

19 November 1993

Mr Peter Hennessy
Executive Director
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Mr Hennessy,

SUBMISSION TO REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

The National Pay Equity Coalition (NPEC) makes the following submission to the Review of the Anti-Discrimination Act 1977 (NSW). NPEC is a coalition of women trade unionists and women's groups, committed to pursuing the goal of pay equity for women. Based in Sydney, we undertake research and educational work to advance this goal. We are a voluntary group and are not affiliated with any other organisation.

In our submission, we address the issue of removal of exemptions for industrial awards and agreements, and a number of general issues about the operation of the Act and the complaints process. If you have any queries regarding this submission, please contact Anita Devos on 660-2074.

Exemptions for industrial awards and agreements

1. NPEC argues strongly in support of the removal of this exemption. An argument cannot be sustained that the exemption should carry on, 15 years after the Act was first introduced. Discriminatory provisions continue in awards and agreements, including different hours of work for men and women cleaners, prohibitions on women working late, exclusion of women from particular types of work and from using particular equipment. We do raise the question that if S. 54 is amended to remove the exemption for awards and agreements, it is unclear what the process and powers would be for amending discriminatory provisions, if the parties decline to agree to remove them.

2. Our argument in support of removal of this exemption is supported by our research into the impact of enterprise bargaining on women workers. NPEC recently reviewed 20 enterprise agreements, which cover three quarters of all employees under enterprise arrangements in the federal jurisdiction. We reached the following conclusions:

- enterprise bargaining exacerbates women's already disadvantaged position in the workforce
- this is because of the structural and strategic disadvantage women face in the workforce.

The exemption must therefore be removed to enable women to seek redress for direct and indirect discrimination arising from current awards and agreements, and the increasing number of enterprise agreements in the state and federal jurisdictions.

3. Related to the point above, NPEC proposes that the Anti-Discrimination Board and the Industrial Relations Commission should collaborate to develop guidelines and models of 'best practice' to apply the principles of the Anti-Discrimination Act. In preparing these, the parties should review in detail the evidence of indirect discrimination coming from local and overseas research. Resources should be dedicated to improving the systems for monitoring standards of equity. The parties to an enterprise agreement should also be required to reflect and comment on the application of seemingly neutral provisions in their agreement on different groups in the workplace. The parties should be required to certify in writing that awards and enterprise agreements have been checked to ensure they comply with the Anti-Discrimination Act.

Other exemptions

4. The Act should be amended to cover private educational institutions. These are currently excepted from the legislation. Especially now that an open training market is being actively pursued, an ever increasing amount of training and education is being done by private providers who are exempt from the Act. Even if you accept that it may be legitimate to make exceptions for actions done in keeping with religious convictions—which NPEC does not accept—the existing exception is very much broader than that. These organisations are also often publicly funded or offering publicly funded programs. Employees in private educational institutions are entitled to the same protection against discrimination on the ground of sex, marital status, homosexuality, pregnancy etc as is provided by the Anti Discrimination Act to other citizens and workers.

5. Charities and voluntary organisations similarly ought not to be excepted from the Act. Many of them are publicly funded and as a matter of public policy should comply with the generally expected standards. They are now required to comply with the Affirmative Action (Equal Employment Opportunity for Women) Act. Often, these bodies are insufficiently careful about their responsibilities as employers and there is no basis for their employees having a lesser level of social and human rights than employees of other organisations.

6. Exceptions for superannuation and insurance should most certainly be removed. Discrimination in superannuation is one of the reasons women make up an increasing proportion of the aged poor. Occupationally based superannuation is structurally discriminatory in relation to those with intermittent workforce participation and this should be recognised in complementary systems of benefits. However, there still are many discriminatory aspects to superannuation which should be able to be addressed under the Act. For example, in some firms, part time employees are put in a different fund with different benefits. Women, of course, make up the larger proportion of part time employees.

7. The exemption for pregnancy discrimination if the woman applying for a job knows that she is pregnant is disgraceful and should be removed, which would also help bring the state and federal Acts into line. There should be no exceptions for any

form of discrimination in employment on the grounds of pregnancy or potential pregnancy. There is evidence from Australian Institute of Family Studies research that some employers say they will not hire women of child bearing age.

8. Junior wage rates should not be excepted from age discrimination provisions. Training wages can be provided in awards and agreements with provisions ensuring access to training. Age is no indicator of competence nor of need for income and should not be a permissible basis for pay discrimination.

Ground and organisations covered

9. Sexual harassment and pregnancy discrimination are not explicitly covered although the legislation has been interpreted to cover them. It would be easier if the Act clearly and unambiguously covered them. Sexual harassment should not be defined in terms of detriment in employment—harassment is detriment enough. Provisions should be introduced consistent with federal legislation.

10. The Act should be extended to cover family responsibilities and age.

11. The Act should be extended to cover discrimination against transsexuals.

12. State owned corporations should be covered under Part 9a of the Anti-Discrimination Act as part of the government's responsibility to support its own legislation. If organisations are fully privatised, then and only then should their coverage transfer to the Affirmative Action Act and the various discrimination Acts.

13. There is a real need for the Act to cover the situation of ex-prisoners who often find it hard to obtain employment and other opportunities because of prejudice against them.

14. The Anti-Discrimination Act most certainly should not deal with the position of fetuses.

General Comments

15. There should be a movement towards a situation which recognises the right to equality as a full right. There should not be exceptions or exemptions and there should be very few defences once the occurrence of discrimination has been established. A declaration of equality might take the form of the Canadian Charter of Rights and Freedoms and provide a frame of reference for the Act.

16. All other legislation still prevails over the Anti-Discrimination Act—this should not continue. There should now be a final review of what can be addressed and a sunset provision put in place to ensure that discriminatory legislation becomes invalid, to the extent it is discriminatory, by a particular date. Other countries cope with discrimination legislation with which all other legislation must be consistent. Discrimination is never an answer to occupational health and safety issues. Where there is any uncertainty about risk, the most authoritative current view should be accepted and it should be possible to call for a declaration on particular issues to use as guidance— from Worksafe or some other appropriate expert body. There should not be exemptions like the Queensland "reasonably necessary" to protect public health, etc. Instead, employers should have to provide safe work conditions and systems.

Employers already have substantial rights with regard to discipline and dismissal of people who are unable to do their work.

17. The complaint process is very difficult for most people. Conciliation officers are required to be impartial, but many people require assistance. In Canada, equity centres provide advocacy services. The Legal Education and Action Fund assists women with test cases. The National Women's Legal Centre and the Lawyers' Committee for Civil Rights under Law in the US also take test cases and appear as *amici curiae*, generally relying on pro bono work by lawyers and gifts. Models of providing advocacy should be investigated including legal aid. Many people cannot face those who have discriminated against them, sometimes out of fear or embarrassment, sometimes out of concern about further ill treatment. Victimisation provisions are not an adequate defence. Conciliation seems to assume dealings between people in an equal position, which is rarely the case. Complainants are not represented by advocates and conciliators are required to be impartial. In the industrial jurisdiction, disputes are usually pursued by unions and employer organisations on behalf of their members, which alleviates the stress for the individuals concerned.

18. Related to the point above, complaints should be able to be made orally.

19. Unions should be able to lodge complaints on behalf of their members.

20. Existing election and waiver provisions prevent someone pursuing different elements of the same matter in different jurisdictions. The Mercedes Benz case in the Victorian Equal Opportunity Commission shows how the same set of facts can give rise to both discrimination and industrial complaints, and the jurisdictions differ in relation to remedies, compensation, standing, evidentiary requirements etc. It should be open to someone to pursue a maternity leave complaint under the Industrial Relations Act and secure a criminal conviction against an employer, to seek reinstatement under the unjust dismissal provisions of that Act, and to seek damages for pregnancy discrimination under the Anti-Discrimination Act.

21. Complainants should be able to bring complaints on several grounds.

22. The Anti-Discrimination Act applies only to workplaces with more than five employees, although women make up a substantial majority of those employed in smaller workplaces. The present provisions appear to be indirectly discriminatory. The Act should be extended to cover all workplaces.

23. Confidentiality of conciliation is an important protection. However, much of the educative value of analysis of discrimination is thereby lost. Since far more cases are conciliated than decided by the Equal Opportunity Tribunal, the nature and outcomes of most complaints are unknown, and parties do not have access to information which may affect their handling of cases. There should be a regular report highlighting key features of cases and settlements reached, which discusses cases in general terms. Public scrutiny of outcomes is also an important principle.

24. Damages are limited to \$40,000 at present, including economic loss, and pain and suffering. There is no justification for this. Cases should be heard and damages awarded on their merits. The prospect of large damages has been a powerful stimulus for some changes in practice in other countries.

25. There should be powers to order damages and redress in representative complaints. The current limitation is quite unreasonable and undermines the use of the representative action provisions. Class actions in which liability and damages/redress can be addressed would be a more just and efficient mechanism.

26. It would be highly desirable for contract compliance provisions to be introduced in support of the Anti-Discrimination Act so that government contracts were not awarded to companies named for breaching the Affirmative Action (Equal Employment Opportunity for Women) Act 1986, or convicted of offences under state or federal discrimination legislation, for a specified period. This is done successfully in the USA and has improved the preparedness of some organisations to change their discriminatory practices.

27. The requirement to investigate and conciliate can lead to unnecessary processes and delays. Some cases should be permitted to proceed immediately to determination by the Tribunal. We propose the complainant should be at liberty to make such a request.

28. The onus of proving that something is reasonable should be on the alleged discriminator rather than on the complainant, since those responsible for the condition have the best prospect of being able to show why it is done, how it works etc. It is often difficult for those discriminated against to obtain the information to establish their case. Once a *prima facie* case has been shown, the onus should transfer from the complainant to the alleged discriminator.

29. NPEC believes there is a need to reformulate the test of indirect discrimination. The four-part test is a substantial barrier to bringing a case of indirect discrimination, for the reasons outlined above in regard to the onus of proving a case.

30. Presumably the ADA will be re-written in gender inclusive language and its wording simplified and clarified.

31. The Act should make it clear that unlawful discrimination occurs where discrimination plays any part in what is done. It should not be required that discrimination be the main or only basis or factor. The Act should make it clear that discrimination is a matter of effect, not intent.

32. It would be useful to clarify the 'inability to comply' provisions in terms stating that it is the 'practical and real ability to comply'.

33. There should be a provision that allows special needs activities to be taken to remedy past discrimination. Existing provisions for exemptions have maximum time limits and a maximum number of renewals which are not realistic in view of the intransigence of some discriminators and the difficulty of some problems and issues.

34. Recidivist offenders should attract extra penalties. Some offenders persistently re-offend. The EOT has made very little use of broad orders reaching beyond individual cases. Many offenders re never proceeded against although they commit the same offences in the same ways as those who are proceeded against.

35. The complaints based approach needs to be supplemented by expanded powers for the Equal Opportunity Tribunal to initiate inquiries and make determinations based on their findings. A possible model is the inquiry powers of the Privacy Commissioner. The New York Anti-Discrimination Board issues orders of compliance without needing to receive formal complaints, for example in relation to HIV/AIDS discrimination.

36. When the EOT makes a determination in relation to a case, it should be required to issue a general ruling applicable to similar types of cases, in the same way as the Tax Commissioner does. The EOT should be empowered to make rulings on matters it sees as requiring them. Such rulings would of course be able to be appealed in courts, just as the tax rulings are. It is noteworthy that major improvements in employment (eg. equal pay cases, test cases) have been achieved by dealing with one major case and then generalising the findings.

37. The rulings of the EOT should be compiled as a Code Of Practice. The Code could be attached to the Act, as is done with attachments of standards or codes to occupational health and safety legislation. The code could have the status that a breach of it could constitute *prima facie* a breach of the Act, although the breach could be disproved by showing that although the code had not been complied with, the Act had.

38. Breaches of codes could be administratively processed, as is done in the occupational health and safety jurisdiction. Inspectors in that area have power to issue prohibition and improvement notices and on the spot fines. (Industrial inspectors also have the power to issue on the spot fines. These on the spot measures are generally applied only in situations where a quite clear breach has occurred, for example, no time and wages book is kept, a machine guard is not fixed as required. An analogous example might be where it is openly acknowledged that someone has been sacked or not selected because of their sex. The on the spot penalties can of course be challenged in court. There are other parallels including for traffic and parking offences.

39. Such a process puts the complainant in the role of providing information which is then used by those administering the Act for enforcement rather than requiring the complainant to enforce the Act.

40. The President's discretion regarding rejecting complaints should be tied to specified criteria.

41. The Anti-Discrimination Board must be appropriately resourced to support its work. The Act is presently not being administered because of the shortage of resources of the Board and the Equal Opportunity Tribunal. Justice delayed is justice denied in many cases, and delays do increase the number of complaints which do not proceed.

Yours faithfully,



Anita Devos
for the National Pay Equity Coalition.