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Submission to the
Senate Legal and Constitutional Affairs Committee
Inquiry into the
Sex Discrimination Act 1984 (Cth)

August 2008



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Acronyms

<i>Convention on the Elimination of All Forms of Discrimination against Women</i>	CEDAW
Equality and Human Rights Commission	EHRC
Human Rights and Equal Opportunity Commission	HREOC
Human Rights Committee	HRC
Human Rights Law Resource Centre	HRLRC
<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>	CERD
<i>International Covenant on Civil and Political Rights</i>	ICCPR
<i>International Covenant on Economic, Social and Cultural Rights</i>	ICESCR
<i>Racial Discrimination Act 1975</i> (Cth)	RDA
<i>Sex Discrimination Act 1984</i> (Cth)	SDA
<i>Sex Discrimination Regulations 1984</i> (Cth)	SDR
<i>Universal Declaration of Human Rights</i>	UDHR

1. Introduction

1.1 Scope of this Submission

1. On 26 June 2008, the Senate referred to the Legal and Constitutional Affairs Committee the matter of the effectiveness of the *Sex Discrimination Act 1984* (Cth) (**SDA**) in eliminating discrimination and promoting gender equality.
2. This submission is made by the Human Rights Law Resource Centre (**HRLRC**) and focuses on issue (b) of the terms of reference, namely: the extent to which the SDA implements the non-discrimination obligations contained in international human rights law. In this context, this submission also addresses other provisions of the Terms of Reference that are incidental to the harmonisation of the SDA with international human rights standards.
3. The recommendations set out in this submission are aimed at ensuring the full implementation of Australia's obligations under international human rights law, including the *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**),¹ the *International Covenant on Civil and Political Rights* (**ICCPR**),² and the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**).³

1.2 About the HRLRC

4. The HRLRC is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.
5. The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:
 - (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

¹ *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

³ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 003 U.N.T.S. 3 (entered into force January 2, 1976).

- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
 - (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.
6. The HRLRC would like to thank Simone Cusack for her valuable assistance with the preparation of this submission.

2. Executive Summary

2.1 Introduction

7. The HRLRC considers that the most effective way to eliminate discrimination against women and promote equality is through a human rights framework. Of particular significance are the standards set out in CEDAW. CEDAW codifies women's right to non-discrimination and equality with men. These principles are also reflected in the *Charter of the United Nations*, the *Universal Declaration of Human Rights (UDHR)*, the ICCPR, ICESCR and all other major international human rights instruments.
8. A human rights approach to the elimination of sex discrimination is supported by the Australian Labor Party's *National Platform and Constitution* which states that 'Labor will adhere to Australia's international human rights obligations and will seek to have them incorporated into the domestic law of Australia'.⁴
9. In a number of ways, the provisions of the SDA fall short of Australia's obligations under international human rights law. As Australia celebrates the 25th anniversary of the ratification of CEDAW and the 60th anniversary of the UDHR, the Australian Government must commit to the full implementation of CEDAW through comprehensive and robust domestic legislation that reflects a human rights approach to eliminating sex discrimination and promoting equality.

2.2 Recommendations

10. To this end, the HRLRC makes the following recommendations for reform:

Recommendation 1: A Human Rights Framework

SDA reform must be consistent with Australia's obligations under CEDAW and other international human rights instruments.

Recommendation 2: Prohibition of Discrimination

- (a) The SDA should include a general prohibition on all forms of discrimination.
- (b) Discrimination should be defined in accordance with Article 1 of CEDAW.

⁴ Australian Labor Party, *2007 National Platform and Constitution*, adopted by the 44th National Conference in Sydney on 27–29 April 2007, < <http://www.alp.org.au/platform/index.php> > at 27 June 2008, 206-226.

Recommendation 3: Equality Before the Law

The preambular statement that 'every individual is equal before the law and under the law, and has the right to equal protection and equal benefit of the law, without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy' should be included as an operative provision of the SDA.

Recommendation 4: Systemic Discrimination

Measures should be introduced to enable the SDA to better address systemic discrimination. Such measures must provide for or enable a mixture of both 'hard' and 'soft' regulation and remedies that are appropriately tailored to address issues of systemic discrimination.

Recommendation 5: Compounded Discrimination

The SDA should be amended to provide that where a complainant formulates his or her complaint on the basis of different grounds of discrimination covered by separate federal legislation, HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if it is substantiated.

Recommendation 6: Special Measures and General Measures I

If retained, section 31 should be reworded and sections 31 and 32 of the SDA should be moved to reflect that these provisions do not relate to practices that are discriminatory.

Recommendation 7: Special Measures and General Measures II

The lawfulness of conduct that is designed to eliminate discrimination against women, such as temporary special measures or general social policies and conditions, should be clarified.

Recommendation 8: Repeal of Permanent Exemptions and Exceptions

The exemptions covering accommodation, sporting clubs, religious bodies, State instrumentalities, charities, voluntary bodies, acts done under statutory authority and combat duties should be repealed. The exceptions discussed in Section 9.6 should also be

repealed.

Recommendation 9: Applications for Exemption

- (a) Any application for exemption should be subject to a limitations analysis that is consistent with international human rights law principles, such as that contained in section 7(2) of the Victorian Charter.
- (b) The SDA should include an additional requirement that the exemption applicant continue to consider the necessity of the exemption, in a manner consistent with the principles contained in section 7(2) of the Victorian Charter, on an ongoing basis.
- (c) Exemptions should be granted for a period of no more than two years.

Recommendation 10: Remedies

In making awards of damages for discrimination, HREOC and the Federal Court should have regard to awards made at common law or under statute as compensation for loss, injury or damage of a comparable nature (and shall specify these factors in reasons).

Recommendation 11: Limitation Period

The discretionary limitation period in the SDA should be extended from 12 months to at least three years.

Recommendation 12: Powers of HREOC

In accordance with the obligation on State parties to provide an effective remedy of violations of the right to non-discrimination under CEDAW, the ICCPR and ICESCR, the SDA should be amended to provide HREOC with broader powers to:

- investigate potential breaches of the SDA, including powers to enter and inspect premises and to compel the production of material;
- take proactive steps to investigate compliance with orders under the SDA;
- commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
- develop enforceable codes of conduct and guidelines to encourage a culture of compliance.

3. A Human Rights Framework

3.1 CEDAW and the SDA

11. Australia has a distinguished legacy of engagement with the United Nations in the field of women's rights and fundamental freedoms. Australia was at the forefront of the development of CEDAW and has been a party to CEDAW since 1983.⁵
12. However, under Australian law international treaties are not legally binding until they are enshrined in domestic legislation. In the absence of implementing legislation, the Government's commitment to the practical realisation of human rights is largely symbolic.
13. Article 2(a) of CEDAW requires that the Australian Government undertake 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.
14. Australia has taken steps to fulfil its obligations under article 2(a). Most significantly, ratification of CEDAW was the major impetus for the passage of the SDA in 1983 and the Convention text is attached as a Schedule to the SDA. However, the SDA does not implement CEDAW in its totality; instead it aims only to implement *certain* of the rights contained in CEDAW.⁶ In general, the SDA is limited in the fields of activity which it covers and the types of conduct to which it applies.⁷ The failure of the SDA to reflect the full scope of CEDAW has been noted by the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and numerous other bodies.⁸
15. Australia's cautious approach to the domestic implementation of CEDAW is in contrast to the approach taken by the *Racial Discrimination Act 1975* (Cth) (**RDA**), which aims to give full effect to the *International Convention on the Elimination of All Forms of Racial*

⁵ Elizabeth Evatt, "Falling short on women's rights: mis-matches between SDA and the international regime", (Speech delivered at Castan Centre for Human Rights Law, Melbourne, 3 December 2004); Australia also played a key role in the formation of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000) although Australia has not yet ratified this important instrument.

⁶ *Sex Discrimination Act 1983* (Cth), section 3.

⁷ E Evatt, above n 5.

⁸ Australian Law Reform Commission, *Equality before the Law, Justice for Women*, ALRC 69, part I, 2003 (ALRC Report); Human Rights and Equal Opportunity Commission, *Report on Review of Permanent Exemptions under the SDA 1984*, AGPS, 1992.

Discrimination (CERD) and closely follows the language of that Convention.⁹ Ironically, the different approaches taken in regards to racial discrimination and discrimination against women exemplifies the entrenched discrimination that CEDAW is directed at eliminating.

16. The HRLRC believes that the SDA would be a stronger and more effective instrument – and one better able to deliver the Labor Party’s promise to ‘make equality real’ for women – if it were to reflect the full scope of CEDAW and the other major international human rights conventions.¹⁰
17. The SDA applies to discrimination directed at men and women, whereas CEDAW applies only to discrimination against women. While emphasizing and reaffirming the CEDAW Committee’s acknowledgement that ‘women have suffered, and continue to suffer from various forms of discrimination because they are women’, the HRLRC recommends the continued application of the SDA to both women and men.
18. Discrimination against men and women interact and CEDAW recognises this in its preamble, which states that ‘a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.’ For instance, if men are stereotyped as the ‘breadwinner’ and denied benefits under the law as a result (e.g. parental leave) then women are more likely to be forced into the role of home-maker.¹¹ The application of the SDA to both men and women is also consistent with Australia’s non-discrimination and equality obligations contained in the other major international human rights instruments.

3.2 Lessons from Other Jurisdictions

19. The experience in comparative jurisdictions, such as the United Kingdom, is that the use of a human rights framework can have a significant positive impact on public sector culture and the development and interpretation of laws. Some of the benefits of using a human rights approach to develop laws and policies include:¹²
 - (a) a ‘significant, but beneficial, impact on the development of policy’;

⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). See Discussion in Evatt, above n 5.

¹⁰ Australian Labor Party, *2007 National Platform and Constitution*, above n 4.

¹¹ This principle is reflected in Article 5(a) of CEDAW which requires States parties to eliminate gender stereotypes of man and women.

¹² See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

- (b) enhanced scrutiny, transparency and accountability in government;
 - (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
 - (d) 'new thinking' as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
 - (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
 - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.
20. Additionally, a human rights framework can inform and guide domestic policy in complex areas such as discrimination and equality. The international community has been at the forefront of recognising the more insidious forms of discrimination, including indirect, systemic and compounded discrimination. The SDA would be a more powerful instrument if it were to draw on the experience and expertise reflected in international human rights standards.
21. The HRLRC submits that a human rights approach to the review of the SDA will not only ensure that Australia's international obligations are fulfilled but will also assist to develop laws and policies that will best eliminate discrimination and promote equality in Australia.

Recommendation 1:

Reforms of the SDA must be consistent with Australia's obligations under CEDAW and other international human rights instruments.

4. General Prohibition of Discrimination

4.1 Introduction

22. The SDA prohibits narrowly defined acts of discrimination in specified fields of activity, namely: 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. Discrimination which occurs outside these spheres, or which does not fall within the SDA's definition of direct or indirect discrimination, is not considered unlawful.
23. These limitations on the scope of the SDA restrict its effectiveness and are inconsistent with international human rights law. In its 2006 Concluding Comments on Australia's implementation of CEDAW, the CEDAW Committee expressed concern about 'the absence of an entrenched guarantee prohibiting discrimination against women...'¹³
24. Successive reports dealing with the effectiveness of the SDA – including a 1992 Report, *Half Way to Equal* by the House of Representatives Standing Committee on Legal and Constitutional Affairs – have recommended that the SDA be amended to include a general prohibition on discrimination.¹⁴
25. The HRLRC reiterates these recommendations and submits that a general prohibition of discrimination as defined in CEDAW is vital to the effectiveness of the SDA and the harmonisation of the SDA with international law.

4.2 Discrimination under International Law

(a) CEDAW

26. CEDAW calls for the elimination of *all* forms of discrimination against women. Article 1 defines discrimination as:¹⁵

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

¹³ Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5.

¹⁴ House of Representatives 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); *Equality before the Law: Justice for Women*, ALRC 69, Part I, 1994, para 3.14 ff, recommendation 3.17.

¹⁵ CEDAW, Article 1.

rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

27. In addition, Article 2(a) provides that States parties must ensure the practical realisation of the principle of equality.¹⁶
28. There are a number of different understandings of equality and non-discrimination. This submission does not attempt to provide a comprehensive study of the various theoretical frameworks.¹⁷ However, the HRLRC considers that a basic understanding of the different conceptions of equality and non-discrimination are necessary in order to appreciate the inconsistencies between domestic and international law in this area. Three dominant models are:
- (a) *formal equality*, which entails gender neutral treatment in all circumstances;¹⁸
 - (b) *equality of opportunity*, which recognises that women do not necessarily have the same experiences as men and should therefore not be treated identically to men in all circumstances;¹⁹ and
 - (c) *equality of results*, which focuses on equality of outcomes and requires the transformation of the underlying structures that are the cause of inequality.²⁰
29. It is generally acknowledged that each model may contribute to the promotion of equality between women and men and CEDAW itself is informed by more than one model of equality.²¹ CEDAW's focus is on eliminating all forms of discrimination against women so that substantive equality, which requires equality in practice and requires the elimination of the structural causes of inequality, might be achieved.

¹⁶ Ibid.

¹⁷ See ALRC Report, above n.8; Sandra Fredman, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights", in I. Boerefijn et. al. (eds.). *Temporary Special Measures* (2003) 111.

¹⁸ Graycar and Morgan, "Thinking about Equality", 27 *University of New South Wales Law Journal* 833 (2004) at 834, criticise this model because "[h]istorically, women and men have not been treated identically. Treating them exactly the same now may only reinforce the already existing disadvantage of women. This model also has nothing to offer where there is no comparable male experience by which to claim women's right to identical treatment. Nor can it respond to structural disadvantages faced by women."

¹⁹ Graycar and Morgan, *ibid* at 835, criticise this model because "different treatment has more often meant less favourable treatment for women... women can be further disadvantaged because discriminatory practices will be justified by resort to women's differences with men."

²⁰ Fredman, above n 17, 111.

²¹ Ibid.

30. The most authoritative interpretation of CEDAW's object and purpose is contained in General Recommendation No. 25.²² The relevant sections are extracted in Attachment 1. In General Recommendation No. 25 the CEDAW Committee describes the three obligations that are central to States parties' efforts to eliminate discrimination as being:²³
- (a) to ensure that there is no direct or indirect discrimination 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;
 - (b) to improve the *de facto* position of women through concrete and effective policies and programs; and
 - (c) to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in the law, and legal and societal structures and institutions.
31. An important aspect of meeting the three obligations described above is ensuring substantive equality by addressing systemic discrimination (systemic discrimination is discussed in greater detail in Section 6, below). Systemic discrimination does not fall within the scope of the prohibition of discrimination as defined by the SDA. This approach is not consistent with CEDAW which recognises 'the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women.'²⁴
32. In this and other respects as outlined in the remainder of the submission, the SDA fails to reflect Australia's obligation under international human rights law to protect against *all* forms of discrimination against women. As a result, certain forms of inequality and the forces that perpetuate it remain untouched by the law. In fact, the law can itself entrench discrimination.²⁵

²² Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30th Session, 2004.

²³ Ibid.

²⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21, on equality in marriage and family relations*, 13th session, 1994.

²⁵ See Office of the High Commissioner for Human Rights – Women's Rights and Gender Unit, *Project on a Mechanism to Address Laws that Discriminate Against Women* (6 March 2008).

(b) *Other Human Rights Instruments*

33. The Australian Government's obligation to ensure non-discrimination and to promote equality is also linked to human rights standards beyond those contained in CEDAW. Non-discrimination constitutes a basic and general principle relating to the protection of all human rights.²⁶
34. Both the ICCPR and the ICESCR contain comprehensive prohibitions on discrimination.
35. Article 2(2) of the ICESCR provides:
- The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
36. The Committee on Economic, Social and Cultural Rights has confirmed CEDAW's model of substantive equality, stating that:²⁷
- Substantive equality is concerned, in addition [to formal equality], with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.
37. Article 2(1) of the ICCPR provides:
- Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
38. Article 26 of the ICCPR provides:
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
39. The Human Rights Committee (**HRC**) has stated in relation to the ICCPR that:²⁸

²⁶ Human Rights Committee, General Comment 18, *Non-discrimination*, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

²⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005) *The equal right of men and women to the enjoyment of all economic, social and cultural rights*, E/C.12/2005/4, 11 August 2005.

State parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions both in the public and the private sector which impair the equal enjoyment of rights.

40. Article 2(1) of the ICCPR prohibits discrimination on certain grounds in the exercise of the Covenant's enumerated rights. However, article 26 of the ICCPR extends considerably further than article 2(1). Article 26 is a free-standing non-discrimination clause that is not confined to the enjoyment of the rights enumerated in the ICCPR but prohibits discrimination – in fact or in law – in all aspects of public life.

4.3 Arguments supporting a General Prohibition of Discrimination

41. Much of the inequality experienced by women finds its source outside the defined spheres of activity specified in the SDA.²⁹ By limiting the scope of the SDA, the Australian Government limits its capacity to address discrimination and promote equality.
42. Sandra Fredman describes CEDAW as requiring structural and social transformation and states that:³⁰

Equality as transformation does not aim at a gender neutral future, but one which appropriately takes gender into account. The future is not simply one of allowing women into a male-defined world... Transformation requires a re-distribution of power and resources and a change in the institutional structures which perpetuate women's oppression. It requires a dismantling of the private-public divide, and a reconstruction of the public world so that child-care and parenting are seen as valued common responsibilities of both parents and the community. It aims to facilitate the full expression of women's capabilities and choices, and the full participation of women in society.

43. The inclusion of a general prohibition of discrimination would extend the ambit of the SDA so that it covers these issues of systemic discrimination.
44. The RDA provides a precedent for a general prohibition of discrimination and indicates that a general prohibition can be implemented within existing political and legal structures. Limiting the legislative response to sex discrimination – particularly where such limitations are not deemed necessary in respect of other forms of discrimination – undermines the

²⁸ Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) [3].

²⁹ See ALRC Report, above n 8, [3.10]

³⁰ Fredman, above n 17, 115.

attempts being made at domestic and international levels to promote 'women's rights as human rights'.³¹

45. The implementation of a general prohibition of discrimination could also open areas of systemic discrimination to investigation and complaint.³² Examples include women's vulnerability to male violence, lower levels of participation in political processes, the historic undervaluation of women's work and the exploitation of unpaid work.³³
46. Finally, and in addition to these practical implications, a general prohibition of discrimination would have great symbolic significance; it would be an indication to all Australians that the government is committed to real and effective elimination of all forms of discrimination against women.

Recommendation 2:

- (a) The SDA should include a general prohibition on all forms of discrimination.
- (b) Discrimination should be defined in accordance with Article 1 of CEDAW.

³¹ Bunch, Charlotte. "Women's Rights as Human Rights: Towards a Re-Vision of Human Rights" *Human Rights Quarterly* Vol. 12, No. 4, 1990.

³² ALRC Report Part I, above n 8 [3.31].

³³ E Evatt, above n 5.

5. Equality Before the Law

5.1 Introduction

47. The preamble to the SDA affirms that:

every individual is equal before the law and under the law, and has the right to equal protection and equal benefit of the law, without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy.

48. The preamble has limited legislative force and does not create legal rights or obligations. It is an inadequate response to consistent calls for the SDA to be amended to include a substantive right to equality before the law.³⁴

49. The inconsistency between domestic and international law is highlighted by the CEDAW Committee's concern in relation to the absence of an Australian law 'providing for the principle of equality between women and men'.³⁵

50. The HRLRC submits that, to give full effect to Australia's obligations under CEDAW and other international human rights instruments, the SDA must include a substantive guarantee of equality before the law.

5.2 Equality under International Law

51. According to article 15(1) of CEDAW: 'States Parties shall accord to women equality with men before the law.' More generally, CEDAW obliges governments to take positive measures to advance women's equality, rather than simply prohibiting discrimination.³⁶

52. The right to equality before the law is also contained in article 26 of the ICCPR which states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'

53. In its General Comment on *The Equality of Rights between Men and Women*, the HRC stated that:³⁷

The States parties must not only adopt measures of protection but also positive measures in all areas so as to achieve the effective and equal empowerment of women.

54. The Committee on Economic, Social and Cultural Rights has stated that:

³⁴ ALCR Report, Part II, above n 8, [4.1].

³⁵ CEDAW Committee *Concluding Comments on Australia*, above n 13.

³⁶ General Recommendation No.25, above n 22.

According to article 3 [of ICESCR], States parties must respect the principle of equality in and before the law. The principle of equality in the law must be respected by the legislature when adopting laws, by ensuring that those laws further equal enjoyment of economic, social and cultural rights by men and women. The principle of equality before the law must be respected by administrative agencies, and courts and tribunals, and implies that those authorities must apply the law equally to men and women.

5.3 Arguments for a Guarantee of Equality before the Law

55. Successive investigations and reports have indicated that the SDA fails to address various forms of discrimination – particularly those that are best understood using a dominance approach to equality. Of particular significance is the Australian Law Reform Commission Report, *Equality Before the Law*, which argues that:³⁸

to achieve equality for women, the law must be capable of responding to the situation and experiences of women. This requires the starting point to be the effects of the laws, policy or program and its social context.

56. As it stands, the SDA tends to promote a model of individual, formal equality with insufficient focus on equality of results (as opposed to equality of treatment). The SDA does not capture the obligation under CEDAW to fully address prevailing gender relations ‘not only through individual acts by individuals but also in law, and legal and societal structures and institutions’.³⁹ The inclusion of an operative equality guarantee would allow women to ‘challenge laws, procedures and practices that create or perpetuate inequality’.⁴⁰
57. Australia’s failure to implement a guarantee of gender-based equality before the law leaves it out of step with comparable countries. Equality before the law is a protection that is legislatively or constitutionally entrenched in every other Western, industrialised nation.⁴¹ This fact negates spurious arguments that such a provision would prove too far-reaching or disruptive to Australian society.

³⁷ General Comment No. 28, above n 28.

³⁸ ALRC Report, Part II, above n 8, [3.29].

³⁹ General Recommendation No.25, above n 22, [7].

⁴⁰ ALRC Report Part II, above n 8, [4.1].

⁴¹ ALRC Reports I and II, above n 8; *Half Way to Equal*, above n 14. See, e.g., *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (UK), Article 15.

58. Domestically, equality before the law also enjoys legislative protection in the Victorian *Charter of Human Rights and Responsibilities Act* and the ACT's *Human Rights Act*.⁴² In addition, the right to equality before the law in respect of racial equality is provided for in section 10 of the RDA.
59. Equality before the law is a right that women are owed in accordance with international standards and practice. Not only that, but a substantive equality before the law provision is essential if the Australian Government is to respond to discrimination against women in all its forms and guises.

Recommendation 3:

The preambular statement that 'every individual is equal before the law and under the law, and has the right to equal protection and equal benefit of the law, without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy' should be included as an operative provision of the SDA.

⁴² See *Human Rights Act 2004* (ACT) section 8(c); *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 8.

6. Systemic Discrimination

6.1 Introduction

60. A major impediment to the substantive equality of women in Australia is systemic and structural discrimination. While the SDA affords some protection to individuals, it does not address the systemic causes of the ongoing exclusion and disadvantage of women.⁴³

61. Systemic discrimination refers to practices which are absorbed into institutions and social structures, including the law, and which have a discriminatory effect.⁴⁴ In commentary on the significance of CEDAW for the elimination of structural gender discrimination, Rikki Holtmaat states that:

The concept of structural gender discrimination refers to those forms of discrimination that are a consequence of the fact that the structure or organisation of society is built on gender stereotypes, hence ensuring that existing unequal power relations between the sexes are sustained.⁴⁵

62. Systemic discrimination is discrimination which is continuous and may take the form of laws, policies or other practices. It is an issue that is particularly prevalent in the areas of paid and unpaid labour, health, family law and violence against women.⁴⁶

63. An example of systemic discrimination in the area of paid work is the failure of various institutions, including the Australian Government and private business, among numerous others, to recognise the parental caring responsibilities of both men and women. When combined with the dominant cultural assumption that women bear the primary responsibility to care for children, the outcome is that women do not enjoy an equal right to work as men. The myriad flow-on effects from this structural inequality include the financial disadvantage of women and under-representation of women in public and political life.⁴⁷

⁴³ R Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (Research undertaken for the Ministry of Social Affairs and Employment in the Netherlands) (May 2004), xii.

⁴⁴ ALRC Report II, [3.29].

⁴⁵ R Holmaat, above n 43, xii.

⁴⁶ Ibid.

⁴⁷ The 2006 EOWA Census of Women in Leadership (2008) report found that women hold just 7 per cent of the top earner positions (80 positions out of 1136) compared with 93 per cent held by men. Female Chief Financial Officers and Chief Operating Officers earn just half the wage of their male equivalents and even in human resource positions, where women are more common, the pay gap is still 43 per cent. In CEO positions, a female CEO earns two thirds of the salary earned by her male counterpart. Further, in 2006 just 30.3% of federal and state politicians were women and women held 21.1% of vice-chancellorships at

64. Combating systemic discrimination requires systemic or structural change. For example, the Government may address the systemic discrimination discussed above in paragraph 63 by designing a parental leave system that encourages fathers to take on caring activities.⁴⁸ This may be complemented by legislative change requiring employers to implement family friendly work practices, such as reduced or flexible working hours and allowing employees to work from home. The essential requirement is that systemic change occurs so as to give women and men equal enjoyment of the right to work.
65. In order for structural discrimination to be addressed, it must be identified. Identifying and revealing systemic discrimination can be difficult
- because it involves challenging self-evident 'truths' about the biological sex of males and females and about the relationships between the sexes that are constitutive of prevailing social, cultural and institutional arrangements.⁴⁹
66. The ALRC Report argued that:⁵⁰
- The systemic nature of women's inequality calls for a systemic response. It is too widespread for a case by case approach to be either effective or cost efficient. Women, courts, law and policy makers need a means to identify and overcome inequality.
67. The HRLRC submits that the SDA should be amended so that it provides for more direct and sophisticated means of identifying and addressing the insidious forms of sex discrimination that lie within the social structures and institutions of our society.
68. The inclusion of a general prohibition of discrimination (Recommendation 2) and a substantive guarantee of equality before the law (Recommendation 3) would substantially increase the capacity of the SDA to confront systemic discrimination. This section considers further amendments that would supplement these recommendations.

6.2 Systemic Discrimination under International Law

69. Article 5(a) of CEDAW commits States parties to:

Australian universities. See Equal Opportunity for Women in the Workplace Agency, 2006 EOWA Census of Women in Leadership (2008), <http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/2006_Australian_Women_In_Leadership_Census/2006_EOWA_Census_Publication.pdf> accessed on 31 July 2008.

⁴⁸ R Holtmaat, above n 43, 77.

⁴⁹ Ibid, xii.

⁵⁰ ALRC Report I,

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.

70. This requirement is also reflected throughout CEDAW, including in the title of CEDAW, in the preamble and in articles 1-5 and 24.

71. The CEDAW Committee has stated that:⁵¹

[t]he position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.

72. In addition, article 26 of the ICCPR imposes a positive obligation on State parties to take steps to protect against discrimination. The HRC has stated that when certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality.⁵²

6.3 Arguments for Addressing Systemic Discrimination

73. Successive reports on the SDA have commented that the individual complaints-based framework contained in the SDA is not able to address systemic discrimination. In 2006 only 10 employment matters under the SDA were dealt with by the Federal Court, with three of these being procedural matters only.⁵³ The influence that this small number of reported cases can have on entrenched culture and practice is limited.

74. In addition, reliance on individual or even group litigation means that much unlawful discrimination is not addressed if there is no complaint.⁵⁴ While systemic discrimination can be manifested in indirect discrimination and will therefore fall within the scope of the SDA if it relates to one of the SDA's specified fields of activity, individual complaints cannot capture the nature and extent of systemic discrimination.

75. As Krysti Guest explained in her 1998-99 research paper:

⁵¹ General Recommendation No 25, [10].

⁵² Human Rights Committee, General Comment 18, *Non-discrimination*, above n 26, [10].

⁵³ Sara Charlesworth, "Understanding of Sex Discrimination in the Workplace: Limits and Possibilities", speech made for the Clare Burton Memorial Lecture, 2007.

⁵⁴ *Ibid.*

Individualising discriminatory behaviour (for example by conceptualising sexual harassment as solely the result of the harasser's abusive sexual beliefs) overlooks a major aspect of the debate concerning discrimination and equality. Prejudicial considerations concerning a person's worth or ability are rarely the arbitrary, aberrant whim of the discriminator, but are socially stigmatised characteristics that attach to the person or people discriminated against due to their membership of a particular social group. From this perspective, discrimination is a social problem, not an individual problem.

76. Overall, the ideal of equality cannot be realised without effective measures designed to identify and address systemic discrimination. Such measures should include legislative, educative, financial, regulatory, investigative, social and administrative measures that are developed and implemented using the maximum of available governmental resources.

6.4 Recommendations

77. The HRLRC submits that a human rights approach is the best way to address issues relating to systemic discrimination. In considering ways that the SDA may be amended, guidance can be drawn from measures that have been implemented or proposed in other jurisdictions. Effective measures may include a mixture of 'hard' and 'soft' regulation to identify and remedy the underlying causes of systemic discrimination.

(a) Identifying Systemic Discrimination

78. The HRLRC submits that the following measures may assist to identify systemic discrimination.⁵⁵
- (a) Increasing the capacity for the Australian Human Rights and Equal Opportunity Commission (**HREOC**) to conduct investigations by its own motion.
 - (b) Increasing the powers of HREOC or another regulatory body to investigate systemic discrimination and breaches of the SDA generally, including giving the body the power to access and inspect workplaces and other institutions and to require the production of information.
 - (c) Giving a broader range of persons than is currently provided for under the SDA the ability to make a complaint concerning systemic discrimination.⁵⁶ Often, individuals will not have sufficient resources or interest to bring a claim.

⁵⁵ The measures outlined in paragraphs 78(a) and 78(b) are discussed in greater detail below in Section 11.

⁵⁶ Currently, any representative complaint must be made on behalf of a 'person aggrieved', so requiring the complaint to have an individual rather than systemic focus: *Human Rights and Equal Opportunity Commission Act 1986* (Vic), sections 46P and 46PB.

- (d) Increased responsibilities for employers to investigate and monitor inequalities that may exist within their workplaces.

- (b) *Remedies*

79. Various kinds of remedies are required to address systemic discrimination adequately and effectively. While pecuniary penalties may have a role (as a deterrent and/or as a means of providing an incentive for persons to enforce provisions relating to systemic discrimination),⁵⁷ such penalties may not be particularly effective in removing the actual causes of the problem. The strategy of discrimination remedies should be:⁵⁸

to devise a procedure that induces employers and other relevant actors to adopt best practice without at the same time using threats of punishment that will drive employers to resist an open investigation and evaluation of their existing practice.

80. The HRLRC identifies the following measures, in addition to research and education, that have been introduced or proposed in other jurisdictions to address systemic discrimination:

- (a) *Equality Plans / Schemes*: A number of jurisdictions have introduced the requirement for certain bodies to formulate and implement plans which typically require standards and targets to be set that are aimed at reducing discriminatory practice and to monitor compliance with those standards and targets.⁵⁹
- (b) *Codes of Practice*: While the SDA currently enables HREOC to prepare and publish unenforceable guidelines regarding the requirements of the SDA,⁶⁰ the availability of enforceable codes of conduct would, it is submitted, provide the community with greater clarity regarding their rights and responsibilities under the SDA and enable HREOC to respond to topical issues. Inspiration for such measures could, for example, be drawn from Canada, the UK or New Zealand.⁶¹

⁵⁷ In industrial law, for example, it is in the usual course for statutory penalties to be awarded to a union for a contravention of the *Workplace Relations Act 1996* (Cth). This is in recognition of the importance of providing incentives to unions to police industrial laws as 'common informers'. See, eg., *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462, 481-3 [63]-[71] (Merkel J).

⁵⁸ H Collins, *Employment Law* (2003), 74.

⁵⁹ See, for example: in NSW, *Anti-discrimination Act 1977* (NSW) s 122J; in Northern Ireland, *Northern Ireland Act 1998* s 75; in Canada, *Employment Equity Act*, S.C. 1995, clause 44.

⁶⁰ SDA, sections 11(n) and 31(h).

⁶¹ Canadian *Human Rights Act*, s27(2); NZ *Human Rights Act*, sections 6, 92B, 92E, 92H and 97; UK *Equality Act*, s 14.

- (c) *Equality Diagnostic Tools / 'Equality Scorecards'*: The Discrimination Law Review in the United Kingdom has proposed the formulation of an 'equality check tool', which may enable bodies to diagnose the extent to which they are eliminating discrimination.⁶² The Equalities Review in the United Kingdom similarly proposed an 'Equality Scorecard', which scores the level of attainment of equality based on various criteria.⁶³
- (d) *Equality Conditions Imposed on Public Sector Procurement*: The International Labour Organisation has recently reported that '[p]ublic procurement policies embodying racial or sex equality clauses are increasingly viewed as an effective tool to combat discrimination. The scale and economic importance of public tenders provide considerable potential for eliminating discrimination.' It stressed that such requirements should be transparent and widely promulgated.⁶⁴

Recommendation 4:

Measures should be introduced to the SDA to address systemic discrimination. Such measures must provide for or enable a mixture of both 'hard' and 'soft' regulation and remedies that are appropriately tailored to address issues of systemic discrimination.

⁶² United Kingdom Communities and Local Government, *Discrimination Law Review: A framework for fairness: Proposals for a single equality bill for Great Britain*, Consultation Paper (June 2007), 112.

⁶³ United Kingdom Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (28 February 2007), 18.

⁶⁴ There is considerable scope for federal government and enterprises to use their significant 'purchasing power' to promote equality and non-discrimination. This potential has been recognised and harnessed to some degree in the state of Victoria, where panel members on the Government's Legal Services Panel are contractually required to, among other things, 'commit to the furtherance of equal opportunity in their work practices (including work allocation) and in briefing barristers'. As part of 'doing business', governmental procurement should require that suppliers' conduct and outputs promote substantive gender equality.

7. Compounded Discrimination

7.1 Introduction

81. Compounded (or 'intersectional') forms of discrimination exist where women experience discrimination because they are women and on other grounds.
82. On a recent listening tour the Sex Discrimination Commissioner found that 'while there were a number of shared experiences among women, there were also stark differences based on other factors, including race, disability, age, sexuality and socio-economic status'.⁶⁵
83. The SDA should be amended so that it includes mechanisms to contemplate and address compounded discrimination.

7.2 Compounded Discrimination under International Law

84. CEDAW recognises the need to address compounded discrimination and the CEDAW Committee has stated that:⁶⁶

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 compounded negative impact on them.

85. In its 2006 Concluding Observations on Australia, the CEDAW Committee specifically noted the compounded discrimination faced by Indigenous, refugee and minority women and women with disabilities.⁶⁷

86. The HRC has also stated that:⁶⁸

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. States parties should address the ways in which any

⁶⁵ Human Rights and Equal Opportunity Commission, *Gender Equality: What matters to Australian women and men*, (2008).

⁶⁶ General Recommendation No. 25, above n.22, [12].

⁶⁷ CEDAW Committee *Concluding Comments on Australia*, above n 13.

⁶⁸ General Comment 28, above n.28, [30].

instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.

87. The Committee on the Elimination of Racial Discrimination also considered this issue in their General Comment on the gender-related dimensions of racial discrimination, stating:⁶⁹

Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination. The Committee believes that its practices in this regard would benefit from developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.

7.3 Arguments for Addressing Compounded Discrimination

88. Currently, the SDA 'treats women as a homogenous group without recognising the multiple forms of discrimination some women may experience.'⁷⁰ This approach does not recognise the reality of many women who suffer from multiple forms of discrimination.
89. Similarly, the SDA would benefit from the adoption of a systemic and consistent approach to evaluating, monitoring and addressing compounded forms of discrimination.

7.4 Recommendations

90. The ALRC Report on the SDA recommended that the SDA be amended to enable issues of discrimination under different legislation (i.e., the SDA, the RDA and the DDA) to be joined.⁷¹ The HRLRC affirms the ALRC's recommendation.
- 91.

Recommendation 5:

The SDA should be amended to provide that, where a complainant formulates his or her complaint on the basis of different grounds of discrimination covered by separate federal legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an

⁶⁹ Committee on the Elimination of Racial Discrimination, General Recommendation No. 25: Gender related dimensions of racial discrimination, 20/03/2000.

⁷⁰ ALRC Report, Part I, above n 8 at 3.60-3.61.

⁷¹ ALRC Part I, above n 8, 63-69.

appropriate remedy if it is substantiated.

8. Temporary Special Measures and General Policies and Conditions

8.1 Introduction

92. Temporary special measures, also referred to as special measures, are measures taken to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field, with the aim of achieving substantive equality.⁷² Special measures are temporary in nature and should be discontinued once substantive equality is achieved and sustained for a period of time.⁷³

93. In its General Recommendation on temporary special measures, the CEDAW Committee stated that temporary special measures are:

part of a necessary strategy by States parties directed towards the achievement of *de facto* or substantive equality of women with men in the enjoyment of human rights and fundamental freedoms.⁷⁴

94. Section 7D of the SDA provides that a person does not discriminate against another person by taking special measures to achieve substantive equality. This is consistent with Article 4(1) of CEDAW, which provides that 'temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination'.⁷⁵

95. The policy of the Australian Government is to 'take special measures designed to achieve equality and eliminate the effects of both historic and contemporary discrimination' where necessary.⁷⁶ The HRLRC considers that the adoption of special measures is an essential step towards substantive equality of women and men and urges the Government to fulfil this policy statement.

8.2 Clarification of the Difference between Special Measures and General Policies and Conditions

96. The CEDAW Committee has emphasised the importance of clearly distinguishing between temporary special measures prescribed by article 4(1) of CEDAW that aim to remedy the effects of past discrimination, and other general social policies or measures adopted to

⁷² General Recommendation No 25, above n 22, [18].

⁷³ Ibid, [11] and [20].

⁷⁴ Ibid, [18].

⁷⁵ CEDAW, Article 4(1).

⁷⁶ Australian Labor Party, *2007 National Platform and Constitution*, above n 4, 207, [11].

improve the situation of women by addressing the differences between men and women,⁷⁷ such as favourable policies or conditions relating to pregnancy and motherhood. The CEDAW Committee has stated that:

Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures.⁷⁸

97. Such general social policies or conditions that address and accommodate difference will not necessarily be temporary in nature and should not be characterised as temporary special measures. States Parties to the CEDAW Convention are obligated on an ongoing basis to adopt such measures to eliminate all forms of discrimination, with a view to realising substantive equality of men and women.
98. While neither temporary special measures nor general conditions or policies are discriminatory (because they are both aimed at achieving substantive equality),⁷⁹ the CEDAW Committee recommends that the difference between these measures be clarified. The HRLRC considers it similarly important to clearly distinguish between such measures and conditions and discriminatory behaviour.

8.3 Special Measures and General Conditions in the SDA

99. As indicated above at paragraph 94, section 7D of the SDA clarifies that temporary special measures are not discriminatory.
100. Sections 31 and 32 of the SDA are examples of non-discriminatory general conditions aimed at achieving substantive equality. These sections deal respectively with privileges afforded to women in connection with pregnancy and childbirth and services of a nature which can only be provided to members of one sex. However, sections 31 and 32 are currently contained in Part II, Division 4 of the SDA, which relates to discriminatory conduct which is exempt from the anti-discrimination provisions of the SDA. Further, section 31 frames the general measure as lawful discrimination against men. These provisions should not provide for exemptions from discriminatory behaviour, but rather clarify that such conduct is not discriminatory at all.

⁷⁷ General Recommendation No 25, above n 22, [11] and [19].

⁷⁸ General Recommendation No 25, above n 22, [18].

⁷⁹ General Recommendation No 25, above n 22, [26].

8.4 Recommendations

101. If our Recommendation 2 is accepted and the definition of sex discrimination under the SDA is defined in accordance with article 1 of CEDAW, then any measures designed to address the substantive equality of women cannot be considered discriminatory under the SDA. As a result, sections 7D, 31 and 32 of the SDA would not be technically necessary.
102. However there is merit in clarifying that such acts or measures do not constitute discriminatory conduct, because '[b]oth equality and equal protection of the law is denied when the law lacks transparency'.⁸⁰ Individuals and organisations that wish to undertake positive steps to advance the situation of women should not be deterred from doing so due to lack of certainty about their conduct. Further, clarification of the legal position may prevent unmeritorious claims of discrimination.⁸¹
103. The HRLRC considers that the following action may be taken in order to clarify the status of special measures and general conditions discussed in this section.
 - (a) Sections 7D, 31 and 32 could remain in the SDA. If this option is adopted, the HRLRC recommends that section 31 be reworded and sections 31 and 32 be moved from the exemptions section of the SDA in Part II, Division 4 to Part I of the SDA. This should occur to avoid such measures being treated as discriminatory conduct that is exempt from the SDA.
 - (b) Clarification about the types of special measures or social policies that are not discriminatory could be provided in the form of examples within the SDA, or codes of conduct published by HREOC (in accordance with our Recommendation 12).
 - (c) Sections 31 and 32 may be replaced by a general provision, similar to section 7D, which confirms that general policies or conditions do not discriminate against other persons if the policies or conditions are designed to respect and accommodate differences between men and women so as to ensure substantive equality of men and women.

⁸⁰ R J Cook and S Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention* (2007) 56 Emory Law Journal 1039,1069.

⁸¹ See, e.g., *R. v. Kapp*, 2008 SCC 41. Under a pilot government sales program, a communal fishing licence was issued to members of three aboriginal bands, granting them an exclusive right to fish for salmon for period of 24 hours. Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleged a breach of their Charter equality rights on the basis of race discrimination. The Supreme Court of Canada held that the Canadian *Charter of Rights and Freedoms* promotes a vision of substantive equality and enables government to proactively combat discrimination by helping disadvantaged groups improve their situation.

- (d) HREOC or the Sex Discrimination Commissioner could be given the power to declare a policy, practice or service that assists women as comprising either a non-discriminatory general condition or a temporary special measure within the meaning of section 7D. This declaration should then form a defence to a challenge to the policy, practice or service on the basis that it discriminates against another person. Currently, in order to obtain the same level of certainty, such organisation and individuals are required to seek an exemption under the SDA, which risks incorrectly framing the conduct as discriminatory when it is not.⁸² The absence of a declaration should not preclude a policy, practice or service from being considered a general or special measure.

104. The HRLRC considers it important that the lawfulness of conduct that is designed to eliminate discrimination be clarified and makes the following recommendations.

Recommendation 6:

If retained, section 31 should be reworded and sections 31 and 32 of the SDA should be moved to reflect that these provisions do not relate to practices that are discriminatory.

Recommendation 7:

The lawfulness of conduct that is designed to eliminate discrimination against women, such as temporary special measures or general social policies and conditions, should be clarified.

⁸² See, e.g. *Recommended decision on application for exemption under Disability Discrimination Act section 55: Employers Making a Difference*, Human Rights and Equal Opportunity Commission (Commissioner Innes, 14 August 2001), <http://www.hreoc.gov.au/disability_rights/exemptions/emap/emaprec.htm> accessed on 25 July 2008. In this decision, Commissioner Innes refused to grant an exemption under the *Disability Discrimination Act 1992* (Cth) to Employers Making A Difference to permit them to advertise positions as being only open to people with a disability. Commissioner Innes refused to grant the exemption because it was 'obvious that in the present matter there is no arguable case of discrimination'.

9. Exemptions and Exceptions

9.1 Introduction

105. The SDA contains a number of permanent exemptions which permit discrimination on the ground of sex, marital status or pregnancy and sexual harassment in certain areas. The HRLRC considers that the exceptions and exemptions in the SDA currently provide for lawful discrimination that is inconsistent with Australia's obligations under CEDAW and other international human rights instruments.
106. In particular, the HRLRC considers that these exemptions are generally inconsistent with Australia's obligation under article 2 of CEDAW to:
- condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
- ...
- (c) To establish legal protection of the rights of women on an equal basis with men...
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women...
107. The HRLRC also considers the exemptions to be inconsistent with the objects of the SDA, which include the elimination of discrimination so far as is possible.⁸³
108. The justification for many of the exceptions and exemptions, such as the exemptions for clubs and voluntary bodies, religious institutions and sport, appears to be the protection of traditional social structures, which discriminate disproportionately against women. Under article 5 of CEDAW, Australia is obliged to take appropriate measures to modify social and cultural patterns of conduct of both men and women to eliminate prejudice and practices based on the idea of inequality of the sexes. The exceptions and exemptions in the SDA not only fail to fulfil this obligation, but they perpetuate discriminatory practices. Further, as the current exemptions cannot adapt to natural shifts in community values without legislative reform, they enable the stagnation of such practices. Accordingly, there is a

⁸³ SDA, section 3.

critical need to reform the provisions relating to exemptions and exceptions in the SDA to ensure Australia's compliance with its international human rights obligations.

109. The HRLRC submits that the exemptions and exceptions outlined in Sections 9.5 and 9.6 below should be removed from the SDA. Exemptions should only be granted on a case by case basis after the application for exemption has been subject to a limitations analysis that is consistent with international human rights principles. The SDA should incorporate a section which provides guidance on permissible limitations to the right to equality of opportunity found in the SDA by including a provision that mirrors section 7(2) of the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Victorian Charter**). The SDA should also incorporate a requirement that the exemption applicant continue to consider the necessity of the exemption, in a manner consistent with the principles outlined in section 7(2) of the Victorian Charter, on an ongoing basis.

9.2 Permissible Limitations under International Law

110. At international law, it is well established that some human rights are absolute while, in certain circumstances and subject to certain conditions, other human rights may be limited.
111. In *General Comment 31*, the HRC stated that, where limitations or restrictions are made:⁸⁴
- States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.
112. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (**Siracusa Principles**).
113. Among other things, the Siracusa Principles provide that:
- (a) no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;
 - (b) all limitation clauses should be interpreted strictly and in favour of the rights at issue;

⁸⁴ UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

- (c) any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;
- (d) limitations must not be arbitrary or unreasonable;
- (e) limitations must be subject to challenge and review;
- (f) limitations must not discriminate on a prohibited ground;
- (g) where a limitation is required to be 'necessary', it must:
 - (i) be based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
 - (ii) respond to a pressing need;
 - (iii) pursue a legitimate aim; and
 - (iv) be proportionate to that aim.⁸⁵

9.3 Victorian Charter

114. Reflecting the Siracusa Principles, the Victorian Charter contains a limitation provision, section 7(2), which is modelled on broadly equivalent provisions in section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.
115. Section 7(2) of the Victorian Charter provides that:
- A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society⁸⁶ based on human dignity, equality and freedom and taking into account all relevant factors.
116. Section 7(2) also sets out the following inclusive list of these relevant factors:
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

⁸⁵ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

⁸⁶ According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

- (d) the relationship between the limitation and its purpose; and
 - (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
117. Section 7(3) provides that the Victorian Charter should not be interpreted as giving a person, entity or public authority a right to limit the human rights of any person. For example, the right to freedom of expression should not be used to destroy the right to privacy. Rather, a balancing exercise is envisaged. The Human Rights Consultative Committee which investigated and recommended the adoption of the Victorian Charter recognised that rights need to be balanced against one another and against competing public interests. This view is consistent with the case law of comparative jurisdictions, such as the UK and New Zealand, and international jurisprudence.

9.4 A Limitations Analysis of the Exemptions and Exceptions

118. In order to analyse whether the exemptions and exceptions outlined in the SDA represent reasonable limitations on the right to equality, the HRLRC urges the consideration of international human rights standards and jurisprudence. In the context of the limitations analysis outlined above, this section considers the compatibility of the exemptions and exceptions set out in the SDA with international human rights law, including CEDAW, the ICCPR and the Siracusa Principles.
119. The HRLRC notes the following general concerns with the compatibility of the current exemptions contained in the SDA with international human rights law.
- (a) Exemptions contained in the SDA are both arbitrary and unreasonable, being based on stereotyped views of women and their role in society.
 - (b) The permanent exemptions are not subject to challenge and review.
 - (c) The permanent exemptions negate the need to demonstrate that the limitation of human rights is necessary in the circumstances.
 - (d) The permanent exemptions enable certain human rights to trump all other fundamental rights and freedoms without any consideration of how competing rights should be balanced.

These concerns are outlined in greater detail below.

(a) *Limitations must not be arbitrary or unreasonable*

120. The aim sought to be achieved by a limitation should be 'specific' and not merely general, and must be compelling and important and not 'trivial'.⁸⁷ The HRLRC is concerned that many of the exceptions pose general rather than specific and adapted limitations. Further, many exceptions, on their face, fail to indicate a compelling reason for the limitation.
121. Any limitation must have a reasonable connection to the legitimate aim of the limitation and should be accompanied by 'relevant and sufficient reasons'.⁸⁸ It should not be, or operate in a way which is, arbitrary or unfair.⁸⁹
122. As the exceptions in the SDA are provided for in a general sense, there is limited opportunity to explore or elucidate the purpose for the limitation expressed by the exception. Accordingly, under the current framework of the SDA, it is difficult to examine the relationship between the limitation and its purpose. This may result in arbitrary and unreasonable limitations in breach of the Siracusa Principles.

(b) *Limitations must be subject to challenge and review*

123. A procedure for re-examining the suitability of exceptions and exemptions in the SDA is essential to ensure that the exceptions are not arbitrary⁹⁰ and that any exemptions keep pace with Australian society's changing notions of inequality. The HRLRC is concerned that by statutorily enshrining limitations on the right to be free from discrimination, these limitations can only be challenged and reviewed by parliament. Unless there is a mechanism that enables analysis of the exceptions in the SDA when the legitimacy or proportionality of the exception is in issue, there is a risk of those exceptions entrenching and perpetuating outmoded discriminatory values and practices.
124. One such example of this in the SDA is section 39, which enables a voluntary body to discriminate against a person on the ground of the person's sex, marital status or pregnancy in connection with the provision of benefits, facilities or services to members of the voluntary body or membership of the voluntary body. It is difficult to see how there could be a legitimate aim justifying such discrimination by a broad range of voluntary organisations, from sporting clubs to business groups, based on current Australian social values.

⁸⁷ See, eg, *Zundel v R* [1992] SCR 731.

⁸⁸ See, eg, *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

⁸⁹ See, eg, *R v Oakes* [1986] 1 SCR 103, 139.

⁹⁰ Alexandre Kiss, *Commentary by the Rapporteur on the Limitation Provisions* (1985) 7 HUM RTS Q 15, 16.

(c) *Limitations must be necessary*

125. Limitations must be necessary in a democratic society. A limitation may be considered necessary if it:
- (a) is designed to protect the public interest (namely, by upholding public order, public health, public morals, national security, public safety or the rights and freedoms of others);
 - (b) responds to a pressing need;
 - (c) pursues a legitimate aim; and
 - (d) is proportionate to that aim.⁹¹
126. It is not evident that the exceptions are necessary in a democratic society ‘two hallmarks of which are tolerance and broadmindedness’.⁹² Nor do the exceptions respond to a pressing social, security-based or other need.⁹³ Rather, in certain circumstances the exceptions appear arbitrary and inconsistent in form and substance. Further, the exceptions have an undemocratic impact because they risk reinforcing systemic discrimination and the under-representation of women in public and political life. While some exceptions may operate to protect other relevant human rights, this protection is applied in an arbitrary and irregular fashion.
127. It is the aim of the limit itself that should be the subject of scrutiny rather than the aim of the law as a whole.⁹⁴ This supports a case by case analysis of discrimination and a balancing of rights, rather than providing a provision which enables discrimination in a broad category of circumstances. Consideration should be given to the nature and extent of the limitation and whether the limitation is proportionate.⁹⁵
128. The HRLRC also highlights that financial considerations in and of themselves will almost never constitute a legitimate aim or justify a limitation on human rights.⁹⁶ Many of the current exceptions to the SDA, such as when offering partnership, education or accommodation, indicate that the exceptions aim to avoid the financial cost that a non-discriminatory offer may entail. The HRLRC recognises the relevance of financial and

⁹¹ *Siracusa Principles*, above n 85 [10].

⁹² *Dudgeon v UK* [1981] ECHR 440 [53].

⁹³ *Ibid*, [51].

⁹⁴ See, eg, *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, 335.

⁹⁵ See, eg, *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

⁹⁶ See, eg, *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 38.

resource allocation considerations to private entities and public authorities. These considerations, however, cannot be the sole justification for an exception to the prohibition on discrimination.

129. The current exceptions also fail to require the discriminating entity to examine whether there is any less restrictive means reasonably available to that party to achieve the purpose of the exception without restricting the relevant human rights. Further, the exceptions do not require the discriminating party to moderate or tailor their behaviour to minimise the extent to which the right is infringed. The HRLRC recommends that the SDA be amended to require consideration of whether the objective of a limitation can be achieved in a way that does not interfere with, or interferes less with, human rights.⁹⁷

(d) *Competing rights must be balanced*

130. The exemptions fail to properly balance competing interests against the fundamental principle of the equal treatment of men and women and may also impinge upon rights and freedoms, including the right to privacy, the right to protection of the family and children and the right to work.
131. For example, while the exemption provided for charities and voluntary bodies⁹⁸ may engage competing rights (the right to privacy, free association and free expression), the exception does not require the discriminator to balance these rights against the right to be free from discrimination, or indeed other relevant rights such as the right to work or the right to protection of families and children. As a result, the SDA favours certain rights above the right to equality, notwithstanding the importance of this right to the normative human rights framework, even where this may result in an unjust outcome that is disproportionate to the purpose of the exemption. Competing interests may be legitimate in certain circumstances. However, the HRLRC submits that any limitation must be justified

⁹⁷ These factors are drawn from s 36(1) of the *South African Constitution* which, in turn, was informed by the decision of Chaskalson P in *State v Makwanyane* (1995) Case No CCT/3/04 (Constitutional Court of the Republic of South Africa) where it was stated at [104] that:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality... [P]roportionality...calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

⁹⁸ SDA, sections 36 and 39. See also *Reference re Remuneration of Judges by the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.

in accordance with principles such as those outlined in section 7(2) of the Victorian Charter.

9.5 Review of Particular Exemptions

(a) Section 13 – Instrumentality of a State

132. This provision of the SDA excludes employees of State governments and State authorities from the coverage of the SDA in relation to their employment. While there is now anti-discrimination legislation in every Australian State and Territory which provides coverage to these employees, this legislation is not uniform. When seeking a remedy to discrimination, an employee's choice of jurisdiction and access to an appropriate remedy should not be restricted solely due to the identity of their employer. All Australians should enjoy the full protection available against discrimination.
133. In addition, the retention of this exemption may comprise a breach of Australia's obligation to properly implement various international conventions. Under CEDAW, the ICCPR, ICESCR and the *ILO Convention Concerning Discrimination in Employment and Occupation*,⁹⁹ the Australian government agreed to protect Australians from discrimination and to promote and guarantee the implementation of the principles of equality and non-discrimination. The Australian government cannot limit this obligation based on the Federal system of government or domestic State powers. In its Concluding Comments on Australia, the CEDAW Committee noted its concern about Australia's 'inadequate structures and mechanisms to ensure effective coordination and consistent application of [CEDAW] in all states and territories,' despite the power of the federal Government to give national effect to treaty obligations by legislating under its external affairs jurisdiction.¹⁰⁰
134. The HRLRC recommends that the exemption be removed to ensure equitable coverage of all employees and that a concerted effort is made to ensure the mutual recognition of Federal and State anti-discrimination laws in order to achieve a uniform national approach.

(a) Sections 30(f) and 34 – Accommodation

135. As indicated above at paragraph 128, the HRLRC emphasises that financial considerations in and of themselves almost never constitute a legitimate aim or justify a limitation on

⁹⁹ *Discrimination (Employment and Occupation) Convention* (ILO No 111), opened for signature 25 June 1958, 362 UNTS 31, entered into force 15 June 1960.

¹⁰⁰ CEDAW Committee *Concluding Comments on Australia*, above n 13. See also ICCPR Article 50 and ICESCR Article 28 which provide that the human rights obligations in those covenants must be implemented across all parts of federal states without limitation or exception.

human rights.¹⁰¹ As a result, where accommodation is provided by employers and educational institutions, it should be provided for men and women unless the failure to do so is not discriminatory or is a permissible limitation according to the principles outlined above in Section 9.1. The HRLRC recommends the removal of this exemption from the SDA.

(b) *Sections 37 and 38 – Religious Bodies and Educational Institutions Established for Religious Purposes*

136. Section 37 provides religious bodies and educational institutions established for a religious purpose with a broad exemption to discriminate on the basis of sex, marital status and pregnancy. The HRLRC acknowledges the need to balance competing human rights – in this case, the rights to freedom of religion, freedom from discrimination, freedom of expression, privacy and private life and to work. However, the current exemptions for religious institutions prioritise the right to freedom of religion over all other competing rights without requiring any consideration of where the balance between these rights should be. The discriminatory effect of this blanket exemption is two-fold:

- (a) the exemptions enable religious institutions to both engage in sexist practices that directly and indirectly discriminate against women; and
- (b) the exemptions enable religious institutions to entrench social and cultural patterns of conduct based on the idea of the inferiority of women or on stereotyped roles for men and women thereby reinforcing systemic discrimination against women.

137. The HRLRC recommends that this exemption be removed. Limitations on the right to non-discrimination on the ground of sex, marital status and pregnancy may be imposed on a case by case basis if the limitation has a legitimate aim – such as the protection of a person's right to manifest their religion – and is proportionate to the aim being pursued. However, like any potential discriminator, religious bodies and educational institutions should be required to apply to HREOC for a specific exemption, using the method outlined below at Section 9.8, and to justify their discriminatory practice. Such limitations should be considered discretely, and should be subject to regular review.

(c) *Sections 36 and 39 – Charities and Voluntary Bodies*

138. The HRLRC objects to the exemption of an organisation from the ambit of the SDA on the basis that the organisation is considered to be a private organisation operating within the

¹⁰¹ See, eg, *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 38. See also *Reference re Remuneration of Judges by the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.

private rather than public sphere. The purportedly private nature of an organisation is not a legitimate reason to sanction its discriminatory practices. Under CEDAW, Australia is obliged to ensure that women are protected against discrimination committed by private organisations, enterprises and individuals in both the public and private spheres.¹⁰² Australia is further obliged to address 'the persistence of gender-based stereotypes that affect women... in societal structures and institutions'.¹⁰³ The current exemptions for charities and voluntary bodies – organisations that often wield considerable economic, political and social power – are incompatible with Australia's human right obligations under CEDAW and should be removed in their entirety.

139. The HRLRC acknowledges that there is a need to balance competing human rights. However, as with the exemptions regarding religious institutions, the exemptions relating to charities and voluntary bodies does not consider the competing human rights in issue, namely the right to be free from discrimination and the right to free association. The right to free association is protected by article 22 of the ICCPR, but not to the absolute exclusion of other fundamental rights and freedoms. If a charity or voluntary body wishes to infringe the right to equal treatment in the name of free association, the organisation should be required to apply for a specific exemption.
140. The removal of these exemptions would not limit the ability of certain charities or voluntary bodies to provide special services to women. As indicated above in Section 8, the non-identical treatment of men and women is not always discriminatory and must be considered in a contextual way. The provision of services to women to the exclusion of men is not of itself discriminatory if it is in response to the special needs of women or if it is necessary to address prevailing gender inequality.¹⁰⁴

(d) *Section 40 – Acts Done Under Statutory Authority*

141. Section 40 of the SDA provides an exemption for acts performed under the authority of certain statutes, industrial instruments or in accordance with an order of a court, HREOC, the Australian Fair Pay Commission or a court or tribunal that has power to fix minimum wages and other conditions of employment. This provision is incompatible with Australia's obligations under Article 26 of the ICCPR, which requires States parties to afford all persons equal protection of the law without discrimination. The UN HRC has confirmed

¹⁰² CEDAW, Article 2(e) and General recommendation 25, above n 22, [7].

¹⁰³ General recommendation 25, above n 22, [7].

¹⁰⁴ See, e.g. *Recommended decision on application for exemption under Disability Discrimination Act section 55: Employers Making a Difference*, above n 82.

that Article 26 imposes obligations on States parties to ensure that the content of their legislation is not discriminatory and that legislation is not applied in a discriminatory way.¹⁰⁵

142. As indicated above, general or special measures that address the special needs of women or aim to rectify gender inequality are not considered discriminatory. As a result, legislative provisions or award conditions which are more favourable to women than to men and which come within this category will not breach the SDA if the statutory authority exemption is removed.

(e) *Section 42 – Sport*

143. The SDA currently provides competitive sporting activities with a blanket exemption whenever the strength, stamina or physique of the competitors is relevant (which covers most sports). This exemption results in the exclusion of women from sports competitions even if they have the skill and merit to compete with men.¹⁰⁶ This exemption is incompatible with Australia's obligations under CEDAW to provide women with the same opportunities to participate actively in sports and physical education and to ensure the full development and advancement of women.¹⁰⁷
144. The equal treatment and advancement of women in sport is particularly important in Australia given the important role of sport in Australian culture. Under CEDAW, Australia has an obligation to promote cultural change to ensure the substantive equality of women. This obligation extends to taking special measures in the areas of sports, culture and recreation to accelerate the modification and elimination of practices, attitudes and behaviour that discriminate against or disadvantage women.¹⁰⁸ By retaining the sport exemption, Australia falls well short of meeting this obligation. The sport exemption may result in arbitrary, unreasonable, disproportionate and unnecessary limitations on a woman's right to equal access and participation in sport and should be removed from the SDA.
145. The removal of this exemption will not mean the blanket prohibition of women only sporting competitions. If a women only sporting competition is necessary to ensure the safe or equal participation of women in the sport, then it will not be discriminatory.

¹⁰⁵ UN Human Rights Committee, *General Comment 18: Non-discrimination*, CCPR 10/11/89 (1989).

¹⁰⁶ See, e.g. *Rannstrom v Dandenong Ranges Junior Football League Inc & Anor* [2008] VCAT 1185. Evelyn Rannstrom, a 14 year old girl, will soon be prevented from playing Australian Rules Football in a mixed sex football team because the AFL 'Gender Regulation Policy' lawfully stipulates that females aged over 14 must play in female only competitions.

¹⁰⁷ CEDAW, Articles 10(g) and 3.

(f) *Section 43 – Combat Duties*

146. The exemption provided in the SDA for combat duties excludes from the coverage of the SDA discrimination in connection with employment, engagement or appointment in the Defence Force in a position or prescribed circumstances involving combat duties. The term 'combat duties' is defined in the *Sex Discrimination Regulations 1984* (Cth) (SDR) to be 'duties requiring a person to commit, or to participate directly in the commission of, an act of violence against an adversary in time of war'.¹⁰⁹ An 'act of violence' is not defined in the SDR, but could presumably be committed by a person with the assistance of technology and minimal physical effort. As a result, this definition indicates that the concern to exclude women from performing combat duties is based on stereotyped views of women's mental characteristics as much as their physical characteristics.
147. It is difficult to see how the blanket exclusion of women from engaging in combat duties, as defined in the SDR, could be justified. If there is a legitimate aim for excluding women from the performance of certain combat duties and restricting their right to work and right to equality, then consideration should be given to whether these restrictions are proportionate to that aim. Such consideration should be as specific as possible and should be based on explicit job descriptions rather than a broadly defined set of duties. As section 43 directly discriminates against women without reasonable justification or capacity for challenge and review it should be removed from the SDA.
148. The HRLRC notes Australia's reservation to CEDAW in relation to women's employment in combat units.¹¹⁰ However the HRLRC considers that Australia should withdraw this reservation to CEDAW, as it is based on a discriminatory Government policy. The exclusion of women from combat duties also comprises a breach of Australia's obligations under article 3 (equal right of men and women to enjoy ICCPR rights), article 25 (equal right of access to public service) and article 26 (right to effective protection against discrimination) of the ICCPR.

9.6 Review of Exceptions

149. The HRLRC notes that in addition to the permanent exemptions contained in Division 4 of Part II of the SDA, there are also a number of exceptions to specific provisions in the SDA, including the following.

¹⁰⁸ General Recommendation No. 25, above n 22, [38].

¹⁰⁹ *Sex Discrimination Regulations 1984* (Cth) section 3.

¹¹⁰ 1325 UNTS 378.

- (a) Section 14 – Discrimination in Employment to Perform Domestic Duties
- (b) Section 17 – Partnerships
- (c) Section 21 – Education
- (d) Section 23 – Accommodation
- (e) Section 24 – Land
- (f) Section 25 – Clubs
- (g) Section 27 – Requests for Information
- (h) Section 28H – Provision of Accommodation

150. The HRLRC stresses that the limitations analysis outlined above at Section 9.4 applies equally to these exceptions. As with the permanent exemptions in the SDA, the HRLRC considers these exceptions to be incompatible with accepted international law principles regarding the limitation of human rights, as outlined above in Section 9.1, and therefore incompatible with Australia's obligations under CEDAW and the ICCPR. For example, the requirement that partnerships consist of 6 or more persons before being subject to the partnership provision in the SDA is an arbitrary exception which disentitles some women to the full protection of the SDA based only on the nominal size of an organisation.¹¹¹ This blanket limitation fails to take into account whether the aim of the limitation is legitimate and does not require the discriminator to balance this aim with the adverse consequences of infringing the victim's rights.
151. We note that our key recommendation (Recommendation 2) supports a general prohibition on all forms of discrimination, which would necessitate the repeal of these sections and exceptions in any event.

9.7 Effect of Removing Exemptions

152. If the permanent exemptions are removed from Part II, Division 4 of the SDA, activities that were previously immune from liability under the SDA may be subject to scrutiny. An aggrieved person may lodge a complaint under the SDA in relation to conduct that was previously protected by the exemption provisions. The complaint will then be subject to the usual inquiry and conciliation process outlined in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

¹¹¹ SDA, section 17.

153. Alternatively, individuals or organisations that do not comply with the SDA may apply to HREOC for an exemption from specific provisions of the SDA. If an application for exemption is successful, the discriminatory conduct is considered lawful for the duration of the temporary exemption. This exemption process is outlined in further detail below.
154. As indicated above at Section 8, general measures and temporary special measures designed to protect the dignity of women and to ensure the equal rights of women and men are not discriminatory under the SDA or CEDAW.¹¹² As a result, the removal of permanent exemptions designed to protect such general or special measures, such as sections 31 and 32 of the SDA, will not impact the lawfulness of such measures.

9.8 Exemption Process

155. Section 44 of the SDA enables HREOC to grant to a person, persons or a class of persons an exemption from the operation of certain provisions of the SDA. The HREOC guidelines on temporary exemptions under the SDA indicate that when deciding whether to grant an exemption HREOC will consider:
- (a) whether an exemption is necessary;
 - (b) whether granting the exemption is consistent with the objects of the SDA, which include to give effect to the object and spirit of CEDAW;
 - (c) the appropriateness of granting the exemption subject to certain conditions; and
 - (d) the views of persons or organisations who are interested in or who may be affected by the outcome of an application.¹¹³
156. In the HRLRC's view, this test is not appropriate, and does not comply with the limitation principles outlined above in Section 9.1. In particular, the test does not require that a limitation be necessary in a democratic society, pursue a legitimate aim and be proportionate to that aim. Further, the HREOC guidelines do not provide appropriate guidance about balancing different interests. As a result, the exemption application provision in the SDA requires re-examination.

¹¹² See, e.g. *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 81 ALD 1.

¹¹³ *Temporary Exemptions Under the Sex Discrimination Act: HREOC Guidelines*, HREOC, 24 April 2008 < http://www.hreoc.gov.au/legal/exemptions/sda_exemption/sda_exemption_guidelines.html > accessed on 25 July 2008.

9.9 The Canadian Process

157. If the exemptions process is retained in the SDA, the HRLRC considers that the approach adopted in Canada should be incorporated into the SDA such that HREOC's discretion to grant an exemption must be made consistently with international human rights law. Canada's constitutional *Charter of Rights and Freedoms* (**Canadian Charter**) ensures that every individual has the right to equal protection and equal benefit of the law without discrimination.¹¹⁴ The rights and freedoms set out in the Canadian Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹¹⁵ Similar provisions are contained in section 7(2) of the Victorian Charter, section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.
158. Under section 27(2) of the Canadian *Human Rights Act 1985*, the Canadian Human Rights Commission may issue a guideline setting out the extent to which and the manner in which the right to be free from discrimination may be limited. These guidelines may relate to areas such as employment, housing, public services and membership in labour unions and professional associations.¹¹⁶ In determining whether a guideline should be issued, the Canadian Human Rights Commission interprets its discretion consistently with international human rights law, including treaties ratified by Canada such as the *ICCPR* and the *Universal Declaration of Human Rights*, and the Canadian Charter.¹¹⁷

9.10 Recommendations

159. The HRLRC considers that, in determining whether to grant an exemption, HREOC should apply a similar test to that set out in section 7(2) of the Victorian Charter, rather than the tests outlined in previous HREOC decisions¹¹⁸ and the current HREOC guidelines. As

¹¹⁴ *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (UK), Article 15(1).

¹¹⁵ *Ibid.*, Article 1. This language reflects that found in the New Zealand *Bill of Rights Act 1990*,¹¹⁵ on which section 7(2) of the Victorian Charter is modelled: Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9.

¹¹⁶ For example, see the New Brunswick Human Rights Commission Guideline on Social Condition, adopted 27 January 2005, 2 (<http://www.gnb.ca/hrc-cdp/e/Guideline-Social-Condition-Discrimination-New-Brunswick.pdf>, accessed 14 April 2008).

¹¹⁷ *Ibid.*, 2.

¹¹⁸ E.g. *Notice of Grant of a Temporary Exemption*, Commonwealth of Australia Gazette, No GN 13 (31 March 2004) 766.

outlined above in paragraph 115 of this submission, section 7(2) of the Victorian Charter provides a test for allowing reasonable limitations on human rights in a free and democratic society based on human dignity, equality and freedom and other specific considerations listed thereunder, namely:

- (a) the nature of the right which is limited by the exemption;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

160. International law and the Siracusa Principles place the burden of proof in relation to the permissibility of a limitation on the party arguing that the limitation is justified and proportionate.¹¹⁹ The HRLRC considers that this principle should be reflected in the SDA.
161. The HRLRC further submits that any exemption granted should be made conditional on an ongoing requirement that the applicant review the necessity and implementation of the exemption in accordance with the principles relevant to section 7(2) of the Victorian Charter.
162. Additionally, the HRLRC recommends that exemptions should be granted for a period of no more than two years. Currently, section 44(3)(c) of the SDA enables exemptions to be granted for a period not exceeding five years. The HRLRC considers five years to be an unreasonably long period between formal reviews of discriminatory conduct. An exemption period of two years would more accurately reflect the capacity of social and institutional change to render discriminatory practice unnecessary and unjustifiable.

Recommendation 8:

The exemptions covering accommodation, sporting clubs, religious bodies, State instrumentalities, charities, voluntary bodies, acts under statutory authority and combat duties should be repealed. The exceptions discussed in Section 8.6 should also be repealed.

¹¹⁹ See, eg, P Hogg, *Constitutional Law of Canada* (2004) 795-6.

Recommendation 9:

- (a) Any application for exemption should be subject to a limitations analysis that is consistent with international human rights law principles, such as that contained in section 7(2) of the Victorian Charter.
- (b) The SDA should include an additional requirement that the exemption applicant continue to consider the necessity of the exemption, in a manner consistent with the principles contained in section 7(2) of the Victorian Charter, on an ongoing basis.
- (c) Exemptions should be granted for a period of no more than two years.

10. The Right to an Effective Remedy

10.1 Content of the Right to an Effective Remedy

163. It is a basic principle of international human rights law that the obligation to respect, protect and fulfil international human rights obligations includes a duty to provide effective remedies to victims.¹²⁰ The requirement to provide an 'effective remedy' as part of a state's obligations in relation to particular human rights is found in many human rights conventions, including under the ICCPR, CERD and the *Convention on the Rights of the Child*.¹²¹
164. Under article 2(2) of the ICCPR, States undertake to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant', and article 2(3)(a) further provides that States must ensure that people whose rights are violated have an 'effective remedy'. Similarly, article 2(b) of CEDAW requires States to 'adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.' The right to an effective remedy is particularly important in situations where 'special measures' exist to ensure the development and protection of fundamental freedoms of particular vulnerable groups.
165. In its General Comment No. 31, the HRC addressed the implementation obligations that article 2 of the ICCPR imposes on states parties.¹²² The Committee observed the 'unqualified' nature of the obligation expressed in article 2(2), stating that a failure to comply with the obligation 'cannot be justified by reference to political, social, cultural or economic considerations within the State'.
166. In relation to article 2(3), the HRC stated that States must provide individuals with accessible domestic remedies, which should be appropriately adapted so as to take account of the 'special vulnerabilities of certain categories of person, including in particular children'.¹²³ The Committee also considers that the right to an effective remedy imposes

¹²⁰ Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹²¹ Cite

¹²² UN Human Rights Committee, *General Comment 31*, above n 84.

¹²³ *Ibid* [15].

on the state a duty to investigate allegations of human rights breaches, and the failure to discharge that duty may itself constitute a separate breach of the ICCPR.¹²⁴

10.2 Damages

167. One particular concern in relation to the SDA is the very low amount of financial damages awarded or settlement payments made to victims of discrimination. Between 1 January 2004 and 31 December 2004, the median financial payment obtained by complainants under the SDA in conciliation was \$5,700.¹²⁵ This may constitute an inadequate remedy as well as resulting in victims of discrimination being deterred from pursuing a complaint of discrimination, detrimentally impacting on their access to justice.
168. Access to justice is a fundamental aspect of the judicial process and is indispensable for the protection of human rights. Indeed, access to justice is a basic element of the right to a fair hearing, which is a norm of international human rights law and is enshrined in the Victorian Charter.¹²⁶
169. The ALRC's 1992 Report argued that 'it would be useful to provide the courts and tribunals with statutory guidance on the appropriate level of award in sex discrimination cases'.¹²⁷ The intention of such statutory guidance is that it would encourage reasons to be given for making a particular award of damages.

10.3 Limitation period

170. In addition, the HRLRC considers that the 12 month discretionary limitation period for complaints¹²⁸ is too short and should be lengthened. There are various reasons why victims of discrimination, including sexual harassment, may delay making a complaint, including fear, shame, a sense of powerlessness, cultural pressure, maintaining their

¹²⁴ Ibid [18].

¹²⁵ Human Rights and Equal Opportunity Commission, *Five Years On: An Update on the Complaint Handling Work of the Human Rights and Equal Opportunity Commission*, 7 December 2005, www.hreoc.gov.au/complaints_information/publications/five_years_on.html, accessed on 28 July 2008.

¹²⁶ The right to a fair hearing is protected in section 24 of the Victorian Charter. For a discussion on the content of the right, including the fundamental aspect of ensuring access to the justice system in the first place, see the Human Rights Law Resource Centre's submission to the Victorian Law Reform Commission's Civil Justice Review, entitled *The Right to a Fair Hearing: The Relevance of the Charter of Human Rights and Responsibilities Act 2006 (Vic) to Civil Justice*, available at: <http://www.hrlrc.org.au/files/8O25PH17P8/Final%20Submission.pdf>.

¹²⁷ ALRC Report Part II, above n 28, [3.104].

¹²⁸ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) section 20(2)(c).

employment or accommodation, and a lack of support. Due to these reasons and in light of the fact that the harm caused by discrimination, including sexual harassment, is often psychological, it is not appropriate to limit the period for lodging a complaint to 12 months.

171. Further, the limitation period in the SDA is out of step with many other limitation periods across Australia, particularly in relation to personal injury claims.¹²⁹ This does not reflect well on the value that Australia places on women's right to equality and the importance of protecting that right.
172. To ensure that victims of discrimination have access to an adequate remedy, the HRLRC recommends that the 12 month discretionary limitation period in the SDA be changed to at least a three year discretionary limitation period.

10.4 Recommendations

173. The HRLRC supports the following recommendations, the first of which was made by the ALRC.

Recommendation 10:

In making awards of damages for discrimination HREOC and the Federal Court should have regard to awards made at common law or under statute as compensation for loss, injury or damage of a comparable nature (and shall specify these factors in reasons).

Recommendation 11:

The discretionary limitation period in the SDA should be extended from 12 months to at least three years.

¹²⁹ *Limitation Act 1974* (Tas) s 4(1)(a), *Limitation Act 1985* (ACT) s 11(1), *Limitation Act 1969* (NSW) s 14(1)(b) and *Limitation of Actions Act* (QLD) 1974 s 10(1)(a) provide for a six year limitation period for personal injury claims. The *Limitation of Actions Act 1958* (Vic) s 27D and *Limitation of Actions Act* (SA) 1936 s 35(c) provide for a three year limitation period.

11. Powers of HREOC

11.1 Introduction

174. As discussed above, Australia's international obligations require that governments at all levels take steps to ensure that all persons are protected from discrimination on any ground. Pursuant to article 2(3) of the ICCPR, a State party is obliged to provide an 'effective remedy' for people whose rights are violated. Further, a remedy, if granted, should be enforceable. According to the UN Office of the High Commissioner for Human Rights:

Rights and obligations demand accountability; unless supported by a system of accountability, they can become no more than window-dressing. Accordingly, the human rights approach ... emphasises obligations and requires that all duty-holders, including States, be held to account for their conduct in relation to international human rights.¹³⁰

Establishing effective mechanisms for seeking redress is critical to ensuring that all members of the community enjoy the benefits that the SDA seeks to bring.

175. This Section discusses the investigative and procedural powers that are vested through international instruments and in other comparative jurisdictions. The HRLRC submits that there is greater scope for the SDA to empower HREOC and its officers to enforce the SDA. In particular, an analysis of powers exercised in other jurisdictions reveals a scope for providing broader and more substantial powers under the SDA for HREOC to:
- (a) investigate potential breaches of the SDA, including powers to enter premises and to require the production of material;
 - (b) take proactive steps to investigate discriminatory practices, including systemic discrimination;
 - (c) commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
 - (d) develop enforceable codes of conduct and guidelines to encourage a culture of compliance.

¹³⁰ Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004), 15-16.

176. It is submitted that such amendments are necessary for the Australian Government to comply with its international legal obligations.

11.2 The ICCPR and Powers of Regulatory Bodies

177. While the ICCPR does not expressly deal with the powers of regulatory bodies, it is clear from article 2(3) that a State party is required to:
- (a) enact laws to implement the obligations in the ICCPR;
 - (b) provide an effective remedy; and
 - (c) institutionally safeguard rights by way of procedural guarantees, the establishment of legal institutions and other positive legislative, administrative, political or judicial measures.¹³¹
178. The HRC has observed that:
- (a) the judiciary has a role by including direct applicability of the ICCPR, application of comparable constitutional or other provisions of law, or the interpretative effect of the ICCPR in the application of domestic law;
 - (b) administrative mechanisms are required to give effect to the general obligation to investigate violations through independent and impartial bodies;
 - (c) national human rights institutions, endowed with appropriate powers, can contribute;
 - (d) a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant; and
 - (e) cessation of an ongoing violation is an essential element of the right to an effective remedy.¹³²
179. While the HRLRC acknowledges that HREOC is already vested with a number of broad functions and powers, there remain key deficiencies relating to HREOC's powers to:
- (a) conduct investigations into breaches of the SDA;
 - (b) monitor compliance with anti-discrimination norms; and
 - (c) initiate 'own motion' proceedings absent a complaint and enforce findings.

¹³¹ Nowak, above n 52, 38.

¹³² UN Human Rights Committee, *General Comment No. 31*, above n 122, [15].

180. The HRLRC submits that expanding HREOC's powers will promote compliance with Australia's international human rights obligations, particularly its obligations under CEDAW and the ICCPR.

11.3 The 'Paris Principles'

181. The principal source of normative standards for national human rights institutions are the 'Paris Principles', endorsed by both the UN Commission on Human Rights (now the UN Human Rights Council) and the General Assembly. Of the various norms it sets out, the Paris Principles state, importantly, that a human rights institution's roles, powers and mandate should be as broad as possible.¹³³ Specifically, and relevantly to the review of HREOC's powers under the SDA, human rights institutions are more effective in protecting and promoting rights when they, among other things:

- (a) treat human rights issues systematically;
- (b) handle individual complaints speedily and effectively;
- (c) have a broad and non-restrictive mandate;
- (d) have an all-encompassing jurisdiction; and
- (e) have power to monitor compliance with their recommendations and advice.¹³⁴

11.4 Examples of Regulatory Powers in other Jurisdictions

182. Examples of regulatory powers in other jurisdictions are instructive and illustrate various ways in which HREOC's powers could be expanded so that they accord with internationally accepted norms relating to the powers of human rights bodies.

(a) *Canada*

183. The Canadian Human Rights Commission administers the Canadian *Human Rights Act*. It is empowered to investigate and settle complaints of discrimination in the fields of employment and the provision of goods, services and accommodation within the federal jurisdiction. In addition, it is vested with the following powers which are not currently held by HREOC:

¹³³ Paris Principles, UN DOC A/RES/48/134 (20 December 1993), principle 2.

¹³⁴ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005), 7.

(i) *Investigative powers*

184. The Canadian Human Rights Commission may designate a person as an 'investigator' to investigate a complaint.¹³⁵ With a warrant, the investigator may at any reasonable time enter and search any premises in order to carry out inquiries.¹³⁶ An investigator may require any individual found in any premises entered to produce material that may be relevant to the investigation being conducted by the investigator.¹³⁷ In addition, under the *Employment Equity Act*, SC 1995, c 44, the Canadian Human Rights Commission's compliance officers may conduct compliance audits on an employer. Compliance officers also are vested with powers to enter premises and to require production of material.¹³⁸

(ii) *Compliance powers*

185. If a compliance officer believes that an employer is in breach of an obligation under the *Employment Equity Act*, the compliance officer can attempt to negotiate a written undertaking with an employer to take specified measures to remedy the non-compliance.¹³⁹ If a written undertaking is obtained and the compliance officer is of the opinion that the employer has breached the undertaking, or if a written undertaking cannot be obtained or is not appropriate to remedy the non-compliance, the compliance officer must notify the Canadian Human Rights Commission. The Canadian Human Rights Commission may then issue a direction to the employer requiring the employer to take such actions as are specified in the direction to remedy the non-compliance.¹⁴⁰
186. If the employer fails to comply with the direction, the Canadian Human Rights Commission may apply to the Chairperson of the Canadian Human Rights Tribunal for an order confirming the direction.¹⁴¹ The Chairperson must then establish an Employment Equity Review Tribunal to consider the request.¹⁴² The Tribunal may, by order, confirm the decision of the Canadian Human Rights Commission or make any other order it considers appropriate to remedy the non-compliance.¹⁴³ An order of the Tribunal is final and is enforceable in the same manner as an order of the Federal Court.¹⁴⁴

¹³⁵ Canadian *Human Rights Act*, section 43(1).

¹³⁶ Canadian *Human Rights Act*, section 43(2.1).

¹³⁷ Canadian *Human Rights Act*, section 43(2.4)

¹³⁸ *Employment Equity Act*, SC 1995, clause 44, section 23(1).

¹³⁹ *Employment Equity Act*, SC 1995, section 25(1)

¹⁴⁰ *Employment Equity Act*, SC 1995, sections 25(2) and 25(3).

¹⁴¹ *Employment Equity Act*, SC 1995, sections 27(2).

¹⁴² *Employment Equity Act*, SC 1995, sections 28.

¹⁴³ *Employment Equity Act*, SC 1995, sections 30(1).

(iii) *Powers to address Systemic Discrimination*

187. The Canadian Human Rights Commission may issue guidelines setting out the extent and manner in which any provision of the Canadian *Human Rights Act* applies in a *class of cases* described in the guideline.¹⁴⁵ Such guidelines are binding on the Canadian Human Rights Commission and any member or panel assigned under the Canadian Human Rights Act with respect to the resolution of a complaint under the Canadian *Human Rights Act* in respect of a case falling within the description contained in the guideline.¹⁴⁶
188. The powers of the Canadian Human Rights Commission are instructive in considering the powers that should be accorded to HREOC to investigate systemic discrimination. Under section 40 of the Canadian *Human Rights Act*, the Canadian Human Rights Commission has the power to initiate complaints for breaches of the Canadian *Human Rights Act*. In addition, the Canadian Human Rights Commission may appoint an investigator to investigate a complaint. These investigators are equipped with extensive powers (for example, they may apply to the Federal Court to obtain *ex parte* warrants to search premises and they may require the production of documents).¹⁴⁷

(b) *United Kingdom*

189. The UK has established various public bodies that are empowered to deal with discrimination issues. These bodies have, however, recently been replaced by a single body — the Equality and Human Rights Commission (**EHRC**) (established on 1 October 2007 under the *Equality Act 2006* (UK) (**UK Equality Act**)).¹⁴⁸ The EHRC has a mandate to promote understanding under the UK *Human Rights Act* and has a directorate of expert lawyers who are able to take on case work or join in legal proceedings taken by others to promote human rights.
190. Like the Canadian Human Rights Commission, the EHRC has been granted extensive investigative powers. Section 20 of the UK Equality Act empowers the EHRC to investigate whether a person has:
- (a) committed an unlawful act;

¹⁴⁴ *Employment Equity Act*, SC 1995, sections 31(1).

¹⁴⁵ Canadian *Human Rights Act*, section 27(2).

¹⁴⁶ Canadian *Human Rights Act*, section 27(3).

¹⁴⁷ Canadian *Human Rights Act*, section 43.

¹⁴⁸ The EHRC took over the role of three previous commissions- the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission: Equality and Human Rights Commission: <http://www.equalityhumanrights.com/en/aboutus/pages/aboutus.aspx>.

- (b) complied with requirements imposed by an unlawful act notice under section 21 of the UK Equality Act; or
- (c) complied with an undertaking given under section 23 of the UK Equality Act.

191. In addition, the EHRC is empowered to do the following.

- (a) Issue unlawful act notices to persons under investigation or persons who have committed an unlawful act. Such notice may, for example, require a person to prepare an action plan to avoid continuation of an unlawful act. Action plans can be enforced by court order.¹⁴⁹
- (b) Enter into an agreement with a person under which the person undertakes not to commit an unlawful act of a specified kind and take, or refrain from taking, other specified action. Again, the EHRC is empowered to enforce such undertakings in the courts.¹⁵⁰
- (c) Make an application to a county court for an injunction restraining (or interdict prohibiting) a person from committing an unlawful act.¹⁵¹
- (d) Assist an individual who is a party to equality legal proceedings.¹⁵² The EHRC may provide legal advice, legal representation, facilities for settlement of a dispute, or any other form of assistance.¹⁵³
- (e) Institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the EHRC that the proceedings are relevant to a matter in connection with its function.¹⁵⁴

192. Although the UK Equality Act does not expressly mention systemic discrimination, the EHRC nevertheless has significant powers to address it. For example, the EHRC may:

- (a) publish reports (after seeking public input) regarding discrimination in society;¹⁵⁵
- (b) provide education or training and give advice or guidance;¹⁵⁶ and

¹⁴⁹ UK Equality Act, section 22(6).

¹⁵⁰ UK Equality Act, section 23(1).

¹⁵¹ UK Equality Act, section 24(1).

¹⁵² UK Equality Act, section 28(1).

¹⁵³ UK Equality Act, section 28(4).

¹⁵⁴ UK Equality Act, section 30.

¹⁵⁵ UK Equality Act, section 12.

¹⁵⁶ UK Equality Act, section 13.

- (c) issue codes of practices in connection with an equality matter.¹⁵⁷

(c) *European Union Directives*

193. Article 13 of the Treaty establishing the European Community empowers the European Community to take action to deal with discrimination on various grounds, including sex.¹⁵⁸ In 2000, the European Community enacted the *Employment Equality Directive*, which defines a set of principles that offer everyone in the European Union a common minimum level of legal protection against discrimination in employment. Some of the powers and competencies of existing equality bodies in Member States include:
- (a) support in taking cases to court;
 - (b) arrangements for mediation or conciliation between parties;
 - (c) reviewing and commenting on legislative proposals and the reform of existing laws;
 - (d) investigating complaints of discrimination;
 - (e) forcing compliance with their investigations by all persons involved;
 - (f) concluding an investigation by issuing its conclusions and recommendations to the parties who will have a certain time to comply;
 - (g) calling public attention to its recommendations;
 - (h) alerting relevant authorities in cases that require disciplinary sanctions;
 - (i) serving a non-discrimination notice following an investigation setting out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination (it is a criminal offence not to comply with a notice for a designated period of time after its issue);
 - (j) issuing sanctions in cases in which they have found discrimination;
 - (k) imposing limited fines including fines for non-compliance with recommendations within a specified time; and
 - (l) issuing orders, published in the official gazette, for the elimination within a specified time limit and in a specified way.¹⁵⁹

¹⁵⁷ UK *Equality Act*, section 14.

¹⁵⁸ *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958).

¹⁵⁹ European Commission, *Equality and Non-Discrimination Annual Report 2006* (September 2006), 27-28.

(d) *New Zealand*

194. New Zealand has established an independent human rights body known as the Human Rights Commission. One of its key functions is to resolve disputes arising under the *Human Rights Act 1993* (NZ) (**NZ Human Rights Act**). Apart from powers similar to those already available to HREOC, the Commission may issue proceedings under the NZ Human Rights Act to obtain a declaratory judgment or order from the High Court to facilitate the performance of its functions under the NZ Human Rights Act.¹⁶⁰
195. The Human Rights Commission is also afforded additional functions and powers that provide a more substantial basis for the Human Rights Commission to address systemic discrimination in New Zealand. These include:
- (a) preparing and publishing guidelines and voluntary codes of practice for the avoidance of acts or practices that may be inconsistent with, or contrary to, the NZ Human Rights Act;
 - (b) appearing in or bringing proceedings; and
 - (c) applying to a court or tribunal to be appointed as an intervener or as counsel assisting a court or tribunal, or to take part in proceedings before the court or tribunal in another way permitted by their rules or regulations.¹⁶¹
196. A complainant may also take a dispute to the Director of the Office of Human Rights Proceedings. The Director's Office is independent of the Human Rights Commission. The Director may investigate disputes, attempt settlements and/or decide whether to take disputes to the Human Rights Review Tribunal. The Director also may on request provide representation for a complainant or aggrieved person or group of persons or the Human Rights Commission in proceedings before the Tribunal or related proceedings (eg, seeking to enforce a settlement reached on a previous occasion, and appeals to the High Court, Court of Appeal and Supreme Court).¹⁶²

(e) *Ireland*

197. These issues are the concern of the Equality Authority, Director of Equality Investigations and relevant courts. Similarly to the human rights and anti-discrimination bodies discussed above, each of the Irish bodies has significant powers to investigate complaints, including

¹⁶⁰ NZ *Human Rights Act*, section 6.

¹⁶¹ NZ *Human Rights Act*, sections 6, 92B, 92E, 92H and 97.

¹⁶² NZ *Human Rights Act*, sections 90(1)(a),(c)&(3).

powers to enter premises and to require the production of material in relation to an investigation.¹⁶³

(f) *New South Wales*

198. In NSW, the Anti-discrimination Board has general powers under section 119(1) of the *Anti-discrimination Act 1977* (NSW) to investigate and conduct inquiries into the existence of systemic discrimination.

11.5 Summary of Key Points and Recommendations

199. The HRLRC refers to and repeats our Recommendation 4. In particular, the HRLRC makes the following specific recommendations in relation to HREOC's powers.

(a) *Investigative Powers*

200. HREOC's investigative powers currently fall short of those required by the ICCPR and the Paris Principles. The HRLRC submits that in undertaking investigations, HREOC officers should be empowered with broader powers of investigation, such as to enter premises and access information. While the HREOC Act enables HREOC to require a person to produce documents and information,¹⁶⁴ there is no power of entry, such as that which is contained in the various workplace health and safety regimes of the States and Territories.
201. Such powers are available in at least Canada, UK, Ireland and other European countries (pursuant to the requirements of the relevant European Union Directives). Further, the availability and use of such powers in other areas of law in Australia, such as occupational health and safety, has at least partly contributed to a far greater 'compliance culture' in those areas. To the extent that a similar culture could be fostered in relation to the prevention of discrimination and promotion of anti-discrimination through investigative powers, such amendments to the SDA are encouraged by the HRLRC.

(b) *Compliance*

202. The ICCPR and the Paris Principles require bodies such as HREOC to be empowered to investigate and to be able to ascertain compliance with such orders as they issue. It is submitted that HREOC should be vested with the power to, on its own motion, ascertain compliance with its orders and/or conciliation agreements that are made in relation to

¹⁶³ See, for example, the powers of the Director of Equality Investigations and the Director's designated officers and equality officers: *Equal Status Act 2000* (Ireland) sections 33, 34, *Employment Equality Act 1998* (Ireland) sections 94 and 95.

¹⁶⁴ *Human Rights and Equal Opportunity Commission Act 1986* (Cth), section 21,

proceedings brought under the SDA. In particular, such powers may be particularly useful where a complaint has been resolved in the context of a continuing relationship between the parties (eg., employment or tenancy arrangements).

203. Such powers are already exercised in jurisdictions such as Canada, the UK and other EU countries. It is submitted that, in meeting its international obligations, Australia should draw inspiration from these countries.

(c) *'Own Motion' Proceedings and Enforcement*

204. It is submitted that the powers under the SDA for HREOC to investigate and refer matters to the Minister in the absence of a complaint are weak and underutilised. While HREOC may inquire into any act or practice, including any systemic practice, which may constitute discrimination,¹⁶⁵ unless the matter is resolved by conciliation HREOC does not have authority to do anything further, other than to report to the Minister in relation to the inquiry.¹⁶⁶
205. The Paris Principles require that such institutions have the power to recommend reparation for victims of discrimination (such as restitution or compensation) and to monitor government departments' compliance with their advice and recommendations.¹⁶⁷ Such powers should be exercisable on individual or collective issues.
206. Again, as has been highlighted above, the SDA falls behind other countries on this issue. HREOC is out of step with bodies that administer laws relating to OHS, corporate misconduct and trade practices. Anti-discrimination compliance and the encouragement of equality would be enhanced by the introduction of such powers.

(d) *Codes of Conduct*

207. The HRLRC refers to and repeats the recommendation discussed above at paragraph 80(b), namely that HREOC should have the power to prepare and publish enforceable codes of conduct regarding the requirements of the SDA.

¹⁶⁵ *Human Rights and Equal Opportunity Commission Act 1986* (Cth), sections 31(b) and 32(1).

¹⁶⁶ *Human Rights and Equal Opportunity Commission Act 1986* (Cth), section 31(b)(ii).

¹⁶⁷ Paris Principles, UN DOC A/RES/48/134 (20 December 1993), principles 18-22.

Recommendation 12:

In accordance with the obligation on States parties to provide an effective remedy of violations of the right to non-discrimination, the SDA should be amended to provide HREOC with broader powers to:

- investigate potential breaches of the SDA, including powers to enter and inspect premises and to compel the production of material;
- take proactive steps to investigate compliance with orders under the SDA;
- commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
- develop enforceable codes of conduct and guidelines to encourage a culture of compliance.

Attachment 1

General Recommendation No. 25 [citations omitted]

...

4. [The purpose of the Convention] is to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.

5. The Convention goes beyond the concept of discrimination used in many national and international legal standards and norms. While such standards and norms prohibit discrimination on the grounds of sex and protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women.

6. A joint reading of articles 1 to 5 and 24, which form the general interpretative framework for all of the Convention's substantive articles, indicates that three obligations are central to States parties' efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.

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. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.

8. In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of

substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

9. Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

10. The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.