

Working Women's Centre

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Discussion Paper No. 32
ISSN-0314-6006

September 1978

ANTI-DISCRIMINATION LEGISLATION

In 1973 Australia ratified Convention No. 111 of the International Labour Organization. That convention proscribes discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin.

EMPLOYMENT DISCRIMINATION COMMITTEES

Soon afterwards the Federal Government set up a National Committee on Discrimination in Employment and Occupation and six state committees to investigate complaints received concerning alleged discrimination. These committees have no power to take legal action and so far there is only one federal Act under which action could be taken, i.e. the (Commonwealth) Racial Discrimination Act 1975. To date no case has been prosecuted under this Act.

In actual practice the state committees investigate complaints and attempt to resolve them by conciliation and persuasion. If a state committee cannot resolve a case in which it believes discrimination has taken place the case is referred to the National Committee. If the National Committee also is unsuccessful, its ultimate sanction is to report the matter to the Minister for Employment and Industrial Relations who may table the report in the Commonwealth Parliament. So far this has not happened. In the one case where the National Committee sought to have this sanction applied the discriminating organization changed its policy.

As the committees were apparently unable to resolve 30 cases (27.5 per cent) in which they believed discrimination had occurred ⁽¹⁾ (see Table 1), it is obvious that the lack of sanctions makes it difficult to secure justice. One wonders what prompted 48 complainants to withdraw their complaints. One also wonders how many of the 270 not considered to reveal evidence of discrimination might have proved their case in a court of law.

Table I

Complaints received by Employment Discrimination Committees during year ended 30/6/77	
Resolved	79
Withdrawn by complainant	48
Insufficient evidence of discrimination	270
More appropriately handled by other machinery	75
Unaccounted for	<u>30</u>
	502

Of the 502 complaints received 300 (60 per cent) were made on the grounds specified in ILO Convention No. 111. Of these 163 (54 per cent) were on the grounds of sex, most being lodged by women.

STATE LAWS

Recognizing the limitations of the discrimination committees, three Australian states have passed laws which prohibit discrimination on the grounds of sex or marital status. These are:

- South Australia: Sex Discrimination Act 1975
- New South Wales: Anti-Discrimination Act 1977
- Victoria: Equal Opportunity Act 1977.

The New South Wales Act also includes discrimination on the grounds of race.

SUMMARY OF THE ACTS

In most respects the three Acts are very similar. An important omission from the NSW Act⁽²⁾ is services relating to education which means that schools and other educational institutions can not only refuse to admit students of one sex but can also refuse to employ staff of one sex. The Victorian Act⁽³⁾ exempts only institutions under the control of a religious body whose members' susceptibilities might be injured by admitting one sex or the other. The SA Act⁽⁴⁾ exempts single-sex schools and institutions so far as admission of students is concerned. Another disturbing exemption from both the NSW and SA Acts is discriminatory wages. These constitute one of the chief means of discriminating against women. The Victorian Act does not include de facto relationships in its definition of marital status.

DEFINITION OF DISCRIMINATION

A person discriminates against another person if, on the ground of sex or marital status, he treats the other person less favourably than he treats or would treat a person of the other sex or of a different marital status.

A person discriminates against another person if he treats the other person less favourably than in those circumstances he treats or would treat other persons because he believes the other person has brought proceedings against him or proposes to do so in good faith under this Act.

South Australia: Includes treating a person less favourably because s/he cannot comply with an unreasonable requirement with which a substantially higher proportion of members of the other sex are able to comply.

New South Wales: Includes treating someone less favourably because of a characteristic appertaining to or imputed to persons of that sex or marital status (eg growing a beard or becoming pregnant - *author's note*).

Exempts rights or privileges granted to a woman in connection with pregnancy or childbirth.

Victoria: A comparison of the cases of persons of the other sex or of a different marital status shall be a comparison where the relevant circumstances in the one case are the same, or are not materially different, in the other. Exempts special treatment afforded to women in connexion with pregnancy or childbirth.

EMPLOYMENT

It is unlawful to discriminate in appointments, promotions, conditions and terms of employment or training opportunities. Applies also to contract workers and agents.

EXEMPTIONS

South Australia: Private household; employers of less than 6 people; job for which sex is a genuine occupational qualification; discriminatory wages.

New South Wales: Private household; employers of less than 6 people; job which is one of two held by a married couple; job for which being a man or a woman is a genuine qualification to satisfy one of the following requirements: reasons of physiology other than physical strength; dramatic performances; fitting clothing; entering lavatories or dressing rooms; searching people; prison custodians; providing people with personal services relating to their welfare or education where a substantial number might reasonably object to a person of the opposite sex. The Governor may prescribe other jobs for which being a man or a woman is a genuine qualification. Discriminatory wages fixed by Wage Tribunal (including over-award wages).

Victoria: Private household; employers of less than 6 people; actors; where terms of employment require employee to reside in communal residential accommodation provided only for persons of one sex.

PARTNERSHIPS

South Aust.: Forbids discrimination with regard to offering partnership; terms on which it is offered, benefits and expulsion. Exempts partnerships of less than 6.

New South Wales: No provisions.

Victoria: Access to benefit, expulsion. Does not include offering partnership. Exempts partnerships of less than 5.

EMPLOYMENT AGENCIES

Forbids discrimination in providing services and terms of service.

South Aust. & NSW: Do not mention agencies which do not charge fees.

Victoria: Specifically includes agencies which do not charge fees.

TRADE UNIONS; EMPLOYER, PROFESSIONAL OR TRADE ORGANIZATIONS

Includes admittance to membership; terms on which membership is offered; access to benefits; termination or detriment.

New South Wales: Mentions only trade unions.

QUALIFYING BODIES FOR TRADES OR PROFESSIONS

Includes conferring of qualifications; terms of authorization or qualification; withdrawal or variance of above.

New South Wales: Specifically mentions renewal or extension of qualifications.

EDUCATIONAL AUTHORITIES

Includes acceptance of students; terms on which admitted; benefits provided; expulsion or other detriment.

EXEMPTIONS:

South Australia: Single-sex schools and institutions so far as admission of students is concerned; some exceptions for religious bodies.

New South Wales: All educational authorities exempt.

Victoria: Single-sex schools; some exceptions regarding employment in religious institutions.

PROVISION OF GOODS AND SERVICES

Includes offering of services and terms on which they are supplied. Services include access to premises open to the public, banking, credit, insurance, professional services, refreshments, recreation, transport and services provided by local government or public authorities.

EXEMPTIONS:

South Aust. & NSW: Where a skill is commonly exercised in a different way in relation to men and women.

ADVERTISING

It is an offence to publish an advertisement or notice which indicates an intention to commit an unlawful act (eg restrict an offer of employment to one sex - author's note). Advertiser and publisher both responsible.

EXEMPTIONS:

South Aust.: Publisher not guilty if he proves he believed on reasonable grounds that publication would not contravene the Act.

Victoria: Use of a word which describes one sex or has a cognate meaning: eg 'salesgirl', 'waiter'. Publisher not guilty as for South Australia.

ACCOMMODATION

Includes offer of accommodation; terms on which it is offered; associated benefits; eviction.

EXEMPTIONS:

South Australia: Private accommodation; accommodation for less than 7.

New South Wales: Private accommodation; accommodation for less than 7 persons; accommodation for aged persons.

Victoria: Hostels; private accommodation; accommodation for less than 7.

GENERAL EXEMPTIONS

SUPERANNUATION, provident fund and pension schemes.

RELIGIOUS BODIES: Some practices.

INSURANCE: Policies based on actuarial or statistical data from source on which it is reasonable to rely and other data and relevant factors.

CHARITIES: Provisions of deeds, wills and other instruments.

CLUBS AND SPORT:

South Australia: Sporting activity in which strength, stamina or physique is relevant. No specific exemption for clubs.

New South Wales: Clubs registered under Liquor Act and Gaming & Betting Act; nonprofit clubs and bodies; bodies not registered by an Act (which would include clubs - author's note).

Victoria: Sport organized for one sex; activities of social, recreational community service or sporting clubs mainly for one sex or marital status.

TEMPORARY EXEMPTIONS:

South Australia: The Board may grant up to 3 years.

New South Wales: The Minister may grant up to 5 years.

Victoria: The Board may grant up to 3 years. May also re-examine or revoke.

ACTS DONE TO COMPLY WITH ANY OTHER ACT OR AN INSTRUMENT MADE OR APPROVED BY OR UNDER ANY OTHER ACT OR AN ORDER OF THE BOARD

This means that every other Act has precedence over anti-discrimination legislation.

REMEDIES

The Board may order a person found to have discriminated to:

- (1) Refrain from further acts of discrimination;
- (2) Pay damages to the complainant to compensate for loss or damage suffered.
- (3) Perform other acts to redress loss or damage.

South Australia: Damages may include compensation for injury to feelings.

New South Wales: Limits damages to \$20,000. Board can declare void in part or whole any contract or agreement in contravention of Act or regulation.

FINES

	<u>S.A.</u>	<u>N.S.W.</u>	<u>Vic.</u>
Failure to obey order of the Board	2000	1000	1000
Failure to appear before Commissioner or Counsellor	2000	500	500
Failure to appear before or obstructing the Board	2000	1000	1000

Appeals may be made to the Supreme Court.

WHY SO MUCH DISCRIMINATION ON THE GROUND OF SEX ?

In her report for 1976-77 the SA Commissioner for Equal Opportunity drew attention to the magnitude of the task of combating discriminatory practices in employment because of entrenched community prejudice.⁽⁵⁾ She stated that she had encountered "a persistent clinging to stereotyped notions of the capabilities, motivations and expectations of men and women . . ."⁽⁶⁾ "Paternalism and an unjustifiable willingness to take up personally the enforcement of what is believed to be a community preference lie behind these attitudes,"⁽⁷⁾ she said.

An illustration of such attitudes was apparent in a case where a man and a woman had been employed by the same firm for 27 years and 13 years respectively. When the manager discovered that they had been living in a de facto relationship for 18 months he told the woman that she would be dismissed. They went to the Commissioner for Equal Opportunity who spoke with the manager and the personnel manager with the result that the woman did not lose her job after all.⁽⁸⁾

The SA Commissioner believes her office has a responsibility to educate and change community attitudes and that this is best achieved by negotiation and conciliation. She has found many employers genuinely anxious to comply with the Act and several have approached her for advice. The Victorian Commissioner and the NSW Counsellor for Equal Opportunity have reported the same experience.

CONFLICT WITH OTHER ACTS

Problems arise because none of these Acts applies where it conflicts with the provisions of other Acts or instruments made or approved by or under any other Act.

Example (a): One employer with several male employees and only one female wished to move his business to premises where there was only one toilet. According to regulations under the Public Health Act he must provide separate toilets for men and women. To instal another toilet would cost \$2000 which he said he could not afford.⁽⁹⁾ He should be able to explain the position to the woman and leave the decision to her as to whether she was willing to share the toilet with the male employees but the Health Act would prohibit such action. The Health Act reflects community attitudes which perhaps need to be changed. After all most private homes do not have separate toilets for males and females - nor do aeroplanes or long-distance buses.

DISCRIMINATION AGAINST MEN

The great majority of complaints about discrimination have come from women. However a few have come from men. Most of the latter have been because men sought traditionally female jobs or because they were denied the latitude sometimes extended to women in matters of dress and discipline.⁽¹⁰⁾

Example (a): A man who wanted to become an airline 'hostess'.⁽¹¹⁾ This case has raised other problems: ie What promotional opportunities are available to hostesses? Can they become flight service officers?

Example (b): Under the NSW Apprentices Act 1969⁽¹²⁾ females who marry during the course of their indentures may cancel them. Males may not and so are discriminated against. They have no redress because the Apprentices Act would prevail over the Anti-Discrimination Act.

DISCRIMINATION AGAINST WOMEN

Women suffer discrimination on two main counts:⁽¹³⁾

- (1) their reproductive function and/or sexuality;
- (2) stereotyped notions about their capabilities.

The first reason is often confounded by the second as the following two examples show.

REPRODUCTIVE FUNCTION

Example (a): A Commissioner of the South Australian Public Service gave evidence, during the hearing of the ACTU application for maternity leave, of an employer who sacked an Italian Catholic woman because she was about to get married and, according to the employer, would soon become pregnant.⁽¹⁴⁾

Example (b): Two pregnant nurses were dismissed by a private hospital because the employer claimed that they were "a high insurance risk". Mr. N. F. Thompson of the Insurance Council of Australia gave evidence that there were no figures to indicate whether pregnant women were a greater risk, that these figures had never been required by employers and that the fact that such evidence had not been called for indicated that there was no need for them. The SA Sex Discrimination Board found that both complainants had been unlawfully dismissed and that they had suffered loss of wages for the respective periods which they would have continued to work before confinement had they not been dismissed. The Board ordered the hospital to pay \$2000 to one complainant and \$1300 to the other to compensate for the wages they would have earned had they worked until the dates they had respectively intended. The Board ordered payment of an extra \$100 to one of the complainants to compensate for injury to feelings.⁽¹⁵⁾

STEREOTYPED NOTIONS ABOUT CAPABILITIES

Example (a): A woman was refused an application form for a position as railway shunter because the Authority concerned maintained that the majority of women did not possess the robust physique required of a shunter. After representations from the relevant State Discrimination Committee the Authority undertook to consider female applicants on their merits.⁽¹⁶⁾

Example (b): A woman applied for a job as a sales representative selling domestic appliances. She was refused an interview. Following an approach by the Commissioner for Equal Opportunity the prospective employer interviewed the woman, gave her the job and subsequently rang the Commissioner to say she had topped the sales team.⁽¹⁷⁾

TRADITIONAL NOTIONS OF MEN AS BREADWINNERS

Some forms of discrimination against women or favourable treatment of men are based on the assumption that all men have dependants and that women do not.

Example (a): A NSW finance organization ran a health fund for employees on a \$1-for-\$1 basis. Men were granted family membership but women were only allowed membership for themselves. After an approach by the Commissioner for Equal Opportunity the company reviewed its policy and changed the rules so that all employees are now offered family membership.⁽¹⁸⁾

Example (b): Finance organizations, banks and insurance companies used to charge different rates on the basis of sex and marital status. They also discriminated against women in terms of eligibility and frequently required women to have a male guarantor. Such practices are now illegal in all three states.

Example (c): A woman was retrenched after 18 months' employment while a man who had been with the same firm for only 9 months was retained. The reason given was that he was a married man with children. In actual fact his wife was employed and they had no children.⁽¹⁹⁾

Example (d): A married woman who applied for a job was told that it was no used applying as men were given first preference, then single women and married women were right at the bottom of the pile. She complained to the Commissioner and subsequently got the job.⁽²⁰⁾

WHAT IS NEEDED TO ELIMINATE DISCRIMINATION ?

It is interesting to compare the results of complaints made last year to the SA Office of Equal Opportunity, which has been operating two years longer than the offices in other states, with the results of complaints made to the Employment Discrimination Committees which have been operating two years longer than the SA CEO (see Table II).

Table II

Comparison of Complaints received and resolved by the SA Commissioner ⁽²¹⁾ of Equal Opportunity and the Employment Discrimination Committees ⁽²²⁾ for the year ended 30/6/1977				
Result	SA CEO		EDC's	
	No.	%	No.	%
Resolved	93	60.38	79	15.74
Withdrawn by complainant	19	12.34	48	9.56
No evidence of discrimination	12	7.79	270	53.78
Not relevant to investigating body	10	6.49	75	14.94
Still unresolved	13	8.44		
Referred to Board	2	1.30		
Unaccounted for	5	3.25	30	5.98
	154	99.99	502	100.00

It is apparent that the existence of sanctions has a pronounced effect on the outcome of negotiations when one compares the 60 per cent success rate of the SA CEO with the less than 15 per cent rate for the discrimination committees. It is disturbing to note the huge 53 per cent considered by the committees to reveal no evidence of discrimination - especially for those states which have no anti-discrimination legislation.

It is obvious that comprehensive federal legislation is needed which would embrace all points covered in the state acts, take precedence over all other Acts and cover every aspect of discrimination. Until this happens women, who make up approximately 80 per cent of all complainants, will continue to be discriminated against in many areas, particularly with regard to overaward payments and superannuation.

The Metal Trades Industry Association has made it plain that it will resist the payment of equal overaward payments to women in states where it is not compelled to pay. In March 1978, when the Victorian Equal Opportunity Bill was being considered by the Government, the MTIA's newsletter reported that it had asked the Government to make amendments to "exclude in a specific way the currently implied requirement to pay equal rates of wages or other remuneration and to provide totally equivalent conditions of employment irrespective of sex or marital status".⁽²³⁾ A survey conducted by the MTIA in 1977 covering 30 Victorian companies showed that in every case female process workers were paid less than their male counterparts. The award in the industry was \$114.50. In one factory men were paid \$140 per week whereas women got \$125 and in another the men got \$140 but the women only \$115. According to Mr. Ian Little, deputy national director of the MTIA, the difference was because men had to lift greater weights. One wonders whether he would suggest that the same men should be paid more than company directors.

WHAT CAN UNIONS DO ?

Ms Mary Beasley, the first SA Commissioner for Equal Opportunity, has suggested that the support of union representatives on the shop floor is most valuable. Unions have been able to provide very useful information to the Commissioner as they have an indepth knowledge of working conditions of their particular organization.

In states which have anti-discrimination legislation unions can inform their members of its existence and can assure members of their support if a member wishes to lodge a complaint with regard to a matter which could be dealt with more effectively by the Commissioner than by the union. The first step is to lodge a written complaint with the Commissioner or Counsellor. Many women would not dare to do this in case their employer gave them the sack.

Employers can afford to employ solicitors to advise them how to conduct their defence. Few women can afford to do this. Unions can provide advice. A union organizer could, with permission from the Board, represent a complainant.

Unions could also do their own research and report cases of general discrimination in an industry to the Commissioner or Counsellor. The Board has power to make general investigations where it has reason to believe that discrimination exists.

One of the most important things unions should do is to encourage all members to acknowledge the right of women - married or single - to equal opportunities in work, pay, training, promotion, superannuation and all benefits enjoyed by men. Unions are in a position to do a great deal towards changing community attitudes.

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