

## THE SEX DISCRIMINATION ACT AND INTERNATIONAL LAW

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### I INTRODUCTION

The major impetus for the passage of the *Sex Discrimination Act 1984* (Cth) ('SDA') was Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>1</sup> ('CEDAW') in 1983. The treaty also provided a constitutional grounding for the Commonwealth legislation because CEDAW fell within the category of an 'external affair' under s 51(xxix) of the *Australian Constitution*. CEDAW was adopted by the United Nations General Assembly in 1979 after a relatively quick drafting process following the first World Conference on Women in Mexico City in 1975. The treaty has been widely accepted at a formal level by the international community with 179 States Parties in October 2004.

CEDAW is considered the flagship of international concern with discrimination against women. Article 1 of the Convention states that discrimination means

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms.

CEDAW thus defines the concept of discrimination more broadly than earlier international treaties on women (for example, the 1953 United Nations *Convention on the Political Rights of Women*)<sup>2</sup> by including both equality of opportunity (formal equality) and equality of outcome (de facto equality). It specifies a range of areas for the elimination of discrimination including political and public life,<sup>3</sup> international organisations,<sup>4</sup> education,<sup>5</sup> employment,<sup>6</sup>

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

2 Opened for signature 31 March 1953, 193 UNTS 135 (entered into force 7 July 1954).

3 CEDAW, opened for signature 18 December 1979, 1249 UNTS 13, art 7 (entered into force 3 September 1981).

4 Ibid art 8.

5 Ibid art 10.

6 Ibid art 11.

healthcare,<sup>7</sup> financial credit,<sup>8</sup> cultural life,<sup>9</sup> the rural sector,<sup>10</sup> the law<sup>11</sup> and marriage, family relations and reproductive freedom.<sup>12</sup>

The treaty requires States Parties to take a variety of steps to implement a policy of eliminating discrimination against women: for example, embodying the principle of sex equality in national constitutions or other appropriate legislation, adopting laws to prohibit discrimination against women, ensuring the 'effective protection' of women from discrimination in all contexts and protecting women's legal rights on an equal basis with men.<sup>13</sup> *CEDAW* also endorses the use of 'temporary special measures' to accelerate achieving equality between women and men.<sup>14</sup>

The performance of States Parties under *CEDAW* is monitored by a 23-member expert body, the Committee on the Elimination of Discrimination Against Women<sup>15</sup> whose members are elected by the United Nations General Assembly. Elizabeth Evatt AC is the only Australian to have been a member of the Committee (1984–92) and her significant contribution to its work was recognised by her election as Chair. States are required to submit reports on their implementation of the treaty every four years and, after discussion with the country concerned, the Committee issues comments assessing the country's performance. In 1999, following criticism of the weakness of the reporting process as an implementation mechanism, the United Nations General Assembly adopted an Optional Protocol as a second monitoring device for *CEDAW*.<sup>16</sup> The Optional Protocol allows individuals within the jurisdiction of a country which has accepted it to make complaints (known as 'communications') about failures to implement *CEDAW* obligations directly to the Committee. The Committee then investigates the complaint, taking into account submissions from the country concerned, and may adopt formal views on the validity of the complaint. The Protocol also sets up a procedure by which the Committee can investigate 'grave or systematic' violations of *CEDAW*, although countries may opt out of this mechanism. The Optional Protocol now has 67 parties, but no complaints have yet been made under it.

If *CEDAW* is the mother of the *SDA*, how well does the Australian legislation reflect the treaty obligations? One immediate difference is that the *SDA* widens *CEDAW*'s concept of discrimination to include discrimination on the basis of sex against men as well as women. This has been criticised as watering down

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7 Ibid art 12.

8 Ibid art 13(b).

9 Ibid art 13(c).

10 Ibid art 14.

11 Ibid art 15.

12 Ibid art 16.

13 Ibid art 3.

14 Ibid art 4.

15 Ibid art 17.

16 *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 54/4, UN GAOR, 54th sess, UN Doc A/Res/54/4 (1999).

*CEDAW*'s focus.<sup>17</sup> In some aspects, however, the *SDA* translates *CEDAW*'s broad brush provisions in a progressive way, for example, in paying attention to sexual harassment as an aspect of sex discrimination.<sup>18</sup>

Australia's implementation of *CEDAW* is limited in two major ways. First, Australia has made formal reservations to significant aspects of the treaty. Second, the *SDA* contains a number of exemptions that are inconsistent with the international obligation to eliminate discrimination against women in all areas of life. Australia's rejection of the Optional Protocol to *CEDAW* signals its sensitivity to international scrutiny on these matters.

## II AUSTRALIA'S RESERVATIONS TO *CEDAW*

Australia's ratification of *CEDAW* was accompanied by two reservations. One stated:

The Government of Australia advises that it is not at present in a position to take the measures required by article 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

The second provided:

The Government of Australia advises that it does not accept the application of the Convention is so far as it would require alteration of Defence Force policy which excludes women for combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'.

Australia amended this reservation on 30 August 2000 to refer simply to the exclusion of women from combat duties. The issue of equality of opportunity for women in the armed forces has been debated by many feminist scholars. Some have argued that excluding women from combat makes them second-class citizens. They have also pointed out that the rationales for keeping women out of such positions are less about security than about asserting a particular understanding of masculinity. Others have been critical of the demand for equal participation of women in the armed forces because it reinforces militaristic values.

We here focus, however, on the implications for women of Australia's first reservation on maternity leave, the subject of criticism by the *CEDAW* monitoring committee. Article 11(2) of *CEDAW* provides:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: ...

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; ...

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17 This broadening prompted an (unsuccessful) argument challenging the *SDA*'s constitutional validity in *Aldridge v Booth* (1988) 80 ALR 1 on the basis that it was not closely enough related to *CEDAW* to constitute a matter of international concern.

18 *Sex Discrimination Act 1984* (Cth) div 3.

Paid maternity leave is thus clearly identified as a measure that would fulfil states' obligation to provide women with equal rights in employment. Indeed, one of the key rationales identified by the *CEDAW* drafters was that maternity leave is a crucial measure to enable women to combine family and maternal obligations with activity in the labour force. However, no reference was made to who should bear the costs of paid maternity leave, or how these costs should be calculated.<sup>19</sup>

The basis of Australia's paid maternity leave reservation was somewhat contradictory. On the one hand, the Federal Government advised that it was 'not at present in a position to take the measures required by art 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia'. On the other hand, the Government asserted that paid maternity leave was available to many public servants and to women employed under federal and State awards, while means-tested welfare benefits were available to single mothers.<sup>20</sup>

Since Australia's ratification of *CEDAW*, there have been calls for removal of the paid maternity leave reservation, all of which have been resisted.<sup>21</sup> The impression given by the Government is that Australian women are not disadvantaged by its failure to comply with *CEDAW* in this respect.<sup>22</sup>

What is the extent of paid maternity leave in Australia? While not available to casual workers, many permanent public sector workers have access to paid leave of some kind. In the private sector some provision for such leave has been introduced into a limited number of workplaces, in single employer collective agreements as a result of enterprise bargaining, through registered individual agreements or through voluntary management initiatives. Estimates of the spread of paid maternity leave vary but it is clear that the majority of women in paid

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19 Human Rights and Equal Opportunity Commission, *Valuing Parenthood: Options for Paid Maternity Leave: Interim Paper* (2002) 28, <[http://www.hreoc.gov.au/sex\\_discrimination/pml/valuing\\_parenthood.pdf](http://www.hreoc.gov.au/sex_discrimination/pml/valuing_parenthood.pdf)> at 30 October 2004. The International Labour Organisation ('ILO') is, however, more prescriptive in this respect. Article 6 of the *ILO Convention (No 183) Concerning the Revision of the Maternity Protection Convention (Revised) 1952*, opened for signature 15 June 2000, 2181 UNTS 255 (entered into force 7 February 2002) provides that cash benefits 'shall be no less than two thirds of a woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits'. Australia has also failed to ratify this Convention. The Australian Government has argued that this is because Australia does not have a tradition of social insurance and that employers fund entitlements such as sick leave, long service leave and maternity leave where paid and, further, that it is not appropriate to require all employers, particularly small employers, to fund maternity leave: ILO, *Maternity Report V(1): Protection at Work*, Conference of the ILO, 87<sup>th</sup> sess, Geneva (1999) 45-7.

20 Cited in Human Rights and Equal Opportunity Commission, *Valuing Parenthood*, above n 19, 29.

21 See, eg, Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a Right not a Privilege to Work while Pregnant* (1999) 229 (Recommendation 44), <[http://www.hreoc.gov.au/sex\\_discrimination/pregnancy/report.html](http://www.hreoc.gov.au/sex_discrimination/pregnancy/report.html)> at 25 October 2004.

22 Commonwealth Attorney-General's Department, *Government Response to the National Pregnancy and Work Inquiry Report* (2002), <[http://www.ag.gov.au/agd/WWW/civiljusticeHome.nsf/Page/Human\\_Rights\\_Publications\\_Human\\_Rights\\_Publications\\_Response\\_to\\_Pregnancy\\_and\\_Work\\_Inquiry#top](http://www.ag.gov.au/agd/WWW/civiljusticeHome.nsf/Page/Human_Rights_Publications_Human_Rights_Publications_Response_to_Pregnancy_and_Work_Inquiry#top)> at 30 October 2004.

work do not have access to paid maternity leave.<sup>23</sup> Recent Australian Bureau of Statistics ('ABS') data suggests that only 36 per cent of female employees (65 per cent in the public sector and 28 per cent in the private sector) have any entitlement to paid maternity leave.<sup>24</sup> Further, even where paid leave is provided, the available data shows a strong pattern of differential access according to occupation, with higher skilled professional employees more likely to have such access than those in less skilled or lower paid work.<sup>25</sup> There is also significant variation across workplaces in the quantum of any paid maternity leave provided, the basis on which it can be accessed, and the conditions that adhere to it.<sup>26</sup>

In 2002 the Human Rights and Equal Opportunity Commission ('HREOC') proposed a relatively modest federally funded maternity leave scheme.<sup>27</sup> This involved payment at the rate of the federal minimum wage or the woman's previous weekly earnings (whichever was the lesser) for all working women who had worked 40 weeks of the past 52 weeks with any number of employers, and/or in any number of positions. Despite broad community support, the proposal was taken up by neither the federal Coalition Government nor the Labor Opposition.<sup>28</sup> Instead a \$3000 'maternity payment' (rising to \$5000 by 2005), paid as a lump sum for each new born child, was introduced in July 2004.

This welfare payment does not constitute paid maternity leave as envisaged under *CEDAW*. It is not intended to encourage women's ongoing attachment to the paid workforce, nor is it intended to compensate working women for income forgone as a result of childbirth, nor is it linked to preventing discrimination against women in employment.<sup>29</sup>

One of the arguments used by the Government in response to HREOC's proposal was that a payment to women who were in the paid workforce would discriminate against 'stay-at-home' mothers. However, introducing paid maternity leave as an employment benefit does not prevent the government from

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23 Human Rights and Equal Opportunity Commission, *Valuing Parenthood*, above n 19, 18–24; Marian Baird and Adam Litwin, 'Unpaid and Paid Maternity and Paternity Leave in Australia: Access, Use, and Options for Broader Coverage' in Michael Barry and Peter Brosnan (eds), *New Economies: New Industrial Relations – Proceedings of the 18th AIRAANZ Conference* (2004) vol 2, 2–9.

24 ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, Cat No 6310.0 (2003). There are of course limits on the level of formal entitlement, such as length of service requirements and other exceptions and exclusions of certain categories of employees.

25 Baird and Litwin, above n 23; Human Rights and Equal Opportunity Commission, *Valuing Parenthood*, above n 19, 105.

26 Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002) 34–6, <[http://www.hreoc.gov.au/sex\\_discrimination/pml2/](http://www.hreoc.gov.au/sex_discrimination/pml2/)> at 25 October 2004. See also Marian Baird, 'Paid Maternity Leave: The Good, the Bad, the Ugly' (2003) 29(1) *Australian Bulletin of Labour* 97.

27 HREOC, *A Time to Value*, above n 26.

28 However, the Australian Democrats' policy provides for 12 weeks paid maternity leave to working women at the minimum wage rate and the Greens' policy provides for 18 weeks paid parental leave at replacement income up to average weekly earnings.

29 The Sex Discrimination Commissioner has recently called on the Federal Government to seek legal advice to determine whether or not the introduction of the Maternity Payment in combination with workplace rights meets the standard in *CEDAW*: HREOC, 'Commissioner Calls on Government to Remove Australia's Reservation to *CEDAW*' (Press Release, 30 June 2004), <[http://www.humanrights.gov.au/media\\_releases/2004/45\\_04.htm](http://www.humanrights.gov.au/media_releases/2004/45_04.htm)> at 30 October 2004.

providing other benefits for women who are not in paid employment at the time they have their child. In the United Kingdom, for example, Statutory Maternity Pay is paid to women who have been employed by the same employer for 26 continuous weeks, a Maternity Allowance is paid to women who are either self employed or in intermittent paid work, and an Incapacity Benefit is paid to women who are not in paid work or do not qualify for the other maternity payments.<sup>30</sup>

A national Australian paid maternity leave scheme for working women such as in the United Kingdom would meet the objective of both the *SDA* and *CEDAW* of ensuring equality for women by providing structural recognition of women's roles as employees and mothers, and offset the disadvantage that stems from women's caring responsibilities.<sup>31</sup>

### III EXEMPTIONS UNDER THE *SDA*

The *SDA* excludes various activities from its scope. The *SDA* also provides for the granting of temporary exemptions. The policies behind the permanent exemptions have been criticised in a number of reports,<sup>32</sup> although the *CEDAW* monitoring committee has paid them surprisingly little attention. From an international law perspective there is a question about the compatibility of many of the exemptions with Australia's treaty obligations and it is striking that they are not the subject of a formal treaty reservation.

Take, for example, the *SDA*'s exemptions in s 37 which allow discrimination by religious bodies in ordaining, appointing and training priests, ministers and participants in religion. Section 37(d) grants an extraordinarily broad ambit for discrimination on the basis of sex in relation to 'any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'. Religious educational institutions are also free to discriminate on the basis of sex, marital status and pregnancy in employment of staff if the discrimination is 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>33</sup> The text of *CEDAW* does not deal directly with the issue of sex discrimination in religious life, although it calls on parties to 'take all appropriate measures' to eliminate 'customary and all other practices which are based on the

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30 Department for Work and Pensions, *Statutory Maternity Pay* <[http://www.dwp.gov.uk/lifeevent/benefits/statutory\\_maternity\\_pay.asp](http://www.dwp.gov.uk/lifeevent/benefits/statutory_maternity_pay.asp)> at 30 October 2004.

31 HREOC, *A Time to Value*, above n 26, 86.

32 See, eg, Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* (1992); Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69, pt I (1994).

33 *Sex Discrimination Act 1984* (Cth) s 38.

idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.<sup>34</sup>

The clash between the norm of non-discrimination on the basis of sex and the practice of most religious traditions in excluding women from significant spiritual roles is usually resolved in favour of religious tenets. These are typically based on the claim that women and men are accorded separate spheres in religious life. The preference granted to claims of religion, however, eats away at the heart of a commitment to sex equality. It is important to pay attention to the political uses of claims of religious culture. We need to ask whose culture is being invoked, what the status of the interpreter is, in whose name the argument is advanced, and who the primary beneficiaries are.<sup>35</sup> Whose interests are served by arguments based on religion and who comes out on top? Religious traditions are often used in a complex way to preserve the power of men and the *SDA* bolsters this unequal distribution of privilege.

If a religious group were to seek exemption from laws prohibiting racial discrimination, there would be great public consternation. It would seem quite unacceptable in modern Australia. It is thus difficult to understand why the religious exemptions from sex discrimination laws attract so little concern.

Ironically, while religious bodies are exempted from the operation of the *SDA*, it was an application by the Catholic Education Office, in its role as employer, to provide male-only scholarships to attract male teachers that led to the tabling of the Sex Discrimination Amendment (Teaching Profession) Bill 2004 (Cth). This Bill is not only in direct conflict with art 10 of *CEDAW*, but it also does nothing to address the underlying cause of the sex imbalance in primary teaching, which is associated with the low pay and status of that profession. Indeed, it entrenches the unequal treatment of women teachers.

#### IV CONCLUSION

Australia's implementation of *CEDAW* through the *SDA* has been a mixed story. Many of the amendments to the *SDA* over the past two decades have been positive, for example, the strengthening of the indirect discrimination provisions, inclusion of dismissal on grounds of family responsibilities, and a tightening of the sexual harassment provisions. HREOC and successive Sex Discrimination Commissioners have also played a valuable role in making the legislation work. On the other hand, the *SDA* is addressed to individual acts of discrimination in a limited number of contexts. It does not constitute the constitutional or statutory guarantee of equality for women required by art 2 of *CEDAW* and detailed proposals for a specific legal commitment to sex equality have attracted no

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34 *CEDAW*, opened for signature 18 December 1979, 1249 UNTS 13, art 5 (entered into force 3 September 1981).

35 Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in Andrea Wolper and Julie Peters (eds), *Women's Rights, Human Rights* (1995) 167, 174.

support from either major political party.<sup>36</sup> Moreover, Australia has failed to accept major elements of the *CEDAW* package through its reservations to the treaty and its extensive scheme of exemptions. Current proposals for amendment of the *SDA* will further distance it from *CEDAW*'s obligations.

When announcing that Australia would not become a party to the Optional Protocol to *CEDAW* in 2000,<sup>37</sup> the Attorney-General argued that Australia already had adequate domestic laws to protect women from sex discrimination. The *SDA*, however, is a partial and porous translation of Australia's international commitments. Now that the *SDA* is entering adulthood, it is time to give it more strength. It needs, for example, to be able to address the effects on working women of the deregulatory trend in workplace relations causing less secure jobs.<sup>38</sup> The comparator version of equality at the heart of the *SDA* (treating women in the same way as similarly situated men) does not address the problem of the systemic undervaluation of women, and should be recast. The *SDA* also needs the machinery to allow HREOC to take a more active approach to achieving equality between women and men. United Kingdom legislation, for example, allows more active investigation of patterns of sex discrimination<sup>39</sup> and the United Kingdom Equal Opportunity Commission ('EOC') has taken landmark legal cases to improve the situation for women and men.

But the *SDA* does not operate in a vacuum. Its possibilities and limitations are as much shaped by changes in the political, institutional and social context as the actual content of its legislative provisions. As we have seen over the 20 years of the *SDA*'s operation, this context is not fixed. Recent experience in the United Kingdom suggests that properly resourcing institutions such as the Women's Equality Unit and the EOC, together with political support for initiatives that openly promote women's equality, can create an 'equality climate' in which progressive action becomes possible.

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36 See the recommendations for a Commonwealth Equality Act in Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69, pt II (1994).

37 Department of Foreign Affairs and Trade, Commonwealth Attorney-General's Department and Department of Immigration and Multicultural and Indigenous Affairs, 'Improving the Effectiveness of United Nations Committees' (Press Release, 29 August 2000), <[http://www.dfat.gov.au/media/releases/foreign/2000/fa097\\_2000.html](http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html)> at 8 November 2004.

38 Beth Gaze, 'The *Sex Discrimination Act* after Twenty Years: Achievements, Disappointments, Disillusionments and Alternatives' (2004) 10(2) *University of New South Wales Law Journal Forum* 57, 58.

39 *Equal Pay Act 1970* (UK); *Sex Discrimination Act 1975* (UK).