Conciliation, intervention and education: The role of the Sex Discrimination Commissioner in the industrial system

Paper written for the 10th Women, Management and
Industrial Relations Conference
28 & 29 July 1998

Susan Halliday
Sex Discrimination Commissioner

Conciliation, intervention and education: the role of the Sex Discrimination Commissioner in the industrial system.

THE ROLE OF THE SEX DISCRIMINATION COMMISSIONER IN DISCRIMINATION AND THE INDUSTRIAL SYSTEM.

The primary role of the Sex Discrimination Commissioner, is often perceived to be one that deals with individual complaints of discrimination. This is a very important aspect of my work, but today I am going to focus on a variety of roles that I perform in industrial matters.

The complaints-based conciliation system that I oversee under the *Sex Discrimination Act 1984* (Cth) ("the SDA") does deal mostly with transgressions of individual rights. The industrial system, while recognising these individual rights, has traditionally focused on collective rights through awards and agreement making. Despite this, it is a mistake to think of discrimination and industrial systems as distinct. There are a number of 'crossover' points between the systems. These 'crossover 'points encourage useful dialogue around two complementary ways of dealing with industrial discrimination. Some of the 'crossover' points within my own jurisdiction are:

- Firstly, many conciliated complaints deal with industrial or award matters. While players in the industrial relations system do not see the SDA as an alternate forum for resolving industrial matters, many of the complaints I receive concern matters that are the subject of an award, and affected employees make a complaint to me after unsuccessful attempts to negotiate solutions within the workplace. ⇒ **conciliation**

- Secondly, the Sex Discrimination Commissioner, has the power to intervene in matters before the AIRC. This provides a unique opportunity to bring a human rights perspective directly into an industrial forum ⇒ **intervention**

- Finally, one crucial aspect of the Commissioner's work is educating employers and employees about their rights and responsibilities in relation to industrial discrimination. In this role I hope to provide a link or conduit between human rights or discrimination models and industrial models of dealing with workplace relations ⇒ **education**

Today, I will be discussing these three 'crossover' points between industrial and discrimination matters - **conciliation, intervention and education** - in relation to pay equity and 'motherhood' issues.

Complaints under the Sex Discrimination Act 1984 (Cth)

Before I turn to these issues, allow me to briefly outline the conciliation powers under the SDA in relation to employment. As many of you would know, the SDA makes direct and indirect discrimination in employment on the grounds of sex, marital status, pregnancy, potential pregnancy and family responsibilities[1] unlawful:

---

[1] In the case of family responsibilities, discrimination in relation to *dismissal* is the only grounds for a complaint under the legislation: SDA s14(3A)

- in the terms or conditions[2] on which employment is offered (s14(1)(c));
- in the terms or conditions of employment afforded the employee (s14(2)(a));
- by denying the employee access to opportunities for promotion, transfer, training or any other benefits associated with employment (s14(2)(b));
- by subjecting the employee to any other detriment (s14(2)(d))

Direct sex discrimination occurs where a woman is treated less favourably than a man in circumstances which are not materially different.[3] Indirect sex discrimination occurs where a condition, requirement or practice is imposed or proposed that has the effect of disadvantaging people of one sex in relation to the other, and this is not reasonable in the circumstances.[4]

Under s48 of the SDA, I have the task of inquiring into and conciliating complaints of direct and indirect discrimination. This means that I am continually presented with powerful anecdotal, and empirical, evidence of what happens to women in the workplace.

Some of the complaints I receive that could be described as 'industrial' include, for example, the provision of a comparable job on return after maternity leave or access to training which are dealt with specifically in awards and agreements. These 'industrial' complaints are the types of complaints that I will be focusing on today. The first of these is pay equity.

CASE STUDY ONE: PAY EQUITY

Pay Equity is one issue that has received a lot of attention lately, due to the NSW Pay Equity Inquiry, the HPM Industries case and a number of associated media reports. It is one of the most obvious areas in which industrial processes such as wage-setting and award and agreement making can overlap with discrimination issues.

I believe that community attitudes towards pay equity have shifted over recent years. The community has a far greater respect for women's skills. The community is also starting to question the value and worth of different jobs and making comparisons. As yet women have not achieved pay equity[5] . To do so it will require concerted and consistent effort on the part of all the industrial players: employers, employees, their respective representatives and industrial decision-makers. If this does not happen we won't overcome the ever persistent wage gap.

What causes pay inequity?

While a number of things can cause pay inequity it is largely a structural issue. It is far more than particular employers paying individual women less than men. It is bigger than the imposition of conditions which impact differently on women. It is not simply about women being treated differently or being offered inferior terms and conditions of employment.

---

[2] *Terms and conditions* includes all components of remuneration including superannuation, leave, bonuses, discretionary payments, allowances, performance bonuses, commissions etc.

[3] SDA s5(1)

[4] SDA s5(2)

[5] Adult women working full-time currently earn around 79.5 per cent of men's total ordinary time earnings. If all employees are included in the calculations, women employees earn earn 66 per cent of the total earnings all male employees receive. See Human Rights and Equal Opportunity Commission *The Equal Pay Handbook* Commonwealth of Australia Sydney 1998, p11.

Pay inequities result from a combination of entrenched historical practices, the invisibility of women's skills, the lack of a powerful presence in the industrial system, and the way that "work" and how we value work are understood and interpreted within the industrial system. The system by which monetary compensation has been allocated, has often failed to recognise skills possessed by women as being worthy of compensation. In some cases, women workers themselves do not recognise the value of their work, or lack the skills to negotiate, factors which make it difficult for women to achieve pay equity.

The complex and systemic nature of pay inequity means that it requires a varied response. From my position that means a focus on broad community education, constant stimulation of public debate, intervention into the industrial system whenever and wherever possible and sound management of individual complaints from which much can be gained including legal precedents which challenge existing boundaries. We need to get individual employers to recognise and value women's work, women to value and promote the skills they have, and encourage the intervention and elimination of discriminatory workplace practice and policy.

Pay equity complaints

Perhaps because of the complexity of the pay equity issue, there have been very few individual complaints of discrimination to HREOC concerning pay equity. I say this because where discrimination is indirect, complex and entrenched in historical practices and workplace culture, it is correspondingly more difficult for an individual to perceive, respond and or formalise a complaint.

Even if a complaint is brought under the SDA, the legislation has limitations in that it focuses on redressing discrimination through individual complaints, rather than dealing with systemic issues such as workplace change. As Sex Discrimination Commissioner, I am restricted to looking at single employers, and cannot compare pay across enterprises or industries under the SDA complaint powers.

The complex phenomenon of pay inequity is not easily addressed by means of the SDA, or any other anti-discrimination complaint mechanism which requires:

- an individual aggrieved by an act; and

- a comparison with a similarly situated man.

Further, the remedies under the SDA can only be structured within the limits of the individual complaint. Anti-discrimination law prescribes a variety of remedies which are directed at compensating the complainant for harm caused as a result of the discrimination suffered. These remedies look backwards and aim to place the complainant in the position that she would have been in had the discriminatory conduct not occurred.[6] Crucially, when dealing with systemic inequities such as those arising with respect to remuneration, these remedies do not adequately deal with the future, as these remedies cannot:

- provide a remedy for large groups of women not party to the proceedings;

---

[6] For example, s81 of the SDA allows HREOC to make a declaration that there has been unlawful conduct and that this shall cease, a declaration that the respondent should perform any reasonable course of action to redress the loss suffered; a declaration that the respondent employ or reemploy the complainant, a declaration that the respondent pay damages by way of compensation, a declaration that the respondent promote the complainant and a declaration that the termination of a contract be varied.

- amend discriminatory arbitral awards for the future;

- require a systemic audit of all inequitable remuneration systems.

In summary, the SDA is limited in its response to pay equity claims for three main reasons:

1. They are individual complaint mechanisms and cannot adequately deal with complaints of discrimination on behalf of a large group of women.

2. The definitions of discrimination are limited. They reflect the individualised focus of the legislation and look to formal equality. Specifically:

    - Although concepts of direct discrimination can deal with different rates of remuneration (including overaward payments) paid to men and women within the one organisation in circumstances that are the same or not materially different, it is often the case that men and women perform quite different jobs and it is difficult to see how these could be said to be the "same or not materially different" circumstances.

    - It is also difficult to see how an individual respondent can be held to be responsible under the SDA for an inequity that exists between his or her firm and another company entirely. This means that the scope of comparators will be limited.[7] In small organisations (where most women are employed) there may be no comparators at all.

    - It is difficult to construct an indirect discrimination argument in relation to pay inequities. This is because these inequities do not fall easily into the legislative formulation of a "requirement or condition" which has a differential impact on women.

    - In the individual complaints jurisdiction, the onus lies on the complainant to make out her case.

3. The remedies available under the SDA compensate for past harms caused by discrimination but cannot address structural inequalities and attack the problems for the future. Centralised systems of wage fixation which allow the gains won by one group to be spread across the system have been beneficial in delivering pay equity outcomes to women.[8] Ad hoc anti-discrimination complaint based systems cannot deliver such across-the-board results.

Neither the "direct" nor the "indirect" models of discrimination are able to capture the complexity of the pay inequity phenomenon. However, the SDA may provide some redress for pay inequity that occurs through discrimination. For example, where the pay inequity occurs within one workplace, there is a male worker who provides an easy comparator and pay systems are transparent, a complainant

---

[7] In this anti-discrimination remedies fall short of the requirements of Australia's international obligations. ILO 100 has been interpreted to require cross industry comparisons. The ILO Committee of Experts has stated that "the principle of equal remuneration for work of equal value extends beyond cases where work is performed in the same establishment and beyond jobs performed by both sexes", see ILO *Equal Remuneration: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: International Labour Office, 1986) at para 22. Note, also, that cross industry comparisons have long been recognised in Australia. In the 1969 Equal Pay decision (127 CAR 1159), the AIRC held that consideration should not be restricted to the situation in one establishment.

[8] See, for example, Laura Bennett *Making Labour Law in Australia: Industrial Relations, Politics and Law* Law Book Company Sydney 1994 pp238-239.

may bring a successful complaint of pay inequity. In other words, sex discrimination law can target the clearest forms of pay inequity.

On the positive side, the SDA does make some provision for the lodgment of representative complaints.[9] There is also some provision for changes to discriminatory award or agreement provisions by referral of the award to the AIRC.[10] If the AIRC finds the provision discriminatory, it must remove the discrimination.[11] However, the SDA does not attempt to provide a broad response to the inequality of women as a disadvantaged group.

Both the collective industrial relations system and the anti-discrimination system have a particular role to play. Each is important. Nevertheless, based on their common underpinnings, it is important to be explicit about the role that each play in the other. Communication, dialogue and exchange between the systems will be important in achieving the substantive equality required by international law.

Pay equity intervention and education

While the option of bringing a complaint under the SDA remains a secondary - but important - forum in remedying pay inequity, my role as intervenor in relevant cases and inquiries, and my educative role take on a greater importance. Where discrimination issues are complex and subtle it becomes even more important to raise awareness amongst the relevant players and to attempt to identify 'front-end' solutions to the problem.

Ways in which the Sex Discrimination Unit have undertaken this educative role include producing guidelines for employers and employees on pay equity issues. Plus some of the research the Unit has produced over the past year deals with a variety of issues related to pay equity: enterprise bargaining, access to training, access to flexible work arrangements and family friendly policies. In addition, the Unit has produced a handbook specifically outlining national and international law on pay equity, providing guidelines to employers on how to conduct an equal remuneration 'audit' at the workplace.

HREOC has also recently participated in the NSW Pay Equity Inquiry, along with the NSW government, unions, employer groups and women's groups. In that process we tried to make clear our view of the close relationship between discrimination law, human rights and industrial law. I strongly believe that if those of us who work in the discrimination and the industrial systems forge links that are based on human rights principles, we will make progress.

I take my educative role extremely seriously. I intend to keep pay equity issues on the agenda of all parties and under the media spotlight.

Integrating human rights and industrial systems

[9] SDA s50.

[10] SDA s50A

[11] *Workplace Relations Act 1996* (Cth) s111A

I referred earlier to forging links between discrimination and industrial systems based on human rights. It is important to remember that, in terms of my educative role, I am part of a Commission that deals broadly with human rights as well as sex discrimination issues, and has a mandate to inform and educate all members of the community, including employers and workers, on their human rights and responsibilities. Pay equity is a human right and a responsibility.

Anti-discrimination law is based on human rights, in particular the recognition of equality between all people, regardless of their sex or other characteristics. Human rights principles also underlie many tenets of the industrial system. There is no theoretical barrier to the conceptualisation of both systems in terms of fundamental underlying international human rights norms.

Part of my role within HREOC is to promote the recognition of human rights norms and the fact that industrial arbitration can, and should, proceed according to the principles of non-discrimination and equality - the essence of international human rights.

This is not to say that the human rights complaints system and the industrial system are the same, nor that they perform the same functions, or that they should be amalgamated. Each system clearly has its respective strengths and weaknesses in relation to particular types of cases.

CASE STUDY TWO: 'MOTHERHOOD' DISCRIMINATION

I am going to turn now to a completely different aspect of industrial discrimination, but one that still overlaps with pay equity in so far as it is a kind of discrimination that must be overcome if women are to achieve equality in pay. I am speaking of discrimination on the grounds of pregnancy, potential pregnancy, and family responsibilities.

Discrimination on the grounds of pregnancy, potential pregnancy and dismissal on the grounds of family responsibilities, are unlawful under the SDA. However, there are a range of other acts, associated with parenting, that may be unlawful because they are discriminatory on the grounds of sex. For example, in some circumstances, a failure to provide flexible work practices may indirectly discriminate against women workers in an organisation. For this reason, I will be referring to the range of practices that may affect women who have children or are pregnant as 'motherhood' discrimination.

I have chosen the word 'motherhood' (rather than 'parenthood') deliberately, because using a gender-neutral term would mask the reality that women in 1998 remain the primary carers of children and that the overwhelming number of complaints on parenting issues are made by women.

However, I believe that men are increasingly taking an active role in parenting, and I intend, in my educative role to push for recognition of the fact that men have a legitimate right to do so and that they should, like women, be encouraged not penalised for parenting. At the recent 1998 Work and Family Awards,[12] there was a notable shift towards recognising the caring work done by both men and women, and signs that men were beginning to take advantage of family-flexible programs to share in child care. I look forward to a time when I can refer to child care responsibilities as 'parenthood' rather than 'motherhood' responsibilities.

Pregnancy discrimination

---

[12] Held by *The Australian Financial Review* and the Australian Chamber of Commerce and Industry.

Under the SDA, a woman cannot be discriminated against on the grounds of pregnancy or potential pregnancy.[13] This includes treating a woman less favourably or imposing a condition or requirement which is likely to have the effect of disadvantaging pregnant or potentially pregnant women. A noteworthy case of discrimination on the ground of potential pregnancy was *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC 92-002, where a woman was found to have been refused appointment as a trainee pilot by Ansett because of her child bearing potential.

Family responsibilities

Discrimination on the grounds of family responsibilities[14] under the SDA, only relates to dismissal of an employee. This includes less favourable treatment than would be given to a person without family responsibilities. Family responsibilities refer to a range of responsibilities a person may have because of being a family member. The "responsibilities" refer to the tasks and duties associated with that "responsibility", for example, caring for a sick partner or child or nursing an elderly relative.

The nature of 'motherhood' discrimination

Discrimination on the grounds of pregnancy, parental status and family responsibility is a small but significant proportion of the complaints made under the SDA, as the most recent figures[15] from HREOC's complaints section show:

Area	Percentage of total complaints under the Sex Discrimination Act 1984
Sexual harassment	60%
Pregnancy and family responsibilities	15%
Sex discrimination	21%
Marital status	4%

[13] s7 (1) For the purposes of this Act, a person (the "discriminator") discriminates against a woman (the "aggrieved woman") on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:
(a) the aggrieved woman's pregnancy or potential pregnancy; or
(b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
(c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant;
the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.

(2) For the purposes of this Act, a person (the "discriminator") discriminates against a woman (the "aggrieved woman") on the ground of the aggrieved woman's pregnancy or potential pregnancy if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are also pregnant or potentially pregnant.

[14] 7A For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:
(a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
(b) the less favourable treatment is by reason of:
(i) the family responsibilities of the employee; or
(ii) a characteristic that appertains generally to persons with family responsibilities; or
(iii) a characteristic that is generally imputed to persons with family responsibilities.

[15] Quarterly figures as at 15 June 1998.

The overwhelming majority of these complaints relate to discrimination in employment:

Ground	**Percentage of total complaints under the Sex Discrimination Act 1984**
Employment	92%
Goods and services	3%
Commonwealth programs	2%
Clubs	3%

Sexual harassment complaints are approximately four times as prevalent as ‘motherhood’ complaints. Still, it is important to keep in mind that these general figures for ‘motherhood’ complaints, while comparatively low, still represent a very significant problem in the workforce, considering that at any given time only a small proportion of women workers will be pregnant.

There is also evidence that ‘motherhood’ complaints are much higher in particular industries. For example, HREOC has recently been given access to research in progress being undertaken by Sara Charlesworth.[16] This research analysed complaints made to HREOC, focusing on the banking sector. It revealed a high proportion of complaints from this sector concerned pregnancy, parental status and family responsibility.

However, it is important to note that this evidence does not necessarily show that this sector is somehow performing poorly in this regard. It is impossible to know - at least from the research conducted to date - whether this sector has a higher incidence of discrimination, or whether banking and finance institutions have created an atmosphere in which employees understand their rights and are willing to enforce them.

Banking industry research

The report which has been compiled thus far by Sara Charlesworth has analysed seventy complaints made between 1987-1997 concerning the banking industry. This research has shown that ‘motherhood’ complaints are moving from the industrial system into the discrimination arena. The research gives a ‘snapshot’ of the patterns of complaints within a particular field, including:

- the majority of complaints are made by women between the ages of 26-35, the early ‘motherhood’ years;
- complaints on the grounds of pregnancy and family responsibilities were more likely to be alleging indirect or a mixture of indirect and direct discrimination;[17]
- 38% of all complaints alleged treatment affecting women either before or after maternity leave;[18]

---

16 Sara Charlesworth “The Outcomes of Conciliation: Banking, Employment and the SDA” *Unpublished draft paper* 1998. The research forms part of a Masters degree at La Trobe University.

17 *Ibid* p5.

- alleged systemic discrimination involving 'motherhood' often related to the indirectly discriminatory effect of policies affecting women during pregnancy, after or on maternity leave, such as securing a comparable position on return to work;[19]

- motherhood related complaints took less time to finalise than sexual harassment or sex discrimination complaints.[20]

A breakdown of the complaints made by year showed that complaints concerning motherhood were extremely common, in some years accounting for more than half of all complaints from this sector.

Sexual harassment has generally been viewed, on the basis of other HREOC statistics, as the most prevalent form of sex discrimination. On the statistics from this recent research, it is clear that "motherhood" complaints are similar in number to sexual harassment complaints in the banking sector.

This 'snapshot' shows us not only that 'motherhood' complaints in this sector have been extremely common, but that such complaints tend to be more subtle, complex or indirect than complaints of sex discrimination or sexual harassment. The discrimination often concerns the indirect mistreatment of women workers by not incorporating their particular needs into policies or monitoring the impact of general policies on them. Despite this, such complaints settle quickly. It may be possible to infer from this, and from the indirect nature of the majority of complaints, that employers are discriminating from lack of understanding. Again, this highlights the crucial need for education in this, and indeed all, sectors of the community.

Of interest also is the fact that use of sex discrimination legislation shows an increasing tendency for women workers and unions to be aware of the potential for resolving industrial-type problems through anti-discrimination processes.

> Many of the complaints on the ground of "motherhood" concerned matters such as the return after maternity leave to a 'comparable position' or access to redundancy. These matters are arguably 'industrial' as well as 'discrimination' issues as they are expressly covered in banking industry awards and agreements. The lack of success in resolving such complaints by industrial means alone is highlighted by the number of cases where the complainant was supported by the Union. Indeed in five complaints the industrial negotiating process appeared to be assisted by the conciliation process and HREOC as a third party. This led to the withdrawal of complaints before the conciliation conference as the grievance had apparently been resolved to the satisfaction of the Union and the complainant.[21]

In my opinion, the assistance that HREOC can give to the industrial system, and the support the industrial system can give to anti-discrimination, is cause for optimism. As well as providing complainants with an additional forum that assists in the resolution of disputes, it is encouraging to see that effective communication between the two systems is in place.

Cases on motherhood discrimination

---

18 *Ibid* p7.

19 *Ibid* p7.

20 *Ibid* p19.

21 *Ibid* pp 4-5.

A recent case on 'motherhood' discrimination, *Hickie v Hunt & Hunt* ("the Hickie case"), highlights the subtlety of many of the complaints I receive that are related to parenting. The Hickie case involved a lawyer who alleged that, due to her maternity leave, and her return to work on a part-time basis, her employer discriminated against her by (amongst other things) reducing the scope of her work and failing to renew her contract. Hickie claimed discrimination on the grounds of sex, marital status, pregnancy, potential pregnancy and family responsibility. The Hearing Commissioner in the Hickie case found there was no direct discrimination against the complainant in regard to the arrangements established for her maternity leave, or in the decision to reduce the scope of her practice. However, the decision to remove the complainant's practice and the non-renewal of her contract were acts of indirect discrimination on the basis of gender due to the fact that women continue to be the primary carers for newborn children.

The attention that this case has received, and the similarity of other complaints that I receive, shows that employer policies on maternity leave and return to work are emerging issues in the discrimination field and that employers need to be mindful of policies and practices that discriminate indirectly.

Motherhood discrimination education

It is important that people continue to make complaints. Discriminatory practices need to be challenged and precedents need to be established. As Sex Discrimination Commissioner I will utilise the effective solutions the SDA provides. Educating employers and establishing early intervention strategies in order to decrease sex discrimination, including motherhood discrimination, is a particularly crucial facet of work that I will be undertaking.

CONCLUSION

A positive aspect of the increasing numbers of discrimination complaints about industrial, and particularly motherhood issues, is that this indicates a greater knowledge of the interrelationship of industrial and discrimination systems, and gives complainants a choice of forums.

> The number of 'industrial' or award matters dealt with via the SDA conciliation process, particularly in regard to 'motherhood' complaints, indicates an increasing awareness by complainants and union officials of the additional forum the SDA offers. The success rate in resolving such complaints, particularly where the Union was actively involved, highlights the advantage of having access to two different modes of dispute resolution. 22

This, in turn, means that complainants are more likely to successfully negotiate a solution with their employer.[23] One criticism of the conciliation process is that when a complaint is made to HREOC it is largely an *individual* and *private* process. This means that the potential for wider workplace change may be reduced.[24] However, a dialogue between the industrial and discrimination systems, in

---

22 *Ibid* p30.

23 Where pregnancy or family responsibilities was the main ground of complaint, complainants were slightly more likely to get something whether directly or indirectly out of the conciliation process. This suggests that where an additional forum was available in which to pursue a grievance.. [and in] which informal industrial negotiations could take place on what are also award matters, the outcome was more positive for the complainant: *Ibid* p29.

24 [A]n increased use of the SDA may highlight the traditional view that grievances raised by women workers are not legitimate industrial issues, belonging if anywhere in the specialist anti discrimination jurisdiction. ...[C]onciliation in the area of sex discrimination does not occur in the quasi-public sphere of the AIRC nor

pay equity, motherhood discrimination, or any other form of discrimination, means that both individual rights and systemic issues are understood and accounted for.

---

within the framework of collective negotiation in which the employer and employee are both equally represented and where broader workplace issues can be addressed: *Ibid* p30.