment Status Key Indicators” (WESKI) database*”, Women in Social and economic Research (WiSER) Curtin University of Technology.