

DISCRIMINATION

Adopting a positive action approach to sex discrimination

SARAH STEPHENS analyses the EU's approach to sex discrimination laws

Since the Rudd government came to power in November 2007, there has been a renewed focus on the elimination of gender discrimination in Australia. Soon after the formation of the new government, Australia acceded to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'), demonstrating this renewed commitment to the elimination of discrimination against women and the principles of CEDAW. The Federal Sex Discrimination Commissioner also conducted a national consultation on gender equality to ascertain what Australian men and women saw as the major challenges in creating a more equal society.¹ However, gender discrimination remains a problem in Australia, particularly in more subtle forms. On average, Australian women still earn 18.4 per cent less than men, are disproportionately represented in industries characterised by casual, part-time and low paid employment, and hold only seven per cent of Australia's most senior and highly paid positions.² To address gender discrimination genuinely, and particularly systemic forms of discrimination which have proven more difficult to tackle, reforms to Australia's relevant legal frameworks are required.

In June 2008, the Senate referred an inquiry to the Standing Committee on Legal and Constitutional Affairs into the effectiveness of the Commonwealth Sex Discrimination Act 1984 ('SDA') in eliminating discrimination and promoting gender equality. A year later, the Minister for the Status of Women announced a review of the *Equal Opportunity for Women in the Workplace Act 1999* ('EOWWA') to similarly examine the effectiveness of that Act. While reforms to these Acts are being contemplated, it is timely to consider addressing the ambiguities and inconsistencies that have been created by their interaction. Reforming the special measures provisions under s 7D of the SDA to align with the positive action approach of the European Union ('EU') could be one positive step on the path to achieving this.

The Senate Committee review into the SDA found that the Act had a positive impact on the most overt forms of discrimination, but had been less successful in tackling systemic discrimination.³ One possible mechanism for addressing systemic gender discrimination is the use of temporary special measures for the purpose of achieving substantive equality between men and women. This has been recognised in Article 4 of CEDAW, and in the CEDAW Committee's subsequent recommendations that parties to the Convention make 'more use of temporary special measures, such as positive action,

preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment'.⁴ In an attempt to meet its obligations under CEDAW, Australia adopted s 7D of the SDA. Section 7D permits the taking of special measures for the purpose of achieving substantive equality between men and women, and provides that such action is not discriminatory for the purposes of the Act (instead of merely providing a defence to an otherwise discriminatory action). The broad terms of the provision suggest that a wide range of measures are available to Australian organisations for the purposes of achieving gender equality in practice, from 'soft' measures such as outreach programs (for example, bringing employment opportunities to the attention of women and encouraging them to apply, or providing them with special training to equip them for available positions), to 'hard' measures such as preferential treatment (for example, flexible or inflexible quota rules to actively increase the representation of women in a particular field).

SDA and the Federal Court

The scope of s 7D has been considered only once by the Federal Court. In *Jacomb v Australian Municipal Administrative Clerical and Services Union*,⁵ Crennan J interpreted the provision as permitting 'hard' forms of affirmative action such as quotas, where it could be demonstrated that such a measure was proportionate to its aim and it was not applied any longer than necessary. However, despite its seemingly broad application, s 7D appears to have been a largely unsuccessful provision, and special measures to achieve substantive equality remain rarely implemented in practice.

A key problem with the provision is the way s 7D interacts with the EOWWA. This Act creates an obligation for organisations to address discrimination against women, through both eliminating discrimination and taking measures to promote equal opportunity. It applies to private employers with more than 100 employees, and higher education institutions, and requires these organisations to implement programs to eliminate discrimination and contribute to the achievement of equal opportunity for women in the workplace. In practice however, the EOWWA institutes little more than self regulation. It creates no rights, establishes no avenue of complaint, and requires only reporting on a program without reference to progress.

The EOWWA preserves the merit principle by providing in s 3(4) that employment matters should be dealt with on the basis of merit. This limits the use of special measures for the purposes of achieving substantive gender equality by ruling out any

REFERENCES

1. Human Rights and Equal Opportunity Commission, *Gender equality: What matters to Australian women and men – The Listening Tour Community Report* (2008).
2. Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Unions Membership*, August 2007, Cat No 6310.0; Australian Council of Trade Unions, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, August 2008, 2.
3. Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, 47.
4. United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No 5 – Temporary Special Measures*, 7th sess, 1988.
5. [2004] FCA 1250 (unreported, Crennan J, 24 September 2004).

preferential treatment for female candidates where they are not equally qualified with the male candidates they are competing against. This is at odds with the terms of s 7D of the SDA, which does not rule out the use of quotas where they are deemed necessary in order to increase the representation of women in a given field. The interaction of the two Acts therefore creates confusion as to what is permissible, and this has been reinforced by statements of the current and previous Governments that Australia does not support the use of quotas or targets.⁶ The lack of cohesion between the SDA and the EOWWA therefore undermines any capacity for using special measures to address discrimination, even where such measures would not be inconsistent with the merit principle.

Positive action and the EU

In considering the role of the EOWWA, the Senate Review Committee noted that there was a clear need to strengthen the obligations in that Act to promote equality. The Committee went on to recommend that further consideration be given to the relationship between the SDA and the EOWWA, and in particular whether the obligations under the EOWWA should be incorporated within the SDA. Now that both of these Acts are under review, such incorporation may be possible. However, another useful reform would be to replace the SDA's special measures provision with the 'positive action' approach used in the EU. This may be a simple but effective way to remove the ambiguities created by the interaction of the SDA and EOWWA, and to improve the mechanisms available to tackle systemic gender discrimination in Australia.

One way in which the EU has sought to address issues of systemic gender discrimination has been to permit Member States to adopt positive action measures in order to achieve full equality in practice between men and women (Article 157(4) of the Treaty of Lisbon⁷). This is an acknowledgment that some preferential treatment may be required to overcome prejudices or entrenched biases that can prevent women from enjoying the same opportunities as men. Although the EU, like Australia, is still grappling with systemic gender discrimination issues, there is evidence that the use of positive action measures may be contributing to a reduction in these structural problems.

The positive action provisions in EU legislation are framed in similar terms to that of s 7D of the SDA, providing that Member States may maintain or adopt measures with a view to ensuring full equality in practice between men and women.⁸ However, a number of decisions of the European Court of Justice, along with communications from the European Commission, have helped to clarify the scope of permissible positive action.⁹ The underlying principle in EU law is that, in order for a woman to benefit from positive action, she must be equally qualified with the male candidates she is competing against. In these circumstances, a rule preferring female candidates may be justified where women are underrepresented, but it may not give *unconditional preference* to women. Male candidates must receive an objective assessment which could override the priority given to females. The consequence of these rules is that hard quotas are strictly excluded in order to preserve the merit

principle, but tie-break rules (with an appropriate savings clause) are acceptable, and indeed are viewed as necessary to overcome the disadvantages experienced by women in certain fields.

By explicitly ruling out hard quotas and preserving the merit principle, the EU's approach reconciles the tension between an individual's right to equal treatment, and the recognition that some preferential treatment may be required to overcome inherent biases which can operate to perpetuate disadvantage. Further, by clearly articulating the type of action that is permissible, the framework can achieve greater community understanding and support.

The EU has had some success with the use of positive action; in particular, its use by political parties has contributed to a steady rise in the number of women in national parliaments.¹⁰ Positive action has also played a role in drawing attention to the need to improve female representation in senior positions of employment, such as in setting targets for the number of women in professorships or in corporate leadership positions.¹¹ While positive action can directly affect gender equality outcomes, its role in raising awareness of the need to overcome gender stereotypes is equally important. Indeed, in its sixth report to CEDAW, the German Federal Government observed that its public servant quotas are rarely used in practice, but that they play a role in raising awareness of the importance of discrimination-free practices.¹² A study of gender action plans in the EU supports this conclusion, observing that they accomplish something merely by requiring people to focus on the issue.¹³

Unlike many other EU Member States, the United Kingdom (UK) has until now been reluctant to embrace positive action in its gender equality laws, despite a firm commitment to the elimination of discrimination. However, after a comprehensive review of its equality laws, the UK is now primed to extend its current (very limited) positive action provisions to the wider limits allowed by EU law.¹⁴ The Equalities Review found that many organisations in the UK were keen to take positive action measures, but were frustrated by the rigidities within the current laws. The government's Equality Bill, currently before the Parliament, takes up the review's recommendations and would extend the scope of permissible positive action to allow employers to take into account, when selecting between two equally qualified candidates, the under-representation of particular groups, including women. In public consultation on the Bill, the Government found that, while there was widespread opposition to mandatory quotas, there was overwhelming support for organisations to be able to use a wider range of voluntary positive action measures, and an 'almost unanimous wish for further and accurate guidance' on such measures.¹⁵

Conclusion

The ambiguities in Australia's current special measures framework mean it does not have the capacity to influence attitudes to gender equality, and it lacks the political and institutional support necessary for success. By maintaining a framework that is ineffective and largely unused, Australia is failing to take advantage of one mechanism that could be utilised in the fight against

6. See, eg, Australian Government, *Australia's combined 6th and 7th Reports on the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women July 2003–July 2008* (2008) 2.23; Australian Government, *Australia's Combined 4th and 5th Reports to the United Nations on the Convention on the Elimination of All Forms of Discrimination Against Women June 2003* (2003) para 48.

7. Ex Article 141(4) of the Treaty Establishing the European Community.

8. See Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal of the European Communities*, OJ L 269/15 [2002] Article 2(8).

9. See Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, Case C-158/97 *re: Badeck* [2000] ECR I-1875; European Commission, *Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice of 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen*, 27 March 1996, Brussels, COM (96) 88 final.

10. See, eg, National delegation of Germany, 'Human rights and economic challenges in Europe – gender equality: Germany' (Report presented at the 6th European Ministerial Conference on Equality between Women and Men, Stockholm, 8–9 June 2006) 1; Aileen McHarg, 'Quotas for Women! The Sex Discrimination (Election Candidates) Act 2002' (2006) 33(1) *Journal of Law and Society* 141, 144; *Fairness and Freedom: The Final Report of the Equalities Review* (2007) 99.

11. National delegation of Germany, above n 10, 2.

12. Germany, *United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Sixth periodic report of States parties*, October 2007, 15.

12. Cornelia Schneider, Magdalena Hajduk and Nina Sartori, *Gender Action Plans – an Effective Instrument for Promoting Gender Equality in the Sixth EU Framework Programme?* (2005) 3.

13. United Kingdom of Great Britain and Northern Ireland, *United Nations Convention on the Elimination of All Forms of Discrimination Against Women: 6th Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, May 2007, 63.

14. United Kingdom Government, *The Equality Bill – Government response to the Consultation* (2008) 61.

15. *Fairness and Freedom: The Final Report of the Equalities Review* (2007) 120.

systemic discrimination, and is arguably not meeting its commitment under CEDAW. While Australia is in the process of reviewing its legislative frameworks for gender equality, it is timely to consider replacing the current special measures provisions under s 7D of the SDA with a clearly articulated positive action regime, based on the EU's model.

Such a reform would in fact involve limiting the range of measures available to achieve substantive gender equality, as it would preserve the merit principle by requiring that preferential treatment for women only be applied where they are equally qualified with the male candidates they are competing against. An advantage of this approach is that it would present a consistent legislative framework and avoid the ambiguities inherent in the current regime. As the experience in the EU has demonstrated, a more limited framework which is consistent and clearly articulated may indeed prove

to be more effective if it means that available measures are actually utilised. Such an approach should also form part of a broader strategy to eliminate systemic gender discrimination, and could complement other changes which are currently being contemplated for the SDA and EOWWA. Australia could usefully learn from the changes taking place in the UK, where it has been recommended that greater use of positive action needs to be made 'to help resolve otherwise virtually immovable, persistent disadvantage'.¹⁵

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