Sex Discrimination and Affirmative Action

The Government's Response to the Lavarch Report

Statement by
The Prime Minister
The Honourable P.J. Keating, MP
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The Government's Response to Recommendations of the Lavarch Report

Introduction

The Government's commitment to eliminating discrimination against women is reflected in the *Sex Discrimination Act 1984* and the *Affirmative Action (Equal Opportunity for Women) Act 1986*.

The **Sex Discrimination Act** is the legal framework for the Government's policies and programs for the elimination of discrimination on the ground of sex, marital status or pregnancy. It is based on the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, which Australia ratified in 1983.

The operation of the Act is based on the resolution of individual and group complaints through conciliation by the Sex Discrimination Commissioner. The great majority of complaints are about discrimination at work, but there are also a large number of complaints about sexual harassment.

The Act has been both a symbolic and a practical source of support for women in their struggle for equality, especially in the workplace. Several amendments to improve its operation and

widen its scope, including the replacement of the blanket exemptions for insurance and superannuation with more limited exemptions, have already been made.

The Act now has wide acceptance, even among many who opposed it in 1984. Moreover, there is now a more general understanding of the institutional and social factors which have worked against equality for women. It is timely to review several aspects of the operation of the Act, and this has been done in part by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Lavarch Committee) in the context of its Inquiry into Equal Opportunity and Equal Status for Women in Australia. Other aspects of the Act have been examined by the Sex Discrimination Commissioner in her Review of Exemptions, tabled in Parliament on 10 September 1992.

The aim of the **Affirmative Action Act** is to remove discrimination against women in employment, with the emphasis on positive programs to improve the position of women workers. The legislation has been gradually phased in to cover all higher education institutions and private sector organisations with 100 or more employees. Employers are required to report each year to the Affirmative Action Agency on the progress of their affirmative action programs. Those who do not comply face being named in Parliament. There has been a very high level of compliance with the Act.

In May 1991 the Minister for Industrial Relations announced a review of the Act, with the aim of introducing amendments to legislation in this Parliamentary sitting. The Effectiveness Review of the Act conducted by the Agency's Director revealed strong support for the legislation and this was also reflected in the Lavarch Report, which makes a number of recommendations to improve the Act.

The Government intends to pass further amendments in the Budget sittings of Parliament to extend the scope and im-

prove the operation of these Acts. These, and the other measures discussed here, are the Government's response to those recommendations of the Lavarch Committee which deal with the Sex Discrimination Act and the Affirmative Action Act. A number of the recommendations do not require legislation. In regard to the Sex Discrimination Act, some present complex or very sensitive legal or social issues, and require full examination before decisions can be reached on implementation. In these cases, however, the Government has set out the process, including the timing, it will use to arrive at a response.

The recommendations are reproduced for reference.

Extension of the Sex Discrimination Act to Industrial Awards

Recommendation 74
The Committee recommends that the Pay Equity Unit in the Department of Industrial Relations undertake investigations into the impact on women of removing the current exemption at 40(1)(e). In particular they should monitor the extent to which discriminatory clauses are being removed as part of the structural efficiency negotiations and decisions.

The Government will introduce legislation in this session of Parliament to extend the Sex Discrimination Act to cover federal industrial awards, and variations to federal awards, made after the date of the legislation.

At present, the Sex Discrimination Act does not apply to an act done by a person in direct compliance with an industrial award. Further, the Australian Industrial Relations Commission is not bound by the Sex Discrimination Act, although it is required to take account of the principles embodied in the Act.

When the Act was passed in 1984 there were many discriminatory provisions in awards and anomalies in the rates paid for work traditionally done by women. Since then, employers, unions, industrial tribunals and governments have worked to-

wards eliminating discrimination, and most of the overt discrimination has been removed. Under the Structural Efficiency Principle established by the Australian Industrial Relations Commission in 1988, minimum wage rates have been reviewed on the basis of work value, and this minimum rates adjustment process has resulted in re-evaluation of many women's jobs. The Government's intention in extending the Sex Discrimination Act to awards is to guard against the introduction of discrimination in new awards, especially in the changed climate of decentralised bargaining arrangements. This is consistent with the Government's commitment to protecting the interests of low paid and vulnerable workers.

The mechanism proposed will enable individuals to complain to the Sex Discrimination Commissioner about federal awards. The Sex Discrimination Commissioner, if she is satisfied that the complaint is not frivolous, will refer it to the Australian Industrial Relations Commission. If it finds that the award is discriminatory, the Commission will be required to vary the award unless there are compelling public interest reasons not to do so. The Sex Discrimination Commissioner will have a right to appear before the Industrial Relations Commission in relation to matters she has referred. The exemption in the Sex Discrimination Act will be modified to take account of the extension of the Act.

Workers with Family Responsibilities

Recommendation 62
The Committee recommends that ILO 156 be attached to the SDA as a schedule and further that the powers of the Commissioner be expanded to include responsibilities in association with ILO 156.

Recommendation 63
The Committee recommends that the SDA be amended to include as a prohibited ground for discrimination, family, parental and carer responsibilities.

Australia's ratification of the International Labour Organisation's Convention No. 156 on Workers with Family Responsibilities in 1991 commits the Government to work towards enabling workers with family responsibilities to be employed without discrimination and, as far as possible, without conflict with their family responsibilities.

The Government is in the process of amending the Sex Discrimination Act to prohibit dismissal on the grounds of family responsibilities. The other recommendations are being addressed in the context of the Government's plan for implementation of ILO 156. Further consultation and investigations will be undertaken as to whether family responsibilities will be incorporated fully as a prohibited ground of discrimination, including consideration of the definition of 'family'. Several States have already incorporated family responsibilities in their anti-discrimination legislation. The Attorney-General's Department has been given resources in this Budget to complete this examination.

Sexual Harassment

Recommendation 65
The Committee recommends that Division 3 of the Sex Discrimination Act be amended to:

(a) remove the need for a complainant to demonstrate disadvantage by repealing Sections 28(3) and 29(2) and replacing them with a definition of sexual harassment similar to that in Section 58 of the *ACT Discrimination Act 1991*

(b) amend Section 29(1) to include harassment of staff by students as an offence; and

(c) make unlawful sexual harass ment in the provision of goods and services and accommoda- tion.

The Government will introduce legislation in this session of Parliament to strengthen the sexual harassment provisions of the Sex Discrimination Act.

Since the Act was passed, the level of general understanding of the harmful effects of sexual harassment has increased and sexual harassment is no longer regarded as a trivial matter. It need no longer be linked to an individual suffering some detriment in employment or education to be unacceptable.

A new definition will be used in the Act so that a complainant need no longer demonstrate disadvantage; it will be sufficient that she or he was offended, humiliated or intimidated by the behaviour in question and that it was reasonable to feel that way. It brings the prohibition closer to the now common understanding of the term.

The operation of the sexual harassment provisions will be extended to the provision of goods and services, and to other areas where discrimination is unlawful under the Act, including contract, commission and partnership relationships, bodies deciding employment qualifications, unions, employment agencies, clubs, land agents, and the administration of Commonwealth laws and programs. Sexual harassment of students by adult students and staff by adult students in educational institutions will be made unlawful.

Victimisation

Recommendation 75
The Committee recommends that Section 94 of the Sex Discrimination Act be amended so as to allow complaints of victimisation to be considered either through a court of law or a process of conciliation.

The Government intends to amend the Act in this session of Parliament to allow complaints of victimisation to be dealt with by the Sex Discrimination Commissioner by conciliation. Section 94 of the Sex Discrimination Act provides that victimisation of a complainant is a criminal offence and, as such, can only be prosecuted in a court. The Government is concerned that such a procedure, which may be expensive and daunting, could discourage people from complaining of victimisation. The amendment will not remove the right to court proceedings.

Group Complaints

Recommendation 66

(b) the Attorney-General's Department examine s.70 of the SDA in the light of the recent *Federal Courts Amend ment Act 1991* to ascertain whether amendment is needed to provide for a less cumber some procedure for initiating a group complaint and to clarify the right to damages by way of representative action.

The Government intends to amend the Act in this session of Parliament to bring the provisions for representative complaints into line with the model used in the Federal Court.

The Human Rights and Equal Opportunity Commission has power to inquire into representative complaints. However, the Commission must first determine whether the complaint meets seven criteria for a representative complaint. The cumbersome nature of these provisions means that they have been rarely used.

Under the new procedure a person may bring proceedings on behalf of a group of seven or more persons where the claims of those persons arise from similar or related events and a common question of law or fact arises with respect to all of their claims. The consent of a person to be a group member is not required and a member of the class does not have to take a positive step to be included in the proceedings, although he or she has the right to opt out within a period specified by the Court.

Making Determinations More Easily Enforceable

Recommendation 67
The Committee recommends that HREOC determinations be registrable in the Federal Court and that in the absence of an appeal they automatically become an enforceable order of the Court.

In this session of Parliament the Government will amend legislation to simplify the procedure for enforcing determinations of the Human Rights and Equal Opportunity Commission. Determinations under the Sex Discrimination Act will be

registrable in the Federal Court when they are made. A respondent will be allowed a period to challenge the determination in the Federal Court. If a challenge is brought, the matter will be heard again by the Court. If there is no challenge, the determination becomes enforceable as if it were an order of the Court.

This will increase the effectiveness of the Human Rights and Equal Opportunity Commission's decisions, which at present are not binding. To enforce its decisions it currently must have recourse to the Federal Court, which has to go through for itself the process of establishing that unlawful conduct has occurred.

Operation of the Human Rights and Equal Opportunity Commission

Recommendation 40
The Committee recommends that Trade Union and employer organisations in conjunction with HREOC run ongoing campaigns amongst men to raise awareness of the effects of sexual harassment

The Government supports this recommendation. At present a Commission training package and video entitled *Eliminating Sexual Harassment in the Workplace - A Guide for Managers* is nearing completion. Aimed at private sector middle management, it has been developed in conjunction with unions and employer groups and should be available for purchase by the end of the year. It could be used to supplement a campaign targeting men.

Recommendation 59
The Committee recommends that without breaching the rights of privacy of parties to a complaint, HREOC publish more comprehensive statistics on the nature of concluded complaints, including those:

(a) which did not proceed to conciliation;
(b) those resolved through conciliation; and
(c) those requiring formal determination by the Commission or the Court

The Human Rights and Equal Opportunity Commission has developed a comprehensive database on complaints and matters proceeding to formal inquiry. It has sought legal advice on the boundaries and requirements of confidentiality, and could make the statistics described here available subject to that advice. In addition, the Sex Discrimination Commissioner intends to produce a quarterly information sheet on developments in sex discrimination issues, with particular focus on legal decisions and conciliated complaints.

Recommendation 66
The Committee recommends that:

(a) the Sex Discrimination Commissioner seek, through arrangements with the ACTU, to ensure that the union movement is familiar with the complaint handling processes of the SDA and of the potential for union involvement in complaints under the SDA.

The Sex Discrimination Commissioner is developing a range of strategies including meetings, seminars and workshops targeted at unions, in order to inform them and their members about rights and procedures under the Sex Discrimination Act. The project is planned to cover two years.

Recommendation 68
The Committee recommends that:

(a) the Sex Discrimination Commissioner be provided with adequate resources to ensure that the Commission's proactive functions specified in Section 48(1) of the Act can be more effectively carried out;
(b) the Human Rights and Equal Opportunity Commission determine separate budget allocations for each of its areas of responsibility in order that the Sex Discrimination Commissioner have access to a clearly designated budget.

The Commission, an independent statutory body, has indicated support for these recommendations. The Sex Discrimination Commissioner has a separate allocation within the Human Rights and Equal Opportunity Commission's budget, but further discussion will continue within the Commission on distribution of resources.

Areas Where Further Work Will be Done on Strengthening the Act

Recommendation 60
The Committee recommends that:

(a) a general provision stating that discrimination on the basis of sex, marital status, potential pregnancy and family responsibilities is unlawful should be included in the SDA.

This recommendation will be considered over the next six months. The Government understands the recommendation to mean the addition of potential pregnancy and family responsibilities as prohibited grounds of discrimination. It needs to be considered in conjunction with Recommendations 61, 62 and 63, which also deal with potential pregnancy and family responsibilities.

The issue of adding family responsibilities to the Act is currently under consideration (see Recommendation 63). Adding potential pregnancy explicitly might strengthen the Act, particularly in regard to occupational health and safety issues. It is discussed further under Recommendation 61. Consultations with the States, and with business and employer groups, will be necessary before any action is taken.

(b) a provision allowing for 'equal protection before the law', similar to the provision in the Racial Discrimination Act, be adopted in the SDA.

The Government will investigate this recommendation further over the next six months. If, as a result of the investigation, it appears that the new provision would strengthen the Act, it will be implemented. The proposal for equal protection before the law, in conjunction with extension of the Act to cover new 'prohibited grounds', could involve a detailed process of searching for inconsistent legislation. It could cause difficulties with State legislation and will be discussed with the States.

Recommendation 61
The Committee recommends Section 7 of the SDA be amended by:

(a) the inclusion of 'potential pregnancy' as a ground of prohibited discrimination.
(b) the repeal of 7(1)(b).

The Government will investigate these recommendations further over the next six months. If, as a result of the investigation, it appears that the amendments would strengthen the Act, they will be implemented.

It is not entirely clear where there could be discrimination on the grounds of potential pregnancy which would not be caught by the definition of sex discrimination already in the Act. However, it could strengthen the Act, in particular with regard to occupational health and safety issues. Consultation with States and business and employer groups would be necessary.

Section 7(1)(b) provides a defence of reasonableness for discrimination on the grounds of pregnancy. Even if it were repealed, temporary exemptions could continue to be made under Section 44, similar to those which have been made in the past for the lead industry.

Recommendation 64
The Committee recommends that the definition of 'marital status' in Section 6 be extended to include discrimination on the basis of the identity of the spouse of the person lodging the complaint.

The Government will implement this recommendation, and is examining the best means to do so. It may be necessary to allow for exceptions to the new provision, for example if an employer wished not to employ someone whose spouse worked for a rival firm. This might be dealt with by a 'reasonableness' criterion, but further consideration and consultation are warranted.

Recommendation 72
The Committee recommends that the Attorney-General's Department, in consultation with HREOC, determine if an amendment is necessary to

Section 33 so that it ensures that measures to promote equal opportunity for women or to meet their special needs are not unlawful.

The Government will investigate this recommendation fully over the next six months. If, as a result of the investigation, it appears that a new provision would strengthen the Act, the Act will be amended.

The Lavarch Report refers to evidence of a very strongly expressed view in the community that the section of the Act which allows for measures to promote equality needs to be reinforced. This concern has been expressed in the context of extending the Act to cover federal industrial awards, a small number of which contain provisions which discriminate in favour of women. The Government recognises that recent cases have caused concern. It has been argued that these cases have demonstrated that the clause is adequate, but many women's organisations would disagree with this view. On the other hand, drafting a more satisfactory clause may be extremely difficult, and there is a danger that a change would obviate the usefulness of previous cases as precedents. Further consideration is warranted.

Indirect Discrimination

Recommendation 70
The Committee recommends that:

(a) sub-sections 5(2), 6(2) and 7(2) paragraph (b) be deleted.
(b) a new sub-section be added to Sections 5, 6 and 7 in the following terms:

it shall be a defence for a discriminator to show that the imposition of the condition or requirement was reasonable in order to pursue the least discriminatory option available to the discriminator in the circumstances of the case.

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The Government accepts the principle behind this recommendation, but implementation warrants further consideration of legal precedent and consultations with the States and Territories and business and employer groups. This will be done over the next six months.

These provisions deal with the test for indirect discrimination. If the recommendation were implemented, it might be necessary to amend the test in paragraph (b) to refer not only to the least discriminatory option but also to allow for a test of economic viability.

Legal Aid

Recommendation 69
The Committee recommends that the Attorney-General investigate the criteria applied by the Legal Aid Commission in deciding aid applications for assistance in sex discrimination cases with a view to ensuring that complainants and respondents are assisted in appropriate cases.

Legal Aid is provided through State agencies, and the criteria are decided at State level. Over the next six months the Government will consider the issues, in the light of the scarce resources available.

The Defence Force

Recommendation 71
The Committee recommends that Section 43 be amended to include a specified time period not exceeding two years to allow the removal of prohibitive and discriminatory provisions from Defence Force legislative requirements and administrative procedures.

The Minister for Defence Science and Personnel will re-examine the exclusion of women from combat duties and the legislative basis of that exclusion after the Chief of the Defence Force presents the results of a comprehensive review of the employment of women in combat and combat-related duties later this year.

Women are at present excluded from serving in combat positions. The Sex Discrimination Act also allows their exclusion from combat-related duties although the latter exclusion has not been applied since May 1990 when the Chiefs of Staff recommended against its continued application and the Minister for Defence announced a new policy based on this advice.

A progress review of the policy of employing women in combat-related positions was considered by the Chiefs of Staff Committee in June 1991. The Chiefs of Staff found that the implementation of the new policy was progressing well and without any major impediment. A further review of policies relating to the employment of women in combat and combat-related positions, prompted by the Lavarch Report, is being conducted with a report to be submitted by the Chief of the Defence Force by 30 October 1992.

Religious Schools

Recommendation 73
The Committee recommends that Section 38 of the Sex Discrimination Act be amended to add the requirement of 'reasonableness'.

The Government will consult widely on this issue, and on the full implications for religious schools of adding any reasonableness criterion to the Act. It recognises the need to balance people's right to equal treatment with the right to freedom of religious practice. It will reconsider its response to the recommendation in twelve months' time.

Implementation of the recommendation to add a criterion of reasonableness to the exemption of employment by educational institutions established for religious purposes would mean that a religious body could be called on to show that discrimination in employment of staff was reasonable having regard to the objectives of the organisation. The Lavarch Report expresses the view that it is unacceptable to have a double standard between men and women employed in schools established for religious purposes.

Quality of Programs

Recommendation 76
The Committee recommends that:

(a) the Affirmative Action Agency be resourced to undertake qualitative assessments of reports received.

The Government supports this recommendation. In the 1992-93 Budget the Government has provided an additional $0.4m in 1992 (and $0.25m in 1993-94) to the Affirmative Action Agency for a new program of measures to encourage quality affirmative action outcomes.

Submissions and consultations of the Effectiveness Review of the Affirmative Action Act revealed wide ranging and strong support for maintaining the existing general structure of the legislation. There was concern, however, about the uneven quality of employers' affirmative action programs and strong support for focussing on improving quality in the next phase of the legislation.

The new measures will include development of performance standards based on best practice benchmarks; and cooperative research projects and training initiatives with employer bodies and unions. Evaluation of reports and feedback to employers will be integral to these measures.

(b) the Agency encourages companies to focus more carefully on identifying and addressing the particular needs of groups of women with special needs in the workforce.

The issue of how to encourage employers to focus on the needs of particular groups of women workers was considered as part of the Effectiveness Review of the Act. The Government accepts the Director's conclusion that the most fruitful approach would be for the Agency to develop models of good practice co-operatively with interested companies (including for example, language and literacy training for women, and workplace design facilitating employment of women with disabilities), rather than provide legislative coverage by category for women with multiple disadvantage. This will be taken up by the Agency in the next stage of the legislation.

Recommendation 77
The Committee recommends that:

(c) those organisations consistently recording good progress should have the obligation of report ing reduced accordingly, reducing the workload of the organisation itself and the Affirmative Action Agency; and

The Government will implement this recommendation which was also raised in the Effectiveness Review, by introducing legislation in this session of Parliament to give the Director the power to vary reporting requirements.

This amendment will enable the Director to alter the report format to permit, for example, detailed reporting in one year and progress and exceptions reporting the next. It would also allow the development of a scheme for exempting exceptional per-formers from reporting requirements for a number of years, similar to the 'exceptional trainer' status under the Training Guarantee (Administration) Act 1990.

(d) the Affirmative Action Agency to be charged with responsibil ity to distribute reports to relevant interest groups, principally trade unions.

Submissions, consultations and research for the Effectiveness Review suggest that the requirements of the Act for employers to consult with trade unions and with employees about their affirmative action programs are not well met. The Government has decided that a tripartite advisory committee will be estab-lished to address this issue as well as how to improve the quality of affirmative action reports. A priority for the committee would be to develop general principles for compliance with the eight steps of an affirmative action program and codes to interpret them. Early emphasis will be given to steps Three and Four on consultation. Effective consultation by employers with their employees and with unions would include providing them with copies of their affirmative action reports.

Employers' affirmative action reports are available to any individual or organisation upon request to the Agency. To im-prove availability, from 1992-93 a full set of the most recent reports will be made available on microfiche in each capital city.

Coverage

Recommendation 77
The Committee recommends that:

(a) a further expansion of the number of companies which come under the Affirmative Action Act to include those employing 40 people and in the long-term, all employees;

(b) the resources of the Affirmative Action Agency would need to be increased commensurate with the increased work load;

In the Effectiveness Review of the Act, the Director estimated that reducing the threshold to 50 would double the number of reports to be handled by the Agency yet increase coverage by only 8 per cent of private sector employees. Accordingly the Government has decided that the objectives of the Act would be better advanced through focusing on the quality of employers' programs rather than reducing the threshold.

The Government intends, however, to legislate in this session of Parliament to extend the Act to ensure the coverage of elected union officials as employees and of trainees employed through Group Training Schemes.

The Effectiveness Review highlighted considerable community concern about discrimination against women in smaller companies. This issue is to be kept under review by the Agency. As part of its program of new measures arising from the Effectiveness Review, the Agency will also develop a strategy for raising awareness of issues surrounding discrimination against women in smaller companies. This could include cooperative training with employer organisations and unions, preparation of appropriate policies and guidelines, and pilot programs in industries reporting particular difficulties.

Recommendation 78
The Committee recommends that:

(b) work needs to be undertaken by DIR in consultation with AAA to establish how employers in the voluntary sector can be encouraged to adopt affirmative action programs.

The Government intends to legislate in this session of Parliament to extend the operation of the Act to voluntary bodies employing one hundred or more employees. This will bring an estimated 60,000 additional paid employees under the Act when the amendment comes into operation and will mainly affect the largest charities, independent schools and the Catholic school system.

Statutory Authorities

Recommendation 78
The Committee recommends that:

(a) evaluative analysis be under taken by DIR to ensure that statutory authorities are adopting effective affirmative action programs; and

The Government supports this recommendation. The Department of Industrial Relations, in administering the Government's industrial relations co-ordination arrangements, will analyse the extent to which statutory authorities are adopting effective affirmative action and equal employment opportunity programs, and report to the Minister for Industrial Relations. The evaluative criteria developed by the Agency will form the basis of the assessments.

The Minister for Industrial Relations will negotiate with his counterparts in State and Territory Governments to ensure coverage of all government employees by EEO provisions.

Contract Compliance

Recommendation 79
The Committee recommends that:

(a) the Commonwealth Government introduce contract compliance for all Commonwealth contracts so that all corporations/organisations tendering for government contracts should be required to supply evidence that they practice equal employment opportunity; and

(b) as part of greater Commonwealth State co-operation in equal opportunity matters, the State and Territory Governments explore options such as contract compliance to enhance the effectiveness of sex discrimination legislation.

The Government accepts this recommendation, which is also a recommendation in the Effectiveness Review, as a means of signalling the Government's support for affirmative action through an additional incentive to employers to comply with the Act. Those employers who fail to comply with the requirements of the Act will not be eligible for consideration for government contracts for goods and services and specified industry assistance. This will encompass purchasing by all government departments. Operational details of the policy are currently being developed and the implementation date and operational policy will be announced at a later date. The Minister for Administrative Services has already announced the adoption of contract compliance for purchasing that occurs through the Department of Administrative Services.

The Minister for Industrial Relations will raise with his State and Territory counterparts the importance of the adoption of similar contract compliance policies by State and Territory governments. The Victorian Government has put contract compliance in place and the policy is operating effectively with minimal administrative costs.