Opening Address I

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Introduction

We are here to honour the twenty-fifth anniversary of the *Sex Discrimination Act 1984* (Cth) (*SDA*) in the place where the legislation laboured in debate and was born (although conception took place in many minds and hearts around the country). It is fitting that we have the mother/s and midwives here to celebrate and speak. Just as interesting as the legislation are the individual feminists who have applied it to real life—people who have been brave enough to complain to equal opportunity agencies when their rights have been breached, women's groups who have consistently lobbied on important gender issues, lawyers and supportive advocates who have fought for its enforcement, the women and men who routinely implement it in their everyday lives, and the pioneer commissioners (and of course staff); some moderates on appointment became activists by the glaring evidence of inequality they saw close up.

All sex discrimination commissioners are very memorable, committed and successful, and I pay equal tribute to their work. Governor-General, Quentin Bryce, has a special place and Pam O'Neil was the inaugural commissioner. I have personally worked with Pru Goward during her consultations for the 2007 report, *It's About Time: Women, men, work and family*, which was preceded by the landmark 2002 report, *A Time to Value*. Elizabeth Broderick is here for the implementation of a national paid parental leave scheme to be introduced in 2011 paying the minimum wage ($543.78) for a maximum 18 weeks, leaving only the United States as the last developed country not to have a national scheme.

Employment

The public area of employment has been the greatest area of change as most workplaces were designed for men by men of another generation. Only in 1969 was the marriage ban removed for federal public servants (I remember this happened while I was in primary school, as my godmother was a secretary in the Tax Department in Parramatta). At the personal level, in my first job interview with a large Sydney law firm in 1982 (at the age of twenty-two), the

second question I was asked was what form of contraception I was using. I was shocked and told them it was private information. Needless to say, I did not get the job (it was pre-1984), but fortunately I was soon employed by the Australian Law Reform Commission and met Michael Kirby, who has been a lifetime mentor. In 1984, some changes did happen overnight: newspaper and other job advertisements could not specify 'men only to apply'. You will read much more from contributors Marian Sawer, Sara Charlesworth and Beth Gaze.

Equality and Human Rights Legislation

Like most ground-breaking laws—as can be seen from the debate—for the *SDA*, there were dire prophecies; these had earlier been made in the case of the 'new' administrative law and now human rights acts. No law can be a magic bullet for implementing human rights and solving complex social justice issues, but it can be a workable step forward in strengthening compliance. The *SDA* has had substantive and symbolic impact—as a source of focus for social change, a specific framework to debate equality and a measure against which decisions and actions can be compared with international standards in order to prevent backsliding in human rights. Implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires other legal mechanisms, such as those relating to industrial relations, super, tax, social security, family and criminal law (domestic violence and sexual assault). There has been real progress on attempting to remove two CEDAW reservations: paid maternity leave following the Productivity Commission report, and exclusion of women from combat duties, with the review of physical capabilities in new employment standards by the Minister for Defence Personnel, Greg Combet.

We have probably expected too much from one law. The *SDA* does not cover law-making, but a national Human Rights Act would, if it were based on the ACT, Victorian and UK legislative models, as laws are scrutinised not only by a parliamentary committee, the Attorney-General must also issue a compatibility statement for all new bills (as well as the administrative practice of requiring details of human rights impacts in draft cabinet submissions). In building a human rights culture, the biggest impact of the *ACT Human Rights Act* has been in the formulation of government policy and new legislation (for example, covering children and corrections). Chairman Professor Frank Brennan and members Mary Kostakidis, Mick Palmer and Tammy Williams held more than 65 community meetings and received more than 35 000 submissions, with organised campaigns by Get-Up, Amnesty International and others.

I think that it could be time to move to a generic equality law that includes sex as well as other forms of discrimination, such as sexuality, religion, disability, race, and so on. This is the structure of State and Territory legislation, as well as the UK *Equality Act 2006* model. The Standing Committees of Attorneys-General are working on harmonising State and Territory anti-discrimination laws. My five and a half years' work at the ACT Human Rights Commission influences my view, primarily because we often receive complaints under the *Discrimination Act 1991* (ACT) on multiple grounds; women are a diverse group and sex is not the only ground, as race, disability, sexuality and caring responsibilities can be entwined in the complainant's case. We also provide community education on discrimination and human rights issues, reviewing laws and providing reports to the ACT Attorney-General under the *Human Rights Commission Act 2005* (ACT) and the *Human Rights Act 2004* (ACT). This is effectively the full jurisdiction of the Australian Human Rights Commission, but of course on a small scale. I have power to seek leave to intervene in human rights court cases and conduct human rights audits—for example, of the Quamby Youth Detention Centre, which I will talk about later.

Senate Committee Report

In December 2008, the Senate Standing Committee on Legal and Constitutional Affairs released its report on the effectiveness of the *SDA* in eliminating discrimination and promoting gender equality. Its recommendations are very sensible and practical, using models of other federal, as well as State/Territory, provisions to call for

- the inclusion of marital and relationship status (same sex) as grounds of complaint
- the removal of the comparator test for discrimination (for example, ACT *Discrimination Act 1991* 'unfavourable treatment' test)
- changing 'reasonableness' to 'proportionality' test for indirect discrimination
- the inclusion of a general equality provision (for example, *Racial Discrimination Act* [s. 10] and *Human Rights Act* (ACT) [s. 8])
- the inclusion of breastfeeding specifically
- the inclusion of a positive obligation to reasonably accommodate flexible work (for example, as in Victoria)
- strengthening the sexual harassment provisions and listing of relevant factors (for example, as in Queensland)

- better funding for advocate/support services and the Australian Human Rights Commission
- the removal of some exceptions—for example, voluntary bodies—and narrowing of others, such as religious
- the empowerment of the Australian Human Rights Commission to join cases with intersecting grounds
- the inclusion of a requirement to consider objects of the *SDA* when deciding whether to grant exemptions
- the inclusion of the power to make legally binding standards (as with the *Disability Discrimination Act 1992* [Cth])
- the Sex Discrimination Commissioner to have an 'own motion' power, as well as intervener/amicus roles
- amendments to the *Equal Opportunity for Women in the Workplace Act 1999* (Cth)—for example, positive duty to promote equality
- regular reports to Parliament (for example, Social Justice Commissioner)
- the Attorney-General's Department to consult and the Australian Human Rights Commission to hold an inquiry into the need for an equality law and report by 2011.

The committee acknowledged that the *SDA* had been more successful in addressing overt cases of sex discrimination than systemic or structural disadvantage issues. It does not have comprehensive enforcement powers like those used by other regulators in the field of employment, such as the Workplace Ombudsman and occupational health and safety bodies—for example, to issue improvement notices. It uses an individual complaints-based model of regulation, which relies on investigation and private conciliation, then moving to public hearings in the federal courts using an adversarial model, following the *Brandy* case.[1] The awarding of damages is traditionally not high—for example, for sex discrimination: *Hickie v Hunt and Hunt* ($160 000).[2] With expensive legal representation, many complainants are deterred and most of the strong cases are settled—for example, a sexual harassment case in the Australian Capital Territory was conciliated for the amount of $65 000. Although not really comparable, I felt the shock when the ACT Human Rights Commission appealed a defence industry race discrimination exemption case in the Supreme Court and was hit with $18 000 legal costs when we were unsuccessful. In the Australian Capital Territory, we had an appalling decision of the Discrimination Tribunal

1 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245; [1995] HCA 10.
2 *Hickie v Hunt & Hunt* (1998) EOC 92-910.

(thankfully its last) on 3 August 2009 in *Paterson v Clarke*[3]—a very old case (13 years)—in which an award of only $1000 was made for a shockingly named 'hands down the pants incident'. I have not highlighted the case in the media, as it could deter other complainants as well as embolden potential respondents; also, the new ACT Civil and Administrative Tribunal has been established.

ACT Jurisdiction

Australia's combined 6/7th report on the implementation of CEDAW of July 2008 sets out the need to improve our treatment of women in correctional facilities and refers to our human rights audits of ACT juvenile (2005) and adult (2007) detention facilities. This need is highlighted by our recent accession to the Convention Against Torture Optional Protocol (as well as CEDAW). One major gender issue we discovered through regular visits (now a power to inspect under the ACT *Corrections Management Act 2008*, but without any funding attached), including of periodic detention on weekends, was the practice of bussing women between facilities on weekends. This amounted to systemic sex discrimination as women were subjected to more strip searches, had difficulty making professional appointments (for example, medical), had fewer visits (for example, from children and family) and work opportunities and were required to clean out their cells—for example, removing vomit and urine—when they relocated due to some weekend male detainees detoxing there. The government agreed and the practice was stopped, even when our ACT facilities were overcrowded (the new prison, the Alexander Maconochie Centre, was delayed and NSW prisons were full).

The most controversial recommendation in the audit was to pilot a needle and syringe program (NSP) based on a harm-reduction approach that protects the rights to life and health, and recognises the principle of 'equivalence'. There are already community-based NSPs, and many global studies have demonstrated their efficacy in communities as well as in prisons in some countries. To deny protection against disease transmission in a closed population in prison could be viewed as inhumane. NSW research indicates that 63.3 per cent of males and 74.5 per cent of females abuse or are dependent on drugs or alcohol. The rate of hepatitis C in the general community is 2 per cent, but the rate for male inmates is 35–40 per cent and is even higher for female inmates—55–56 per cent. The rate of spread of these preventable infections could be exponential, considering that detainees return to the community quickly; the average length of stay is seven months.

3 *Paterson v Clarke* [2009] ACTDT 3.

Wide Range of Issues

Gender equality has had something of a roller-coaster ride—cases such as: *Proudfoot* in 1992 (Chris Ronalds appeared as counsel), in which President Ron Wilson found that ACT women's health centres were a special measure,[4] exemption applications for Catholic teachers' scholarships in 2004, the Club Pink breastfeeding case in 2005 and Virginia Haussegger's call to 'ban the burqa' in 2009. Maybe the colour of children's ballet uniforms will be next! The future is unclear about the interaction with discrimination law through the impact of the new Fair Work Ombudsman, which started on 1 July 2009 (under the *Fair Work Act 2009*). It receives about 30 complaints a week, many in the area of pregnancy and family responsibilities. Its resources are phenomenal compared with human rights agencies, with 26 offices nationally and about 800 staff.

The Australia Institute's report *The Impact of the Recession on Women* shows the impact is disproportionate, as women are the hidden underemployed (80 per cent of those in the twenty-five to thirty-four-year-old group), with many working part-time.[5] There are many more women's human rights issues, including the glass ceiling in employment (although we continue to batter away), the gender pay gap with over-representation in casual, part-time and low-skilled or low-valued caring work (for example, teaching, child care, health care and hospitality), the feminisation of poverty and women's insufficient superannuation. The new workplace relations system has collective bargaining as a central feature, but the Workplace Research Centre at the University of Sydney recently found that women are often in service industries under awards with fewer pay increases. I look forward to the finding of the House of Representatives Standing Committee on Employment and Workplace Relations inquiry into 'Pay Equity and Associated Issues Related to Increasing Participation of Women in the Workforce'. No wonder it's being called 'Are we there yet?'.

It is very important that equal employment opportunity (EEO) agencies work with academic and other researchers to analyse discrimination trends. For example, Professor Margaret Thornton from The Australian National University has researched our de-identified old case files, as has Professor Patricia Easteal from the University of Canberra, whose work '"She said, He said": Credibility and Sexual Harassment Cases in Australia' has been published.[6] Academics have also been good promoters of the need to collect disaggregated data. While we are world leaders in levels of educational attainments for women, this does not

4 *Proudfoot v ACT Board of Health* (1992) EOC 92-417.

5 David Richardson, *The Impact of the Recession on Women*, The Australian Institute, 2009, p. 8 (<http://www.security4women.org.au/wp-content/uploads/IP-3-Women-in-the-recession-S4Wl.pdf>).

6 In (2008) 31(5) *Women's Studies International Forum* 336–44.

translate into pay equality. The ACT Human Rights Commission has also been doing its own work on community attitudes using Survey Monkey; local non-governmental organisations (NGOs), such as the ACT Women's Centre for Health Matters, are also using this cheap methodology.

Conclusion

I agree with Pru Goward's statement at the twentieth anniversary conference that the *SDA* 'deals with gender relations, an issue at the heart of all cultures. The *SDA* will only ever be as strong as our commitment to it.' The Act is aspirational, but the ideal situation is when there is no need for the *SDA*, which has not yet occurred. I will finish with the words of Martin Luther King Jr: 'if you start treating equally people who have been treated unequally, you capture them forever in their inequality.'

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