



DCA's submission
to the Federal Government's
Senate Committee Review
into the effectiveness of the
Commonwealth Sex Discrimination Act (1984)

1 August 2008

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1. ABOUT DIVERSITY COUNCIL AUSTRALIA

Diversity Council Australia (DCA) provides diversity advice and strategy to over 100 organisations, many of whom are Australia's biggest employers.

Our mission is to lead in diversity thought and practice in Australia in partnership with our member organisations to:

1. Model and provide leading diversity practice in an Australian context
2. Embed this practice into businesses and organisations
3. Influence and lead the direction of diversity debate in Australia and in our region
4. Achieve excellence in diversity compliance in a changing legislative environment.

Funded solely by member subscription and advisory services, our members are Australia's leading diversity and strategically-oriented businesses – they understand that membership of DCA as the peak diversity organisation in Australia pays dividends, both internally and externally.

2. DCA'S POSITION

DCA welcomes the Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act announced by the Federal Government in June 2008. Such an inquiry is particularly pertinent given this year marks the 25th anniversary year of Australia's ratification of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and next year will see Australia celebrating the 25th anniversary of the adoption of the Sex Discrimination Act.

The Act is a vital piece of legislation, having played a key role in raising societal awareness of sex discrimination and providing access to remedies for individuals whose complaints fall within the parameters of the Act.

While direct evidence of the social and societal impacts of the implementation of the provisions of the Act have not been tracked in any meaningful way, indirect evidence of the positive impact of the Act in DCA's specific area of interest - employment market participation - can be found in the increase in women's workforce participation, from 49% in 1984 to more than 58% in 2006¹, and the reduction (albeit slight) in the gender pay gap from 18.2% in 1984 to 15.2% in 2004².

Notwithstanding, DCA notes there is considerable room for improvement with respect to gender equality in Australian workplaces. As Sara Charlesworth³ points out in her recent analysis of the effectiveness of the Sex Discrimination Act, despite the closing of the gender participation gap, much of the employment growth for women has been in part-time work where (regrettably) career advancement opportunities are limited, where wages growth is below average, and where a small but growing proportion of women are in fact underemployed (that is, they want to work more hours). Added to this, occupational and industry segregation by gender persists, with women concentrated in a narrow band of occupations in the service sector⁴.

¹ ABS, (2006). *ABS 1986-2006 censuses of population and housing*, Available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7002008>

² EOWA, (2005). *Pay equity statistics March 2005*, Sydney: EOWA.

³ Charlesworth, S. (2007). *Understandings of sex discrimination in the workplace: Limits and possibilities*, Clare Burton Memorial Lecture 2007, p. 4. Available at: <http://mams.rmit.edu.au/tug062qz5vva1.pdf>

⁴ Charlesworth, p. 4.

To assist in progressing gender equality in Australian workplaces, DCA has developed this submission, on the basis of consultation with its members. The submission consists of an overarching position on the legislation, as well as four key recommendations for change. These recommendations will position Australian employers to better prevent and manage sex discrimination in the workplace, while promoting equality for women in an economic and labour market environment where DCA considers women's labour market capacity is currently under-utilised.

Overarching Position

DCA is deeply committed to the spirit and application of the Sex Discrimination Act, as well as the number, integrity and public and community role of the Commissioners of the Human Rights and Equal Opportunity Commission ('HREOC'). The legislation has played an important role in raising awareness of sex discrimination and providing access to remedies for individuals whose complaints fall within the parameters of the Act.

Recommendation 1: Introduce a federal anti-discrimination act

DCA recommends a federal anti-discrimination act be established to provide a uniform national standard with respect to anti-discrimination rights and responsibilities. It is anticipated that this would require states and territories agreeing to a national anti-discrimination framework by way of, for instance, conceding to a federal act.

This act should include grounds of discrimination currently included in various state and territory anti-discrimination legislation including:

age, race ethnicity, national origin, social origin, sex, sexual orientation, gender identity, marital status, family responsibilities, pregnancy and potential pregnancy, religious conviction, political conviction, physical, intellectual, psychological or psychiatric disability, irrelevant criminal record.

DCA notes grounds of discrimination could be added to the proposed act as community definitions emerge.

Definitions and interpretations of particular grounds of discrimination should follow the most sophisticated and responsive approaches taken to-date in various state and territory anti-discrimination legislation (for example, 'family responsibilities' as outlined in Victorian legislation [see Appendix A]).

Such legislation should clearly differentiate between, and clarify intersections between, discrimination and harassment, and bullying.

The existing framework of specialist Commissioners (i.e. Human Rights Commissioner and Disability Discrimination, Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner, Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination) should be retained and could be added to in the event of additional grounds of discrimination being adopted as addendums to the act.

Rationale

Acting on this recommendation would address the lack of consistency between various states and territories with respect to anti-discrimination legislation. Providing one uniform national standard would assist employers and potential and current employees more clearly understand their legal rights and responsibilities.

Further clarifying the difference between discrimination and harassment and bullying would reduce community confusion about these behaviours and their legal definitions. It is DCA's experience that the differences between these behaviours are not well

understood in the general community, nor are the respective legal jurisdictions that cover each.

Retaining the existing (and possibly enhanced) framework of specialist Commissioners would ensure due attention, resources and focus continues to be given to each of the important areas of human rights, Aboriginal and Torres Strait Islander social justice, age discrimination, disability discrimination, race discrimination, and sex discrimination.

Recommendation 2: Provide a clearer definition of indirect discrimination

DCA recommends the legislation clarify what constitutes indirect discrimination, through introducing a clear definition of indirect discrimination into the legislation. This would specify the comparator group and indicate how employers can utilise workforce statistics to demonstrate their policies and practices do not treat women less favourably.

Rationale

Acting on this recommendation would provide greater clarity to employers. Indirect discrimination laws are aimed at stopping the effects of requirements, practices or conditions which are apparently neutral, but which have discriminatory effects⁵. Indirect discrimination consists of situations where disparate or adverse impacts on women compared to a comparator group can be demonstrated⁶. Currently the test for the scope of indirect discrimination is vague and courts have handed down conflicting interpretations. For example, in some cases women returning from maternity leave have established a right to seek part-time work to accommodate conflicting work and family responsibilities (e.g. *Hickie v Hunt & Hunt [1998]*, *Mayer v Ansto [2003]*)⁷. In other instances, the law has been interpreted more narrowly: for example, *Kelly v TPG Internet Pty Ltd [2003]* in which the court held that a contractual requirement to work full-time was not a 'condition, requirement or practice' which could be challenged within the legislation, and therefore there was no right to have the employer consider whether part-time work could be made available. Thus because the employer did not offer flexible work generally to its staff, it could be refused to new mothers in its workforce⁸. In this way, there is inconsistency and lack of clarity for employers about what constitutes indirect discrimination, an appropriate comparator group, and an appropriate response to flexibility requests from women with care-giving responsibilities.

In DCA's consultation, members indicated that introducing a clearer definition of indirect discrimination would assist with promoting awareness amongst the community that many workplaces changes (e.g. parent rooms for nursing mothers) are not 'special privileges' but part of being responsive to differing gender-based needs. Additionally, members indicated such a definition would greatly clarify for employers what constitutes appropriate responses to women returning to work from maternity leave and seeking part-time work.

⁵ Guest, K. (1999). *The elusive promise of equality: Analysing the limits of the Sex Discrimination Act 1984*, Research Paper 16 1998-99, Parliamentary Library, Parliament of Australia. Available at: <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp16.htm>

⁶ Charlesworth, pp. 2-3.

⁷ Gaze, B. (2005). 'Twenty years of the Sex Discrimination Act,' *Alternative Law Journal*, Vol 30, p. 5.

⁸ Gaze, p. 5.

Recommendation 3: Strengthen HREOC's community profile

DCA recommends HREOC's conciliation structure be extended so that:

- Conciliators with appropriate expertise (i.e. workplace and diversity and equal employment opportunity experience and expertise) are appointed from the community, and
- Conciliations sit in regional areas (following the example of relevant state industrial tribunals).

Rationale

Acting on this recommendation would:

- Strengthen the profile of HREOC in the community, including in regional areas,
- Improve access in regional areas and so minimize fear of the conciliation process (for example, of having to travel to a capital city to navigate an unfamiliar and therefore potentially intimidating process),
- Assist with local ownership and resolution of issues and complaints,
- Promote timely resolution of issues, prior to working relationships being irrevocably damaged, and
- Raise awareness and understanding amongst the general community about what constitutes discrimination and harassment.

Recommendation 4: Develop workplace grievance guidelines

DCA recommends community guidelines which adopt a workplace grievance procedure approach be developed. Specifically, such an approach would entail listing resolution options from informal to formal and lowest to highest levels of intervention. The guidelines would stipulate that the complainant should have already sought to resolve the issue at the workplace level, before seeking assistance or further resolution through HREOC.

Rationale

Acting on this recommendation would respond to the general lack of awareness and understanding amongst the general community about grievance and resolution options available to individuals with complaints. Specifically, such guidelines would make clear that in some types of complaints (for example, sexual assault in the workplace) there are connections with industrial relations, civil and criminal legislation and these may take precedence over anti-discrimination legislation. While larger employers tend to have workplace grievance guidelines such as these in place, many smaller employers do not. This hinders effective resolution of issues as employers and their employees are not equipped with the necessary information on appropriate processes to follow and outcomes to expect.

3. ANTI-DISCRIMINATION LEGISLATION DELIVERS SIGNIFICANT BUSINESS BENEFITS

“Any departure from ... equality ... demeans not only women but men and diminishes our whole community. It also distorts the efficient working of the Australian economy...Utilising all human resources effectively, fairly and profitably for the individual and the organisation, makes great business sense”⁹

Leading employers have long recognised the benefits of pro-actively preventing workplace discrimination and harassment and effectively managing issues and complaints when they arise. Their commitment is driven by social and legal imperatives, as well as good business practice. Appropriate and effective action in this area:

- Minimises costs associated with unnecessary staff absenteeism,
- Reduces avoidable costs associated with turnover, recruitment and re-training,
- Positions organisations to receive positive rather than adverse publicity in relation to its people management practices,
- Provides a safe and healthy work environment,
- Generates productivity benefits through retention of valued staff,
- Improves staff morale, and
- Minimises legal exposure and risk

Below we demonstrate the business case for preventing workplace discrimination and harassment and appropriately and effectively managing issues and complaints, through drawing on research highlighting costs and benefits.

Costs of Discrimination and Harassment

Costs to individuals

Sex discrimination exacts a financial as well as emotional toll on women¹⁰ and their families. It is extremely difficult to quantify the economic cost of this – as Carol Andrades notes, putting a dollar value on dignity and opportunity is challenging to say the least¹¹. Having said this, available research demonstrates discrimination in employment has a range of psychological, physical, and financial consequences. For instance, VicHealth research has demonstrated that the costs of discrimination include higher rates of depression and other forms of mental illness¹². In relation to pregnancy discrimination more specifically, recent Australian research indicates this has a measurable detrimental effect on women’s emotional and psychological health: in this research women who were discriminated against at their workplace, and/or had no access to maternity leave reported higher levels of distress, anxiety, anger and fatigue than women who were not experiencing these difficulties at their workplace

⁹ Goward, P. (2001). *HR law conference speech*. Available at: http://www.hreoc.gov.au/speeches/sex_discrim/hr_law_conference.html.

¹⁰ We say ‘women’ here as a review of HREOC complaints indicates women are most likely to be subjected to discrimination and lodging complaints: in 2006-2007, 87% of sex discrimination complaints received by HREOC were lodged by women.

¹¹ Andrades, C. (1998). *What price dignity? Remedies in Australian anti-discrimination law*. Research Paper 13 1997-98. Available at: <http://www.aph.gov.au/library/Pubs/rp/1997-98/98rp13.htm#Putting>

¹² VicHealth, (2007). *More than tolerance: Embracing diversity for health*. Available at: [http://www.vichealth.vic.gov.au/assets/contentFiles/DCASv2%20\(4\)%20-%20FINAL%20060907.pdf](http://www.vichealth.vic.gov.au/assets/contentFiles/DCASv2%20(4)%20-%20FINAL%20060907.pdf)

during pregnancy¹³. This finding is consistent with an emerging consensus that discrimination and stigmatization are major causal factors of ill health, including higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping¹⁴.

In addition to adverse psychological consequences, individuals experiencing sex discrimination face a range of financial hardships. Foremost among these is reduced earning capacity, with US-based research indicating that over the course of a woman's life, the average female graduate loses \$1.2 million earnings¹⁵. Research indicates that were it not for sex discrimination, women would be earning just as much as or more than men¹⁶. Discrimination also exacts a financial toll associated with loss of employment, with HREOC statistics indicating three out of four complainants are no longer employed with the organization when they lodge their complaint¹⁷. Added to this, in the process of seeking legal redress, complainants often incur significant legal costs.

Costs to organizations

Organisations incur a range of costs associated with discrimination. Readily quantifiable costs of diversity complaints to the organisation may take the form of negotiated damages (known to have reached \$225,000 in individual matters), awarded damages (known to have exceeded \$100,000), and legal fees (quotes of more than up to \$100,000 to defend complex complaints are not uncommon). Less easy to quantify are the "hidden" costs, including, for example unplanned absenteeism, reduction in work team cohesion and productivity, reduction in staff morale, lost management/employee time (investigations, hearings etc.), resignations and labour replacement costs, workplace accidents, stress and illness claims, damage to the company's reputation, and/or political and industrial relations impacts.

The following research provides some general indicators of these costs:

- The New South Wales Anti-Discrimination Tribunal (NSW ADT) has estimated the cost of resolving the average 'in-house' serious or complex complaint to be \$35,000. This includes wages and lost productivity for all parties involved – that is, those involved in the allegations and those involved in resolving the complaint. This estimate was made over ten years ago and so, allowing for inflation, it is likely this amount now exceeds \$45,000.
- Similarly, DCA has estimated the average cost for a serious external grievance to be \$125,000. This allows for costs associated with managing the complaint, including possible settlement costs. It does not consider more indirect costs associated with lost productivity and turnover.
- The average penalty for sex discrimination in Australia over the period 1985-2000 (when anti-discrimination legislation was administered by HREOC) was almost \$14,000¹⁸. This does not appear to have significantly changed since

¹³ Cooklin, A., Rowe, H. & Fisher, J. (2007). *Workplace discrimination continues for women*. Available at: <http://www.onlineopinion.com.au/view.asp?article=6656>

¹⁴ Lynch, P. (2005). Homelessness, poverty and discrimination: Improving public health by realising human rights, *Deakin Law Review*. Available at: <http://www.austlii.edu.au/au/journals/DeakinLRev/2005/11.html#fn46>

¹⁵ Murphy, E. with Graff, E.J. (2005). *Getting even: Why women don't get paid like men--and what to do about it*, New York: Touchstone.

¹⁶ Bergman, B.R. (2007). 'Discrimination through the economist's eye', in F. J. Crosby, M. S. Stockdale, and S. A. Ropp, (ed.), *Sex discrimination in the workplace*. Malden, MA: Blackwell Publishing.

¹⁷ HREOC, (2003). *A bad business: Review of sexual harassment in employment complaints 2002*. Available at: http://www.hreoc.gov.au/sex_discrimination/workplace/bad_business/media/fact_cost.html

¹⁸ Brooks, R. (2004). *The price of discrimination: an economic analysis of the human rights and equal opportunity commission rulings 1985-2000*. Available at: http://findarticles.com/p/articles/mi_m0PAO/is_3_23/ai_n6201943

the transfer of the hearing function to the Federal Magistrates Court and the Federal Court in 2000. While the highest damages for sex discrimination awarded under the SDA was \$41,488.57 (*Evans v National Crime Authority* [2003] and *Commonwealth v Evans* [2004]), the average damages was approximately \$14,000. The highest damages awarded in sexual harassment cases under the SDA since 2000 was \$392,422.32 (*Lee v Smith (No 2)* [2007]), while the average damages was approximately \$37,000¹⁹.

- Turnover associated with complaints is common: at least three out of four complainants are no longer actively working for the organisation where the allegations occurred by the time they reported it to HREOC. As HREOC points out, this represents a considerable cost to employers in recruitment, training and development, in addition to the indirect cost associated with loss of staff morale inevitably arising from unresolved disputes within workplaces²⁰. Turnover costs have been variously estimated at between 50 and 150% of the person's annual salary.
- Research conducted by the US Department of Labor indicates that when employers have a diversity complaint which goes public, their share price will drop within 24 hours. Conversely, when employers win a Diversity Award their share price will increase within 10 days.

Cost to community

Not only does discrimination adversely impact upon individuals, groups, and organisations, it also incurs costs to the broader community. The United Nations estimates that discrimination against women has cost Asia-Pacific billions of dollars every year. The Economic and Social Survey for Asia and the Pacific 2007 identified that barriers to employment for women cost the region \$42 billion to \$47 billion annually.²¹ Other research has demonstrated a direct relationship between higher sex discrimination in particular nations and lower output per capita. The authors note, their research, "suggests the costs of gender discrimination are indeed quite substantial and should be a central concern in any macroeconomic policy aimed at increasing output per capita in the long-run"²².

Benefits of Prevention and Management

Benefits to Individuals

Since the introduction of the Sex Discrimination Act, women's workforce participation has increased from 49% to more than 58% in 2006²³. Having a job or being involved in a business activity not only improves financial independence, it also enhances self esteem and reduces social alienation, and leads to improved incomes for families and communities (which has a positive influence on health, education of children etc)²⁴.

¹⁹ Federal Discrimination Law Online, June 2008. <http://www.hreoc.gov.au/legal/FDL/index.html>

²⁰ HREOC, (2003). *A bad business (Review of sexual harassment in employment complaints 2002)*. Available at: http://www.hreoc.gov.au/sex_discrimination/workplace/bad_business/media/fact_cost.html

²¹ United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), (2007). *Asia-Pacific: The Economic Costs of Discrimination against Women*

²² Cavalcanti, T. & Tavares, J., (2007). *The output cost of gender discrimination: A model-based macroeconomic estimate*, Centre for Economic Policy Research. Available at: <http://www.cepr.org/pubs/new-dps/dplist.asp?dpno=6477.asp>

²³ ABS 1986-2006 Censuses of Population and Housing. Available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7002008>

²⁴ Steering Committee for the Review of Government Service Provision (2007) *Overcoming Indigenous disadvantage: Key indicators 2007 Report*, Canberra: Productivity Commission.

Organisational benefits

A range of research quantifies the economic benefits of effectively managing gender diversity in organisations. Catalyst research, for instance, indicates that *Fortune 500* companies with the highest representation of women board directors attained significantly higher financial performance, on average, than those with the lowest representations of women board directors. This related to return on equity (companies with the highest percentages of women board directors outperformed those with the least by 53%), return on sales (by 42%), and return on invested capital (by 66%)²⁵. Research by McKinsey & Company indicates that companies with gender diversity financially outperform their sector in terms of return on equity (11.4% versus a sector average of 10.3%), operating result (EBIT 11.1% versus 5.8%), and stock price growth (64% versus 47% over the period 2005-2007)²⁶. Similarly, other research has demonstrated that over a ten year period the top 50 companies for diversity outperformed the S&P 500 by 24.8% and the NASDAQ by 28.2%²⁷.

Organisations calculating return on investment on gender diversity initiatives also demonstrate the economic benefits that can be generated. Deloitte Touche in the US generated savings of \$250 million by implementing initiatives aimed at retaining and developing their female staff, which reduced their annual turnover from 25% to 18%²⁸. In the UK, Lloyds TSB increased their maternity return rate from 74% to 85% following the introduction of work-life policies, making business savings of £2 million per annum²⁹.

Leaders in managing diversity in Australia have also been able to demonstrate that effective management of gender diversity leads to significant business benefits:

- The Walter Construction Group introduced a 5-day working week from 6 days. This resulted in a 15% increase in productivity and 30-60% less sick leave, with 90% of staff preferring the arrangement.
- The Australian Catholic University offers female staff with more than two years service maternity leave of three months full pay and nine months at 60% pay (provided the staff member returns for at least six months). The University says that even if every potential paid mat leave person took the leave, it would still represent only 1% of their payroll – compared with the cost of departing employees being 75-100% of their annual salary.
- Hollywood Private Hospital generated a 95% return to work rate following the introduction of six weeks full pay or 12 weeks half pay paid parental leave.
- In 1995, Westpac introduced paid maternity leave, flexible work practices and work-based childcare. As a result its return to work rate return to work rate rate increased by 30%, saving them \$6 million.
- In 1993, the first year of work-family policies at NRMA, the company saved \$1.7 million and doubled the number of skilled staff returning to work after

²⁵ Catalyst, (2007). *The bottom line: Corporate performance and women's representation on Boards*. Available at: <http://www.catalyst.org/publication/200/the-bottom-line-corporate-performance-and-womens-representation-on-boards>

²⁶ McKinsey & Company, (2007). *Women matter: Gender diversity, a corporate performance driver*. Available at: http://www.mckinsey.com/careers/women/makingadifference/socialsectorimpact/womenmatter/Mckinsey_women_matter.pdf

²⁷ Baue, B. (2006). First socially responsible investing portfolio devoted to diversity launched, *Sustainability Investment News*, July 31, 2006. Available at: <http://www.socialfunds.com/news/article.cgi/2071.html>

²⁸ Kingsmill, D. (2001). *Report into women's employment and pay*. Available at: <http://www.equalities.gov.uk/pay/kingsmill.htm>

²⁹ Kingsmill, D. (2001). *Report into women's employment and pay*. Available at: <http://www.equalities.gov.uk/pay/kingsmill.htm>

parental leave. The return to work rate increased from 32% in 1993 to 85% in 1998.

- AMP increased its return to work rate from 50% in 1992 to 90% in 1997, saving the company \$50,000 to \$150,000 per woman returned. AMP calculated its return on investment on work-life initiatives since 1992 as \$400 million.
- SC Johnson has an HR strategy to create a brand for themselves as an Employer of Choice - SC Johnson's global human resources strategy is 'Best People – Best Place'. A key focus is work/life balance programs, including nine weeks paid parental leave with flexible pay options (eg motor vehicle and superannuation payments). They now have a 100% return to work rate.
- Australian unit of Autoliv had 2002 sales of \$260 million to customers such as local car makers. The cost of flexible work hours is \$100,000-a-year. Flexibility provisions for those with family commitments include things such as school interviews or assisting family members get to appointments and early finish on Fridays to allow families to shop and organise for the weekend. It has reduced staff turnover to under 2% and saves the company about \$3.6 million a year.
- The 2003 Managing Work-Life Balance Survey of Australian employers found that the business benefits of work-life initiatives included reduced turnover by an average of 6%, reduced absenteeism by average of 4%, increased parental leave return rate by an average of 25%, and increased employee satisfaction by an average of 14%.

DCA anticipates that when considering the costs of failing to prevent discrimination with the benefits associated with effective management of gender diversity, the business case for continuing action in this area is self-evident.

APPENDIX A

Family Responsibilities

The *Equal Opportunity Act 1995* (Vic) has been amended to introduce a requirement that employers must not unreasonably refuse to accommodate an employee's responsibilities as a parent or carer. Specifically, the legislation requires all relevant facts and circumstances to be taken into account in determining whether a refusal to accommodate a person's family/carer responsibilities is unreasonable. It also includes a list of specific factors that must be considered, including:

- The person's circumstances, including the nature of their responsibilities as parent or carer
- The nature of the role
- The nature of the accommodating arrangements required
- The financial circumstances of the employer, principal or firm
- The size and nature of the workplace and business
- The effect on the workplace and the business of accommodating the responsibilities, including the financial impact, the number of persons who would be advantaged or disadvantaged, and the impact on efficiency, productivity and customer service
- The consequences for the employer, principal or firm of making the accommodation, and
- The consequences for the person of not making the accommodation.