

THE SEX DISCRIMINATION ACT: LOOKING BACK AND MOVING FORWARD

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This year marks the 20th anniversary of the federal *Sex Discrimination Act 1984* (Cth) ('*SDA*'). It is an occasion to celebrate and reflect on two decades of legislation prohibiting sex discrimination and sexual harassment, and promoting equality between men and women in Australia.

When the Sex Discrimination Bill 1983 (Cth) was first introduced into Parliament by Labor Senator Susan Ryan, it was met with horror, caution and premonitions of the end of the world as we knew it. Conspiracy theories emerged from the most unlikely places. Senator Crichton-Browne argued that the *real* intention and purpose of this Act was 'to destroy the structure, the fabric and the intrinsic role of the family unit which for centuries has been the foundation of our orderly and disciplined society and culture'.¹

Government Cabinet Ministers privately worried that the legislation was too controversial and, says Susan Ryan, encouraged her to withdraw the Bill and reintroduce it at a later date. In the face of such ardent opposition, it is testimony to Susan Ryan's vigilance that the Bill became law and the *SDA* commenced operation on 1 August 1984.

Unsurprisingly, two decades later the *SDA* is still in place and so too is our society. The perspective provided by 20 years allows us to ask whether the Act has achieved its intended goals. Has the existence of the *SDA* made a difference at all? What challenges will it face in the future?

Essentially the *SDA* is conservative in that it followed, rather than preceded, social, technological and economic change. The 1960s saw the introduction of the contraceptive pill, the lifting of the public service marriage bar in 1969 and the handing down of the first equal pay decision in that same year. The *SDA* was a reflection of public opinion in Australia at the time: it merely confirmed the direction in which we were already heading.

The *SDA* made unlawful discrimination on the grounds of sex, marital status and pregnancy in certain areas of public life – education, employment, provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs. It made sexual harassment in employment, educational institutions and other areas of public life

* Federal Sex Discrimination Commissioner.

¹ Commonwealth, *Parliamentary Debates*, Senate, 9 December 1983, 3628.

unlawful and now prohibits discrimination on the ground of family responsibilities, when such discrimination leads to workplace dismissal, as well as discrimination on the ground of potential pregnancy. Overnight, for example, newspapers stopped publishing 'men and boys' or 'women and girls only' job advertisements.

Since the introduction of the *SDA*, an enormous amount has been achieved, yet there is still a long way to go. We cannot accept that we have achieved equality when we see the continuing incidence of gendered violence and sexual assault, more women than men in poverty and a workplace framed by glass ceilings and gender pay gaps. The fact that this pay gap is one of the smallest in the world – in Australia, women earn 84.9 cents in the male dollar when comparing full-time adult ordinary-time earnings of men and women – is a source of pride for Australia. However, the fact that there remains any gender pay inequity in our country *at all* is hardly cause for celebration, particularly when the gap is so persistent. When overtime, part-time and casual workers are considered, the majority of whom are female, the pay gap increases to 66 cents in the dollar.² A differential of this order also has consequences in terms of female poverty which should cause us to redouble our efforts.

Pay equity is not merely about elite graduates in stockbroking companies; the gender pay gap is more the result of pay differentials for workers on average and low incomes, since this is where the bulk of female workers are concentrated. For this reason, achieving pay equity requires that the low rates of pay enjoyed by nurses, for example, be addressed. Pay equity also concerns the teaching profession, so undervalued that few men consider entering it. In addition, it concerns childcare workers, who earn less than many manual labourers. Together these three groups make up a significant proportion of women in the workforce and most of them are employed either by State governments, government instrumentalities or in government-funded programs. State governments, it must be said, bear a not insignificant responsibility for the gender pay gap.

The gender pay gap is also reflected in the low numbers of women in leadership positions. Today we have more women in more areas of public life than ever before. But they are few and far between. Last year, of the top 200 companies listed on the Australian Stock Exchange, only 8.4 per cent of board directorships were held by women.³ In the Federal Court of Australia, women comprise around 15 per cent of the Bench.⁴ Of our Commonwealth parliamentarians, just 26.5 per cent are women.⁵

2 Australian Bureau of Statistics, *Average Weekly Earnings*, Cat No 6302.0 (2004).

3 Equal Opportunity for Women in the Workplace Agency, *2003 Australian Census of Women Board Directors* (2003), <http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/2003_Australia_n_Women_In_Leadership_Census/Fact_Sheet_Board_03.pdf> at 28 October 2004.

4 *Alphabetical List of Current Judges* (2004) Federal Court of Australia <http://www.federalcourt.gov.au/aboutt/jj_alpha.html> at 28 October 2004.

5 *The Number of Women in Parliament* (2002) Parliament of Australia: Parliamentary Library <<http://www.aph.gov.au/library/parl/hist/noswomen.htm>> at 28 October 2004.

While many might wonder if gender equality will ever truly be achieved or if anything much has changed for the average woman since 1984, what has definitively changed forever, since the introduction of the *SDA*, is public awareness and the preparedness of individual women to take action in the face of discrimination. Most women in Australia now know that they have rights. Since the introduction of the *SDA* in 1984, more than 13 000 complaints under the Act have been received by the Human Rights and Equal Opportunity Commission. These complaints and their outcomes have affected the lives of the women involved, their employers, co-workers and, through public discussion, community values and expectations.

In addition, complaints from individuals help to identify emerging areas of disadvantage for women because they reflect the lived experiences of Australian women. These complaints continue to act as uncomfortable reminders that women still struggle for equality. In doing so, they provide momentum for further systemic, cultural and attitudinal change.

The *SDA* is a complex piece of law and much of it remains untested and undeveloped. It has been the employer liability provisions of the Act, in conjunction with the public educational function of the Sex Discrimination Commissioner, which surely have been the Act's most powerful tools for cultural change.

Consider one of the continuing and enduring achievements of the *SDA*, the encouragement of workplace arrangements which enable women both to work in paid employment *and* to have children. Liability under the *SDA* is broad; a respondent need not have intended to discriminate in order to be liable. The framing of the liability provisions has driven change in workplace practices. This applies to recruitment and termination of employment practices, and also to sexual harassment. The effect of these provisions has been to encourage employers to adopt preventative policies, which may themselves be indicative of, or which can lead to, cultural change.

The new drivers for advancing women's rights will be demographic shifts, the pursuit of economic growth and global competitiveness, if harnessed in a human rights framework. Australia's female workforce participation rate of 56 per cent⁶ is low when compared with the rest of the countries in the Organisation for Economic Co-operation and Development ('OECD').⁷ Given the predicted rise in aged dependency ratios,⁸ and the high costs of obtaining an education, it makes good economic sense to tap into one of our most under-utilised resources – women and mothers. Add to this the privatisation of old age and changing household economics, which now require two incomes to support a family, and it

6 Australian Bureau of Statistics, *Australian Social Trends*, Cat No 4102.0 (2004).

7 Of the 30 OECD countries, with female workforce participation rate ranked from highest to lowest, Australia is placed 19th: see Florence Jaumotte 'Female Labour Force Participation: Past Trends and Main Determinants in OECD Countries' (Working Paper No 376, OECD Economics Department, 2003), <[http://www.oilis.oecd.org/olis/2003doc.nsf/linkto/eco-wkp\(2003\)30](http://www.oilis.oecd.org/olis/2003doc.nsf/linkto/eco-wkp(2003)30)> at 28 October 2004.

8 It is predicted that by the year 2042 there will be more than double the number of dependents per tax payer compared with 2003: see Commonwealth Department of Treasury, *Intergenerational Report 2002–03*, Budget Paper No 5 (2002), <<http://www.budget.gov.au/2002-03/bp5/html/index.html>> at 28 October 2004.

is crucial that women be able to contribute to their family's living expenses as well as to their retirement incomes. The national interest and national economy are the ultimate beneficiaries.

Improved workforce attachment for this group will depend upon the workplace becoming a more flexible environment, responsive to the needs of all, not half, of its members. The absence of workplace flexibilities in Australia means that we require parents – particularly mothers – to excise a significant part of their lives when they enter their workplace. It is also clear that men need to be supported in a more active fathering role. In this way, all of us can find a better balance between work and family responsibilities.

A second, unintended, consequence of the failure of workplaces to support the lives of mothers has been reduced fertility. It is apparent that Australian women will continue to reduce the number of children they bear so long as the workplace remains so unsympathetic to their needs. If Australians believe that it is in the national interest for us to have a sustainable population, then this too will become a driver for women's rights.

The *SDA* was born in response to social change that made further change inevitable. It is challenging and aspirational, sometimes uncomfortably so. Each generation will find a different challenge, whether that is the challenge of paid work, aged poverty or declining fertility.

Upholders of traditions and customs, even those traditions which deny women their freedom of choice or which endanger their lives, are deeply offended when told that those traditions or customs are discriminatory. They believe them to be good and right. Inevitably, this means that the *SDA* will continue to be a source of tension – publicly criticised, under review, always evolving. It should never be assumed that the *SDA* no longer requires defending, testing or open debate – after all, it deals with gender relations, an issue at the heart of all cultures. The *SDA* will only ever be as strong as our commitment to it.