

# CONFERENCE SEX DISCRIMINATION ACT SILVER ANNIVERSARY

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Women's work is never done:  
The pursuit of equality and the  
Commonwealth *Sex Discrimination Act*

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## **Women's work is never done: The pursuit of equality and the Commonwealth *Sex Discrimination Act***

Marian Sawer

*The campaign for the Commonwealth Sex Discrimination Act lasted more than a decade – or did it? Actually the campaign for effective sex discrimination legislation has never ended. The champagne and cake of 1984 marked one victory in an ongoing struggle. Continual effort has been required even to keep a specialist sex discrimination commissioner, while repeated Budget cuts have depleted the resources needed to be effective. Nor has the two-decades long campaign to enhance the statutory powers of the commissioner yet borne fruit. Meanwhile, industrial relations changes have contributed to new inequalities, while decision-makers assume that discrimination has already been dealt with. This paper will reflect on the history of the pursuit of equality by the organised women's movement in Australia and the changing nature of the obstacles in the path.*

It is now 25 years since the Commonwealth *Sex Discrimination Act* came into force. The Act had a long pre-history and this paper touches both on the decades spent by women in advocating for gender equality guarantees and then in protecting the Act from sometimes unfriendly governments.

Despite Jessie Street's advocacy and the wartime mobilisation around the Australian Women's Charter, gender equality did not become part of the 1944 Constitutional Referendum that laid the basis for postwar reconstruction and the welfare state. Australia remains the only country that has renovated its constitution since the Second World War without incorporating the principle of gender equality.

Demands for a general prohibition of sex discrimination receded from view during the Cold War being widely regarded as having something to do with communism. This idea lingered on into the 1970s, resulting in the members of the Australian Security and Intelligence Organisation (ASIO) lurking in the shrubbery outside women's liberation meetings.<sup>1</sup>

Meanwhile, women who felt dissatisfied with their lot as Brian's wife and Jenny's mum were famously recommended to have a cup of tea, a Bex and a good lie down. In many areas of employment, including the Commonwealth Public Service, women continued to be subject to the infamous marriage bar, and were fired if they committed the sin of matrimony, losing their superannuation in the process. The Commonwealth marriage bar lasted until 1966, long after such bars had been removed elsewhere, that is, in all comparable countries except Ireland. Things began to move in the 1960s, with the increased entry of women into higher education and the increased demand for women in the labour market. Attitudes were slow to shift, however, and were patronising in a way that would be totally unacceptable today.

[**SLIDE 2** *Bulletin* cover story 1967]

In 1967 a cover story, 'What shall we do with the educated woman?' appeared in the *Bulletin*, the lead Australian current affairs journal of the period.<sup>2</sup> It was about an influx of married women into Macquarie University in 1967, its first year. The women had formed a group to get a crèche organised and the article quoted the Vice-Chancellor's reaction: 'They don't have full permission yet, of course, They have yet to prove to us they can establish it, staff it, and keep it going. It just isn't possible for university funds to be used for a minority.'

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<sup>1</sup> For ASIO photos of women arriving at a Canberra women's liberation meeting see National Archives of Australia Series No. A6122, Accession No. 2004/00686598.

<sup>2</sup> April Hersey, 'What shall we do with the educated woman?', *Bulletin*, 23 September 1967.

This view of married women as a minority and the request for a university childcare centre as novel and strange, is a good illustration of the times. So too is the accompanying commentary by the journalist:

Publicity has been showered on the Mums of Macquarie since the first mention of their childminding centre became known, and much of it has been a little absurd. They cannot, of course, take babies to lectures... They don't shell peas in the common-room or discuss the problems of napkin service (p. 23).

This kind of trivialising of married women was indicative of the attitudes for which the new wave of the women's movement was shortly to invent a word: 'sexist'. Society overlooked and wasted women's skills and talents, marooned them in the suburbs, expected them to spend the most productive part of their lives in housework and then discounted their views as simply those of 'housewives'. By the beginning of the 1970s women's pent-up frustration at their treatment was about to explode.

**[SLIDE 3 IWD 1973]**

A new wave of the women's movement swelled and in 1972 a new organisation, Women's Electoral Lobby (WEL), succeeded in making sex discrimination a major campaign issue in the federal election. In response to WEL's agenda-setting work Senator Lionel Murphy, soon to be Attorney-General, announced in November 1972 that: 'The need to remove discrimination against women is obvious and will have early priority from a Labor government.'<sup>3</sup>

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<sup>3</sup> Jocelyne Scutt, 'Legislating for the Right to be Equal', in Cora V. Baldock and Bettina Cass (eds) *Women, Social Welfare and the State*, Sydney, Allen & Unwin, 1983; 1988, pp. 230–231.

While the Whitlam government moved quickly to ratify ILO Convention 111 on Discrimination in Employment and Occupation and to establish national and State employment discrimination committees, legislation took longer to appear. One must remember that this was before the adoption of the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, so the Constitutional grounds for federal legislation were less clear, quite apart from the enormous agenda of the Whitlam Government in the area of law reform. Nonetheless, in August 1975 the government did circulate a memorandum, on a 'Proposed Bill to Prohibit Discrimination against Persons by Reason of their Sex or Marital Status'.<sup>4</sup> By then, of course, it was too late and the dismissal of the government in November meant that the proposed Sex Discrimination Act did not eventuate.

Lobbying continued at the federal level, while women started gaining sex discrimination legislation at the State level, first in South Australia in 1975 and then in NSW and Victoria. The federal minister with responsibility for Women's Affairs, R.J. Ellicott, was persuaded of the need for sex discrimination legislation, as was the Convenor of his National Women's Advisory Council, Beryl Beaurepaire. The National Party ministers in Cabinet, however, were fiercely opposed and had support from the newly formed Women Who Want to be Women (WWWW). While Beaurepaire engaged in agenda setting on the need for anti-discrimination legislation, Babette Francis and Jackie Butler of WWWW were vociferous in

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<sup>4</sup> In retrospect, the fact that the only Bill to be enacted was the *Racial Discrimination Act* was perhaps a blessing in disguise; it made an ideal test case before the High Court for the use of the external affairs power as a Constitutional base for federal human rights legislation (in Koowarta 1982). This meant that the Constitutionality of the use of the external affairs power to enact human rights legislation was established before the more controversial Sex Discrimination Act came along.

opposition. Nonetheless, federal sex discrimination legislation was the centre-piece of the draft plan of action for the UN Decade of Women, drawn up after an unprecedented series of town hall meetings with women around Australia culminating in a national meeting in the Academy of Science in Canberra in 1980. Despite being adopted by delegates whose election was overseen by the Australian Electoral Office, the Plan of Action was again blocked by the National Party.

At the Mid-Decade Conference in Copenhagen Minister Bob Ellicott did, manage to sign CEDAW, the new UN's Women's Convention. He achieved this despite WWWW trying physically to prevent him. They had acquired press accreditation for the conference from the *Ballarat Courier* and the *Toorak Times*. Ellicott and Andrew Peacock, as Minister for Foreign Affairs, issued a joint statement saying that signature of the Convention was an important indication of 'Australia's policy of equality for women and the elimination of discrimination.'<sup>5</sup> There was, however, no progress towards ratification of the Convention before the election of the Hawke Government.

Meanwhile, classified job advertisements in papers such as the *Sydney Morning Herald* continued to be divided between those for men and boys and those for women and girls. There was still an assumption that jobs that involved responsibility and had a career structure attached to them were for men, even though an increasing number of women had been able to take advantage of the Whitlam Government's abolition of tertiary fees to go to university. Often they had originally been trained as nurses or secretaries, as these were regarded as suitable jobs for women to have before they got married. Now these former nurses and

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<sup>5</sup> *Australian Foreign Affairs Record*, July 1980, p. 240.

secretaries were finding they had the brains to be brain surgeons or chief executive officers, and not only handmaidens as originally planned.

Meanwhile, in federal parliament the Labor Opposition was increasing the pressure on the issue and in 1981 Shadow Minister Senator Susan Ryan introduced her Sex Discrimination Bill as a Private Senator's Bill. This was a broad-ranging bill, drafted by early WEL member and barrister, Chris Ronalds. Sex discrimination legislation became a major plank of the Labor Party's election policy, endorsed by representatives of some 26 national women's organisations, most of which had participated in Beaurepaire's UN Decade of Women consultation process. The momentum now seemed unstoppable and with the election of the new Labor government in 1983 the way seemed clear for action at last. A Sex Discrimination Bill was introduced into parliament in June 1983 and CEDAW was ratified in July. By now the High Court had confirmed in the *Koowarta* case that the federal government was able to use its external affairs power to meet obligations under international human rights conventions.

It was at this point that a public furore erupted as described by other contributors to this anniversary conference. While Elaine Nile, of the Festival of Light, made arrangements for busloads of supporters to come to Canberra to demonstrate against 'the Sex Bill' outside Parliament, supporters of the Bill were also busy. Pamela Denoon, the National Co-ordinator of WEL, stitched together a coalition of women's organisations from across the political spectrum to support the Bill, ranging from the National Council of Women through to the Union of Australian Women. When the Bill at last passed through both houses after

parliament, after 53 amendments to placate seemingly implacable opponents, Denoon organised a large celebration party on the lawn in front of parliament to thank Susan Ryan and all the parliamentary supporters of the Bill, including Liberals such as Ian Macphree and Kathy Martin and Democrat Janine Haines, as well as tireless Labor advocates such as Senator Pat Giles. To go with the champagne there was a large purple, green and white cake in the shape of the women's symbol.

Once the legislation was through, what did it mean for women? For some it was empowering just to know there was now a law to prevent women being treated less favourably by employers because they were women, or because they were married women. Increasingly, women believed that they had the right the same range of employment opportunities as men, the right not to be sexually harassed at work, and the right to be paid equally, although the substantive achievement of the latter rights proved more elusive. In this new era women became increasingly visible in public life, for example in February 1986 Lynne Simons, the first woman Serjeant-At-Arms in the House of Representatives, led in the first woman Speaker, Joan Child. Women had come a long way in a parliament which until 1969, would not even employ a woman for the job of Hansard reporter, despite a lack of men with the short-hand skills required.

**[Slide 4 the first woman Serjeant-at arms and the first woman Speaker]**

Unfortunately, despite this progress in the 1980s, Australia has been slipping down the Inter-Parliamentary Union's league table for representation of women in national parliaments for at

least the past decade and is today at 33<sup>rd</sup> place.<sup>6</sup> This is because other countries, particularly since the UN's Fourth World Conference on Women (the Beijing Conference), have been taking more vigorous action to ensure the presence of women in their parliaments, and more than 100 countries have adopted some form of electoral quota for women. Nonetheless, it is now widely accepted in Australia, as elsewhere, that male-dominated political representation implies a democratic deficit, making it clear that there is 'something wrong with the picture' in cases like the 1992 Tasmanian Cabinet.

[Slide 5 Tasmanian Cabinet 1992]

The Sex Discrimination Act also intermeshed with a range of policies to address broad forms of discrimination against women. One of these was the failure of workplaces to acknowledge that employees had family responsibilities and that work practices needed to be more flexible to accommodate these responsibilities. Both men and women workers had such responsibilities and from 1983 the Hawke Government was elected with a commitment to ratifying ILO Convention 156, which recognised that this was so. The Office of the Status of Women designed a 'Joe Average' poster to promote the Convention and to normalise the practice of male workers taking their share of family responsibilities.

Convention 156 was controversial because it required family-friendly work practices and conditions that would enable men to take a more equal role in raising their children. Although the Convention had been part of the Hawke Government's election policy there were many

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<sup>6</sup> Inter-Parliamentary Union, Women in National Parliaments, 31 July 2009 <http://www.ipu.org/wmn-e/classif.htm>

delays in ratifying it, on the ground of States' objections. It again became part of Labor election policy in 1990 after determined advocacy by Labor feminists. At last the Convention was ratified and the Office of the Status of Women led its implementation with a 'Sharing the Load' community education campaign that was highly commended by the UN. A Work and Family Unit was also established in the industrial relations portfolio to continue policy development on ways to enable both parents to combine family responsibilities with paid work. The unit was abolished in 2003 but the Rudd Government has re-established an Office for Work and Family in the Department of Prime Minister, with responsibility for paid parental leave and other 'work/life' issues. The need to amend the *Sex Discrimination Act* to prohibit both direct and indirect discrimination on the ground of family responsibilities has long been recognised, and was once again recommended by the Senate Standing Committee on Legal and Constitutional Affairs in 2008. However, at the time of the silver anniversary of the Act the family responsibilities provision was still limited to termination of employment.

In one interesting development, soon after Australia's ratification of CEDAW, Justice Elizabeth Evatt took her place on the UN Committee responsible for its oversight. Almost immediately she began to play an important role in the development of CEDAW processes and jurisprudence.

[Slide 6 Justice Evatt]

One of her most significant contributions was the drafting of the General Recommendation No 19 (1992) on violence against women. The Convention text does not directly address the issue, so the General Recommendation is particularly important in clarifying that gender-based violence constitutes discrimination as defined under the Convention and that attitudes by which women are regarded as subordinate contribute to such violence. The General Recommendation also made it clear that because the concept of discrimination is not restricted to acts by or on behalf of government, States may be held responsible for private acts of violence if they fail to act with due diligence to prevent, investigate and punish such acts. *In the case of A.T. v Hungary* (2/03) the CEDAW Committee found that the State Party was in breach of the Convention because it had failed to ensure the protection of A.T. from her former common law husband and had failed to enact specific domestic violence legislation to provide for protection orders and support services such as shelters.<sup>7</sup>

Back at home, the women's movement was still working from both inside and outside government to improve the effectiveness of the *Sex Discrimination Act*. These efforts bore fruit with successive amendments passed in 1992 and 1995. The amendments flowed from a House of Representatives inquiry of 1989–1992. At first the inquiry, put together quickly to take advantage of the fifth anniversary of the passage of the Act, looked unpromising – with an all-male committee and ambiguous terms of reference. The somewhat disturbing terms of reference included the formulation ‘the extent to which the objects of the *Sex Discrimination Act 1984* have been achieved or are capable of being achieved by legislative or other

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<sup>7</sup> For discussion of this case see Bal Sokhi-Bulley, ‘The Optional Protocol to CEDAW: First Steps’, *Human Rights Law Review* 6 (1), 2006, pp.143–59.

means'.<sup>8</sup> Yet with the help of inquiry secretary Jon Stanhope, later Chief Minister of the ACT, feminists were able to ensure a highly participatory inquiry process, including public seminars jointly sponsored by women's units.

The first public seminar was held in November 1990 and was co-hosted by the ACT Division of the Royal Australian Institute of Public Administration (of which Marian Sawyer was then Vice-President). It was led off by discrimination expert Professor Margaret Thornton and included a dazzling cast of feminist legal and policy activists, from Justice Elizabeth Evatt to Jocelyne Scutt, Moira Rayner and Philippa Hall (for award issues) as well as John Basten, whose work on improving the definition of indirect discrimination was to be invaluable. Helen Styles of the Department of Foreign Affairs and Trade, a complainant in a major test case on the Act's indirect discrimination provisions, was asked by an industry representative whether voluntary EEO programs would not be less stressful than legal battles. She replied that if voluntary compliance worked, Moses would have handed down 'The Ten Guidelines'.

The report of the Inquiry, *Half Way to Equal*, reflected much of what was learnt through such seminars and was promoted very effectively in the media by energetic committee chair Michael Lavarch, later to be Attorney-General.<sup>9</sup> Not long before the tabling of the Report in April 1992, a new coalition of national women's organisations called CAPOW! had been established, which proceeded to make the strengthening of the Act the subject of its first conference. Another element in this favourable configuration was the appointment of Anne

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<sup>8</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Equal Opportunity and Equal Status for Australian Women*, 1989, Terms of Reference.

<sup>9</sup> Lavarch had taken over as Chairman of the Legal and Constitutional Affairs Committee after the 1990 election, when the inquiry was reinstated.

Summers to the Prime Minister's Office. Prime Minister Paul Keating had been having 'women trouble', with the Opposition press boxing his maiden speech on the eve of International Women's Day 1992. As a new member of parliament in 1970 he had attacked the Gorton Government over the increased number of women in the workforce and asked what it was doing to 'put the working wife back in her home'. A bad press on women's issues, combined with his abysmal rating with women voters, led to the appointment of Summers to recapture the women's vote.

The combination of insider and outsider advocacy brought success when the Prime Minister announced the first set of amendments to the Act at the CAPOW! conference in September and foreshadowed the second set, that was to come in 2005. The immediate changes included strengthening the sexual harassment provisions, making dismissal on the ground of family responsibilities unlawful and removing the exemption for industrial awards. The changes that had to wait until 2005 included strengthening the special measures provision and, most importantly, reversing the onus of proof in cases of indirect discrimination, so that an employer had to demonstrate the business necessity for requirements that disadvantaged women.

At the same conference the Prime Minister announced the government's acceptance of the longstanding women's movement demand for contract compliance to be introduced as an additional incentive for employers to comply with the *Affirmative Action Act*. This meant that from 1992 companies named in parliament for non-compliance with the Act would be ineligible for government contracts or industry subsidies. Contract compliance is still part of

the federal government procurement policy overseen by the Department of Finance, but has little effect on those named for non-compliance, which tend to be companies that do not have business with government. The Coalition objected to the introduction of contract compliance and also to the removal of the exemption in the Sex Discrimination Act for industrial awards. The Shadow Minister, Senator Jocelyn Newman, decried the new commitments with a press release headed 'Keating's sex speech a bit limp'.<sup>10</sup>

In a classic but unusual example of policy transfer, some of the improvements to the Commonwealth Act had already been trialled in the new ACT *Discrimination Act* of 1991. The developments in the ACT owed much to feminist advocates already involved in the federal inquiry, so the policy transfer was not really from a small jurisdiction to a national one, as much of the policy learning had already taken place.

Under the Howard government elected in 1996 the women's movement was more involved in defensive actions than moving the agenda forward. It seemed clear that the new government was disinclined to have a Sex Discrimination Commissioner at all. Sue Walpole, then Sex Discrimination Commissioner, was described by the Prime Minister as a 'Labor stooge' and resigned early. She was not replaced for 14 months. A cartoon by Cathy Wilcox depicted feminist frustration at this long wait and the uncertainty over the position being filled. It shows the Prime Minister delivering the following answering-machine message:

**[Slide 7 Wilcox cartoon].**

*Bleep! The office of the Commissioner for Sex Discrimination is currently unattended. If you're a woman and have a complaint, well, that's just typical.*

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<sup>10</sup> Senator Jocelyn Newman, Press Release, 19 September 1992.

*Complain, complain, complain, it's all you women do. Not content to have a nice job and a few sisters in parliament, you want equal pay, childcare and protection as well! Face it. Sex Discrimination happens. In fact it's something of a tradition in this country, and well, I'm an unashamed traditionalist. So on with the powder, there's a good love, freshen up your lippy, give up and Go Home. And sorry. We don't take messages. We only give them. Beep.*

The position was finally filled soon after this very effective cartoon appeared.

Another high-profile campaign was to prevent the watering down of the marital status provisions of the *Sex Discrimination Act*. The Federal Court had ruled that a Victorian law restricting access of single women to IVF treatment was inconsistent with the Commonwealth *Sex Discrimination Act* and hence invalid. But the Commonwealth Attorney-General issued a fiat to allow the Australian Conference of Catholic Bishops to appeal to the High Court.<sup>11</sup> The challenge not only threatened single women's access to IVF, but also the marital status provisions of the *Sex Discrimination Act 1984* more generally and WEL-Victoria intervened along with the Human Rights and Equal Opportunity Commission. It was the first time a women's group had been granted status in the High Court. The bishops, who had not been a party to the original case, were unsuccessful.

In the meantime, the government introduced a bill to amend the *Sex Discrimination Act* to allow States and Territories to discriminate on the basis of marital status in the provision of

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<sup>11</sup> Australian Catholic Bishops Conference & Anor, Ex parte - Justice Sundberg C22/2000.

‘assisted reproductive technology services’ Fortunately the Senate Legal and Constitutional Affairs Committee Legislation Committee was chaired by Senator Marise Payne, who helped hold the line against the various attempts by the Howard Government to weaken the Act. The Committee found that the bill was unable to achieve its objective of providing a child with the care and affection of a mother and father.<sup>12</sup>

The Howard Government also made unsuccessful attempts before and after the 2004 federal election to amend the *Sex Discrimination Act* to provide an exemption for male-only teachers’ scholarships, an initiative opposed by women’s groups and by the Sex Discrimination Commissioner, Pru Goward.

In addition, there were continuing struggles over the resourcing and structure of the Human Rights and Equal Commission, which had responsibility for administering the Act.

Resourcing of the Commission and of the Sex Discrimination Commissioner became one of the recurrent themes of women’s conferences. These struggles had begun under the Hawke government but were exacerbated under the Howard government, which straightaway made a 40 per cent cut to the Commission’s budget, meaning a loss of one third of its staff in 1997–98. It went further by introducing successive Bills to remove the specialist commissioners, including the Sex Discrimination Commissioner, and to require the Commission to obtain permission from the Attorney-General before intervening in court proceedings. Fortunately these Bills blocked in the Senate. WEL, along with feminist lawyers, wrote submissions and appeared before the Senate Legal and Constitutional Affairs Committee, to argue the

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<sup>12</sup> Louise Chappell, ‘Winding back Australian Women’s Rights: Conventions, Contradictions and Conflicts’, *Australian Journal of Political Science*, 37 (3), 2002: 475–488.

deleterious effects of losing specialist expertise. WEL has continued to advocate the importance of the specialist commissioners and the overload caused by the current doubling up of responsibilities.

It should be noted here that with the abolition or muting of women's policy units in government, the role of a relatively independent Human Rights Commission in policy advocacy became increasingly important. This was particularly notable with Commissioner Pru Goward's campaign for paid maternity leave and more recently with the campaigns of Commissioner Liz Broderick both on paid maternity leave and a range of gender equality issues.

### **Conclusion**

So where are we now? The Rudd Government was elected in 2007 without a women's policy, the first time that the Australian Labor Party (ALP) had gone to an election without a women's policy since 1977. Like the Blair Government in the UK, it had been convinced that any trace of feminism would be an electoral turnoff for the blue-collar workers being wooed back to the party. Despite the absence of an overall plan on how to address gender inequalities, the ALP did have policies that included the strengthening of the Commonwealth Sex Discrimination Act, the ratification of the Optional Protocol of CEDAW and strengthening the Office for Women (but without moving it back to Prime Minister and Cabinet or ensuring that the portfolio minister was in Cabinet).

The loss of the capacity within government to monitor policy for its impact on women and the loss of political will to act on such gender auditing had contributed to a range of adverse outcomes, particularly with WorkChoices and its impact on the pay and conditions of low-paid women workers. The Rudd Government has legislated to undo the more extreme aspects of WorkChoices but so far little is happening in relation to the gender pay gap. The House of Representatives inquiry into pay equity has already been running for more than a year and is not due to report until October 2009, well after the setting up of the new industrial relations system under Fair Work Australia. Meanwhile the gender pay gap in the ordinary time earnings of full-time workers increased to 17.2 per cent in Australia as a whole, and 25.9 per cent in Western Australia.<sup>13</sup>

There is a promise to legislate in this term of government to introduce 18 weeks paid maternity leave, but in 2009 we remain one of only two OECD countries without such a basic entitlement at the national level.<sup>14</sup> Childcare policy is in tatters, with the collapse of ABC Learning illustrating the dangers of using public money to subsidise the growth of a for-profit corporate childcare market. Again, however, no resolute action is on the agenda.

Twenty-five years after the Sex Discrimination Act came into force, our expectations have risen considerably. The Senate Legal and Constitutional Affairs Committee produced an excellent report last December on what needed to be done in the short term to strengthen the Sex Discrimination Act and make it effective again. As we have noted, the Rudd Government was elected with a platform commitment to ‘strengthen and improve the Sex Discrimination

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<sup>13</sup> ABS Cat. 6302, Average Weekly Earnings, May 2009.

<sup>14</sup> In the other country, the United States, some States such as New York and California have Temporary Disability Insurance schemes, which cover pregnancy and childbirth.

Act and the powers of the Commissioner...'. Despite this commitment, the Human Rights Commission suffered disproportionately from the 2008 Budget, with the efficiency dividend resulting in 14.5 per cent funding cut across the Commission, including the sex discrimination area. And despite Senator Faulkner's promise in December 2008 that the government would make a concerted effort to respond to parliamentary committee reports within the required three months, making good on its platform commitment to restore respect for parliament, 10 months later no response to the Senate Committee report on the Sex Discrimination Act had yet appeared. Let us hope that response comes soon. It would be an excellent way to celebrate the silver anniversary of the Act.