

## **THE SEX DISCRIMINATION ACT: AN EMPLOYER PERSPECTIVE – TWENTY YEARS ON**

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### **I INTRODUCTION**

On 1 August 2004 it was exactly 20 years since the *Sex Discrimination Act 1984* (Cth) ('*SDA*') came into operation in Australia. The majority of current Australian employers were not in business at that time, and most current employees were still in education. Hence, a very large slice of Australian employers, managers and employees have not known a workplace environment that predates sex discrimination legislation.

This explains the first and most basic response of Australian employers to the *SDA* – they accept its policy underpinnings, and have learnt to live with its regulatory obligations. That acceptance is largely drawn from five propositions:

- (1) The legislative purpose of the *SDA* is (at least conceptually) sound;
- (2) The past generation has witnessed Australia develop a more diverse labour force, especially with higher rates of female participation;
- (3) Social and economic forces have combined to create a strong business case for workplace cultures that do not discriminate on gender grounds;
- (4) A strong public awareness campaign has been conducted by governments, statutory regulators, community bodies, unions and business organisations on the nature and function of the *SDA*; and
- (5) The reality is that businesses overwhelmingly seek to comply with the law of the day, howsoever it be enacted, and to avoid exposure to the costs, consequences and publicity of complaints and compliance activity.

This acceptance does not, however, mean that aspects of the *SDA* are viewed uncritically by industry. Nor does it mean that deficiencies in the law do not exist, nor that there are counterproductive impacts and unjustified transactional costs for employers. The method of its implementation by regulators, the use of the *SDA* to pursue extraneous industrial objectives and the expansion by tribunals and courts of the circumstances giving rise to statutory liability have all been the subject of critical comment by employers.

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## II EMPLOYERS AND DISCRIMINATION LAW: KEY PRINCIPLES

There is a substantial body of discrimination law in Australia, at both Commonwealth and State levels. Most discrimination law bears directly on the rights and responsibilities of employers and employees in the workplace. Regulating the contract of employment has been one of the major areas of attention for policy makers and parliaments when framing Australian discrimination law over the past 20 years. In this sense, employers have developed an acute awareness of discrimination law. Many have dealt first-hand with its operation in their workplaces. Others have actively participated in employer policy development and reaction to policy proposals.

In a broad sense, employers accept the general principle of equal opportunity that underpins discrimination law. Discrimination law must, however, necessarily be qualified. It should represent a balance of interests, and it operates most efficiently when it is targeted at specific conduct rather than imposing far-reaching or unspecified duties. The particular circumstances of smaller and medium-sized businesses need to be taken into account in framing and implementing the law.

In particular, employers lose confidence in discrimination law if it goes beyond the boundaries of common sense or is unbalanced in content or enforcement. Employers accept their role as part of the community and acknowledge that their workplaces need to reflect the general norms of the community at large. Conversely, employers resist their workplaces being used to engineer social attitudes or to experiment with policy that is ahead of community attitudes.

Nor should employer acknowledgement of equal opportunity be a basis for the headlong pursuit of regulation. Indeed, intervention by governments in the absence of a clearly demonstrated need can hinder rather than foster effective and fair employment policy and practice.

All regulation should be regularly reviewed. Ideally, the ultimate policy objective should be for regulation such as the *SDA* to become unnecessary, or at least to be modified, once community and workplace practice is overwhelmingly in compliance with the mischief that the regulation was intended to cure. Moreover, if it is demonstrated that the regulation is failing to cure the mischief, if the costs outweigh the public benefits, or if there emerge better alternatives to maintaining a regulatory approach, then legislation should be substituted with different approaches.

## III THE *SEX DISCRIMINATION ACT* AND INTERNATIONAL STANDARDS

The *SDA* was not the first enactment of its kind that employers in Australia were forced to grapple with. Throughout the 1970s, various States enacted anti-discrimination laws, based, in part, on international standards.

In 1973, the Australian Government ratified the International Labour Organisation ('ILO') *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*,<sup>1</sup> and a year later ratified the ILO *Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.<sup>2</sup> The United Nations' *Convention on the Elimination of All Forms of Discrimination against Women* was ratified in 1983,<sup>3</sup> and the ILO *Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* was ratified in 1990.<sup>4</sup> In addition, the ILO *Declaration on Fundamental Principles and Rights at Work* was adopted in 1998.<sup>5</sup>

This body of international law and policy partially explains why the SDA has general support amongst Australia's representative business organisations. Through the representation of the Australian Chamber of Commerce and Industry ('ACCI') and the International Organisation of Employers, business organisations have participated in the process of international standard-setting on discrimination law.

#### IV DISCRIMINATION LAW AND REGULATORY REFORM

In 2002, Australia's leading employer bodies combined to produce a joint statement on reforming employment law, including discrimination law, under the auspices of the ACCI. The result was *Modern Workplace: Modern Future – A Blueprint for the Australian Workplace Relations System 2002–2010*<sup>6</sup> ('*Blueprint*').

Inappropriate regulatory intervention, even if well intended, can frustrate the achievement of broader economic, social and industrial objectives, such as the pursuit of full employment. Over-regulation and inappropriate or inexact regulation must be resisted.

The *Blueprint* outlined broad principles that employers generally apply when dealing with discrimination policy and practice, including the SDA. On the question of employment regulation, the *Blueprint* argued that:

- the scope and content of employment regulation is the combined accumulation of laws made over many decades by parliaments, governments and industrial tribunals based on the disputes and circumstances of the day;
- 'ad-hockery' has characterised the regulation-making process and, in qualitative terms, regulation has far too often characterised employers

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1 Opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

2 Opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953).

3 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

4 Opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983).

5 Conference of the ILO, 86<sup>th</sup> sess, Geneva, 18 June 1998.

6 ACCI, *Modern Workplace: Modern Future – A Blueprint for the Australian Workplace Relations System 2002–2010* (2002), <<http://www.acci.asn.au/WRBluePrintMain.htm>> at 7 October 2004.

according to the worst possible form of conduct – as a general rule, this is not the correct approach to labour market regulation;

- policy makers with a predilection for legislative and judicial solutions usually underestimate the capacity and goodwill of Australian managers and workers to sort things out for themselves;
- one should not approach a response to employment law on the basis of the activities of a miniscule minority of people; and
- there is no significant mechanism in place that effectively and systematically revises the regulatory content of the system once regulation is enacted.

These observations are directly relevant to employer attitudes to the *SDA*. Specifically on the issue of discrimination policy, the *Blueprint* noted:

Employers are subject to both federal and state anti-discrimination laws. Employers do not seek to conduct business operations or employment practices on a discriminatory basis. However, the regulation of employment practices by discrimination law raises multiple issues of public policy that can, if the law fails to properly take into account the interests of industry, unduly and inappropriately impede legitimate business decisions and employment practices.

Multiple regulatory jurisdictions create multiple regulatory obligations. There are also anti-discrimination provisions in non-discrimination statutes at the federal level, including in the *Workplace Relations Act 1996* (eg, the form of awards, unlawful dismissal etc). This proliferation of obligations can be confusing and challenging to employers.

Unlawful discrimination is not an acceptable human resource practice, does not constitute an appropriate basis for human resource decision-making, and is contrary to the interests of business.

Workplaces are not appropriate venues for experimentation in social policy. In framing law, it should be recognised that private sector workplaces are private businesses where work is performed under private contracts of employment.<sup>7</sup>

## V OBJECTIVES IN REVIEWING THE *SEX DISCRIMINATION ACT*

Should the *SDA* be reviewed by the federal government or Parliament, the *Blueprint* advocates six objectives from an employer perspective:

- (1) Discrimination law should be clearly expressed so that employers can readily identify their obligations, whether under one or multiple regulatory systems;
- (2) Employers should be protected from ‘double jeopardy’. Discrimination law should not permit multiple claims in different jurisdictions based on the same conduct. Discrimination law should not permit claims in discrimination tribunals which are within the lawful jurisdiction of industrial tribunals;

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<sup>7</sup> Ibid 127 <[http://www.acci.asn.au/text\\_files/blueprint/Chapter9.pdf](http://www.acci.asn.au/text_files/blueprint/Chapter9.pdf)> at 7 October 2004.

- (3) Discrimination law should, in certain cases only, apply the concept of 'indirect discrimination' to employment and workplace policy and practices. The concept of indirect discrimination does not always provide the regulatory certainty required by employers, especially small business;
- (4) Any proposed extensions of discrimination law to include new grounds, or to extend and vary the application of existing law, should be examined under the principles for regulation review;
- (5) Discrimination law should not impede necessary business decisions, such as decisions to employ or not to employ, to advertise for employment, to discipline or to terminate employment on lawful grounds, to undertake redundancies and restructuring, and to measure or reward employee productivity or performance; and
- (6) There should be a greater emphasis on education, promotion and problem solving, and less emphasis on sanctions in the implementation of discrimination law in employment.<sup>8</sup>

A particular aspect of any review should be the complaint and compliance processes under the *SDA*. Generally speaking, the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioners have, over the life of the Act, put in place reasonable arrangements for conciliation and complaint management, and have balanced these against the need for education and awareness-raising.

However, employers continue to be exposed to the 'compensation mentality' that is created by a 'rights-based' complaint system. Like unfair dismissal laws, a complaint can be made by an aggrieved employee irrespective of whether the employer has breached the law or not. The costs of defending the business against complaints are high, especially for small and medium-sized employers. Apart from the pressure to make pay-outs that arises from views expressed by conciliators, the risks of continued litigation and adverse publicity create an environment where an employer who may not have breached the *SDA* nonetheless feels compelled to offer monetary compensation simply to dispose of the matter. This is a poor public policy outcome and should be a matter considered in any statutory review.

## VI DIRECT AND INDIRECT DISCRIMINATION

Employers have very little dispute with the concept of direct discrimination. In the *SDA* context, it is well understood and supported.

However, indirect discrimination is an area of greater concern. This is not because indirect discrimination is not as unacceptable a practice as direct discrimination, but because of difficulties with the application of the concept. In particular, some decisions of tribunals and courts have applied discrimination law

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8 Ibid 158 <[http://www.acci.asn.au/text\\_files/blueprint/Recommendations.pdf](http://www.acci.asn.au/text_files/blueprint/Recommendations.pdf)> at 7 October 2004.

to conduct not originally thought to have been covered, with attendant uncertainty thereby created for business policy, management and planning.

As has also been noted by commentators on the topic,

the notion of indirect discrimination has ... significant implications for policy making. [One] ... is to show that treating different people in the same way, without due consideration for the specific circumstances or context of the disadvantaged, may, in some instances, perpetuate or even deepen existing inequalities instead of reducing them. This implies that, in some cases, giving effect to equality means treating different people differently.<sup>9</sup>

As a result, industry needs to keep a close eye on the outcomes of cases of indirect discrimination to ensure that business practices and policies will not be challenged for being in breach of the *SDA* or other discrimination legislation.

## VII EXEMPTIONS

The *SDA* contains a range of exemptions, many of which are well established. The 'genuine occupational qualification'<sup>10</sup> exemption is a fundamental one, and logically sits as a qualification to the policy of the Act that employment should be based solely on merit.

As the scope of discrimination law varies according to changes in our society and labour force, so must the nature of the exemptions provided for in the *SDA*. Industry looks to policy-makers to ensure that exemptions are provided which reflect accepted forms of commercial conduct, or in cases where there is clear public benefit, or benefit to a group or category of employee, whilst not disturbing the fundamental underpinnings of the Act.

## VIII SEXUAL HARASSMENT

As is the case with the primary discrimination provisions of the *SDA*, employers and employees are increasingly aware of community intolerance to the practice of sexual harassment in the workplace, made unlawful by the *SDA*.

Whilst most employers and employees deal with sexual harassment issues in a common sense fashion, these issues must be pro-actively managed. Reasonable steps should be taken in advance to prevent their occurrence. The 2004 report of the federal Sex Discrimination Commissioner on sexual harassment provided a timely insight into the nature and extent of sexual harassment in workplaces.<sup>11</sup> It found examples of significant alleged breach, despite there being a relatively small population which has experienced sexual harassment in the past five years.

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9 Manuela Tomei, 'Discrimination and Equality at Work: A Review of the Concepts' (2003) 142 *International Labour Review* 401, 403.

10 *Sex Discrimination Act 1984* (Cth) s 30.

11 Human Rights and Equal Opportunity Commission, *Twenty Years On: The Challenges Continue – Sexual Harassment in the Australian Workplace* (2004), <[http://www.hreoc.gov.au/sex\\_discrimination/challenge\\_continues/challenge\\_continues.pdf](http://www.hreoc.gov.au/sex_discrimination/challenge_continues/challenge_continues.pdf)> at 12 October 2004.

These findings should not be used to tar all employers, managers or workplaces with the same brush. However, they underline a continuing role for the SDA and the importance of taking reasonable steps to prevent sexual harassment. They also underline the need for business managers to intervene at an early stage in cases of known or suspected harassment. A key focus in this regard should be continuing workplace information, education and awareness-raising. This is particularly important given the increasing mobility of the labour force and rising participation rates, as well as the number of new businesses commencing each year.

## **IX THE SEX DISCRIMINATION ACT AND BUSINESS MANAGEMENT**

The SDA not only imposes obligations on employers, but also makes employers vicariously liable for the (unlawful) conduct of employees.<sup>12</sup> Whilst the public policy basis for this proposition is generally understood, it remains controversial – particularly as courts and tribunals extend employer liability beyond the requirement to take all ‘reasonable steps’ to meet their obligations, and into the realm of responsibility for the unknown, the uncontrollable or even the unknowable.

Further, other mandatory requirements which impact on employment can compromise the operation of the SDA. For example, employment laws, such as unfair dismissal laws, that provide a jurisdiction for employees to challenge employer dismissals (even misconduct-based dismissals),<sup>13</sup> or privacy laws that stop employers from controlling employee misuse of technology,<sup>14</sup> serve to compromise the capacity of management to eliminate sexual harassment and sex discrimination from the workplace.

Policy-makers need to ensure that they are providing consistent messages to employers and employees. The basic proposition is this – if discrimination law is to make employers liable for any (mis)conduct that occurs in a workplace context, then employers are entitled to demand that other (workplace relations, dismissal or privacy) laws do not compromise the right of employers to manage their businesses in a way that eliminates such conduct or the risk of it occurring.

## **X MULTIPLE DISCRIMINATION LAWS**

One unresolved issue that confronts business is the multiplicity of sex discrimination (and anti-discrimination) laws existing within each Australian jurisdiction, as well as across the different jurisdictions. This multiplicity of regulation creates uncertainty and confusion, adds to regulatory costs, imposes

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12 *Sex Discrimination Act 1984* (Cth) s 106.

13 See, eg, *Workplace Relations Act 1996* (Cth) s 170CE(1).

14 *Privacy Act 1988* (Cth) s 13.

transaction costs, gives rise to forum shopping and is generally a poor public policy outcome. Business is looking for a more rational system of regulation of discrimination law. One jurisdiction leapfrogging the other is not a sound basis for public policy or law-making.

A related, and not less complicating factor, is the existence of multiple discrimination law frameworks in the one jurisdiction. For example, apart from the *SDA* regulating discrimination in employment, other Commonwealth laws such as the *Workplace Relations Act 1996* (Cth) ('*WRA*') cover the very same ground, both in terms of objects and in terms of substantive provisions. Both Acts create mandatory obligations for employers on the same issue, yet may not enact the same substantive provisions, exemptions, remedies or processes.

Australian policy makers have not grappled with this issue in a discrimination law context, but need to do so as our economy has not only a national focus but is also part of a global economy that does not recognise State borders.

## **XI USE OF DISCRIMINATION LAWS FOR EXTRANEOUS PURPOSES**

An additional area of concern for Australian employers is the use of the *SDA* and its emerging jurisprudence as a basis for establishing economy-wide regulation of employment through workplace relations law.

This is a real and pressing issue. In 2003, the Australian Council of Trade Unions commenced a national test case in the Australian Industrial Relations Commission, which seeks to introduce five new national employment standards based, in part, on the prohibition of discrimination against workers with 'family responsibilities' under the *WRA* and the combined jurisprudence of federal and State tribunals and courts when dealing with the *SDA* and its State equivalents.<sup>15</sup>

For employers, this is a worrying development. The *SDA* sets out certain legal obligations. Case law pursuant to the Act is based on the application of the statute to the particular facts of each case. Use of the Act in a way that would impose the orders made against one employer acting unlawfully upon the bulk of employers acting lawfully is an unwelcome extension of the basis on which economy-wide employment law is made. It also risks undermining the confidence of industry in the *SDA* if employers see it being used as a platform to impose additional employment obligations that go beyond the regulation of gender-based discriminatory conduct.

## **XII CONCLUSION**

The general approach of Australian employers and of representative business organisations is to support the continued operation of the *SDA*, but to do so with

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15 See generally Australian Industrial Relations Commission, *Family Provisions* (2004) <<http://www.e-airc.gov.au/familyprovisions/>> at 25 October 2004.

a constructively critical eye on its operation and with a mind to encouraging regular review.

For its part, the ACCI supports the principle of equal opportunity and non-discriminatory workplace policies and practices. Support for these principles does not, however, mean a blank cheque for regulatory intervention or additional regulatory intervention. Regulation should only be introduced where there is a demonstrated need and where alternatives to regulation have failed.

Both social and economic conditions are bringing industry closer to a realisation that policies and practices that are non-discriminatory enhance labour market participation and underpin the contemporary business case. Balanced and workable laws providing remedies against discriminatory conduct have a part to play, but education should be the priority for regulators rather than a narrow focus on punishment and court-enforced compliance.

Business is also aware that the community expects the corporate sector to take its non-discriminatory obligations seriously, in word and in deed.

In turn business expects the community, through its legislators and regulators, to apply a common sense, balanced and reasonable set of standards against which business performance on discrimination matters can be judged.