

**The National Human Rights Consultation Secretariat  
Attorney-General's Department  
Robert Garran Offices  
BARTON ACT 2600**

### **Re: National Human Rights Consultation**

The United Nations Development Fund for Women (UNIFEM) Australia thanks the Human Rights Consultation Committee for the opportunity to make this submission. UNIFEM has also contributed to the Womenspeak submission as a member and endorses its recommendations.

UNIFEM Australia welcomes the Australia Government's appointment of a Committee and establishment of the National Human Rights Consultation project.

UNIFEM Australia focuses its activities on fostering women's empowerment and gender equality through initiatives aimed towards reducing women's economic exclusion, eliminating violence against women and the spread of HIV/AIDS and supporting women's leadership. In view of these priorities UNIFEM Australia has confined its submission to human rights it considers essential for ensuring gender equality and women's empowerment. In doing so, it has had regard to the Terms of Reference provided to the Committee.

#### ***Which human rights should be protected and promoted? (tor 1)***

UNIFEM Australia does not consider human rights to be divisible. We consider it imperative to uphold the protection of all human rights for all people. Women are often detrimentally affected by violations of their economic, social and cultural rights. For this reason, UNIFEM Australia deems it necessary to incorporate protection of economic, social and cultural rights in accordance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), in addition to civil and political rights as outlined by the International Covenant on Civil and Political Rights (ICCPR). The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is especially for important to consider in framing a Human Rights Act to ensure international standards of protection for women are enshrined in Australian domestic law.

In addition, UNIFEM Australia recognizes that certain vulnerable groups within society require positive discrimination to ensure their rights are upheld, including women, indigenous communities, refugees and people from non-English speaking backgrounds. The Human Rights Act should encompass additional mechanisms for the protection of these vulnerable groups.

#### ***Recommendation:***

- ❖ ***Rights enshrined in the ICCPR, ICESCR and CEDAW should be protected under Australian law.***

#### ***Are these human rights currently sufficiently protected and promoted? (tor 2)***

#### **Legal framework**

## 1. Incorporating international conventions into domestic law

UNIFEM acknowledges and commends the Australian Government's signature and ratification of the ICESCR, ICCPR, CEDAW and the Optional Protocol to the ICCPR and CEDAW, but regrets that commitments made within these Covenants are not currently upheld in Australian domestic law.

### *Equal pay*

ICESCR article 7 (a) (i) provides:

*Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work*

ICESCR article 7 (c) requires:

*Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence*

CEDAW article 11 (d) likewise provides for women's right to equal pay for equal work:

*The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work*

As a State Party to the above Conventions, in the absence of any reservations to these articles, Australia is legally required to ensure pay equity for women; however its provisions to do so through the Commonwealth *Sexual Discrimination Act 1984* are inadequate. Section 14(2) (a) of the Act claims

*It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy in the terms or conditions of employment that the employer affords the employee*

The ambiguity of the term "conditions of employment" renders this article open to interpretation, and hence less binding. A 2008 report issued by the Equal Opportunity for Women in the Workplace Agency (EOWA) reveals women today experience an average pay gap of over 16 per cent and have a median salary less than men in nine out of ten industry sectors. The largest median pay gap is 52 per cent in the Finance sector. Among ASX200 Index companies as at 1 February 2006, women held only 12 per cent of Executive Manager Positions and only 7 per cent of Top Earner positions.

### *Paid maternity leave*

ICESCR Article 10 (1) states that:

*The widest possible protection and assistance should be accorded to the family... particular for its establishment and while it is responsible for the care and education of dependent children*

ICESCR Article 10 (1) claims:

*Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits*

CEDAW article 11 (2) (b) similarly requires State Parties to take appropriate measures to introduce paid maternity leave. It provides:

*In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measure... to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances...*

Australia remains one of only two OECD Countries that does not have a requirement for paid parental leave. The Australian Government has not yet signed the ILO Convention on paid maternity leave.

Under the Commonwealth *Sex Discrimination Act 1984* maternity leave is left to the discretion of the employer. According to the Human Rights Commission (HRC), formally the Human Rights and Equal Opportunity Commission (HREOC), paid parental leave is accessed by only one third of employed pregnant women and 25 per cent of male partners. Where it is provided it is often less than the international standard of 14 weeks paid leave. Securing flexible work arrangements without a cost to career progression also remains a major challenge for Australian women. Resultantly, the HRC reports the employment rate of mothers with a youngest child under six years of age is 49.6 per cent compared with an OECD average of 59.2 per cent.

UNIFEM Australia welcomed the Productivity Commission Draft Inquiry Report into paid parental leave released in September 2008 by the Australian Government Productivity Commission. In November 2008, UNIFEM Australia made comment to the Maternity Services Review expressing regret that the Draft did not recommend to the Australian Government the removal of its reservation against Article 11 (2) (b) of CEDAW. UNIFEM Australia considers paid parental leave to be a necessary measure to ensure equal opportunity for women in the workplace as well as an international obligation separate to the general provision of assistance to parents combining work and family responsibilities.

UNIFEM Australia also notes that the Australian Government has not ratified the ICESCR Optional Protocol, adopted by the UN General Assembly on 10 December 2008. The OP provides individuals and groups with a means to seek and obtain remedy for domestic violations of their economic, social and cultural rights at the international level and will come into force once ten State Parties have ratified it.

#### **Recommendations:**

- ❖ ***That the Committee recognise that several key human rights for women are not currently protected under Australian law, including equal pay and paid maternity leave.***
- ❖ ***That Australia should sign the Optional Protocol to ICESCR***
- ❖ ***That the Australian Government remove its reservation against Article 11 (2) (b) of CEDAW***

## **2. The Commonwealth Sex Discrimination Act 1984**

UNIFEM Australia is concerned that women are not adequately protected from discrimination by the current Commonwealth *Sex Discrimination Act 1984*. UNIFEM Australia welcomed the Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act (SDA) in eliminating discrimination and promoting gender equality, referred by the Senate Legal and Constitutional Affairs Committee on 26 June 2008.

In July 2008 UNIFEM Australia made comment to the inquiry expressing its concern that the SDA does not adequately implement the obligations of CEDAW. In addition to the above discrepancies between international human rights standards outlined in ICESCR and CEDAW and the protection of women under the SDA in relation to paid maternal leave and pay equity, Australian women face a number of additional forms of discrimination.

Violence against women and harassment remain pervasive violations of Australian women's human rights. One in three Australian women experience violence by an intimate partner in their lifetime. A telephone poll commissioned by HRC in 2003 revealed 41 per cent of women

had experienced sexual harassment versus 7 per cent of men. Twenty-eight per cent of female harassment cases were in the workplace.

Occupational segregation in low paid, undervalued work and under-representation in leadership and senior decision-making positions remain the reality of women in the workplace. While the SDA protects women from dismissal due to family responsibilities, UNIFEM Australia is concerned that the SDA does not provide adequate mechanisms to ensure women's equal participation in full-time work as required by articles 11(1) (e) and 11(2) (c) of CEDAW. This contributes to women's concentration in casual, part-time, temporary, contract and low-paid work. Accordingly, HRC claims half of all women aged 45 to 50 have \$8000 or less in superannuation saving, compared to \$31,000 for men.

The SDA also fails to incorporate any mechanism to increase the representation of women in both elected and appointed public offices until they are present in Australian public life in numbers proportionate to their representation in the community as called for by article 4, 7(b) and 8 of CEDAW which support the introduction of an exemption to the SDA with the function of increasing political participation of women.

The SDA is inadequate at addressing intersecting forms of discrimination and acknowledging specific forms of disadvantage that arise from the combination of gender with attributes such as race, disability and sexuality. Current anti-discrimination statutes tend to denote discrimination in a rigid and artificial manner. Discriminatory actions suffered by victims of dual disadvantage often fall outside of any particular act and consequently are unrecognised. UNIFEM Australia is particularly concerned that the Act does not specifically address the needs of Indigenous women who have proven to be a distinctly vulnerable group.

There is no mention of sexual trafficking and exploitation of prostitution made in the SDA, despite article 6 of CEDAW requiring that State Parties take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women.

While legislative measures have been put in place to prevent discrimination, UNIFEM Australia finds that the 'reasonableness test' referred to in SECT 7B of the SDA is too ambiguous and flexible to draw a clear line between desirable and non-desirable practices. Section 7B of the Act states:

*A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.*

Because of its open nature, the test has acted as a vehicle for the transmission of traditional views of social practices, and the rejection of change.

Temporary exemptions granted by the SDA are also incompatible with article 5 of CEDAW. Section 37(d) of the Act grants an extraordinarily broad ambit for discrimination on the basis of sex in relation to:

*...any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion*

Religious educational institutions are also free to discriminate on the basis of sex, marital status and pregnancy in employment of staff if the discrimination is:

*...in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed*

UNIFEM Australia believes that these exemptions undermine Australia's commitment to sex equality.

UNIFEM Australia regrets that the Act does not prohibit discrimination on the grounds of marital status for women in same-sex couples. Section 6 of the Act prohibits discrimination on the grounds of marital status, which incorporates the condition of being single, married, married but living away from one's spouse, divorced, widowed, or the de-facto spouse of another person. De facto spouse is limited to a partner of opposite sex who lives with the person as the husband or wife despite being not legally married. Consequently, women in same-sex relationships are denied equal protection from discrimination on the grounds of relationship status.

Marital status discrimination also prohibits single women and same-sex couples from accessing reproductive technologies.

Finally, the SDA does not encompass provisions for positive discrimination.

#### ***Recommendations:***

- ❖ ***That the Committee recommend that the SDA be reformed to comply with CEDAW, as per the recommendations of the Senate Legal and Constitutional Affairs Committee on 26 June 2008.***
- ❖ ***That Australia redouble its efforts to address violence against women and girls.***

### **3. The power of the Australia Human Rights Commission (HRC)**

As the HRC operates in conjunction with the SDA to provide for complaints and non-complaint handling functions, it is necessary to ensure it has adequate power to effectively protect women's human rights where violations of their legal rights have occurred.

The federal anti-discrimination legislation administered by HRC incorporates a complaint process whereby individuals and groups can seek redressed for alleged breaches of their legal rights. Where unresolved, complainants can pursue allegations to the Federal Court of Australia or Federal Magistrates Court.

UNIFEM Australia is concerned that aspects of the SDA complaints procedure prevent women from successfully utilising the HRC for complaint purposes. Formal complaint procedures are cumbersome in practice, particularly for women who often face social disapproval in the workplace for pursuing allegations or women from non-English speaking or socially disadvantaged backgrounds. In addition, applicants have a limit of 28 days to commence court proceedings. This is too short a time period for people financially disadvantaged or having difficulty accessing required assistance given the scarcity of free and accessible legal help services.

Complaint procedures also prevent a person or organisation, including the HRC, from pursuing allegations through the courts on behalf of the aggrieved person. This rule undermines the capacity of the SDA to bring about systemic change as systemic problems incorporating a wide class of persons cannot be brought to court without the participation of the persons aggrieved.

UNIFEM Australia is concerned that restrictions on the formal inquiry functions of HCR limit its ability to promote gender equality.

The HRC has a statutory function under section 11(1)(f) of the HREOC Act to initiate formal inquiries into acts or practices in Australia which may be contrary to human rights, including the rights proclaimed in CEDAW. A similar function inquiry under section 31(b) of the Act gives HRC the power to conduct inquiries into discrimination in employment.

However, as outlined by the HRC in its 2008 submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the SDA 1984, these inquiry functions are limited to Commonwealth laws or actions done by the Commonwealth or its Territories, thereby excluding employers or other bodies that may be acting in breach of the SDA.

When formal inquiries made under section 11(1)(f) of the HREOC act are unresolved, the HRC must report to the Minister and include recommendations for action. However no enforcement mechanism is available and the Minister is not required to act on these recommendations. This is similarly the case concerning other functions the HRC has to address discrimination, such as examination of proposed and existing federal laws.

**Recommendations:**

- ❖ *That the Committee recommend that the Sex Discrimination Commissioner be given the power to undertake own-motion inquiries*
- ❖ *That the Sex Discrimination Commissioner be given increased resources to discharge her mandate*

**Promoting a human rights culture**

**1. Education on Human Rights**

UNIFEM Australia supports the view that education and awareness of human rights is vital for ensuring human rights are respected and upheld. While information on human rights is available it is not easily accessible, as evidenced by Amnesty International Australia's finding that among a nationwide poll of 1001 voters, 61 per cent of people believed Australia already had a charter or bill of rights, 26 per cent stated they couldn't say and only 13 per cent indicated no.

Only with education can gender stereotypes which exist to the detriment of both sexes be eliminated. The federal Sex Discrimination Commissioner's 2008 Listening Tour Community Report entitled Gender equality: What matters to Australian women and men, found that the most apparent issue raised by participants regarding gender inequality is the need for education on gender equality to change attitudes and build skills. The message from the Australian community was that without attitudinal change we will fail to make the world a more equal place.

**2. International human rights culture**

On an international level, UNIFEM Australia wishes to see Australia adopt a position of leadership concerning gender equality and women's empowerment throughout the Pacific region. However Australia's capacity to fulfill this function is limited by the absence of human rights enshrined in Australian domestic law. Australian efforts to raise the status of women in our region will not be perceived as sincere or credible unless we continue to empower women politically at home.

**3. Non-government organisation sector**

UNIFEM Australia commends the introduction of a CEDAW shadow report allowing NGOs to give independent consultation on Australia's ratification of CEDAW and provision of funding to do so. UNIFEM Australia interprets this action as an indication of the Federal Government's willingness to engage in constructive conversation with the NGO sector.

UNIFEM Australia applauds the Federal Government's move to dismantle the several thousand 'gag clauses' included in purchase-provider contracts established between government and NGO service providers. These contracts previously included the provision that NGOs must not speak publicly without first receiving approval from the relevant department, effectively silencing advocacy efforts of the not-for-profit sector and limiting the ability of NGOs to contribute to public debates.

UNIFEM Australia submits that funding processes for NGOs may benefit from revision. At the present time the government fund peak bodies as opposed to individual NGOs. While UNIFEM Australia acknowledges that this practice is beneficial for efficiency purpose, this makes it difficult for small NGOs who cannot access core funding. NGOs are instead required to participate in competitive tendering and continuously create new projects to attract funding

in the form of grants. Constant tender applications take time and energy away from service delivery and create an environment of uncertainty as to whether successful programs are renewed beyond their initial timeframe which has implications for the retention of staff. Stop-start funding approach is not effective in ensuring consistent and sustainable operation.

Competitive tendering for grants by small NGOs also promotes rivalry between NGOs that limits the extent to which NGOs are able to work in collaboration with each other. Collaboration and cooperation are necessary to ensure the best models and best practice is adopted by all NGOs.

#### **Recommendations:**

- ❖ *That the Committee recommend that the human rights education role of the Sex Discrimination Commissioner be increased and adequately resourced*
- ❖ *That human rights education make special provision for education on the rights of women both in Australia and the region*
- ❖ *That NGOs are an important source of human rights education, but current funding arrangements with the Commonwealth inhibit their capacity to undertake that role.*

### **How could Australia better protect human rights? (tor 3)**

#### **Legal framework**

##### **1. Establishment of Human Rights Act**

UNIFEM Australia calls for the establishment of a Human Rights Act whereby human rights are protected by ordinary statute and can be altered by Parliament where there is due cause for improvement on account of social change. Within the Act it is necessary to ensure economic, social and cultural rights as outlined in the ICESCR are upheld as equivalent with political and civil rights as outlined in the ICCPR and given legal sanction.

UNIFEM Australia submits that any Human Rights Act must be accompanied by clear and accessible guidelines regarding monitoring and assessment procedures to govern implementation of the Act, whether this is to be the responsibility of individual departments of an overseeing body.

UNIFEM Australia believes the establishment of a Human Rights Act would place Australia in a strong position to advance its regional leadership on issues of women's empowerment and equality.

##### **2. Ratification of international conventions**

UNIFEM Australia submits that the Australian Government should promptly remove its reservation to article 11 (2) (b) of CEDAW and affirm women and men's rights to paid parental leave in accordance with CEDAW and ICESCR in a Human Rights Act. Specifically, UNIFEM Australia encourages the adoption of the HRC's proposed two-stage National Paid Leave Scheme which would provide structural recognition of women's roles as employees and mothers and offset the disadvantage that stems from women's caring responsibilities.

UNIFEM Australia calls for the Government to ratify the ICESCR Optional Protocol to provide individuals and groups with a means to seek remedy for domestic violations of their economic, social and cultural rights.

Australia should also increase core funding to UN agencies which promote and protect human rights, including women's rights.

##### **3. Strengthening antidiscrimination laws**

UNIFEM Australia calls for the Senate Legal and Constitutional Affairs Committee to promptly report its conclusions in response to the Inquiry into the effectiveness of the SDA and replace

ineffectual aspects of the Act with provisions more amenable to protecting women's human rights.

UNIFEM Australia submits that amendments should include, in addition to a system of paid maternity leave, an examination of the provisions other countries have adopted to eliminate the salary gap Australia still experiences and implementation of provisions to ensure gender pay equity in line with international obligations specified in ICESCR and CEDAW.

UNIFEM Australia recommends that the SDA acknowledge women's disproportionate responsibility for unpaid caring and domestic labour and offer remedies to ensure an equal opportunity to support themselves financially, paid leave for family-related responsibilities, equal access to promotion and training and increased representation in public offices.

In order to better protect individuals who suffer multiple forms of discrimination, UNIFEM Australia considers it timely to review all anti-discrimination legislation for the purpose of formulating an *Equality Act*. At the present time, there are anomalies between the SDA and other federal discrimination laws as well as corresponding states and territory laws. An *Equality Act* could be sufficiently flexible to accommodate any matrix of facts and competing considerations that contribute to specific situations of discrimination.

UNIFEM Australia recommends the SDA include a section on trafficking in women, at a minimum through reference to a different body of law that is more specifically targeted to this issue.

UNIFEM Australia deems it necessary to address ambiguity inherent in the reasonable test referred to in section 7B of the SDA, narrow the potential application of temporary exemptions in section 37 (d) of the Act and extend the definition of marital status to incorporate same-sex relationships.

#### **4. Expanding the power of the HRC**

UNIFEM Australia urges a review of SDA compliant procedures administered by HRC to ensure it is accessible to all people, including women from non-English speaking backgrounds or who are financially disadvantaged.

UNIFEM Australia endorses the recommendations made by the HRC in its 2008 submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the SDA 1984 to include a broad formal inquiry function for HRC and increase enforcement action, insert a function for HRC to pursue legal action for breaches of the SDA and broaden standing provisions to allow proceeding to be brought forward by public interest-based organisations. UNIFEM also supports the recommendation that the HRC and Sex Discrimination Commissioner be provided with the power to commence investigation of allegations without requiring an individual to lodge a complaint in circumstances of widespread breaches of the SDA or systemic discrimination.

In addition, HRC's role may be expanded by providing HRC with the capacity to undertake regular independent monitoring and reporting on national gender equality indicators, which is currently lacking in Australia.

### **Promoting a human rights culture**

#### **1. Increasing human rights education and awareness**

UNIFEM wishes to see gender equality enshrined in all education attempts concerning human rights.

#### **2. Increasing the capacity of NGOs**

UNIFEM Australia submits that funding processes for NGOs may benefit from revision, specifically in regard to competitive tendering processes.

***Final recommendations:***

- ❖ ***That the Committee recognise that several key human rights for women are not currently protected under Australian law, including equal pay and paid maternity leave.***
- ❖ ***That the Australian Parliament should pass a Human Rights Act, which includes economic, social and cultural rights and enshrines the principle of gender equality***
- ❖ ***That Australia should sign the Optional Protocol to ICESCR and remove its reservation against Article 11 (2) (b) of CEDAW. UN human rights agencies should be given increased core funding***
- ❖ ***That the SDA should be reformed to bring it into line with CEDAW, for example by addressing the ambiguity inherent in the reasonable test referred to in section 7B of the SDA, narrow the potential application of temporary exemptions in section 37(d) of the Act and extend the definition of marital status to incorporate same-sex relationships, plus the addition of a trafficking provision. Australia should also move towards an Equality Act.***
- ❖ ***The powers and resources of the Sex Discrimination Commissioner and the AHRC should be increased***
- ❖ ***Human rights education efforts should be increased and have gender equality at their heart***
- ❖ ***Civil society and NGOs are key players in protecting human rights and should be funded in a way that assists this role, unlike present competitive funding arrangements.***

UNIFEM Australia thanks the Committee for the opportunity to submit these comments.

Yours sincerely,



Sue Conde AM  
President  
UNIFEM Australia