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**Submission to the Legal and Constitutional Affairs Committee
inquiry into the effectiveness of the Commonwealth Sex
Discrimination Act 1984 in eliminating discrimination and promoting
gender equality.**

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Introduction.

The Australian Women's Health Network congratulates the Senate on its establishment of this timely Inquiry into the effectiveness of the *Sex Discrimination Act* 1984 (SDA). As the scope and extent of the Terms of Reference suggest, a multitude of proposals have been made by organisations and individuals for tightening the provisions of the Act and increasing its effectiveness. The 25th anniversary of the legislation presents a real opportunity to introduce reforms that will further reduce discrimination and, most importantly, promote gender equality.

This submission addresses the Inquiry's specific Terms of Reference. However, we wish to take the opportunity to stress to the Committee, first, that gender inequality remains a serious issue in Australia and, second, that it is a major health issue. The negative impact of gender inequality on women's and children's health is severe, ongoing and a daily occurrence. Commonly viewed as a human rights problem, gender inequality has only recently become widely recognised as a major determinant of poor health outcomes. Gender inequality is closely linked to women's economic insecurity, to women's mental ill health and to violence against women and children, including sexual violence. We present evidence that demonstrates the negative consequences for health and well-being that arise from the foundation of unequal status.

The Australian Women's Health Network

Promoting gender equality is part of the core business of the Australian Women's Health Network (AWHN). The organisation is community-based, non-profit and consultative and provides a national voice on women's health issues. Established in 1986, it is linked to women's health networks and service provision agencies in all States and Territories. Each jurisdiction is represented on the management committee, as well as Aboriginal women, who have established an Aboriginal Women's Caucus. AWHN cuts across political, economic, social and ethnic barriers and works with a wide cross section of Australian women. It operates as a women's health advocacy and information organisation, working with government policymakers, where appropriate, and other agencies to improve the health and well-being of Australian women. The organisation is funded from membership fees and does not receive government funding.

Gender Inequality and Poor Health Outcomes.

Gender inequality is a health issue. AWHN, following the World Health Organisation (WHO), views health in its broad social context, recognising that health is determined by range of social, environmental, economic, gender and biological factors and that differences in health status and outcomes are linked to sex, age, socioeconomic status, ethnicity, disability, location and environment¹.

Discrimination on the basis of sex, in its many forms, gives rise to poor health outcomes. Discrimination and/or harassment in the workplace, for example, may lead

¹ Australian Women's Health Network (2008) *Women's Health: the New National Agenda*, Position Paper, March, pp 8-9.

not only to anxiety, depression and other mental health problems but may give rise to economic insecurity, which is closely associated with reduced life chances and poorer health. Where ever studies have been undertaken around the world, close links have been found between low socio-economic status and higher rates of morbidity and mortality. Thus, the gender pay gap in Australia, for example, undermines women's health and well-being by reducing economic security. The gender pay gap operates throughout women's life spans. It contributes to economic insecurity for low income families, especially women headed families, and has a negative impact therefore on the health of children as well as women. It also contributes to a serious lack of financial independence for women in retirement. One of the ways that income insecurity impacts directly on health is by reducing the use of necessary medical services. An international study shows that 17 per cent of Australians did not access recommended medical care because of cost in 2006. This study, which unfortunately does not provide sex disaggregated data, also shows that 13 per cent of Australians did not get their prescriptions filled or skipped doses in order to make their medications last longer.² We know that most of these people are women because women are overrepresented in low income groups.

Gender inequality, it is commonly agreed, forms the foundation for violence against women. As WHO has argued, a significant factor underlying domestic violence "is the unequal distribution of power and resources between men and women".³ Moreover, the persistence of gender inequality undermines public policy efforts to reduce the incidence of violence and abuse.

Violence is enormously detrimental to women's and children's health. A major WHO study of violence and health in 2002⁴ found that violence had an impact on women's physical, sexual, reproductive, psychological and behavioural health, as well as having fatal consequences in cases of AIDS related mortality, maternal mortality, homicide and suicide. Women with a history of violence suffered higher rates of depression, more suicide attempts, more chronic pain, more psychosomatic disorders, more physical injuries, gastrointestinal disorders and negative reproductive health outcomes. Moreover, it was found that the consequences of abuse could persist for many years after the abuse had stopped and that the more severe the abuse, the greater the detrimental effect on health, with multiple episodes having a cumulative impact.

In Australia, specifically, a study in Victoria in 2004 found that intimate partner violence, based as it is in gender inequality, contributed 9 per cent to the total disease burden for Victorian women aged between 15 and 44 years and 3 per cent for all Victorian women. Astonishingly, perhaps, partner violence was the leading contributor to death, disability and illness for women aged between 15 and 44 years, ahead of well recognised risk factors, such as high blood pressure, smoking and obesity. An Access Economics study, undertaken for the Commonwealth government, found that, in 2002-3, the total cost of violence in Australia was \$8 billion. The Report noted, however, that "less tangible costs", including fear, mental

² Schoen, Cathy, Osborn, Robin, Doty, Michelle, Bishop, Meghan, Peugh, Jordon and Murukutla, Nandita, (2007) "Towards Higher- Performance Health Systems: Adults' Health Care Experiences in Seven Countries, 2007" in *Health Affairs*, Web Exclusive, pp W717-W734.

³ WHO, (2002), *World Report on Violence and Health*, Geneva, quoted in VicHealth, (2004), p 10.

⁴ Krug, Etienne et al (2002) *World Report on Violence and Health*, WHO, Geneva.

anguish, loss of leisure and physical pain and disability were probably more important to those experiencing violence than productivity losses.⁵

Children's health is profoundly affected by living in households experiencing violence⁶. An Australian Bureau of Statistics (ABS) study shows that 61 per cent of women (822,500) who had experienced violence from a previous partner and 49 per cent of those (111,700) who were experiencing violence by a present partner, had children in their care.⁷ An international study of Australian women found that 29 per cent of those surveyed reported having experienced physical and sexual violence before the age of 16. Those who had experienced childhood abuse were 1 1/2 times more likely to experience violence in their adult lives.⁸

Children who witness violence against their mothers have been found to be at higher risk of a range of serious emotional problems, along with poor school performance and physical health complaints.⁹ They experience anxiety, depression, low self-esteem, nightmares and physical health problems. A recent Canadian study documents in detail the multitude of deleterious effects that witnessing violence may have on babies, children and young people.¹⁰ There is evidence that the brain development of infants may be retarded. Exposed children between the ages of 3 and 5 years have been found to have lower verbal skills and to develop behavioural problems.¹¹ Research shows that children and their mothers are often injured in attempts to protect each other.¹² North American studies show that children who witness spousal violence exhibit many of the same problems as children who are directly abused.¹³ A high proportion of young people brought before the juvenile justice system in Canada have been either direct or indirect victims or perpetrators of domestic violence.¹⁴

In Australia, it is estimated that one quarter of children and young people have been witnesses to violent acts against their mothers or stepmothers. Research also shows that family violence and direct child abuse frequently coexist. It is estimated that between 30 per cent and 60 per cent of children who witness family violence also experience some form of abuse themselves. Further, witnessing family violence as a

⁵ Commonwealth of Australia (2004) *The Cost of Domestic Violence to the Australian Economy: Part 1*, pp 19-35.

⁶ A review of recent literature can be found in Humphreys, C. (2006) "Relevant Evidence for Practice", in Stanley, N (Ed) *Domestic Violence and Child Protection: Directions for Good Practice*, Jessica Kingsley Publishers, London, pp 19-35.

⁷ ABS (2006) *Personal Safety Survey, Australia*, ABS catalogue No 4906.055.003, Canberra. At <http://www.abs.gov.au/ausstats/abs@nsf/cat/4906.0>

⁸ Mouzos, Jenny and Makkai, Tony (2004) *Women's Experiences of Male Violence*, Australian Institute of Criminology, Research and Public Policy Series, number 56, p 28.

⁹ Krug, pp 100-103.

¹⁰ Cunningham, Alison and Baker, Linda (2007) *little eyes, little ears*, Centre for Children and Families in the Justice System, London, Ontario.

¹¹ Ybarra, Gabriel et al (2007), "The influence of domestic violence on preschooler behaviour and functioning", *Journal of family violence*, volume 22, number 1, January, pp 33-42.

¹² Mbilinyi, Lyungai et al (2007) "What happens to children when a mother is a battered?", *Journal of family violence*, volume 22, number 5, July, pp 309-317.

¹³ WHO, op. cit., p 103.

¹⁴ Baker, Linda and Jaffe, Peter (2007) "Youth exposed to domestic violence", Centre for Children and Families in the Justice System, London, Ontario.

child is likely to perpetuate gendered patterns of violence in future generations.¹⁵ Gender inequality, therefore, needs to be taken very seriously if only for its damaging impact on women's and children's health and the health of the communities they live in. As a recent Canadian study concluded, "Male-to-female spousal violence is a significant public health problem because of the associated physical, psychological, and financial costs to victims, their families, communities, and society in general".¹⁶

Examples of gender inequality are evident in Australian life on a daily basis. These examples operate to produce a demonstration effect. Consciously or unconsciously, citizens are reminded regularly of the unequal status of women. The recognition of inferior standing forms the foundation for discrimination, from trivial incidents to instances of violence, abuse and murder. AWHN strongly recommends that this important opportunity to amend the SDA to strengthen its capacity to promote gender equality be used to its fullest advantage.

We now address the specific terms of reference for the Inquiry.

Terms of Reference.

TOR a.

The scope of the act and the manner in which key terms and concepts are defined.

Anti-discrimination legislation does not challenge structural gender inequality unless it is specifically designed to do so. The Sex Discrimination Act 1984 (SDA) is not so designed: its scope is intentionally narrow. It establishes a limited framework within which individuals may, if they are mentally and emotionally strong and have financial resources, make a complaint in certain circumstances. The narrow complaints base of the Act restricts the issues that can be raised to a narrow range of instances of largely direct discrimination. The focus on individual remedies, even where instances of discrimination are resolved and compensated, does not allow the impact of cases to ripple out to change practices and attitudes in the wider society. The successful completion of individual cases cannot provide remedies for women who are not party to the proceedings. Pay equity, for example, cannot be addressed through an individual complaints instrument. To be effective and to prevent further discrimination, remedies must promote system change. Individual perpetrators are not responsible for systemic inequality and no amount of contrition on their part will bring significant change, even though individual acts of discrimination are firmly

¹⁵ State of Victoria, Department of Justice (2006) *Victorian Family Violence Database: Five-Year Report*.

¹⁶ Institute of Health Economics (2004) *Spousal Violence against Women: Preventing Recurrence*, January, p. 26.

based in structural inequality. The act cannot, therefore, be an instrument for the reduction of gender inequality, which is a primary obligation under CEDAW.

The SDA covers only the public sphere, whereas the gendered division of labour applies in both public and private spheres, the latter being a major contributor to continuing gender inequality. For example, the responsibility of women for an unequal load of unpaid work is a major reason for unequal workforce participation and consequent economic inequality and financial insecurity. The continuation of unequal private sphere responsibilities violates Australia's obligations under CEDAW. Article 5 (b), for example, recommends "the recognition of the common responsibility of men and women in the upbringing and development of their children". Article 16 1. (d) requires that States Parties take "all appropriate measures" to ensure that men and women have "the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children". Significant progress towards gender equality cannot be achieved in the presence of continuing unequal responsibilities in the private sphere.

The manner in which certain key terms and concepts are defined weakens the Act . In particular, the repeated use of the phrase "so far as possible" in the preamble and the Objects of the Act has the effect of severely qualifying any attempt to "prohibit" or "eliminate" discrimination.

AWHN recommends that the scope of the Act be expanded to cover both public and private spheres, in the order to facilitate the elimination of systemic discrimination based in the gendered division of labour.

AWHN recommends that the complaints based model be expanded to create the capacity to achieve Object 3 (d), notably "to promote recognition and acceptance within the community of the principle of the equality of men and women".

AWHN recommends that the words "as far as possible" be deleted from the preamble and the Objects of the Act. In the Objects of the Act, the words, "to eliminate", should be replaced by the more realistic and more forceful words, "to prohibit", which are already used in the preamble.

TOR b.

The extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organisation and other international instruments.....

The Act is not an effective instrument for implementing Australia's obligations under CEDAW or ILO 156. CEDAW defines discrimination broadly to include any action that has "the purpose or effect of impairing or nullifying the recognition, employment or exercise by women.....of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The Convention requires States Parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the

exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men" (Article 3). Thus, States Parties must not only prohibit acts of discrimination but must also establish comprehensive measures to reduce and eventually eliminate systemic gender inequality.

Clearly, the SDA, restricted as it is to individual complaints and the public sphere, falls far short of being able to influence the attainment and enjoyment of the fundamental freedoms that CEDAW envisages. Moreover, Section 3 (a) demonstrates that the Act was never intended to respond comprehensively to CEDAW requirements. It states that one of the Objects is to give effect to "certain" provisions of CEDAW only. While legislation is only one of the ways in which States Parties might respond, the intentionally limited scope of the SDA breaches the requirement that "all appropriate measures" be taken.

CEDAW envisages a situation of substantive, rather than formal, equality between men and women and it envisages that equality in both public and private spheres. The SDA, cannot begin to pursue a substantive equality agenda as presently constructed. It can do nothing, for example, about the segregation of the Australian workforce, in which women continue to be heavily concentrated in the low paid sales, clerical and care provision industries. As Thornton¹⁷ has argued, "the individual complaint-based model plays down the systemic nature of sex discrimination in which the individual instance is necessarily embedded".

AWHN recommends that the definition of discrimination in the SDA be broadened to cover formal and substantive equality for women.

AWHN recommends an expansion of the powers of HREOC and the Sex Discrimination Commissioner as set out under TOR c.

AWHN recommends that the provisions of the Act be expanded to provide comprehensive protection for workers with family responsibilities, as required under ILO 156, including full protection against all forms of discrimination by people with caring responsibilities, rather than being limited to protection against termination of employment, as is the case at present.

TOR c.

The powers and capacity of the Human Rights and Equal Opportunity Commission and the sex discrimination Commissioner, particularly in initiating enquiries into systemic discrimination and to monitor progress towards equality

The powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner are too narrow to allow the wide-ranging investigations needed to deal with systemic discrimination. The Sex Discrimination Commissioner needs to be provided with broader powers of intervention and she

¹⁷ Thornton, Margaret (2004) "Auditing the Sex Discrimination Act", paper given to the Casten Centre annual conference, *Human Rights 2004: the Year in Review*, Melbourne, 3 December.

needs the power to undertake inquiries outside those that arise from the individual complaints system.

At present, there are no effective Commonwealth instruments to monitor progress, or otherwise, towards gender equality. Departmental agencies such as the Women's Bureau and the Equal Pay Unit have been abolished, along with the Women's Budget Statement. Because it is relatively independent, HREOC is an appropriate agency in which to locate monitoring and evaluation functions. However, resources must be provided for these functions so that the other work of the Commission is not disrupted. Moreover, the information gathered should be published in order to fulfil a public education function. The Sex Discrimination Commissioner should be required to report annually to Parliament on the state of gender equality.

AWHN recommends that the roles and responsibilities of the Sex Discrimination Commissioner and HREOC be expanded to enable a comprehensive equality agenda to be adopted.

AWHN recommends that the Sex Discrimination Commissioner be furnished with wider powers to conduct regular and broad ranging enquiries into systemic discrimination.

AWHN recommends that adequate resources be made available for the establishment of a section within HREOC, the single responsibility of which should be evaluation and monitoring of progress towards gender inequality. Evaluation and monitoring should be based on a comprehensive set of agreed indicators and should pay particular attention to health outcomes for women and children.

TOR e.

Significant judicial rulings on the interpretation of the act and their consequences.

Commentators generally agree that judicial interpretation of the SDA has been narrow. For example in *Amery* (2006), the High Court's approach has been criticised as narrow and legalistic, displaying little understanding of the systemic discrimination faced by women with work and family responsibilities. According to Thornton,¹⁸ the text of the Act is imprecise and leaves a great deal unsaid. Commissioners, judges and magistrates have therefore been required to fulfil a "trailblazing" role and endow the text with meaning. In doing so, they have drawn on their own (conservative) "normative universe". If interpretation is to be broadened to cover systemwide inequality, it will be necessary to amend the Act to state specifically that it is Parliament's expressed intention to pursue such an agenda.

AWHN recommends that a new subsection (e) be added to the Objects of the Act, clearly stating Parliament's intention, as a guide for judicial interpretation. This

¹⁸ Ibid

subsection might read, "it is the intention of the Parliament that the this Act be interpreted expansively so as to fully achieve the Objects of the Act, especially in relation subsection (d) "to promote recognition and acceptance within the community of the principle of the equality of men and women".

TOR g.

Preventing discrimination, including by educative means

The limited capacity of an individual complainants based mechanism to achieve discrimination prevention goals has been discussed above. Convictions result in orders for compensation but courts have no power to recommend policy changes that would prevent further discrimination or to institute any other kind of preventive program. The SDA operates to deal with only the most blatant cases of discrimination. The closed and confidential nature of complaints processes means that they have little or no educative value.

While HREOC has been able to conduct some useful awareness campaigns, these efforts need to be intensified and additional measures need to be adopted. The consideration of a Gender Equity Duty, introduced as an amendment to the SDA in the United Kingdom in 2006, should be considered. The UK SDA now places a statutory duty on all public authorities, including the National Health Service, to comply with a general duty to proactively promote gender equality. Public agencies are required to create and implement a Gender Equality Scheme which has due regard for the elimination of unlawful discrimination and harassment, the elimination of discrimination that is unlawful under the Equal Pay Act and the promotion of equality of opportunity between men and women. All public authorities are required to publish their Gender Equality Schemes within three years and are required to submit progress reports annually. The policy is intended to ensure that gender equality is built into the core business processes of all major public agencies. All organisations are required to actively promote gender inequality rather than be reactive.¹⁹ Apart from their practical impact, the processes of complying with the Act will generate widespread awareness and information dissemination.

Another mechanism, apparently used successfully in Northern Ireland, which has both educative and practical value, and applies to the private sector as well as the public, is the use of government purchasing power to achieve good practice and antidiscrimination goals. In order to be awarded a government contract, businesses must be able to show that they meet set standards in terms of employment and other practices.

If Object 3 (d), "to promote recognition and acceptance within the community of the principle of the equality of men and women" is to be taken seriously, then clearly the Act needs to be amended in order to furnish the agencies responsible for implementation to pursue preventive and educative goals, as discussed under **TOR c.**

¹⁹ Department of Health (2007) "Creating a Gender Equality Scheme: a practical guide for the NHS", March. At http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_066068

TOR h.

Providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process.

The process of making an individual complaint to HREOC can be daunting and intimidating for women, especially if they have recently experienced violence and/or harassment. Consider the challenge that making a complaint poses for a woman experiencing fear, anxiety, depression and the other mental health issues that follow from the experience of discrimination, abuse and violence. The fear of acquiring financial burdens is also a deterrent, since costs may be awarded against unsuccessful parties. Fears of financial loss are an enormous barrier in cases where women have already lost their jobs. Indeed, since, in most cases it would be extremely difficult for a woman who had made a complaint to remain in a workplace, job loss and the prospect of financial insecurity are givens. For these and other reasons, many complaints are withdrawn at the request of the complainant. Moreover, the complaints process has been described as "slow and painful", characterised by frequent delays, intended to exhaust the complainant and wear down her resolve.

Probably the most unfair aspect of the complaints process is the inequality of the power relationship between the complainant and the respondent. This is particularly pertinent during mediation processes where the parties must sit across the table from each other. Complainants are in a very unequal bargaining position and, as JA Hobson argued more than a century ago, where employers have only profits to lose, the very livelihood of employees is at stake.

Complainants and respondents generally have very unequal financial resources. In many cases, complainants are low paid workers who have lost their jobs, whereas respondents may be corporate giants. Complainants are not required to have legal representation at hearings and may be severely disadvantaged on this account. Cases have been conducted where an unrepresented respondent has had to confront a "barrage of barristers"²⁰, an utterly ironical situation, when one remembers that the purpose supposed they *elimination*, rather than *promotion*, of discrimination. JA Hobson had something to say on this issue as well: in such cases, he said, justice can be bought by the person with the longer purse.

Another aspect of the complaints process that undermines Australia's obligations under CEDAW is the difficulty of proving an act of discrimination. Respondents can always argue that action took place, not on one of the SDA grounds of sex, marital status or pregnancy, but on another ground, such as assessed merit, superiority of qualifications, unsatisfactory work effort and so on. As currently written, the law provides no support to help complainants prove their cases. Here again, unequal financial resources are a compounding factor.

²⁰ Thornton, *ibid.*

AWHN recommends that HREOC provide legal assistance to complainants, as a matter of right.

AWHN recommends that the practice of awarding costs against unsuccessful complainants be abolished because it constitutes an unduly high barrier to seeking protection under the Act.

AWHN recommends that thought be given to the development of mechanisms to provide fair and appropriate compensation in cases of sex discrimination and employment loss.

AWHN recommends that the Act be amended to permit courts to draw an inference of discrimination if this is suggested by the circumstances and if the respondent fails to provide evidence of other reasons for the action(s).

TOR n.

Scope of existing exemptions

In a community where there is a serious intention to work towards gender equality, exemptions would not be made. Exemptions allow large institutions, such as religious bodies, to preserve entrenched, male dominated and discriminatory practices, providing a very bad example for all those who have contact with them. The negative educative impact is especially destructive when such practices are an entrenched part of children's education.

AWHN recommends that exemptions be removed for religious bodies and educational institutions established for religious purposes and that these institutions are required to work within Australian laws, in the usual manner.