

Falling short on women's rights: mis-matches between SDA and the international regime

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DRAFT for submission

Introduction

1. To mark the 20th anniversary of the Sex Discrimination Act 1984 (SDA), I have been asked to assess the Act in light of the Women's Convention.¹ In doing so, I will concentrate on its shortcomings rather than its virtues, of which there are several. The question is, how well does the SDA fulfil Australia's obligations under the Women's Convention?

2. The most effective way to implement an international human rights instrument is to make it part of domestic law. This does not mean that all the provisions of the Women's Convention should be reproduced in the SDA. Because women's march to equality in Australia has been moving forward over many years, parts of the Convention were already reflected in other laws and policies at the time of ratification. Women had achieved formal legal equality under legislation such as electoral laws, marriage and divorce laws and under citizenship legislation. Equal pay awards and affirmative action legislation are also relevant to the implementation of Convention obligations. Some aspects of the Women's Convention are, or should be, implemented through policies and programs, by the commitment of resources and the delivery of services.

3. The SDA annexes the Women's Convention. But it aims to implement only *certain* provisions of the Convention.² Its main aim was to prohibit sex discrimination in certain areas and provide remedies for discrimination. That was a significant innovation at Commonwealth level, one which some thought would bring us to the end of civilization.

4. Resistance to the idea of legislating in respect of discrimination meant that important parts of the Convention were not fully implemented, even those parts calling for specific laws. Furthermore, some areas of sex discrimination are exempt from the application of the SDA. There is a marked contrast with the Racial Discrimination Act 1975, which implements the Racial Discrimination Convention (CERD)³ and follows very closely the language of that Convention. The result is that Australia has fallen short of its international obligations. Criticisms have been made of the SDA over the last 20 years by Parliamentary

¹ Convention on the Elimination of All Forms of Discrimination Against Women, GA Res 34/180. 18 December 1979, in force 3 September 1981. .

² Section 3, objectives of the Act.

³ Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 A (XX) 21 December 1965, in force 4 January 1969.

Committees, by the Australian Law Reform Commission, by HREOC and others on this basis.⁴

Objectives of SDA

5. The goal of the Women's Convention is the elimination of *all* forms of discrimination against women and the realisation of equality between women and men in the enjoyment of rights and freedoms. The Convention applies to discrimination against women on the basis of sex and marital status. It extends to maternity and pregnancy discrimination in the context of employment.

6. The objects of the SDA, under section 3, are more modest: to "eliminate so far as possible" discrimination in defined areas of activity. The Act applies to discrimination on the grounds of sex, marital status,⁵ pregnancy or potential pregnancy and family responsibility (in relation to dismissal).⁶ It applies to discrimination involving sexual harassment in certain areas. The grounds of discrimination expand those of the Convention to some extent. Notably, the SDA applies to sex discrimination and is not limited to discrimination against women.

Defining discrimination

7. The Women's Convention defines discrimination against women very broadly:

Article 1: For the purposes of the present Convention, the term "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.

8. This definition is based on the CERD definition of discrimination.⁷ It covers all forms of discrimination against women and is not limited to

⁴ *Half Way to Equal, Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, House of Representatives Standing Committee on Legal And Constitutional Affairs, 1992, AGPS; *Equality before the Law, Justice for Women*, ALRC 69, part I, 2003; HREOC, *Report on Review of Permanent Exemptions under the SDA 1984*, AGPS, 1992.

⁵ *McBain v Victoria*, Federal Court of Australia, Sundberg J, 28 Jul 2000, [2000] FCA 1009.

⁶ The provisions of the Act dealing with family responsibility were inserted in response to International Labour Organisation Convention 156 on Workers with Family Responsibilities; there is also support for these provisions in the Women's Convention, art 11 (2): "In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities"

⁷ article 1.1.

particular fields or to types of conduct. The Convention's broad definition of discrimination enabled the monitoring body, CEDAW, to define violence against women, gender based violence, as a form of discrimination which the Convention requires to be proscribed.⁸

9. The Women's Convention puts the focus on unequal outcomes,⁹ and allows for consideration of the underlying issues of systemic discrimination. CEDAW, has recently explained its approach to indirect and systemic discrimination:¹⁰

Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.¹¹

10. The SDA is limited in scope, both as regards the fields of activity and the types of conduct to which it applies. The fields of activity covered are: work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs. By contrast, the Racial Discrimination Act, 1975 applies to racial discrimination in *any* field. It follows closely the definition of discrimination in CERD,¹² whereas the SDA defines discrimination either as less favourable treatment by reason of sex in circumstances that are the same or are not materially different,¹³ or as indirect discrimination - the imposition of conditions, requirements or practices likely to disadvantage persons of a particular sex.¹⁴

⁸ CEDAW, General Recommendation No 19 (11th Session 1992), para 1.

⁹ See, eg. ALRC 69, Part I, 1994, pp 44-47 and recommendation 3.2.

¹⁰ General Recommendation No 25 on article 4, para 7: Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination - committed by public authorities, the judiciary, organizations, enterprises or private individuals - in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. . See also footnote 10.

¹¹ CEDAW, General Recommendation on article 4 (1), para 7, footnote 10.

¹² Section 9.

¹³ SDA s 5 (1): treatment that is less favourable, in circumstances that are the same or are not materially different.

¹⁴ s 5 (2): if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person. See also ss 7B and 7C. *Styles v Secretary, DFAT & Harrison*, 1987. The original rather complex provisions on indirect discrimination were simplified in 1995, following the model of the ACT legislation; the onus

11. The framers of the original SDA were aware of the broad scope of the Women's Convention, for they inserted provisions to outlaw sexual harassment.¹⁵ The Federal Court of Australia later confirmed that sexual harassment was proscribed by the Convention as discrimination against women.¹⁶ This decision came down in 1988, four years before CEDAW expressly defined sexual harassment and gender based violence as forms of discrimination outlawed by the Convention.¹⁷ But, except in this one respect, the SDA is more restrictive in scope than the Convention.

Equality rights are not fully protected

12. Article 2 (b) of the Convention requires States parties to prohibit "all discrimination against women" by legislative or other measures. States should establish legal protection of women's rights and effective protection against *any* act of discrimination, and should take appropriate measures to eliminate discrimination "*by any person, organisation or enterprise.*"¹⁸

13. The SDA has been criticised for its more limited approach, and for failing to provide a legal framework for tackling all forms of discrimination, including systemic discrimination. Both the Parliamentary Committee Report, *Half Way to Equal*, in 1992¹⁹ and the Australian Law Reform Commission in 1994,²⁰ recommended the introduction of a general prohibition of discrimination, which would bring into play the Convention's broad definition of discrimination. The Racial Discrimination Act, s 9 (1), which follows CERD quite closely, provides a precedent for this.

14. A general prohibition of discrimination, defined as in the Convention, would expand on the anti-discrimination provisions of the SDA to cover the protection of equality and the equal enjoyment of rights and freedoms. There may be a certain symbolism in this. But in practical terms, it could open up

of disproving disadvantage was placed on the respondent. The ALRC recommended changing the definition to match CEDAW, ALRC 69, Part I, para 3.16, and recommendation 3.1, p 42.

¹⁵ ss 28A - 28L; originally ss 28 and 29. This followed decisions in State jurisdictions finding that sexual harassment was a form of discrimination against women.

¹⁶ *Aldridge v Booth* in 1988, 80 ALR 1, Spender J. See also *Hall & ors v Sheiban & Anor and HREOC* No. NG1185 of 1988 20 FCR 217 Lockhart, Wilcox and French JJ, confirming and extending the decision.

¹⁷ CEDAW, General Recommendation No 19, 1992, paras 22, 23. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN. Doc. HRI\GEN\1\Rev.3 (1997).

¹⁸ Article 2 (c) and (e).

¹⁹ House of Reps Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, AGPS Canberra 1992, recommendations 60 (a) and 60 (b).

²⁰ *Equality before the Law: Justice for Women*, ALRC 69, Part I, 1994, para 3.14 ff, recommendation 3.17.

areas of systemic discrimination to investigation and complaint (eg the undervaluation of women's work)²¹.

Legal recognition of principle of equality

15. The Women's Convention calls on States to give legal recognition to the principle of equality of women and men. States are required:²²

To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

The resistance in Australia to a Bill of Rights probably ensured that a general legal protection of equality would not find its way into our legislation. Nevertheless, Australia entered no reservation to this provision, and is obliged to put it into effect. Without a legal guarantee of equality or a general prohibition of discrimination, the law is not a fully effective tool for achieving equality.

16. The Australian Law Reform Commission recommended, in 1994, that the Women's Convention be fully implemented by enacting a guarantee that everyone is entitled to equality in law.²³ The Commission had in mind a legally enforceable right to equality, a right which would override laws, policies and practices which are unequal or discriminatory in principle or in effect. The most effective way to do this, the Commission said, would be to entrench an equality guarantee in the Constitution.²⁴

17. An alternative proposal was made for a statutory guarantee of equality by means of an Equality Act.²⁵ This would define 'equality in law' to include

'equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms.'²⁶

18. Such a provision would give rise to a legal obligation to take positive measures to achieve substantive equality and to overcome the disadvantages which obstruct women from enjoying rights on an equal basis. Areas for action might include the historic undervaluation of women's work, the exploitation of

²¹ ALRC 69, Part I, para 3.31.

²² Article 2 (a) of the Convention.

²³ ALRC 69, Part II, *Equality Before the Law: Women's Equality*, 1994, recommendation 4.1, p 58, recommendation 4.7

²⁴ ALRC 69, Part II, 1994, para 4.16.

²⁵ ALRC 69 part II, *Equality before the law: Women's Equality*, 1994, recommendation 4.2. An Equality Act could stand alone, or it could be part of a statutory Bill of Rights. It could be a precursor to a later Constitutional amendment.

²⁶ ALRC 69, Part II, 1994, recommendations 4.3, 4.4, para 4.20 ff.

unpaid work, the concept of dependency, women's vulnerability to male violence and women's lower level of participation in the political process.²⁷ CEDAW expressed support for the ALRC proposal in 1997.²⁸

19. Although the Commonwealth Government has shown little support for an equality guarantee, there has been a recent advance in the ACT. The Human Rights Act 2004 incorporates the principle of equality and equal enjoyment of rights without discrimination. Section 8 provides that

(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Experience under this enlightened ACT legislation may help to pave the way for a Bill of Rights for Australia, in which equality rights are guaranteed.

Positive action and temporary special measure

20. The Women's Convention recognises that much discrimination against women is insidious, buried in long standing attitudes and practices, and that the simple approach of equal treatment will not be enough to achieve full equality. It calls on States to take a range of measures in all fields in order to guarantee to women the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.²⁹

21. To encourage States to take positive steps to achieve equality for women, article 4 of the Convention allows for the adoption of temporary special measures "aimed at accelerating de facto equality between men and women." These measures are not to be considered as discrimination, but should be discontinued when [if ever] equality is achieved. The Convention also recognises that measures for the protection of maternity are not to be considered discriminatory, article 4 (2).³⁰

22. The CEDAW Committee has recently affirmed that the goal of the Convention is substantive equality, equality of outcomes, and that underlying causes of discrimination, such as the persistence of gender based stereotypes

²⁷ Violence is mentioned expressly as a factor contributing to inequality. [rec 4.7]

²⁸ CEDAW, Concluding Observations on Australia, 1997, para 387: The recommendation of the Commission to enact an Equality Act which could lead to the entrenchment of equality legislation in the Constitution would, if implemented, reinforce Australia's leadership role with regard to the equality of women.

²⁹ Article 3.

³⁰ article 4 (2), implemented by SDA sections 31 and 32.

that adversely affect women, must be addressed by States.³¹ The Committee has urged States to adopt concrete policies and programmes to accelerate access to equal participation or to the redistribution of power and resources.³²

23. Some countries have been more adventurous than others in adopting temporary special measures. They have imposed quotas on public boards, and even on parliamentary elections. The Australian Government however, believes that education to change stereotypical attitudes is preferable to setting quotas or targets.³³

24. The SDA, section 7D, takes up article 4 of the Convention, by authorising special measures to be taken for the purpose of achieving substantive equality between men and women, provided that purpose has not been achieved.³⁴ Such special measures are not to be regarded as discrimination. Section 7D replaced an earlier section 33³⁵ in 1995, following recommendations of the ALRC.³⁶

25. The new section 7D was considered in 2004 by Justice Susan Crennan of the Federal Court in a case brought against the Australian Municipal Administrative Clerical and Services Union. Under the rules women were to have equal representation at Branch level and at State and National conferences.³⁷ The Judge affirmed that a special measure is one which has as one of its purposes, achieving genuine equality between men and women, and that the union had adopted a 50 per cent policy for representation of women in order to accelerate substantive equality between its male and female members in the governance of the union. The rules enabled the discontinuance of the two rules in question, if they were no longer needed to achieve substantive equality.

26. This is an encouraging decision. But there is an obstacle to the adoption of special measures in Australia. Apart from any informal advice available from

³¹ General Recommendation on article 4 (1), 30th Session, 2004, paras 7, 8 & 10.

³² Gen Recommendation No 25 on article 4 (1), para 39.

³³ Fourth and Fifth Report to CEDAW, para 48.

³⁴ (Previously s 33, and in a different form, amended in 1995) 33. Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act.

³⁵ *Re Australian Journalists Association* [1992] EOC 92-417 before the Australian Conciliation and Arbitration Commission: Deputy President Boulton J. found s 33 only applied "to measures which are intended to achieve equality of opportunity." He then went on to find that since women had the opportunity to stand for election equally with men, measures reserving positions for them on the governing body of journalists were not saved by the exemption provisions of s 33. [an exemption was later granted?] *The Municipal Officers' Association of Australia and Australian Transport Officers Federation v The Technical Service Guild of Australia* [1991] 93 IR Comm A: Deputy President Moore J. found that reserving positions for women on a governing body of an amalgamated union was an act that was exempted, by a liberal construction of s 33, when such measures were intended to ameliorate past discrimination.

³⁶ Following the recommendations of ALRC, sections were amended.

³⁷ *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250, Crennan J, 24 September 2004.

the Sex Discrimination Commissioner (SDC), the validity of a measure under the Act has to await a challenge and a determination by the Federal Court. The case just mentioned had already been considered by HREOC and by the Australian Industrial Relations Commission before going to the Federal Court. Such prolonged procedures might well discourage innovative attempts to boost equality, were anyone disposed to take such steps.

27. The SDC sometimes grants exemptions under the SDA in situations where the activity in question might appear to be a special measure. It is unfortunate that this is the only way to ensure the validity of a measure, since the essential quality of special measures is that they are *not* discriminatory, and therefore should need no exemption. When the ALRC reviewed the SDA, it recommended that provision be made for an advance declaration to be made about special measures, to encourage their use.³⁸ Ultimately, however, it is a question of who decides what is and is not discriminatory, and at what stage.

28. The Federal Court case mentioned above is also significant because Justice Crennan considered not only Australian³⁹ and international authorities, but also the General Recommendation of CEDAW in reaching her decision. Her view was that while recommendations made by the Committee are not binding they explain the Convention's context, object and purpose. This recognition of the role of CEDAW is welcome, especially at a time when the Committee will soon be making determinations in individual complaints. It should also be noted that the Committee's Concluding Observations on Australia help to identify areas where we may fall short of our obligations.

29. A goal of the Women's Convention is to change prejudicial attitudes and practices and to eliminate those which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁴⁰ The Committee has said that States must improve the de facto situation of women and deal with persistent attitudes and stereotype images which lead to discrimination and disadvantageous outcomes for women.⁴¹ It has called for temporary special measures in this respect,⁴² though one might guess that the temporary period is likely to be rather long.

30. In a rather pale reflection of article 5 of the Convention, the SDA states as one of its objects that of promoting: recognition and acceptance within the

³⁸ ALRC 69, Part I, pp 59 ff, recommendations 3.7 and 3.8.

³⁹ Authorities include *Gerhardy v Brown* (1984 – 1985) 159 CLR 70 at 87/88 per Gibbs C.J. and at 105 per Mason J.. See also *Proudfoot v Australian Capital Territory Board of Health* [1992] EOC 92-417, and *Western Australia v Commonwealth (Native Title Act case)* (1994 –1995) 183 CLR 373.

⁴⁰ CEDAW. Article 5 (a).

⁴¹ General Recommendation No 25, article 4, para 7.

⁴² General Recommendation No 25 on Article 4 (1), para 38: States parties are reminded that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women.

community of the principle of the equality of men and women.⁴³ The SDA also assigns an educational role to HREOC.⁴⁴

31. The current Government has faith in education as the best way to achieve change, rather than legislation:⁴⁵ It believes that education about individual rights should encourage tolerance and respect. I agree that education is important, but it is not an adequate substitute for positive measures to achieve equality or for the effective legal enforcement of equality.

Exemptions and exclusions

32. The SDA has been amended and improved since its enactment in 1984. Most Commonwealth legislation is now in line with the Convention, eliminating the need for further exemption. Industrial awards have been brought within the scope of the Act.⁴⁶ The range of exemptions has been narrowed. Nevertheless, there remain in force no less than 16 provisions describing statutory exemptions of various kinds from the anti-discrimination provisions. These constitute one of the most serious deficiencies of the SDA. Some of the exemptions appear to be contrary to the object and purpose of the Convention, which provides no basis for such exemptions. Yet, apart from the exclusion of women from combat duties, Australia has entered no reservations to allow for these exemptions.

33. The Convention's test of discrimination is whether the equal enjoyment of rights and freedoms has been impaired or nullified by the differential treatment; it thus emphasises unequal outcomes as the centre of discrimination.⁴⁷ In accordance with international standards, certain differences of treatment are not considered discriminatory "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate" under the Convention.⁴⁸ The decision as to what is reasonable would ultimately reside in the hands of an independent arbiter of some kind.

34. A few of the exemptions provided for in the SDA relate to treatment which, though unequal in effect, would probably not be considered as proscribed discrimination under the Convention. An example is section 30, which permits the imposition of genuine occupational requirements.⁴⁹

⁴³ SDA s 3 (d).

⁴⁴ SDA s 48 (1) (d) (e) (g) and (ga).

⁴⁵ Fourth and Fifth Report to CEDAW, *Women in Australia*, 2003, para 23.

⁴⁶ Section 40 (1) (e).

⁴⁷ CEDAW, article 1.

⁴⁸ see HRC General Comment No 18 on Discrimination.

⁴⁹ Sections 31, 32, 34 and 35 may also fall into this group.

35. Other exemptions are, however, clearly incompatible with the objectives of the Convention. They condone discrimination selectively, and because they are fixed in statutory form, they pre-empt any consideration of their merit or 'reasonableness'. They displace any independent assessment of what is or is not unacceptable discrimination. The exemptions to the SDA were a high price to pay for the enactment of the legislation, and they have proved rather difficult to remove.

36. Some of the exemptions in the SDA indicate less than wholehearted support for the principle of equality. They state openly that it is acceptable to discriminate in the areas covered. The activities covered involve some formidable bastions of the patriarchy. Prominent are the churches, the military and male sporting clubs. The wide exemptions for religious bodies and religious educational institutions⁵⁰ are a reminder for women that there remain influential institutions in our society implacably opposed to the idea of full equality for women. The Australian Catholic Bishops were unhappy about the review of exemptions undertaken by the SDC because it was not going to consider extending them.

37. Recommendations were made more than 10 years ago to remove the exemptions which apply to employment by religious educational institutions,⁵¹ state instrumentalities,⁵² membership of voluntary bodies⁵³ and participation in certain sports.⁵⁴ These have not been followed up, even though it is doubtful if there remains any justification for the exemptions. Private religious schools are expanding as is their dependence on State funding. And yet they remain free to discriminate, by imposing moral codes on their employees which they do not intend to apply to the parents of their students.

38. The SDA, section 43 exempts the Australian Defence Forces in regard to the prohibition or restriction of women from performing combat duties.⁵⁵ Australia has a reservation to the Convention, which originally related to the participation of women in combat or combat-related duties in the Australian Defence Force. Since 2000, the reservation has been limited to the exclusion of women from combat duties.⁵⁶

⁵⁰ SDA sections 37, 38.

⁵¹ SDA section 38.

⁵² SDA section 13.

⁵³ SDA section 39.

⁵⁴ SDA section 42.

⁵⁵ Combat duties are defined by the Sex Discrimination Regulations as 'duties requiring a person to commit, or participate directly in the commission of, an act of violence against an adversary in time of war.' See 4th and 5th Report to CEDAW p 50, paras 281-282.

⁵⁶ The complete text of the reservations is published in United Nations, *Treaty Series*, vol. 1325, p. 378. See 4th and 5th Report to CEDAW, 2003, paras 281-282.

39. Further exemptions under the SDA can be granted by HREOC.⁵⁷ Currently 24 exemptions are in force. Some may be for the benefit of women, and some appear to be special measures disguised as exemptions.

40. Recently, an exemption was granted by HREOC to allow the Catholic Education Office (CEO) to offer 12 male and 12 female scholarships to HSC students enrolling in primary teacher training in each of the next five years.⁵⁸ The students would commit to working in Catholic primary schools for a period.

41. The surrounding circumstances of this exemption were controversial. HREOC had earlier rejected an application for an exemption in respect of male only scholarships. The Government then put forward a Bill to amend the SDA to provide a permanent exemption for gender specific scholarships offered in order to redress a gender imbalance.⁵⁹ Such an enactment would appear to be incompatible with article 10 (d) of the Women's Convention which requires States to ensure that women have the same opportunities as men to benefit from scholarships. The Bill did not proceed, but it was re-introduced into the House on 17 November 2004.

42. In the last few years the Commonwealth Government has attempted to restrict the application of the SDA by further amendment. In 2001 it introduced a Bill to remove from the scope of the Act State and Territory laws which deny access to assisted reproductive technology to persons on the basis that they were not married or in a de facto relationship.⁶⁰ Those laws had been found to be discriminatory by the Federal Court.⁶¹ The amendments lapsed and so far have not been revived.

Reservation: paid maternity leave

43. In addition to the reservation relating to combat duties, Australia has a reservation relating to article 11(2)(b) of the Convention, which calls on States to provide "maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."⁶² Australia's reservation states that the Government is not in a position to implement that provision. This, despite the fact that the international standard of paid maternity leave is enjoyed by women in 157 countries and has applied in

⁵⁷ Section 44; the assessment of exemptions by the SDC is reviewable.

⁵⁸ Gazetted 31 March 2004.

⁵⁹ The Sex Discrimination Amendment (Teaching Profession) Bill 2004

⁶⁰ The Sex Discrimination Amendment Bill (No 1) 2000 followed *Mc Bain v Victoria*.

⁶¹ *McBain v Victoria*, Sundberg, 28 Jul 2000 [2000] FCA 1009; the High Court dismissed the case on other grounds, *Re McBain exp Australian Catholic Bishops Conference; Re McBain, ex p A-G (Cth); ex rel Australian Episcopal Conference of the Roman Catholic Church* [2002] HCA 16.

⁶² Article 11 2(b).

Commonwealth employment for nearly 30 years.⁶³ The Commonwealth SDC, Pru Goward, has observed that the lack of universal paid maternity leave is a serious impediment to working women who wish to have children. CEDAW has criticised Australia for maintaining this reservation.⁶⁴

44. In 2000, the Government rejected a recommendation of the Human Rights and Equal Opportunity Commission that it should withdraw its reservation on paid maternity leave.⁶⁵ In 2002, the SDC issued proposals for a government funded paid maternity leave scheme of 14 weeks.⁶⁶ In June 2004, the SDC called on Government to reconsider its reservation to CEDAW in the light of the Maternity Payment introduced in that year's budget.⁶⁷ It is high time that this anomaly was resolved.

Multiple discrimination, and special groups

45. The Women's Convention does not make express provision for women who are subjected to multiple discrimination, such as on the grounds of sex and race.⁶⁸ CEDAW has, however, called on States to adopt, where necessary, temporary special measures directed at women subjected to multiple discrimination, including rural women.⁶⁹ Both CERD and the Human Rights Committee have published General Comments on this issue.⁷⁰

46. Multiple discrimination is of special concern to Australia. The Government's own report to CEDAW states that indigenous women face particular disadvantages, not least of which are violence and discrimination.⁷¹

⁶³ *Pregnancy Report* para 14.11.

⁶⁴ In 1997, CEDAW expressed concern about this reservation and about Australia's non-ratification of ILO Convention No. 103 concerning maternity protection. This provides for 12 weeks of cash benefits for qualifying women, art 4.4. In 2000, CESCR also expressed concern at the lack of paid maternity leave, which is required by article 10 (2) of that Covenant. Australia entered no reservation to that provision. Neither instrument specifies a period for the leave.

⁶⁵ *Report of the National Inquiry into Pregnancy and Work - Pregnant and Productive: it's a right not a privilege to work while pregnant*. HREOC assessment of Government Responses to Recommendations, 1 November 2000, recommendation no 44.

⁶⁶ *A Time to Value, Proposal for a national paid maternity leave scheme*, HREOC, 2002.

⁶⁷ 30 June 2004, media release. The SDC wanted the government to seek advice on whether this did or did not fulfil the requirements of CEDAW and if not to do something more about it.

⁶⁸ For discussion of issues see *Hidden Gender of Law*, 2nd edition, pp 50 ff.

⁶⁹ General Recommendation No 25 on article 4, para 381; CERD, General Recommendation on Gender Related Dimensions of Racial Discrimination, March 2000

⁷⁰ HRC, General Comment No 28 on article 3, 2000, para 30: Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷¹ paras 13 and 15.

CEDAW recognised that ATSI women faced discrimination in many areas when it last considered Australia's report in 1997.⁷²

47. In its review of the SDA, the ALRC made recommendations to enable issues of discrimination under different legislation to be joined, so that the true nature of the injury suffered by the complainant could be assessed.⁷³ That recommendation remains outstanding.

The Optional Protocol to the Women's Convention

48. Australia contributed to the drafting of the Optional Protocol to the Women's Convention, and I regret very much the negative attitude of the Government towards the Protocol and in general towards the treaty body process. One purpose of the Protocol is to test, within the framework of a particular case, whether a State has complied with its obligations. The Committee's jurisprudence in determining individual complaints under the Optional Protocol, will further amplify the interpretation of the particular articles and identify where States have fallen down on their obligations. If Australia were to ratify the Optional Protocol, CEDAW could be asked to consider cases of discrimination in areas now covered by exemptions and exclusions to the SDA, or where no remedy is provided in Australian law. Exposing the deficiencies of the SDA in this way would help to keep up the pressure for further amendment or review of the Act.

49. Some issues of discrimination against women could be tested under the Optional Protocol to the ICCPR, which covers many aspects of discrimination against women. Australia has been found in violation of its obligations under ICCPR and CERD on several occasions.⁷⁴ Discrimination was raised successfully in a recent case where a man was denied a pension under the Veteran's scheme because he was in a same sex relationship, not recognised in the legislation. The Human Rights Committee found a violation of article 26.⁷⁵ However, the Australian Government has shown little respect for decisions of the Human Rights Committee in recent years.

Conclusions

⁷² CEDAW, Concluding Observations on Australia in 1997, para 390. The Committee was aware that Aboriginal and Torres Strait Islander women continued to face discrimination and disadvantages in terms of access to rights, opportunities and resources. para 397:

⁷³ ALRC 69, Part I, pp 63 - 69, recommendation 3.9, recommended ability to combine cases under race, sex and disability.

⁷⁴ *Hagan v Australia*, re the 'ES 'Nigger' Brown Stand at Toowoomba. 26/2002, 31 July 2002.

⁷⁵ *Young v Australia* 941/2000 [2003] art 26: Author was denied a pension as he was not a dependant, because he was in same sex relationship. The State did not attempt to justify why the distinction was made. This was a violation of art 26. Australia was recommended to reconsider the pension application including if necessary a change in law.

50. The Women's Convention, because of its broad definition of discrimination, has something to say about most issues of major concern to women, issues such as violence and sexual assault, trafficking, aids and political participation.

51. The SDA does not implement fully the wider objectives of the Convention, - the elimination of all forms of discrimination and the realisation of equality. Its goal is more modest, to target discrimination in defined areas and to provide recourse and remedies. While this has proved valuable in providing legal remedies for individual acts of discrimination, the SDA fulfils only part of Australia's obligations under CEDAW. Its definitions and restrictions are too narrow to deal with systemic discrimination; it has too many exemptions. Further review is necessary.

52. What prospects are there for reform? If we put our faith in the Commonwealth Government, there is little to hope for. The Government has shown itself willing to erode the protection afforded by the SDA by introducing legislation to allow discrimination in respect of the provision of fertility services and the award of scholarships for teacher trainees. It has also reduced the resources available to the HREOC and the SDC.

53. Overall, the history of the current Government in regard to the international human rights instruments is not good. It has refused to ratify the Optional Protocol to the Women's Convention as well as that to the Torture Convention. It has consistently refused to respect decisions of the treaty bodies relating to the detention and treatment of asylum seekers. This is part of a wider picture in which disregard of human rights by the Government has been manifested in the anti-terrorism laws and in the failure to uphold the human rights of our citizens detained in Guantanamo Bay; it is manifest in neglect of the self-determination rights of indigenous people, and in the denial of reparations for the stolen generation.

END

