

Abstract

For over twenty years Australia has been building and revising mechanisms to promote gender equality. This paper discusses the path taken towards developing these structures and its successes and challenges with implementation and enforcement. Offered are clear lessons learned and how the Australian experience can provide insight for the development of similar mechanisms in other countries.

Introduction

Australia has a number of laws and mechanisms that were, at least in their inception, designed to promote gender equality. Most have been in place for more than 20 years.

This paper will briefly address the background to our key gender equality mechanisms and laws; the main features of these mechanisms and laws and the concepts of “equality” and “discrimination” on which they draw; how these mechanisms and laws are implemented and enforced; the key strengths and weaknesses of the Australian sex discrimination framework; and finally, the main lessons learned from the Australian experience.

First, this paper will focus on gender equality in employment, as it has been the chief focus of the promotion of gender equality in Australia. Second, Australia has a federal system of government with equal opportunity laws and mechanisms both at the state level and at the national or federal level. Here we will focus on the federal level.

Background

The United Nations declaration of 1975 as International Women’s Year was an important catalyst for the ultimate enactment of the federal *Sex Discrimination Act* in 1984. While women had steadily increased their participation in employment since the 1960s, they were faced not only with lower rates of pay because they were women but also with a “marriage bar”, which meant they had to resign their jobs upon marriage. The 1970s saw the arrival of a new wave of the women’s movement and the creation of Women’s Electoral Lobby (WEL), which made sex discrimination, particularly in employment, a major campaign issue.¹ At the same time the new Labour Government introduced

a number of social justice initiatives including free tertiary education and the first national anti-discrimination law, the *Racial Discrimination Act 1975*. It also moved quickly to ratify *ILO Convention 111 on Discrimination in Employment and Occupation*. The new government importantly provided support for the promotion of gender equality *within* government with the appointment of an adviser to the Prime Minister on Women's Affairs. This position led to the establishment of a women's policy unit in 1974, the Office of the Status of Women (OSW), located in the Department of Prime Minister and Cabinet. Together with the emergence of a group of articulate senior women within government bureaucracy ("femocrats" as they were called) avenues were created for women both within and outside government to lobby for sex discrimination legislation.

Even after the change of government in 1976, WEL and other women's groups managed to gain support from their conservative sisters who joined the push for a sex discrimination law. Indeed, the ongoing campaign on both sides of politics for equal pay made such legislation a pressing issue. Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* in 1983 provided direct impetus for the preparation of a new sex discrimination Bill after the failure of an earlier private members Bill in 1981. There was much contentious community and political debate around the principles of eliminating discrimination against women. Those opposed to the legislation predicted dire consequences with the passage of the Bill. One such claim was that the Bill was "the brainchild of radical feminists... intent on destroying the nuclear family, creating a unisex society and, most dangerous of all, defying the laws of nature."²

Partly because of the controversy and the difficulty in getting the original Sex Discrimination Bill passed, when the new Labour government was elected in 1983 a reworked Bill was put to Parliament. The *Sex Discrimination Act 1984* was stripped of the contentious affirmative action provisions, which were later placed, in a watered down form, into another piece of legislation, the *Affirmative Action (Equal Opportunity for Women) Act 1986 (AAA)*.

Australian gender equality legislation

Sex Discrimination Act 1984 (SDA)

The main objectives of the *Sex Discrimination Act 1984 (SDA)* are to: promote recognition and acceptance of the principle of equality between men and women; and eliminate, *as far as possible*: discrimination on the basis of sex, marital status, pregnancy or potential pregnancy in employment, educational institutions, in the provision of goods and services, in the provision of accommodation, and in the administration of federal programs; sexual harassment in employment, in educational institutions, in the provision of goods and services, in the provision of accommodation and the administration of federal programs; and lastly, discrimination involving dismissal of employees on the ground of family responsibilities.

The emphasis on "as far as possible" makes the SDA somewhat narrower in its aims than CEDAW. CEDAW provides that "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.”³

Unlawful Discrimination

The approach adopted in the SDA, as in other Australian discrimination laws, is the identification of specified conduct as “unlawful discrimination”. Discrimination on the following grounds is illegal under the SDA: sex, marital status, pregnancy and potential pregnancy, dismissal on the grounds of family responsibilities, and sexual harassment.

Not all such discrimination is illegal under the SDA, just that which relates to certain areas in the public sphere. These include the areas of: employment, industrial awards and enterprise bargaining, insurance and superannuation, education, goods, services or facilities, accommodation and housing, buying or selling land, and within Commonwealth laws and programs. Both direct and indirect discrimination are covered by the SDA.

Direct Discrimination

In the SDA *direct discrimination* is defined as having occurred if either the aggrieved person is treated less favourably because of that person’s sex or marital status, or a characteristic appertaining to or generally imputed to person of that sex or marital status. The concept of direct discrimination reflects a “formal” understanding of equality, which can be characterised as an “identical treatment with biological exceptions” model of equality.⁴ Unlike the “strictly identical treatment” model, this acknowledges the impact of women’s child bearing and the impact of potential pregnancy on their participation in certain areas of the public sphere.

In simple terms then, direct discrimination occurs when someone is treated unfairly or badly compared to others, often because they are seen as different. This happens because people can have unfair, stereotypical, old-fashioned or prejudiced ideas or beliefs about others because they happen to belong to a particular group of people or because they have certain personal characteristics or attributes. For example, a woman is overlooked for management training because of assumptions that women cannot manage men.⁵

Indirect Discrimination

While direct discrimination is concerned with less favourable treatment in the same or similar circumstances, *indirect discrimination* is defined in the SDA as having occurred where a condition, requirement or practice is imposed that has, or is likely to have, the effect of disadvantaging persons of the same sex or marital status as the aggrieved person, or where the aggrieved woman is pregnant or potentially pregnant. In simple terms, indirect discrimination is where the same rules or requirements are applied to everyone and appear to treat everyone equally, but where these rules or requirements make it difficult for members of a group, such as women, to comply with them. For example, if the manager of a company said that employees who had worked continuously for the company for twenty years would receive a wage increase, it is likely that many more women than men would miss out on the increase. Many women interrupt their working lives to have children and would not have worked continuously in one company for twenty years.⁶ Unless such a rule is necessary or reasonable in all circumstances, it will be indirect discrimination and against the law. The concept of indirect discrimination thus incorporates recognition that discrimination can be structural, rather

than individually based, and connotes a more substantive understanding of equality.⁷

Special Measures

The SDA also provides for “special measures” to address systemic discrimination. Systemic discrimination against women refers to a complex of directly and/or indirectly discriminatory practices, which operate to produce general disadvantage for women as a class or a group of women.⁸ Special measures are measures specifically designed to address systemic discrimination and taken for the purposes of achieving substantive equality. Within sex discrimination law, special measures have ranged from establishing specific women’s legal services and women’s health centres to allowing women-only advertisements to be placed for employment in a women’s refuge.⁹

Sexual Harassment

The SDA also prohibits sexual harassment in the designated areas. Sexual harassment is defined as any *unwanted* or *unwelcome* sexual behaviour that makes a person feel offended or humiliated and that reaction is reasonable in the circumstances.

Affirmative Action (Equal Opportunity for Women) Act 1986 (AAA)

After the passage of the SDA, the broader promotion of positive measures to address the systemic barriers facing women workers was ultimately set out in the *Affirmative Action (Equal Opportunity for Women) Act 1986* (AAA). The AAA was amended in 1999 and is now the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWWA). While arguably weaker than the AAA, the EOWWA also covers private sector organisations,

higher education institutions, community sector employees, non-government schools and group training companies of more than one hundred employees.

Under the EOWWA, employers are obliged to develop equal opportunity for women in the workplace program; and report annually to EOWA on the program and its effectiveness.

This report typically contains statistics and other relevant information on the gender composition of their workforce as well as reporting on steps taken to develop and implement their equal opportunity for women in the workplace program. Sanctions can be imposed as a last resort for failure to lodge a report by naming the transgressor in Parliament. On the other hand, those employers deemed to be actively working towards the advancement of women can be waived from reporting to the EOWA for up to 3 years.

Redressing discrimination: implementation and enforcement

Individual Complaints

As set out above, the SDA establishes a limited framework within which a person or a group of people have the right to lodge a complaint in certain circumstances. The legislation is essentially reactive rather than proactive and seeks to provide a redress and a remedy.¹⁰

A key feature of the SDA is the focus on dispute resolution of a written complaint made by an individual or group of individuals through conciliation. Conciliation aims to bring the parties together to achieve a settlement

of a complaint. Under the SDA, conciliation is undertaken by the Human Rights and Equal Opportunity Commission (HREOC). A person who believes they have been discriminated against on one of the grounds and in one of the areas specified under the SDA is required to provide a written complaint to HREOC, which is then charged with investigating and endeavouring to conciliate the complaint. If conciliation is not possible or it breaks down, then a complaint may be referred to the Federal Court, which conducts a hearing and makes a decision. Thus a complaint can be substantiated with the Court making enforceable orders as to redress or it can be dismissed. It is estimated that less than five percent of complaints go to hearing.¹¹

The range of formal complaints made under the SDA in 2004-2005 is set out in Tables 1-3 below.¹² As can be seen, the majority of complaints under the SDA are made in the area of employment. Sex Discrimination, sexual harassment and discrimination on the grounds of pregnancy or potential pregnancy are the main grounds of complaint.

It should be noted that complainants might also be able to lodge complaints about sex discrimination and related grounds under state anti-discrimination laws. However, a total of just 348 individuals making complaints on one or more grounds over the course of 2004-2005 could be considered to be a relatively low level of formal complaints.

Table 1: Sex Discrimination Act - complaints received and finalised

Sex Discrimination Act	Total
Received	348
Finalised	375

Table 2: Sex Discrimination Act - complaints received by ground

Sex Discrimination Act	Total	Percentage
Sex discrimination	218	36%
Marital status	22	4%
Pregnancy	158	26%
Sexual harassment	167	28%
Parental status / family responsibility	20	3%
Victimisation	17	3%
Aids, permits, instructs discrimination (section 105)	2	-
Total¹³	604	100%

Table 3: Sex Discrimination Act - complaints received by area

Sex Discrimination Act	Total	Percentage
Employment	516	85%
Goods, services and facilities	40	7%
Land	-	-
Accommodation	1	-
Superannuation, insurance	3	1%
Education	12	2%
Clubs	2	-
Administration of Commonwealth laws and programs	24	4%
Application forms etc	2	-
Trade unions, accrediting bodies	4	1%
Total¹⁴	604	100%

Research, policy and educative work¹⁵

Within HREOC, specific commissioners undertake responsibility for different areas of discrimination. The Sex Discrimination Commissioner undertakes research, policy and educative work designed to promote greater equality between men and women. Recent projects have concentrated on equal pay for male and female workers, the career options for women in the finance industry, and eliminating sexual harassment from the workplace.

The Commissioner has a broad educational role to highlight the rights of individuals, as well as the responsibility of all members of the community to respect the rights of others and to work cooperatively in developing a fair and cohesive society

Inquiries

Under the SDA, the Sex Discrimination Commissioner is also able to initiate inquiries around issues of public concern. Various federal Sex Discrimination Commissioners have undertaken a number of important reviews related to gender equality issues. For example, in 1991/92 the *Inquiry into Sex Discrimination in Overaward Payments*¹⁶ focused on the impact of overaward payments on gender pay equity. In 1998/1999 there was an inquiry into pregnancy discrimination in employment¹⁷ and in 2002 another wide ranging inquiry involving extensive community consultation and research canvassed options for a national paid maternity leave scheme.¹⁸ The recommended national paid maternity leave scheme was not taken up by the federal government and Australia remains one of only two OECD countries without a national system of paid maternity leave. However the consultation process in this inquiry highlighted the need to consider the roles of both women and men as care givers

and to challenge the gender stereotypes that prescribe “women’s work” and “men’s work” in both the paid workforce and in unpaid care giving work.¹⁹ This has led to the current inquiry being undertaken by the Sex Discrimination Commissioner.

This inquiry, entitled *Striking the Balance: women, men work and care*, is an ambitious one and is “...fundamentally concerned with the choices men and women make about how they spend their unpaid work time and the effect this has on their choices and opportunities in paid work”.²⁰

Other policy mechanisms

Apart from HREOC, two other federal government agencies are charged with the promotion of women’s issues and more broadly equal opportunity for women. The Office of the Status of Women, now the Office for Women, has a number of roles.²¹ It:

- Provides high level (policy and other) advice to the Minister Assisting the Prime Minister for Women’s Issues
- Administers programmes, including most significantly programmes to combat domestic violence and sexual assault
- Advises on legislative issues relating to women
- Provides the principal focus on consultation between the women’s sector and government; and
- Represents government at national and international forums on women’s issues, such as the United Nations.

The EOWA, apart from monitoring the submission of annual reports to the Agency, has also promoted the advancement of women in the workplace through education, research and the development of resources

to assist employers in developing an equal opportunity workplace. While it has been criticised for focusing too much on women in management, the EOWA has produced important industry benchmarking reports and continues to provide a rather embarrassing account of women's poor representation in Australian senior and executive management when compared to the US and Canada.

Strength and weaknesses of the Australian legislative and policy framework

There is no doubt that Australia has a comprehensive policy, education and legislative framework to address the promotion of gender equality, particularly in employment. At times it is easy to be a little cynical about the effectiveness of this framework. Sex discrimination persists in almost every sphere of public life. However, it is important to acknowledge that the SDA and other state anti-discrimination laws have removed most formal legal barriers to women's choosing what they want to do. This has ensured women greater access to employment, and they have moved into the workforce in much greater numbers and we now take for granted many basic rights that did not exist before sex discrimination laws.²² Considerable advances have also been made, particularly in the community acceptance of at least formal equality for women.

Strengths

In my view, some of the key strengths of the Australian legislative and policy framework for promoting gender equality include the following:

- The multi-pronged focus on both redressing individual instances of discrimination under the SDA and addressing more structural or systemic discrimination under the EOWWA.
- There are a variety of fora in which to pursue complaints of sex discrimination, not only in the federal SDA and the state anti-discrimination jurisdictions, but also in state and federal industrial relations jurisdictions.
- Employer liability for discrimination. In the area of employment under the SDA, employers are liable for discrimination and sexual harassment unless they can show they have taken reasonable steps to ensure sex discrimination or harassment does not occur. Particularly in the larger enterprises, the threat of vicarious liability has worked to encourage employers to put Equal Employment Opportunity (EEO) policies in place and to train and educate their workforce about sex discrimination.
- The legal recognition of sexual harassment. The naming of sex harassment as a gendered harm has been one of the most important contributions of Australia's sex discrimination laws. Indeed the inclusion of the term sexual harassment in the SDA was the first time that the words had been used in a legislative formula anywhere in the world.²³ It is now widely accepted that sexual harassment has no place in the modern workplace.

Weaknesses

In my view some of the main weaknesses of the current system include:

- The focus on individual complaints. The individual complaint process in the SDA remains in practice the main mechanism to address gender inequality. Because the SDA is complaint-based, the enforcement of the provisions of the Act depends on an individual's willingness to lodge a complaint. The individual complainant bears the onus of proving discrimination even if the harm is of a broader structural

or institutional nature. Moreover, with the increasing legalism of anti-discrimination conciliation processes, the use of the SDA is also dependent on access to legal resources and/or union and other support. The emphasis on conciliation and settlement rather than on public hearings also means the enforcement system has failed to ensure that there is sufficient decision-making to develop the law adequately.²⁴

- The limited reach of the legislative recognition of indirect discrimination. Indirect discrimination is only unlawful in Australia if the requirement or condition in question is not reasonable in all the circumstances.²⁵ Not surprisingly what is reasonable is much contested. The reasonableness test thus significantly undermines the progressive possibilities of indirect discrimination in addressing systemic discrimination.
- The continued exemptions under the SDA. One important and contentious example is the SDA's exemption that allows discrimination by religious bodies in ordaining, appointing and training priests, ministers and participants in religion. Religious educational institutions are also free to discriminate on the basis of sex, marital status and pregnancy in employment of staff if the discrimination is "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".²⁶
- Under the EOWWA, the lack of effective sanctions and auditing of actual practice (rather than paper reports) in workplace programs has been a major weakness in addressing systemic discrimination. As Beth Gaze notes, this law has virtually no teeth, little resourcing, and has had to rely on persuasion and encouragement for its

implementations. This means its impact has been muted and patchy.²⁷

- The lack of active government support for the promotion of gender equality.

Concluding comments

In conclusion, I think there have been a number of key lessons learned to come out of Australia's experience with its gender equality legislation and mechanisms over the last 20 years that may be relevant in considering the design of Gender Equality Laws.

1. The need for a multi-pronged approach. While laws work in different ways in different places, what is clear is that in any jurisdiction equality laws need to cover a range of functions and work on a number of levels at once. These include:²⁸
 - The need for sanctions and judicial processes. There needs to be sanctions which apply when there has been a breach of anti-discrimination law. Sanctions can be remedies applied for a party seeking redress for discrimination. Australia, as most countries, provides for a range of civil or administrative penalties for breaching its sex discrimination legislation including financial compensation, which can be enforced by the Federal Court
 - The need for a "watch dog agency" to oversight, monitor and enforce both legislation and policy. Such agencies need to have sufficient "teeth" and resources to enable them to carry out their function and need a certain level of independence from government. In Australia, HREOC, a statutory agency, has that role and is responsible both for dealing with complaints under the SDA and monitoring and promoting

awareness of gender equality.

- National policy machinery to direct, drive and influence support government policy and legislation is also critical.
2. Policy support is at least as, if not more important, than legislation in promoting gender equality. While the SDA has been arguably strengthened by a number of amendments over the last 20 years, it is clear that government support for gender equality has waned. Indeed any focus on EEO or gender equity for women, at its height in the 1980s and early 1990s, has gradually receded from policy and political discourse. We have seen the Office of the Status for Women, once located in the Prime Ministers Department, relegated to a more junior status as the Office for Women in the Department of Family and Community Services, Indigenous and Youth Affairs. There has been a related slide from a more substantive understanding of gender equality as equality of result or as treatment according to all differences, to an understanding of equality as “strictly equal treatment” — treating all people the same no matter what — which fails to account for the ways in which informal barriers operate to prevent or undermine sex equality. This then makes it easy to construct the promotion of women’s equality as “more favourable” and hence “unfair” treatment.
3. Ongoing evaluation, reinvigoration and renewal of efforts to promote gender equality are critical. One mechanism to achieve this is through broad ranging public reviews or inquiries. In Australia, inquiries undertaken by the Sex Discrimination Commissioner under the SDA have not only placed gender equality issues on the public

agenda, but they have also influenced what is seen as discrimination and as gender equality. The increase in pregnancy and “motherhood” related complaints following the pregnancy discrimination inquiry and the community debate that followed HREOC’s PML proposal are testament to that.²⁹ The current *Striking the Balance* inquiry promises to provide a blue print or framework for action to address an issue that lies at the heart of gender inequality; the relationship between, and the gender relations in, the private sphere of unpaid care giving work and the public sphere of paid employment.

Endnotes

- 1 Marian Sawyer (2004) *The Commonwealth Sex Discrimination Act: Aspirations and Apprehension* Paper given at the *Women Work & Equity Forum*, University of Sydney 2004
- 2 Kristi Guest (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* (Research Paper No 16, Department of the Parliamentary Library, Information and Research Services). p11.
- 3 Art 1, CEDAW
- 4 Elizabeth Sheehy (1987) *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (Background Paper, Canadian Advisory Council on the Status of Women, Ottawa). P5.
- 5 http://www.hreoc.gov.au/sex_discrimination/guide/index.html
- 6 Ibid.
- 7 Kristi Guest (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* Research Paper No. 16, Department of the Parliamentary Library, Information and Research Services: Canberra.
- 8 Rosemary Hunter (1992) *Indirect Discrimination in the Workplace* Federation Press p.13.
- 9 Kristi Guest (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* p8
- 10 Chris Ronalds & Rachel Pepper (2004) *Discrimination law and practice*, Sydney: The Federation Press. p7
- 11 Rosemary Hunter and Alice Leonard (1995) *The Outcomes of Conciliation in Sex Discrimination Cases* Working Paper No 8 Centre for Employment and Labour Relations Law, Faculty of Law, The University of Melbourne. p1.

- 12 Human Rights & Equal Opportunity Commission (2005) *Annual Report 2004/2005*, HREOC: Sydney
- 13 Individual complainants may make more than one complaint on different grounds
- 14 Individual complainants may make more than one complaint on different grounds
- 15 http://www.hreoc.gov.au/sex_discrimination/guide/index.html
- 16 Human Right Australia (1992) *Just Rewards: A Report of the Inquiry into Sex Discrimination in Overawed Payments* AGPS: Canberra.
- 17 Human Rights & Equal Opportunity Commission (1999) *Pregnant and Productive: It's a Right not a Privilege to Work While Pregnant* HREOC: Sydney.
- 18 See Human Rights & Equal Opportunity Commission (2002) *Valuing Parenthood: Options for Paid Maternity Leave Interim Paper 2002*, Sex Discrimination Unit, HREOC: Sydney; Human Rights & Equal Opportunity Commission (2002) *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*, Sex Discrimination Unit, HREOC: Sydney.
- 19 Human Rights & Equal Opportunity Commission, (2005) *Striking the Balance Women, men work and care: A Discussion Paper*. Sex Discrimination Unit, HREOC: Sydney p. 2.
- 20 *Striking the Balance* Launch Speech by Pru Goward, federal Sex Discrimination Commissioner, 22 June 2005.
- 21 <http://ofw.facs.gov.au>.
- 22 Beth Gaze: *The SDA after 20 years: Achievements, Disappointments, Disillusionment & Alternatives* Paper given at the *Women Work & Equity Forum*, University of Sydney 2004.
- 23 Chris Ronalds & Rachel Pepper (2004) *Discrimination law and practice* p19
- 24 Beth Gaze *The SDA after 20 years: Achievements, Disappointments, Disillusionment & Alternatives*
- 25 The "reasonableness" test is relevant to proving indirect discrimination in all Australian jurisdictions. CCH Australian & NZ Equal Opportunity Commentary. Para 4-700.
- 26 See Hilary Charlesworth & Sara Charlesworth (2004) 'The Sex Discrimination Act and International Law' *University of NSW Law Journal* 27 (3), 858-865
- 27 Beth Gaze: *The SDA after 20 years: Achievements, Disappointments, Disillusionment & Alternatives*.
- 28 The following draws substantially on Sally Moyle, Director Sex Discrimination Unit HREOC Presentation to the *International Workshop on implementation and enforcement mechanisms for gender equality legislation* 12-13 December 2005, Ha Noi Vietnam.
- 29 Sara Charlesworth "Contributions and Limitations of the Sex Discrimination Act at the Workplace Level" Paper given at the *Women Work & Equity Forum*, University of Sydney 2004.