



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

### **1. Introduction**

- 1.1. The National Foundation for Australian Women (NFAW) welcomes the opportunity for wide ranging community input offered by the Inquiry of the Senate Legal and Constitutional Affairs Committee into the Effectiveness of the Commonwealth Sex Discrimination Act (SDA) in eliminating discrimination and promoting gender equality.
- 1.2. NFAW has well established credibility in documenting and commenting on the impact of government policies on the well-being of women and girls and is firmly committed to the principle of evidence- based policy.
- 1.3. NFAW, a non-politically aligned feminist organisation, was founded in 1989. Its objectives are:
  - 1.3.1. To advance and promote the interests of Australian women
  - 1.3.2. To record and make accessible the histories of Australian women
  - 1.3.3. To ensure women's achievements are handed on to future generations
- 1.4. NFAW has been particularly interested over the past several years in the position of women (including young women) in the workforce. We commissioned and published research on the impacts on certain groups of women of changes to the income support system (Welfare to Work).
- 1.5. In association with other non-government organisations, including the Young Women's Christian Association (Australia) and the Women's Electoral Lobby (WEL) NFAW commissioned and published research on the impacts of the former Government's WorkChoices policy on low-income women, and conducted consultations and published the report of the views of women and their organisations on WorkChoices (*What Women Want*).
- 1.6. NFAW has played an important role in ensuring that the matter of paid maternity leave was referred to the Productivity Commission for report. At earlier dates we have examined health policy; commissioned and published a paper on the ethical issues in the termination of pregnancies; and given evidence to the Senate Committee inquiring into the Transparent Advertising and Notification of Pregnancy Counselling Services Bill of 2005. Further details are available on [www.nfaw.org](http://www.nfaw.org).

### **2. Introductory comments on the current legislative machinery to eliminate discrimination and promote gender equality**

- 2.1. Australia has a long and proud history of action in both domestic and international spheres to promote the elimination of discrimination, and to protect human rights. The post World War 2 conference in San

Francisco to establish the United Nations saw the contribution of the Australian delegate Jessie Street result in the addition of language to the United Nations' functions on the elimination of all forms of discrimination against women, and the subsequent creation of the Commission on the Status of Women (CSW), and the Convention on the Elimination of Discrimination Against Women (CEDAW).

- 2.2. We draw to the Committee's attention that the Commonwealth Attorney-General is currently consulting in Australia on whether Australia should accede to the Optional Protocol to CEDAW. NFAW is one of many bodies which have supported the accession, including the removal of the current Australian reservation to the Article requiring paid maternity leave.
- 2.3. In its submission to the Attorney-General on this matter, which the NFAW has endorsed, the organisation Australian Women Lawyers (AWL) has observed 'As well as putting CEDAW on a par with other human rights treaties which have complaints mechanisms in place, accession to the Optional Protocol to CEDAW will enhance existing mechanisms by specifically incorporating practices and procedures which have been developed under other complaints procedures'.
- 2.4. NFAW strongly supports action in line with the above.
- 2.5. NFAW strongly supports the principle that an independent statutory agency such as the Human Rights and Equal Opportunity Commission (HREOC) should have the principle role of handling monitoring and reporting as well as compliance roles. This in no way implies that there should not also be appropriate data collecting and monitoring entities within the bureaucracy. However, the independence of a statutory body with the prestige of an entity such as the HREOC is extremely valuable.
- 2.6. The NFAW would strongly oppose any proposition that existing rights provided under the current form of the Sex Discrimination Act should in any way be wound back or minimized.

### **3. The need for a national action plan and annual reporting**

- 3.1. It is well over a decade since the Australian Government had a Cabinet that endorsed a National Action Plan for Women. Over the elapsed time there have been a number of changes made to legislation and to administrative machinery which have effectively downgraded the 1980's commitments to a range of progressive measures to bring about a greater degree of gender equity.
- 3.2. Moreover, there has been a policy of so-called 'mainstreaming' of measures and policies to deal with issues impacting particularly on women, whether these be related to specific population groups, such as indigenous women and their children, women with disabilities, or young women, or related policies about specific areas such as affordable housing, or the abatement of the incidence of domestic violence. This has also permitted a dilution of Government recognition of the specific issues affecting women.
- 3.3. We note also that the policy and practice of making individual Commissioners of the Human Rights and Equal Opportunities

Commission (HREOC) have responsibility for more than one area of legislation may be inappropriate. In particular, we consider that the Sex Discrimination Commissioner (SDC) and the Sex Discrimination Unit of HREOC may well be overloaded in being additionally responsible for discrimination on the basis of age. Notwithstanding that many women are also included in the aged grouping, so too are many indigenous and many disabled Australians. We understand that sex discrimination cases form the greater part of the Commissioner's workload. The present arrangement has the capacity to inappropriately diminish the scope for adequate attention to the issues facing older Australians, as well as to the issues facing women in particular.

- 3.4. We commend the Government for its commitments to work on the major national issue of homelessness. We commend the Government for its renewed efforts to reduce the incidence of domestic violence, and of neglect and abuse of children. We commend the initiatives related to enhancing the education and care experiences of very young children. We commend the announcements of both a national rural health strategy and national men's and women's specific health strategies.
- 3.5. We commend initiatives to ensure that the Office for Women once more has access to Cabinet Submissions and the opportunity to comment on new policy proposals.
- 3.6. What is absent is the setting of these welcome initiatives in the framework of a national action plan, together with the establishment of formal capacity to monitor progress, and to report publicly.
- 3.7. We draw to attention, for example, the New Zealand Government's Action Plan for women, wherein clear goals and targets are set, with responsibilities and resources allocated. That provides the opportunity to measure achievements on a regular basis, against agreed performance indicators.
- 3.8. An Australian Action Plan for Women needs to be developed through the central processes of the Cabinet and of Ministerial responsibilities for individual portfolios, and to be backed by appropriate resource provision in the budgetary cycle.
- 3.9. Such an approach of goals and measurable targets must be based on the ready availability of timely and sound quality social statistics. For example, a campaign to reduce domestic violence requires key performance indicators to measure success and a campaign to reduce homeless requires key performance indicators of achievements, not solely reporting on use of inputs. Similarly, initiatives relating to rural women and drought also demand appropriate data for measurement of effectiveness.
- 3.10. The NFAW in association with the Office for Women (OfW), HREOC, Security for Women (S4W), and the Australian Bureau of Statistics (ABS), has begun work on the development of gendered statistical indicators. However, progress is directly linked to the currently limited resource bases of the Bureau and other collecting agencies.
- 3.11. We draw to attention the recent Report by the Sex Discrimination Commissioner on her Listening Tour, and the resulting action plan for

women to which she has committed herself for her term of office. We commend this action plan to the Government as a basis for a Government National Action Plan.

- 3.12. In our view, it is highly desirable that the Sex Discrimination Commissioner be given the formal function of monitoring and reporting to Parliament on progress towards reducing discrimination and the promotion of gender equality, on the basis of available statistical reporting as well as of consultation and commissioned research.

#### 4. Employment related issues

- 4.1. We draw to the Senate Committee's attention that in the recent publication, *Employment Outlook 2008*, the Organisation for Economic Cooperation and Development (OECD), in the specific discussion of the Australian situation, whilst remarking that Australia fares better than the OECD average when it comes to labour market disparity between men and women, goes on to say that there is still room for improvement.
- 4.2. The OECD commended the Australian framework provided by HREOC, describing it as 'simple and transparent'.
- 4.3. But the critique is also made by the OECD that 'First, the Australian system relies almost exclusively on victims' willingness to assert their rights, rather than empowering HREOC to investigate and take action against companies in the absence of individual complaints. Second, case law has shown that in practice there is still a great deal of uncertainty about the stringency of the elements of proof required to establish a discrimination case before the court. And evidentiary requirements requested by courts might be, in certain cases, greater than in standard civil disputes. *Reducing uncertainty in this field will increase victims' incentives to lodge complaints, thereby raising the effectiveness of the whole system*' (NFAW italics).
- 4.4. According to the OECD Report 'women in the OECD on average are paid 17% less than their male counterparts, and 30% of the gender pay gap is attributable to discriminatory practices', and according to new research in the report. '*Australia had the third lowest gender wage gap of about 13%*', it said. (NFAW italics)
- 4.5. The OECD report also found that at least 8% of the 20% average gap between male and female employment rates across the OECD could be attributed to discrimination.
- 4.6. In addition the OECD found that Australia had the tenth biggest gender employment gap at around 18%.
- 4.7. While stating the importance of education, training, competition policies, labour market reforms and adequate parental leave and childcare services in providing equal employment opportunities, the report says greater public awareness and stronger enforcement of anti-discrimination laws are also required.
- 4.8. 'Legal rules are likely to have more impact if the enforcement is not exclusively dependent on individuals,' the OECD report argues.

- 4.9. These OECD data and comments do not reflect the changed experiences for Australian women. Under the WorkChoices policy of the previous Government, the situation for Australian women deteriorated further. We note that in the 2008 Social Issues publication of the Australian Bureau of Statistics an essay on the gender wage gap shows that earlier trends to diminish the gap have actually plateaued.
- 4.10. We understand that a significant proportion of sexual harassment cases coming to the Sex Discrimination Commissioner come in relation to employees in small businesses. For example, women working as casual employees who are employed in small businesses and experience harassment are ill-placed to have to bear the costs of making complaints a currently required by the Act.
- 4.11. The Senators will be conscious, no doubt, that some of these issues will also be examined by the House of Representatives Employment and Workplace Relations Committee in its current inquiry into the causes of any potential disadvantages in relation to women's participation in the workforce including, but not limited to:
- 4.11.1. The adequacy of current data to reliably monitor employment changes that may impact on pay equity issues;
  - 4.11.2. The need for education and information among employers, employees and trade unions in relation to pay equity issues;
  - 4.11.3. Current structural arrangements in the negotiation of wages that may impact disproportionately on women;
  - 4.11.4. The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation;
  - 4.11.5. The adequacy of current arrangements to ensure fair access to training and promotion for women who have taken maternity leave and/or returned to work part time and/or sought flexible work hours; and
  - 4.11.6. The need for further legislative reform to address pay equity in Australia.
- 4.12. We hope, and assume, that the Report of the Senate Committee will be available to Members of the House of Representatives Committee, and vice versa, and that there will be opportunity for joint discussion on options for structural change. The NFAW will be making a submission to the House of Representatives inquiry.
- 4.13. Senators may recall that in the period leading to the introduction of the Sex Discrimination Act 1984, there was considerable discussion around the merits of the proposal by Senator Susan Ryan, the responsible Minister, to include affirmative action provision in that legislation. In the event, the provisions were removed from the Sex Discrimination Bill as being overly controversial and having the potential to cause the Bill to fail in the Senate. There followed a two year process including both a Green Paper and a pilot program, leading to the introduction of the 1986 Affirmative Action Act ( now the Equal Opportunity for Women in the Workplace Act 1999). The former Affirmative Action Agency is now the Equal Opportunity for Women in the Workplace Agency (EOWA) and has been located since the 2007 election in the portfolio of the Commonwealth Minister for Women.

- 4.14. The legislation limits the scope of EOWA to entities employing more than 100 people. In consequence, it is unable to be of great assistance in relation to the many small to medium enterprises where the great majority of Australian women are employed. This produces considerable inequities.
- 4.15. Moreover, although the community education and research functions of EOWA are indeed valuable, many now regard the agency as having had less impact than might have initially been hoped would be the case.
- 4.16. Nonetheless, in its report '2006 Pay Equity Statistics', EOWA reported that the components of the gender pay gap (based on ABS data) were the outcomes of: 9% less access to overtime, 44.8 % differences in work-force participation, and a stunning 46.2% were due to 'unexplained pay inequality'.
- 4.17. It may be appropriate in the course of this inquiry for Senators to revisit the merits of including the affirmative action functions in the Sex Discrimination legislation, or recommending other measures to bring about closer collaboration with the role and functions of the Sex Discrimination Commissioner.
- 4.18. It should be possible to formulate provisions which both remove from complainants the burden of responsibility for costs; while allowing the Commissioner to initiate investigation of discrimination issues and to promote equality of opportunity in the workplace. This can and should be done through means which bring small and medium business into scope, without imposing onerous reporting burdens on either larger or small businesses.
- 4.19. It is clear from the above limited discussion that there remains a significant element of inappropriate discrimination and gender inequality in the work force and it is appropriate to consider means of strengthening the institutional and legislative arrangements to deal with this. In no way should current overall resources be lessened. If anything, significant additional resources are required for the tasks both of compliance and education.

## **5. Possible approaches to workforce related gender inequality**

- 5.1. Give HREOC, working in conjunction with ABS, the formal legal function of gender equality monitoring. This would involve both a formal legal mandate, as well as provision of the necessary additional resources to establish a monitoring unit which could analyse and collect data, and publish results- preferably in a report to the Parliament similar to the functions of the Aboriginal and Torres Strait Islander/Race Discrimination Commission. This would be broader than the current reporting role of EOWA.
- 5.2. We consider it worthwhile investigating the potential benefits of merging the two agencies (EWOA and the Sex Discrimination function of HREOC) and relevant legislation.
- 5.3. Provide HREOC/ the Sex Discrimination Commissioner (SDC) with power to commence applications for enforcement of legal responsibilities

without needing an individual complainant e.g. for persistent breach of standards, or of the SDA in a workplace, industry etc.

- 5.4. Currently, an individual must be prepared to carry the burden of enforcing a remedy, including the risks of losing and having to pay large court costs. Many individuals also settle for good reasons. To have an industry-wide outcome, powers are required to take action independently of relying on an individual. This change would be consistent with the report of the OECD.
- 5.5. Provide individual complainants with greater access to legal advice and representation, through change to legal aid guidelines.
- 5.6. Legal Aid guidelines are currently very restrictive. It is extremely difficult to get legal aid to commence an action under the SDA. Individuals are often in a complex area of law dealing with well-resourced and experienced respondents.

## 6. Remedies

- 6.1. SDC/HREOC needs to have power and importantly, the resources to enquire into, regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote gender equality. This would provide across all areas of discrimination the capacity adverted to in 5.4 above, a capacity for the SDC to initiate action without requiring an individual to complain, where it is clear that a law or policy is not consistent with the provisions of the SDA.
  - 6.1.1. The SDA currently only provides for adoption of discretionary guidelines 'for the avoidance of discrimination'. HREOC has no power to mandate application of positive duties, or to enforce compliance. There is limited capacity to address systemic discrimination beyond an inquiry and reporting function, which is limited due to lack of resources. Even when recommendations are made there is no enforcement power.
- 6.2. SDC/HREOC needs to have a statutory responsibility to independently monitor and report to parliament on gender equality in all fields.
  - 6.2.1. 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 also be a key public education and awareness-raising process.
- 6.3. The SDA needs to be modernized to reflect contemporary standards. Exemptions in key areas of public life may need to be removed or significantly narrowed
  - 6.3.1. Currently, it is lawful to discriminate under the SDA in certain cases re voluntary bodies; educational institutions established for institutions established for religious purposes, sport etc. This should be opened up to further public discussion in the light of current public views and values- some of the existing exemptions

may not be any longer relevant or appropriate in a changing society where women are now engaged in the Defence forces and where there are now many women practicing the law.

- 6.4. The SDA needs to better protect against discrimination involving both sex/gender and other attributes such as race or disability
  - 6.4.1. Currently, there is no ability for a court to look at the whole act of discrimination in order to adequately address the seriousness of discrimination, which occurs for a range of reasons.

## **7. Scope for harmonisation with State legislation**

- 7.1. NFAW has no direct experience in this area, but we are guided by the reports from our colleagues working in the field in dispute resolution in individual cases.
- 7.2. We understand there to be significant existing differences between the legislation in individual states and Territories as to grounds and coverage. In this regard, we would have profound reservations about any approach to harmonization which led to a lowest common denominator approach.
- 7.3. We further understand there to be, related in part to the above, differences between jurisdictions as to the extent to which relevant State/Territory or Commonwealth anti-discrimination law is used by applicants. There is also a problem where notwithstanding the law itself, there is no face-to-face access to a locally based office of HREOC, and complaints must be handled by telephone or occasional visits.
- 7.4. There should be scope for agency arrangements between the State/Territory anti-discrimination offices and the Sex Discrimination Commission, so as to provide a face to face function in all capital cities, at a minimum. However, there could be difficulties if there exist substantial differences between the provisions of the State/Territory and the Commonwealth legislation.
- 7.5. In consequence, we urge the Senators to carefully consider the advice of our colleagues in relevant women's organisations in different States, especially the Working Women's Centres.

## **8. NFAW makes the following recommendations:**

- 8.1. That the Government develop a national Action Plan for Women, with goals, and targets, and allocation of Ministerial responsibilities, supported by the provision of resources sufficient to develop appropriate and timely national statistics by the Australian Bureau of Statistics and other collecting bodies. This plan could set out priority areas for action over a 3-5 year time span.
- 8.2. That the Sex Discrimination Commissioner be given the statutory responsibility to independently monitor and report to parliament on gender equality in all fields, and to be provided with sufficient additional resources to do so.

- 8.3. That the Report of the Senate Committee on the Sex Discrimination Act should be made available to Members of the House of Representatives Committee on Employment, and vice versa, and there should be joint discussion on options for structural change in relation to machinery to monitor and promote equality of opportunity in the workplace.
- 8.4. That the Sex Discrimination Act be modernized to reflect contemporary standards. Exemptions in key areas of public life may need to be removed or significantly narrowed.
- 8.5. That the Sex Discrimination Act includes the power for the Commissioner to commence applications for enforcement of legal responsibilities without needing an individual complainant.
- 8.6. That the Government appoint a separate Age Discrimination Commissioner, and provide resources for HREOC to establish a discrete Age Discrimination unit to support the Age Discrimination Commissioner.
- 8.7. That consideration is given to merging the enabling legislation and functions of the Sex Discrimination Commission and the Equal Opportunity in the Workplace Agency.

## 9. Conclusion

- 9.1. The foregoing by no means deals in detail with each term of reference, which the Committee is required to examine. We will work collaboratively with other non government organisations who are dealing in greater detail with more expertise on particular issues, and where appropriate will endorse their submissions in due course.
- 9.2. We summarise by saying that we believe there is a need to strengthen and modernize the Sex Discrimination Act; to provide sufficient additional resources to enable HREOC to carry out enhanced functions; that we see a need for Ministerial attention and commitment to the development of a National Action Plan for Women; and that we look to coordination of policy outcomes a between the work of the Senate Legal and Constitutional Affairs Committee, and the House of Representatives Employment and Education Committee.

## **Attachment A: NFAW organisational information**

Founding sponsors included Elizabeth Evatt, Rhonda Galbally, Dame Margaret Guilfoyle, Jill Hickson, Elizabeth Jolly, Eva Learner, Tobsha Learner, the Hon Dame Roma Mitchell, Elizabeth Reid, Edna Ryan, Kaye Schofield, Kerry Schott, Judy Small, Ann Symonds, Pat Turner, Margaret Whitlam and Judith Wright.

Donations to NFAW are tax deductible. The Foundation is one of the few broadly focused organisations promoting the advancement of women which has tax deductible status under the Income Tax Assessment Act. NFAW Ltd is not exempt from income tax although the NFAW Education and Research Trust is income tax exempt.

NFAW Ltd was incorporated in 1990. The Company manages the finances and administration of NFAW, and company members comprise the Board Directors of the day, plus some founding members and previous Directors who have been invited to remain members of the company.

### **Committees of the Board**

The Board may approve the establishment of committees of the Board to manage its projects.

In some cases projects are undertaken in partnership with other organisations, for example the University of Melbourne is a partner in the Australian Women's Archives Project (AWAP). Such partner organisations are represented on the relevant Committees.

Each committee includes a minimum of one Director of NFAW.

Membership of committees is determined by the Chair of the committee, in cooperation with the appointed Director(s).

### **Social Policy Committee (SPC)**

This committee assists the NFAW to make an evidence-based contribution to informing public debate, consistent with the NFAW objective of contributing to the advancement of women. The policy stance of NFAW is always non-partisan and non-party politically aligned. The Committee develops an annual work program with flexibility provided to change priorities in order to respond effectively to the changing public policy environment. The committee meets in Canberra on a monthly basis and has a number of corresponding members with particular expertise in public policy issues of interest to the SPC.

### **External Affiliations:**

The NFAW is affiliated to two of the national secretariats for women's organisations, which receive support from the Commonwealth Office for Women. These are the group Security for Women (<http://www.security4women.com/>) and the WomenSpeak Network (<http://www.ywca.org.au/projects/womenspeak/>).

Further information on NFAW may be found at the web-site [www.nfaw.org](http://www.nfaw.org)