

Gender Equality Roundtable Submission to the Consolidation Project

Introduction

On Tuesday 14 December 2010, Equality Rights Alliance (ERA)¹ hosted a roundtable event to discuss gender equality in the context of the Australian Government's project to review and harmonise Australia's four federal anti-discrimination Acts (known as the 'Consolidation Project'). The Consolidation Project is a joint departmental project involving the Attorney General's Department and the Department of Finance and Deregulation.

The ERA roundtable involved 15 representatives from non government organisations, academia, anti-discrimination practitioners and unions.² This submission is based on the key concerns and recommendations identified at the roundtable.

Recent international commentary

The Consolidation Project recently received international attention during the United Nations' Universal Periodic Review (UPR) of Australia in January 2011.

During Australia's UPR, concerns were raised that Australia's current anti-discrimination legislation regime does not fully incorporate Australia's international human rights obligations into domestic law and that the legislative protection of human rights is inadequate.

States made ten recommendations that specifically referenced the need for Australia to develop stronger equality protections. A number of recommendations specifically referred to the current Consolidation Project, including a recommendation that Australia ensures that its efforts to harmonise and consolidate Commonwealth anti-discrimination laws addresses all prohibited grounds of discrimination and *promote substantive equality* (recommendation 86.42, emphasis added).³

Following Australia's last review under the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW) in July 2010, the CEDAW Committee also urged Australia to strengthen the promotion and protection of human rights, including through the consolidation and harmonisation of federal anti-discrimination law into a single Act.⁴

¹ Equality Rights Alliance (ERA) is a national network of non government and not for profit organisations and social enterprises coming together to advocate for women's rights and gender equality. ERA is Australia's largest organisational network of women's advocates with 53 member organisations. ERA maintains a focus on gender equality, women's leadership and women's diversity. YWCA Australia is the lead agency and contract holder for ERA.

² Appendix Two lists the roundtable attendees.

³ A/HRC/WG.6/10/L. 8, *Draft report of the Working Group on the Universal Periodic Review – Australia*, 31 January 2011

⁴ CEDAW/C/AUS/CO/7, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Australia*, 30 July 2010, [25], available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-AUS-CO-7.pdf>

The attention given to Australia's Consolidation Project during the UPR and the CEDAW review indicates the international expectation that Australia must address current gaps in its adherence to international human rights obligations. We urge the Australian Government to address the recommendations related to the Consolidation Project, both in its response to the recommendations of the UPR, and by addressing our concerns with the process undertaken for the Consolidation Project.

Concerns about the Consolidation Project

The Consolidation Project is a rare opportunity to introduce effective, modern equality laws that reflect current best practice and fully implement Australia's international human rights obligations, including obligations relating to gender equality. However, we have a number of concerns regarding the process the Government has adopted in its review of the current federal anti-discrimination Acts.

Consultation

We are concerned that, despite its significance and potential impact on equality in Australia, the Consolidation Project does not have a clear framework, terms of reference and/or public consultation process to guide the project. We note that recommendation 43 ('Sen Recom 43') of the Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality ('Senate Inquiry'), was for a public inquiry to be held to examine the merits of replacing the existing federal anti-discrimination Acts with a single Equality Act. We are concerned that the process of the Consolidation Project has not fulfilled this recommendation.

Although we have been pleased to have had the opportunity to meet with officials from the Attorney-General's Department and the Department of Finance and Deregulation about the Consolidation Project, we are concerned about the ad-hoc nature of the Consolidation Project consultations. We understand that public comment on the process will be sought only when an exposure draft of the consolidated laws is released around April 2011. Our concern is that the laws will have essentially been determined in the exposure draft. In our view, this process is both highly unusual and extremely inadequate particularly given Sen Recom 43.

Gender perspective and recommendations of Senate Inquiry into the effectiveness of the Sex Discrimination Act

We are also concerned that the Consolidation Project, particularly with the lack of open consultation with stakeholders, may result in the loss of a gender perspective on equality and anti discrimination. We note that in its response to the Senate Inquiry's report, the Government stated that many Senate Inquiry recommendations would be dealt with as part of the Consolidation Project, including important recommendations about the definition of discrimination, the onus of proof and the powers of the Sex Discrimination Commissioner. We

are concerned that many of the important recommendations that resulted from the Senate Inquiry will be ignored in the Consolidation Project.

We therefore call for a proper and transparent consultation process that **includes full consideration of all outstanding recommendations of the Senate Inquiry into the effectiveness of the Sex Discrimination Act** and which reports on how these recommendations have been reflected in any draft exposure for a consolidated Act.

Equality and the economy/productivity

We note that Government's aim with the Consolidation Project is to 'reduce the regulatory burden on and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business'⁵. Regulation that ensures a clear and less confusing process for industry, business and individuals does not need to have an antithetical outcome to improving capacity of the anti-discrimination laws to achieve substantive equality. We refer to the broad approach of the *Victorian Review into the Equal Opportunity Act 1995* which noted the economic loss to societies brought about by systemic discrimination and concluded that to better address systemic discrimination, additional mechanisms of protection are required⁶.

Recommendations to the Consolidation Project

1. Key principles

1.1. In the absence of a framework of principles or terms of reference for the harmonisation of federal anti-discrimination legislation, we recommend that any consolidation of Australia's current four federal anti discrimination Acts should result in a consolidated Act which:

- Explicitly states that achieving the equality of all people regardless of sex or gender is a key principle underpinning the Act.
- Fully implements all of Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and removes the qualification "so far as is possible" from the prohibition of discrimination.
- Is inclusive and does not lose a gender perspective in its generality.
- Provides an integrated system, including preventative measures and functions to monitor and measure performance.
- Ensures adequate funding and resourcing for education programs about human rights.
- Considers the proposed consolidation of federal anti-discrimination Acts in conjunction with other relevant government reviews, such as the review of the Equal Opportunity for Women in the Workplace Agency (EOWWA) and the findings of the National Human Rights Consultation.

⁵ Media Release, Attorney-General and Minister for Finance and Deregulation, *Australia's Human Rights Framework*, 21 April 2010

⁶ An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report, 2008

- Removes permanent exceptions. The only exception contained in a consolidated Act should be a simple test of “proportionate means of achieving a legitimate end or purpose”, supplemented with guidelines and codes of practice.
- Strengthens the role of specialist commissioners, including an appropriately resourced Sex Discrimination Commissioner.

2. Recommendations

- 2.1. We call for a **legal right to substantive equality** (Sen Recom 9).
- 2.2. We call for **mechanisms to identify, target and address systemic discrimination**, with an integrated system of anti-discrimination law which includes:
 - 2.2.1. preventative measures and positive duties to eliminate sex discrimination, sexual harassment and promote gender equality (Sen Recom 40)
 - 2.2.2. a reversal of the onus of proof in discrimination cases (Sen Recom 22)
 - 2.2.3. effective enforcement measures (Sen Recoms 23, 24)
 - 2.2.4. own motion powers and monitoring roles for Commissioners (Sen Recoms 29, 30, 31, 32, 33, 37, 38)
 - 2.2.5. the capacity and resources to efficiently measure outcomes
 - 2.2.6. the capacity and resources for the Commissioners to play a significant educative role as modelled by the Fair Work Ombudsman (Sen Recom 34)
 - 2.2.7. performance improvement motions as modelled by the Fair Work Ombudsman with adequate funding (Sen Recoms 24, 34).
- 2.3. We reject a lowest common denominator approach. We call for **best practice and for levelling up** when considering the divergence and subsequent harmonisation of clauses across current anti-discrimination Acts.
- 2.4. We request the **removal of the distinction between direct and indirect discrimination**. Indirect discrimination is extremely complex, difficult to prove and very costly for the individual complainant in terms of time and financial and personal resources. *Women’s disadvantaged position in the labour market tends to be accepted as the norm and therefore complex tests of indirect discrimination and reasonableness do not address systemic discrimination, such as the discrimination suffered by women working on casual and part-time basis* (Sen Recom 5, 6).
- 2.5. **We reject a comparator test**. It is difficult to find an appropriate comparator and, for women in particular, their discrimination case may be lost as a result of the law being unduly technical. (Sen Recom 5). The behaviour which discrimination law seeks to

address is discrimination (as defined in accordance with 3.1 below) *on the basis of a protected attribute*. It removes the need to define a comparator which distracts the courts from focusing on this issue. It would remain possible to use comparisons where appropriate as evidence as to the reason for the treatment complained of, but failure to provide a comparator (or the use of inappropriate comparators) would no longer of itself result in a claim failing. Comparators are further discussed below in relation to pregnancy and maternity leave discrimination at 2.10-2.11 below.

- 2.6. ***We identify the failure to protect victims of domestic violence as a significant gap in law, including anti-discrimination law.*** Adverse treatment on the basis of domestic violence victim status is an issue that severely affects a large number of women, especially in the workplace. Other regions (particularly New York State in the USA) have addressed this in their human rights legislation, incorporating domestic violence victim status as an attribute upon which discrimination is unlawful. We recommend that "domestic violence victim status" (or similar wording) be included in the list of attributes upon which it is unlawful to discriminate, as per the consolidated *Australian Human Rights Commission Act*.
- 2.7. We call for sexual orientation and gender identity to be included in a ***non-exhaustive list of protected attributes***. The non-exhaustive list of protected attributes should also include additional grounds such as homelessness, socio-economic status and irrelevant criminal record. A consolidated Act should be modelled on the equality and non-discrimination provisions of the core treaties to which Australia is a party.
- 2.8. We support a broader definition of carer and family responsibilities to include domestic relationships and cultural understandings of family, including kinship groups. We also support broader coverage to include all areas of employment. (Sen Recoms 13, 14, 30).
- 2.9. We propose that a consolidated Act addresses the extensive **pregnancy and maternity leave discrimination** which Australian women face. Though considerably under researched compared with European jurisdictions,⁷ Charlesworth and MacDonald⁸ have summarised available Australian evidence and provided detailed qualitative data about how such discrimination occurs and its impact.
- 2.10. ACT and Victorian discrimination laws no longer require a comparator in discrimination claims.⁹ For over a decade, the European Court of Justice has held that European Community laws provide that from the beginning of pregnancy until the end of maternity

⁷ For example, UK Equal Opportunities Commission (2005). 'Greater Expectations: Summary final report EOC's investigation into pregnancy discrimination', EOC, Manchester; Lembrechts, L. and E. Valgaeren (2010). 'Pregnancy at Work: experiences and barriers encountered by women workers in Belgium' Institut pour l'Egalite des femmes et des Hommes, Brussels.

⁸ Charlesworth S. and P. McDonald (2007). *Hard Labour? Pregnancy, Discrimination and Workplace Rights*, A Report to the Office of the Workplace Rights Advocate, Melbourne.

⁹ Discrimination Act 1991 (ACT); Equal Opportunity Act 2010 (Vic).

leave a woman must not be treated unfavourably at work because she is pregnant, about to take, is on or has taken maternity leave. No comparator is needed.¹⁰

- 2.11. Many jurisdictions in Europe provide more protection from pregnancy and maternity discrimination than simply removing the need for a comparator. We propose a similar approach is taken in Australia. Any dismissal or unfavourable treatment or discrimination as defined below during pregnancy, maternity leave and in the three months after returning to work should be regarded as having taken place because of pregnancy or maternity leave. It would therefore be unlawful sex discrimination. It would then be open for the employer to prove that pregnancy or maternity leave was in no way a reason for the treatment. Redundancy would only be permissible where an employer's operations are closed down.¹¹ A comparator would be unnecessary, it would be clear where the burden of proof lay, and the revised exception (see 2.15 below) impermissible in these cases.¹²
- 2.12. **Compounded or intersectional discrimination** must be recognised as a specific issue for women in any consolidated Act. We call for recognition of the difference between 'joining grounds' for discrimination in an action and intersectional discrimination. See also the proposed definition of intersectional discrimination at 3.2 below.
- 2.13. Each factor in compounded discrimination should be accounted for in legislation, together with an account for the combined impact of the multiple factors of discrimination. (Sen Recom 19). See also the proposed definition of intersectional discrimination at 3.2 below.
- 2.14. We recommend explicit steps should be taken in any consolidation of anti-discrimination laws to ensure that in a claim, the complainant need not identify which ground is the cause of the disadvantage provided they can establish that they were treated less favourably than a person who did not embody the same combination of characteristics.¹³
- 2.15. **There should be no exceptions in a consolidated Act.** The only exception contained in a consolidated Act should be a simple test of "proportionate means of achieving a legitimate end or purpose", supplemented with guidelines and codes of practice.
- 2.16. Exemptions in a consolidated Act should be **temporary and reviewable** (Sen Recoms 25, 28, 36, 42).
- 2.17. We are concerned that there is a hierarchy of grounds of discrimination such that race, disability and age are valued above sex, sexuality and marital status and that religion and religious belief is privileged.

¹⁰ See e.g. Palmer, C. and J. Wade (2001). 'Maternity and Parental Rights', Legal Action Group, London (p28)

¹¹ Similar to for example provisions in Finland and Norway (which provide substantial protection than that available in Germany and the Netherlands).

¹² This provision would have similarities to the reversal of onus of proof provided for in s. 361 Fair Work Act 2009.

¹³ This wording has been taken from p.15 of the Collaborative Submission from leading women's organisations and women's equality specialists to the Inquiry into the Effectiveness of the Sex Discrimination Act

- 2.18. Clear guidelines regarding exemptions are required, including the granting of exemptions **only in accordance with the aims and objective of the Act and in a transparent manner** that invites public submissions.
- 2.19. We believe there is a need for provision for **temporary special measures to promote equal opportunity**. We recommend that special measures be treated differently and separately.
- 2.20. We believe **contracting out** of the protection of the Act should be **explicitly prohibited**.
- 2.21. Women are less likely to have the necessary resources to pursue a discrimination matter through the courts. There should therefore be a **no costs jurisdiction in discrimination law matters**, with the exception of vexatious complaints. As it currently stands, there is a powerful disincentive in the federal jurisdiction for a complainant to take a discrimination matter to court due to the risk of an adverse costs order if the complainant is unsuccessful.
- 2.22. Anti-discrimination legislation should contain civil penalty provisions, similar to those in the Fair Work Act General Protections provisions. This can assist an Applicant with mitigating their costs in a no-costs jurisdiction, by way of Applicants applying for the penalty to be payable to themselves when filling out forms to refer the matter to hearing.
- 2.23. Effective representative complaints provisions are required to improve the accessibility and efficacy of the individual complaints process.

3. Specific definitions

3.1. Definition of discrimination

We refer to the discussion on p.6 of the *Discrimination Law Experts' Roundtable: Report on recommendations*, 29 November 2010 and support its recommend definition of discrimination (based on the International Labour Organization Convention 111 and CEDAW):

Discrimination includes any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.

As the Attorney General has commented, anti-discrimination protections should be "clear and easy to understand because people shouldn't need expensive legal advice to know their rights and obligations". A step towards this is a simplified definition of discrimination.

3.2. Definition of intersectional discrimination

Women's life experiences and identities, for example class, nationality, ethnicity or sexuality, can mean policies have differential impacts on them. While CEDAW focuses specifically on distinctions grounded in sex, recent debates have highlighted the limitation of a single factor analysis of discrimination. The term 'intersectional discrimination' recognises that some people experience discrimination on the basis of more than one aspect of their identity.¹⁴ Intersectional discrimination reveals 'both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination'.¹⁵ The CEDAW Committee has recognised the importance of an intersectional analysis in a general recommendation on temporary special measures:

certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compound negative impact on them.¹⁶

Intersectional discrimination recognises that a person may be subject to discrimination based on several aspects of their identity. As each woman's experience of life is different, a woman may simultaneously experience discrimination in one or more aspects of her life including gender, race, class, ethnicity, sexual orientation, ability, age, language, and religious beliefs. Intersectional discrimination acknowledges that discrimination can be experienced as a combination of many factors rather than one factor at a time. Intersectional discrimination cannot be distinguished as the sum of its parts, rather it is a compounded discrimination which is unique from discrimination based on a single factor.

A starting point for a legislative definition of intersectional discrimination may be to adapt the definition of 'Combined discrimination: dual characteristics' in section 14 of the United Kingdom's *Equality Act 2010*, making it relate to multiple rather than dual characteristics and adapting it in line with the list of protected attributes at 2.7 above. In simple terms, the definition may begin as follows:

(1) A person (A) discriminates against another (B) if, because of a combination of two or more relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share those characteristics.

(2) The relevant protected characteristics are—

¹⁴ For an insightful discussion into intersectional discrimination see Kimberle Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics," in *Feminist Legal Theory: Foundations*, ed. D Kelly Weisberg (Philadelphia: Temple University Press, 1993).

¹⁵ UN Division for the Advancement of Women, *Gender and Racial Discrimination, Report of the Expert Group Meeting* No UN Document Number (New York: United Nations, 2000).

¹⁶ [www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

- (a) age;
- (b) disability;
- (c) gender identity;
- (d) race
- (e) religion or belief;
- (f) sex;
- (g) sexual orientation.

(3) For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

4. Additional Reports

4.1. We recommend the following to the Australian Government:

- *Economics of equality: An investigation in to the economic benefits of equality*, Victorian Human Rights Commission, June 2010
- *Report on recommendations for a consolidated federal anti-discrimination law in Australia: Discrimination Law Experts' Roundtable*, 29 November 2010, including the bibliography
- Queensland Working Women's Services Inc, *Domestic violence discrimination in the workplace: Is statutory protection necessary? Our Work, Our Lives conference 2010*

Appendix 1: Endorsements

The submission is endorsed by:

- 1) 2020 women
- 2) Amnesty International Australia
- 3) Australia Women's Health Network
- 4) Australian Centre for Leadership for Women
- 5) Australian Council of Trade Unions (ACTU)
- 6) Australian Domestic and Family Violence Clearinghouse
- 7) Australian Education Union
- 8) Australian Federation of Graduate Women
- 9) Australian Immigrant and Refugee Women Alliance
- 10) Australian National Committee for UN Women
- 11) Australian Services Union
- 12) Australian Reproductive Health Alliance
- 13) Australian Womensport and Recreation Association
- 14) Business Professional Women Australia
- 15) Central Australia Women's Legal Service
- 16) Children by Choice
- 17) Donelle Wheeler, UN Women Australia Board Member
- 18) Community and Public Sector Union
- 19) Dr Muriel Porter OAM
- 20) Dr Sara Charlesworth, University of South Australia
- 21) Finance Sector Union
- 22) Economic Security4Women
- 23) Graduate Women of SA
- 24) Human Rights Law Resource Centre
- 25) Independent Education Union
- 26) JERA International
- 27) Jessie Street National Women's Library
- 28) Liberty Victoria
- 29) Maritime Union of Australia
- 30) Members of the Centres Against Sexual Assault Forum in Victoria
- 31) National Association of Community Legal Centres
- 32) National Council of Jewish Women of Australia
- 33) National Tertiary Education Union
- 34) National Union of Students' Women's Department
- 35) Network of Immigrant and Refugee Women of Australia
- 36) Professor Margaret Thornton
- 37) Professor Marian Sawer
- 38) Public Health Association of Australia (PHAA)
- 39) Queensland Working Women's Service

- 40) Sisters Inside
- 41) Soroptimists International Australia
- 42) Textiles, Clothing and Footwear Union of Australia
- 43) Vedna Jivan, Senior Lecturer, University of Technology Faculty of Law
- 44) Victoria Women Lawyers
- 45) Women with Disabilities
- 46) Women's Electoral Lobby Australia
- 47) Women's Legal Centre (ACT & Region)
- 48) Women's Legal Services NSW
- 49) Women's International League for Peace and Foundation
- 50) Women's Legal Services Australia
- 51) Working Women's Centre SA Inc
- 52) YWCA Australia

17th March, 2011

Dear Ms Richards,

Economic Security for Women (eS4W), on behalf of its member organisations, endorses the Equality Rights Alliance's (ERA) submission to the Consolidation Project on anti-discrimination laws.

eS4W is one of the six national women alliances given financial support by the Federal Government's Office for Women. As our name suggests, our member organisations coalesce around issues which impact on women's financial and economic well being at all stages of the life-cycle. eS4W advocates for equal opportunity and anti-discrimination laws that protect women's economic well being.

eS4W agrees with ERA's statement that "the Consolidation Project is a rare opportunity to introduce effective, modern equality laws that reflect current best practice and fully implement Australia's international human rights obligations, including obligations relating to gender equality." eS4W endorses ERA's concern regarding the process the Government has adopted in its review of the current federal anti-discrimination Acts and supports their recommendations as outlined in ERA's submission.

eS4W believes that lifelong economic wellbeing is a high priority for Australian women – it empowers women to make choices and live independently. eS4W alliance membership are peak bodies and state wide or national organisations that aim to advance the economic well being of women through training and education and provide services to enable all women to improve their economic status and to have access to training and legal services.

Yours sincerely,

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Appendix 2: Participants in *Gender Equality and the Consolidation Project Roundtable*, Tuesday 14 December 2010

Name	Organisation
Belinda Tkalcevic	ACTU
Ludo McFerran	Australian Domestic and Family Violence Clearinghouse
Alison Aggarwal	Australian Human Rights Commission
Margaret Thornton	Australian National University
Marian Sawyer	Australian National University
Kathy Richards	Equality Rights Alliance
Alana Heffernan	Queensland Working Women's Service & Young Workers' Advisory Service
Lee Matahaere	Queensland Working Women's Service Inc & Young Workers' Advisory Service
Sara Charlesworth	RMIT, Melbourne
Sheila Byard	United Nations Association of Australia Status of Women Network
Prue Elletson	Victorian Women Lawyers Law Reform Committee
Akane Kanai	Victorian Women Lawyers Law Reform Committee
Liz Snell	Women's Legal Services NSW
Alison Laird	YWCA Australia