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A Human Rights Approach to Equality for Women in the Workplace

Submission to the Review of the
Equal Opportunity for Women in the Workplace Act 1999

October 2009

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About the Human Rights Law Resource Centre:

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the Victorian Charter of Human Rights and Responsibilities; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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GLOSSARY

AHRC means the Australian Human Rights Commission.

CEDAW means the *Convention on the Elimination of All Forms of Discrimination Against Women*.

CESCR means the Committee on Economic, Social and Cultural Rights.

CHR Act means the *Canadian Human Rights Act*.

CHRC means the Canadian Human Rights Commission.

EEA means the *Employment Equity Act 1995* (Canada).

EHRC means the Equality and Human Rights Commission in the UK.

EOWA means the Equal Opportunity for Women in the Workplace Agency.

EOWW Act means the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

EU means the European Union.

FW Act means the *Fair Work Act 2009* (Cth).

GEO means the Government Equalities Office in the UK.

HRC means the United Nations Human Rights Committee.

ICCPR means the International Covenant on Civil and Political Rights.

ICESCR means the International Covenant on Economic, Social and Cultural Rights.

ILO means the International Labour Organisation.

SDA means the *Sex Discrimination Act 1984* (Cth).

UDHR means the Universal Declaration of Human Rights.

UK means the United Kingdom.

WR Act means the *Workplace Relations Act 1996* (Cth).

1. Introduction

1.1 Executive Summary

1. The Human Rights Law Resource Centre (**HRLRC**) considers that the most effective way to promote equality and eliminate discrimination against women is through a human rights framework. A human rights approach requires that legislation, regulation, monitoring and reporting systems be developed with a focus on positive measures to achieve substantive equality.
2. A human rights framework can inform and guide domestic policy in complex areas such as discrimination and equality. The international human rights framework has been at the forefront of recognising the more insidious forms of discrimination, including indirect, systemic and compounded discrimination. This submission argues that the *Equal Opportunity for Women in the Workplace Act (EOWW Act)* would be a more effective and powerful instrument if it were to draw on the experience and expertise reflected in international human rights standards.
3. This submission discusses the right to equality under international human rights law and makes recommendations on how the EOWW Act can better comply with Australia's human rights obligations and, by extension, contribute more effectively to equality, participation and social inclusion on Australia.

1.2 Scope and Structure of the Submission

4. Section two of this submission sets out the international human rights standards relevant to this inquiry. Of particular significance are the standards set out in the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*. CEDAW codifies women's right to non-discrimination and equality with men. These principles are also reflected in the *Charter of the United Nations*, the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and all other major international human rights instruments.
5. Section three considers various International Labour Organisation (**ILO**) Conventions which are aimed at eliminating discrimination in the work force, creating pay parity and protecting employment rights of workers with family responsibilities. The ILO recognises that creating equal opportunity for women in the workplace is the responsibility of government and society. Australia has ratified a number of these conventions and therefore needs to ensure that its legislative framework and policies address these obligations.
6. Section four discusses the recommendations made in the Senate Standing Committee on Legal and Constitutional Affairs' report on the effectiveness of the *Sex Discrimination Act 1984 (SDA)* in eliminating discrimination and promoting gender equality. The recommendations made in this submission are aligned with the developing legislative framework in this area.

7. The remainder of the submission draws on the standards set out in sections two, three and four and applies these to the EOWW Act, making recommendations in the following areas:
- (a) coverage of the EOWW Act (section five);
 - (b) workplace programs, reporting and compliance (section six);
 - (c) pay parity (section seven);
 - (d) the role of men as fathers and carers (section eight);
 - (e) temporary special measures, including quotas (section nine); and
 - (f) the role and function of the EOWA (section 10).

1.3 Recommendations

8. The HRLRC makes the following recommendations:

Recommendation 1:

Requirements and obligations for all organisations, whether in the public or private sector, should be streamlined. If government bodies continue to be excluded from the operation of the EOWW Act, a review should be conducted to ensure that State and Federal Governments are subject to requirements at least as strong as those imposed on the private sector.

Recommendation 2:

The coverage of the EOWW Act should be extended to businesses with more than 15 employees and the EOWW Act should be amended to allow for less onerous reporting requirements for small businesses (that is, businesses with more than 15 but less than 100 employees).

Recommendation 3:

The Government should conduct a review of the effectiveness of the self-identification system. Depending on the outcome of that review, the Government should consider the reintroduction of registration and EOWA identification of organisations.

Recommendation 4:

The EOWW Act should be amended to provide greater prescription as to those matters which must be addressed in the workplace programs and should be included within a workplace profile, including outlining the procedures which the employer will utilise to address 'priority issues'.

Recommendation 5:

Employers should be required to ensure that 'priority issues' are developed with the consultation of female employees, and include key anti-discrimination factors such as:

- the number of job vacancies in the workplace attracting women and men;
- the number of training opportunities offered to women and men within the organisation;
- the remuneration provided to women and men for similar services to the organisation;
- the opportunity for women and men to join the union (if applicable); and
- the level of paid maternity or parental leave provided by the organisation.

Recommendation 6:

The EOWW Act should require a timeframe to be included within workplace programs within which 'priority issues' must be addressed.

Recommendation 7:

The Government should extend the role of the EOWA to instigate investigations of non-compliance with workplace programs and extend the parties which are entitled to make a complaint against non-compliance within the EOWW Act.

Recommendation 8:

The EOWW Act should provide for the 'effectiveness' of workplace programs to be measured against notional benchmarks.

Recommendation 9:

The EOWW Act should implement accountability mechanisms to promote employer compliance with workplace programs and setting out the penalties to be applied to an employer who fails to implement or comply with a plan.

Recommendation 10:

As part of the EOWA's functions in section 10 of the EOWW Act, the Director of the EOWA be required to consider whether any recommendations should be made to the Sex Discrimination Commissioner regarding the seeking of equal remuneration orders under section 302 of the FW Act.

Recommendation 11:

As part of the EOWA's functions in section 10 of the EOWW Act, the Director of the EOWA be

required to review modern awards to ensure that the principles of equal remuneration for work of equal or comparable value is reflected in modern awards and to recommend to the Sex Discrimination Commissioner that a review is sought if issues are identified under section 161 of the FW Act.

Recommendation 12:

As part of the EOWA's functions in section 10 of the EOWW Act, the Director of the EOWA be required to make submissions where appropriate to the Minimum Wage Panel of Fair Work Australia in relation to equal remuneration for work of equal or comparable value under section 289 of the FW Act.

Recommendation 13:

Section 13 of the EOWW Act should be amended to:

- require employers to include information regarding any pay gap between men and women in their 'workplace profile';
- require employers to specifically comment on any existing pay gap when identifying equal opportunity issues under the employment matter entitled 'Conditions of Service';
- remove the option for employers to submit confidential reports on the efficacy of measures taken to address equal opportunity issues affecting women in their workplace program; and
- require that all employers submit their reports on their workplace program in the 'Public Report Form' supplied by the EOWA (this Form may need to be amended to take account of the above recommendations).

Recommendation 14:

That all Australian governments adopt a quota system for improving female representation on government-controlled boards.

Recommendation 15:

That all Australian governments develop supportive measures such as child care facilities and further training with the aim of improving women's participation on both government controlled boards and boards of public listed companies.

Recommendation 16:

That a transition period be developed during which public companies are encouraged to reach a target percentage of women on boards, perhaps providing incentives to those companies that reach these targets.

Recommendation 17:

That after this transition period, a review take place to decide whether mandatory quotas should be invoked.

Recommendation 18:

That EOWA be given the function of auditing compliance with workplace programs, and the power to impose penalties for non-compliance with the EOWW Act, and rewards or incentives for compliance:

- (a) Provide rewards and incentives, including public awards, recognition in public sector tendering processes access to state funding or formal recognition on a public register); and
- (b) Provide disincentives such as denying private organisation access to government benefits, publishing a public list of violators of the law, issuing orders for compensation payments or obtaining injunctions preventing them from committing future violations.

Recommendation 19:

The EOWA should not be given the function of handling complaints from employees who feel that their employer is not complying with their EOWW Act obligations.

Recommendation 20:

The Government should implement recommendations 19-24 contained in the Senate Committee on Legal and Constitutional Affairs' report into the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality.

Recommendation 21:

The EOWA should ensure that its private and public education programs adopt a human rights approach to equality for women in the workplace, including by emphasising systemic and compounded forms of discrimination.

Recommendation 22:

The EOWA should develop more public awareness of its existence and functions (rather than predominately providing education and awareness activities to subscribers). The EOWA could provide more public awareness through mail outs, posters or general advertising/talks.

Recommendation 23:

Tax concessions, subsidies or other incentives should be introduced to enable organisations to implement a workplace program and promote gender equality training and education.

2. International Human Rights Law

2.1 Article 11 of CEDAW

9. Article 11 of CEDAW requires parties to eliminate discrimination in employment so as to ensure that women have the right to work, the right to the same training and employment opportunities as men and the right to receive equal pay for work of equal value. Women must also have access to the same benefits, compensatory schemes, and allowances as men, especially in relation to retirement and incapacity to work.
10. Article 11 further requires that parties prohibit discrimination in the workplace on the basis of marriage, pregnancy and maternity, and introduce paid maternity leave without loss of benefits or career opportunities, and encourage provision of supporting social services to allow parents to combine family obligations with work responsibilities.
11. Article 11 of CEDAW specifically states:

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) 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;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

2.2 Equality under International Human Rights Law

12. CEDAW calls for the elimination of all forms of discrimination against women. Article 1 defines discrimination as:¹

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

13. In addition, Article 2(a) provides that States parties must ensure the practical realisation of the principle of equality.²

14. There are a number of different understandings of equality and non-discrimination. This submission does not attempt to provide a comprehensive study of the various theoretical frameworks.³ However, the HRLRC considers that a basic understanding of the different conceptions of equality and non-discrimination are necessary in order to appreciate the gaps in domestic law in this area. Three dominant models are:

- (a) *formal equality*, which entails gender neutral treatment in all circumstances;⁴
- (b) *equality of opportunity*, which recognises that women do not necessarily have the same experiences as men and should therefore not be treated identically to men in all circumstances;⁵ and

¹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

² *Ibid.*

³ See Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in I. Boerefijn et. al. (eds.). *Temporary Special Measures* (2003) 111.

⁴ Graycar and Morgan, 'Thinking about Equality', 27 *University of New South Wales Law Journal* 833 (2004) at 834, criticise this model because '[h]istorically, women and men have not been treated identically. Treating them exactly the same now may only reinforce the already existing disadvantage of women. This model also has nothing to offer where there is no comparable male experience by which to claim women's right to identical treatment. Nor can it respond to structural disadvantages faced by women.'

- (c) *equality of results*, which focuses on equality of outcomes and requires the transformation of the underlying structures that are the cause of inequality.⁶
15. It is generally acknowledged that each model may contribute to the promotion of equality between women and men and CEDAW itself is informed by more than one model of equality. CEDAW's focus is on eliminating all forms of discrimination against women so that substantive equality, which requires equality in practice and the elimination of the structural causes of inequality, might be achieved.
16. The most authoritative interpretation of CEDAW's object and purpose is contained in General Recommendation No. 25.⁷ In General Recommendation No. 25, the CEDAW Committee describes the three obligations that are central to States parties' efforts to eliminate discrimination as being:⁸
- (a) to ensure that there is no direct or indirect discrimination in their laws and that women are protected against discrimination – committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies;
 - (b) to improve the *de facto* position of women through concrete and effective policies and programs; and
 - (c) to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in the law, and legal and societal structures and institutions.
17. The Australian Government's obligation to ensure non-discrimination and promote equality is also linked to human rights standards beyond those contained in CEDAW. Non-discrimination constitutes a basic and general principle relating to the protection of all human rights.⁹ Both the ICCPR and the ICESCR contain comprehensive prohibitions on discrimination.¹⁰
18. The Human Rights Committee (**HRC**) has stated, in relation to the ICCPR, that:¹¹

⁵ Graycar and Morgan, *ibid* at 835, criticise this model because 'different treatment has more often meant less favourable treatment for women... women can be further disadvantaged because discriminatory practices will be justified by resort to women's differences with men.'

⁶ Fredman, above n 3, 111.

⁷ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30th Session, 2004.

⁸ *Ibid*.

⁹ Human Rights Committee, *General Comment 18, Non-discrimination*, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

¹⁰ ICESCR, art 2(2); ICCPR See also, Committee on Economic, Social and Cultural Right, General Comment No. 16 (2005) *The equal right of men and women to the enjoyment of all economic, social and cultural rights*, E/C.12/2005/4, 11 August 2005.

¹¹ Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) [3]

State parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions both in the public and the private sector which impair the equal enjoyment of rights.

19. In summary, the equality provisions in CEDAW and the other international human rights instruments to which Australia is a party require:
- (a) the elimination of *systemic discrimination* to achieve *substantive equality*;
 - (b) *positive steps* to achieve equality;
 - (c) the adoption of *temporary special measures* where appropriate;
 - (d) recognition of *compounded forms* of discrimination; and
 - (e) the implementation of effective mechanisms to promote *remedies* and *accountability*.

Each of these concepts is discussed in more detail below.

2.3 Systemic Discrimination and Substantive Equality

20. Article 5(a) of CEDAW commits States parties to:
modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.
21. This requirement of substantive equality is also reflected throughout CEDAW, including in the preamble and in articles 1-5 and 24. The Committee on Economic, Social and Cultural Rights (**CESCR**) has explained that substantive equality, 'is concerned, in addition [to formal equality], with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.'¹²
22. In order to achieve substantive equality, States parties must eliminate systemic discrimination, or those forms of discrimination that have become institutionalised in laws, policies, practices and social structures. As the CEDAW Committee has explained:¹³

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and *measures adopted towards a real transformation of opportunities, institutions and systems* so that they are no longer grounded in historically determined male paradigms of power and life patterns [emphasis added].

¹² CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) at para 7.

¹³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, above n 7, at para 10 [emphasis added].

23. Systemic discrimination refers to practices which are absorbed into institutions and social structures, including the law, and which have a discriminatory effect. In commentary on the significance of CEDAW for the elimination of structural gender discrimination, Rikki Holtmaat states that:¹⁴
- The concept of structural gender discrimination refers to those forms of discrimination that are a consequence of the fact that the structure or organisation of society is built on gender stereotypes, hence ensuring that existing unequal power relations between the sexes are sustained.
24. Overall, the ideal of equality cannot be realised without effective measures designed to identify and address systemic discrimination. Such measures should include legislative, educative, financial, regulatory, investigative, social and administrative measures.

2.4 Positive Obligations

25. The legal obligation of non-discrimination is both negative and positive in nature.¹⁵ In order to comply with their legal obligations under article 2(2) of CEDAW, States parties must do more than merely refrain from discriminating against individuals and/or groups. They must also take positive steps (e.g. legislative, judicial and administrative measures) to protect and fulfil the right to non-discrimination, and guarantee substantive equality.¹⁶
26. In its General Comment No 1, the ICESCR Committee notes that an initial step towards the realisation of Covenant rights requires States parties to identify disadvantaged sectors of society, and undertake targeted positive state action aimed at securing the full realisation of their rights.¹⁷
27. In addition, article 26 of the ICCPR imposes a positive obligation on State parties to take steps to protect against discrimination. The HRC has stated that when certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee

¹⁴ R Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (Research undertaken for the Ministry of Social Affairs and Employment in the Netherlands) (May 2004) xii.

¹⁵ See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc. E/CN.12/2005/4 (2005), at paras 18-21; Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para 6-8; Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994), at para 5

¹⁶ See, e.g., *Yilmaz-Dogan v. The Netherlands*, CERD, Communication No. 1/1984, U.N. Doc. CERD/C/36/D/1/1984 (1988) (CERD); *Nachova v. Bulgaria*, Appl. Nos. 45377/98 and 43579/98, (European Court of Human Rights, Grand Chamber, 2005); *Moldovan v. Romania*, Appl Nos. 41139/98 and 64320/01 (European Court of Human Rights, 2005). See also Bob Hepple, 'Positive Obligations to Ensure Equality,' (2006) 15 INTERRIGHTS *Bulletin* 114.

¹⁷ International Women's Rights Action Watch Asia Pacific, 'Addressing Intersectional Discrimination with Temporary Special Measures', Occasional Papers Series, No. 8, p. 21, available at: <http://www.iwraw-ap.org/aboutus/pdf/OPSVIII.pdf>

true equality.¹⁸ In its General Comment No. 26 on *The Equality of Rights between Men and Women*, the HRC stated that:¹⁹

States parties must not only adopt measures of protection but also positive measures in all areas so as to achieve the effective and equal empowerment of women.

28. In cases where certain groups have traditionally been subjected to systemic discrimination, State parties are required to adopt temporary special measures (discussed below) or, for example, implement longer term processes, which are designed to achieve systemic reform and ensure future compliance with the right to equality.

2.5 Temporary Special Measures

29. Temporary special measures, also known as 'special measures' or 'affirmative action', are 'positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life'.²⁰ Special measures are temporary in nature and should be discontinued once substantive equality is achieved and sustained for a period of time.²¹

30. The most commonly used types of temporary special measures are training and support, the establishment of targets, preferential treatment and use of quotas. The HRC has previously approved quotas in several of its country reports, such as in relation to India, which now reserves a particular number of seats in elected local bodies for women and members of certain tribes and castes.²²

31. In its General Comment No 16, the HRC confirms that States parties have an obligation to adopt temporary special measures in certain circumstances:²³

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause, or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.

32. The Inter-American Commission on Human Rights has also emphasised that the achievement of equality 'may well require the adoption of special measures of affirmative action'.²⁴

¹⁸ Human Rights Committee, *General Comment 18, Non-discrimination*, above n 9, [10].

¹⁹ Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, above n 11.

²⁰ Rebecca Cook in Ineke Boerefijn et al (eds), 'Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women', Transnational Publishers, New York, 2003, p.119.

²¹ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, above n 7, paras 11 and 20.

²² UN Doc. CCPR/C/79/Add.81 (1997), para 10.

²³ Human Rights Committee, *General Comment No 18, on Non-discrimination*, above n 9, [10].

²⁴ Inter-American Commission on Human Rights, Annual Report 1999, Chapter IV, 'Considerations regarding the compatibility of affirmative action measures designed to promote the political participation

2.6 Compounded Discrimination under International Law

33. CEDAW recognises the need to address compounded discrimination and the CEDAW Committee has stated that:²⁵
- Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.
34. In its 2006 Concluding Observations on Australia, the CEDAW Committee specifically noted the compounded discrimination faced by Indigenous, refugee and minority women and women with disabilities.²⁶
35. The HRC has stated that:²⁷
- Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.
36. The Committee on the Elimination of Racial Discrimination also considered this issue in their General Comment on the gender-related dimensions of racial discrimination, stating:²⁸
- Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination. The Committee believes that its practices in this regard would benefit from developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.

3. ILO Conventions

37. The ILO, being a specialised agency of the United Nations, has a principal role in setting international labour standards through the adoption of conventions and
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of women with the principles of equality and non-discrimination', available from:
<http://www.cidh.org/women/Chapter6.htm>.

²⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, above n 7, [12].

²⁶ Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5.

²⁷ Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, above n 11, [30].

²⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25: Gender related dimensions of racial discrimination*, 20/03/2000.

recommendations that cover a broad spectrum of labour related subjects. The ILO recognises that creating equal opportunity for women in the workplace is the equal responsibility of government and society. The specific needs and circumstances of women must be recognised and measures adopted to ensure that opportunities exist for women's active participation in the workforce. Human beings have the right to pursue their material well-being in conditions of equal opportunity and free from discrimination.²⁹

38. Six ILO Conventions are relevant to issues concerning equal opportunity for women in the workforce. They are:

- (a) C111 Discrimination (Employment and Occupation);
- (b) C100 Equal Remuneration;
- (c) C156 Workers with Family Responsibilities;
- (d) C183 Maternity Protection;
- (e) C175 Part-Time Work; and
- (f) C168 Employment Promotion and Protection Against Unemployment.

Of these, C111, C100 and C156 have been ratified by Australia.

39. Conventions C100 and C111 relate to elimination of discrimination in respect of employment and occupation and are considered so fundamental that they have been included in the eight core conventions enunciated in the Declaration on Fundamental Principles and Rights at Work³⁰ and have been ratified by the majority of member states.

3.1 C111 Discrimination (Employment and Occupation) Convention, 1981 (Discrimination Convention)³¹

40. The Discrimination Convention provides that discrimination constitutes a violation of rights as enunciated by the UDHR. Discrimination includes 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.³²

41. Having ratified the Discrimination Convention, Australia has undertaken to pursue a national policy which promotes equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.³³

42. Consequently, Australia has an obligation to seek cooperation of employers and workers' organisations in promoting acceptance and observance of the policy, to

²⁹ http://www.ilo.org/global/Themes/Equality_and_Discrimination/GenderEquality/lang--en/index.htm

³⁰ Adopted by the ILO in 1998 at the International Labour Conference.

³¹ Convention 111 was adopted by the ILO on 25 June 1958 and ratified by Australia on 15 June 1973.

³² Article 1, C111 Discrimination (Employment and Occupation) Convention, 1981.

³³ Article 2, C111 Discrimination (Employment and Occupation) Convention, 1981.

enact legislation that promotes the policy, and repeal any statutory provisions and instruments that are inconsistent with the policy.³⁴

3.2 C100 Equal Remuneration Convention, 1951 (Remuneration Convention)³⁵

43. The Remuneration Convention is based on the principle that men and women are entitled to equal remuneration for work of equal value. Remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable by the employer arising out of the worker's employment. Equal remuneration for male and female workers for work of equal value refers to rates of remuneration established without discrimination based on sex.³⁶
44. Having ratified the Remuneration Convention, Australia has agreed to promote and ensure the application of the principle of equal remuneration to all workers irrespective of sex. Australia may apply the principle by implementing any combination of national laws and regulations, recognised machinery for wage determination, or collective agreements between employers and workers.

3.3 C156 Workers with Family Responsibilities Convention, 1981 (Family Responsibilities Convention)³⁷

45. The Family Responsibilities Convention is founded in principles aimed at ensuring equality of opportunity and protection against discrimination, applying equally to male and female workers. It acknowledges that the Discrimination Convention does not expressly cover distinctions made on the basis of family responsibilities and that supplementary standards are required to achieve full equality between men and women. The problems facing all workers are aggravated in the case of workers with family responsibilities and the need to improve their conditions must be recognised.
46. Article 1 provides that the 'Convention applies to men and women workers with responsibilities in relation to their dependent children where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity'. The Family Responsibilities Convention extends to carer responsibilities in relation to other immediate family members who clearly need their care or support. These workers are referred to as 'workers with family responsibilities'.
47. Article 3 provides that the object of the Family Responsibilities Convention is to create effective equality of opportunity and treatment for male and female workers. Each member shall aim to create policy that enables individuals with family responsibilities to engage in employment or exercise their right to do so without being subject to discrimination and where possible without conflict between their employment and family responsibilities. Discrimination is taken to have the same meaning as in the Discrimination Convention.

³⁴ Article 3, C111 Discrimination (Employment and Occupation) Convention, 1981.

³⁵ Convention 100 was adopted by the ILO on 29 June 1951 and ratified by Australia on 10 December 1974.

³⁶ Article 1, C100 Equal Remuneration Convention, 1951.

³⁷ Convention 156 was adopted by the ILO on 23 June 1981 and ratified by Australia on 30 March 1990.

48. Having ratified the Family Responsibilities Convention, Australia has agreed to create equality of opportunity and treatment by introducing policy measures that enable workers with family responsibilities to exercise their right to free choice of employment and to take account of their needs in terms and conditions of employment.³⁸ The needs of these workers are to be considered in community planning and development and in respect of community services such as child-care and family services and facilities.³⁹
49. Accordingly, Australia must take measures to enable workers with such responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities.⁴⁰

3.4 Other Relevant Conventions not Ratified by Australia

50. The Conventions on Maternity Protection,⁴¹ Part-Time Work⁴² and Employment Promotion and Protection against Unemployment⁴³ are inter-related Conventions that touch upon the protection of opportunity of employment for women whose working lives may be interrupted by maternity and family responsibilities.
51. The Convention for Maternity Protection recognises that the need to provide protection for pregnancy is a shared responsibility of government and society. The object of the Convention for Maternity Protection is to promote equality of all women in the workforce by providing paid maternity leave and conditions for employment protection. The Convention for Maternity Protection prohibits termination of employment of a woman on grounds of pregnancy or nursing, and guarantees the woman's right to return to the same position or an equivalent position paid at the same rate, at the end of maternity leave.⁴⁴
52. Women are more likely to seek part-time work in order to balance their carer responsibilities. The Convention for Part-Time Work recognises the importance of productive and freely chosen employment for all workers as well as the economic and social importance of part-time work. Its object is to ensure that part-time workers enjoy the same rights as full-time workers.
53. The Convention on Employment Promotion and Protection against Unemployment provides broad based protections against unemployment, including the provision of special programs for women disadvantaged with respect to long term employment. It emphasises the importance of work and productive employment in any society as creating resources for the community, bringing income to workers, and the feeling of self-esteem and social connection which workers derive.

³⁸ Article 4, C156 Workers with Family Responsibilities Convention, 1981.

³⁹ Article 5, C156 Workers with Family Responsibilities Convention, 1981.

⁴⁰ Article 7, C156 Workers with Family Responsibilities Convention, 1981.

⁴¹ C183 Maternity Protection Convention, 2000,

⁴² C175 Part-Time Work Convention, 1994.

⁴³ C168 Employment Promotion and Protection against Unemployment, 1988.

⁴⁴ Article 8, C183 Maternity Protection Convention, 2000.

4. Reform of the Sex Discrimination Act

4.1 Senate Committee Inquiry into the *Sex Discrimination Act 1984* (Cth)

54. In December 2008 the Senate Committee on Legal and Constitutional Affairs released a major report on the *Sex Discrimination Act 1984 (SDA)*. The Report recommends a transformation in the way our laws deal with discrimination and promote gender equality.
55. The Senate Committee made a range of recommendations, including:
- (a) broadening the prohibition of discrimination on the grounds of family responsibilities and imposing a positive duty on employers to reasonably accommodate requests for flexible working arrangements;⁴⁵ and
 - (b) amending the SDA or the EOWW Act to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.⁴⁶
56. The Senate Committee recognised that:
- there is a clear need to strengthen the positive obligations to eliminate discrimination imposed by the EOWW Act. Legislation aimed at promoting equal opportunity for women in the workplace should require something more than the development of a program and reporting on that program: it should require progress. In the Committee's view, it would be worthwhile considering the creation of broad positive duties:
- to promote equality and remove discrimination
 - to take reasonable steps to avoid sexual harassment.
- In particular, the positive duties under the *Equality Act 2006 (UK)* may provide a useful model which could be adopted and applied either to public sector organisations or to both the public and private sector.
57. The Senate Committee's recommendations draw heavily on Australia's international human rights obligations and recognise the need to eliminate systemic discrimination and promote substantive equality. The recommendations contained in this submission acknowledge and complement those contained in the Senate Committee's report.

⁴⁵ Legal and Constitutional Affairs, Senate Committee Report into the Effectiveness of the *Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008), recommendation 14.

⁴⁶ *Ibid.*, recommendation 40.

5. Coverage of the EOWW Act

5.1 Current scope

58. The EOWW Act applies to universities, non-government schools, group training organisations, community organisations and private sector employers with more than 100 employees. These organisations are collectively known as 'reporting organisations'. The identification of reporting organisations is largely based on 'self-identification' and disclosure by such organisations.
59. The obligations imposed by the EOWW Act, such as the implementation of workplace programs and reporting, apply only to what are defined as 'relevant employers'. Under section 3 of the EOWW Act, 'relevant employer' means:
- (a) a higher education institution that is an employer;
 - (b) a natural person, or a body or association (whether incorporated or not) being the employer of 100 or more employees in Australia, but does not include the Commonwealth, a State, a Territory or an 'authority'.
- 'Authority' is defined as:
- (a) a body (whether incorporated or not) established for a public purpose or under a law of the Commonwealth or of a State or Territory;
 - (b) the holder of an office established for a public purpose by or under a law of the Commonwealth or of a State or Territory; and
 - (c) an incorporated company over which the Commonwealth or a State or Territory is in a position to exercise control.
- Accordingly, Commonwealth, State and Territory departments and authorities are specifically excluded from the application of the EOWW Act.
60. It is also worthwhile to note that the EOWW Act does not include equity partners in professional firms or non-executive board members of companies as 'employees', meaning that employment outcomes for women in these positions are not necessarily captured in workplace programs or organisational reporting.
61. If at any time, a reporting organisation ceases to meet the criteria set out in section 3 of the EOWW Act because the number of employees falls below 100, the EOWW Act is deemed to continue to apply unless and until the number of employees falls below 80.

5.2 Exclusion of State and Commonwealth Employers

62. State and Commonwealth bodies are specifically excluded from the operation of the EOWW Act, which significantly reduces the number of reporting organisations under the Act. However, equal employment opportunity for State and Commonwealth bodies is regulated by specific tailored legislation. The *Public Service Act 1999* (Cth) regulates equal employment opportunity for Federal Government bodies and the Act is administered by the Australian Public Service Commission. The Australian Public

Service Commission releases an annual report which reflects the status of employment equity for women in the Australian Public Service.

63. In Victoria, equal employment standards are regulated by the *Public Administration Act 2004* (Vic). Under that Act, 'Public sector body heads must establish employment processes that will ensure that....equal employment opportunity is provided'. Standards and guidelines on equal employment opportunity have been issued by The Public Sector Standards Commissioner in accordance with section 66(2) of that Act.
64. Accordingly, whilst the Federal Government previously identified the need for all employers, whether in the public or private sector, to conform to the principles of equal opportunity in employment,⁴⁷ this is achieved in the public sector not under the EOWW Act, but through the development of the specific legislation which applies to State and Commonwealth government employers.
65. The promotion of equal of opportunity for women in the workplace would be enhanced if the requirements and obligations for all organisations, whether in the public or private sector, were streamlined. At present, there are significant differences between the requirements imposed not only on the public and private sector, but also the public sector in different jurisdictions. There is also an argument, that as the government acts as a role model for best practice to other organisations, that more stringent requirements be imposed. In order to facilitate this, it is suggested that as a minimum, the same standards should be imposed across all employers.

Recommendation 1:

Requirements and obligations for all organisations, whether in the public or private sector, should be streamlined. If government bodies continue to be excluded from the operation of the EOWW Act, a review should be conducted to ensure that State and Federal Governments are subject to requirements at least as strong as those imposed on the private sector.

5.3 Extending the Coverage of the EOWW Act - Application to Small Business

66. As noted above, the EOWW Act applies to all private sector employees with 100 or more employees, all higher education institutions, group training schemes, trade unions, non-government schools and community organisations. In a submission by the Equal Opportunity for Women in the Workplace Agency to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the SDA, it was recognised that a significant number of women work in smaller businesses. It was also identified that discrimination is an issue in businesses of any size.
67. For over a decade, there has been ongoing debate as to whether the EOWW Act employee threshold should be lowered to include small businesses. The HRLRC considers that the current coverage of the EOWW Act limits its effectiveness, as discrimination is clearly an issue in any sized business.

⁴⁷ Second Reading Speech, *Affirmative Action (Equal Opportunity for Women) Bill 198*, 19 February 1986, House of Representatives

68. The HRLRC recognises, however, that an extension to the coverage of the EOWW Act must be balanced with the burden that such reporting obligations will have on businesses with less than 100 employees. The HRLRC considers, however, that this can be overcome by tailoring reporting obligations to avoid placing a disproportionate burden on businesses with less than 100 employees.
69. It is therefore recommended that the threshold be reduced so that the provisions of the EOWW Act apply to businesses with 15 or more employees. This will bring the EOWW Act in line with the provisions of the *Fair Work Act 2009* (Cth). Section 23(1) of the *Fair Work Act 2009* (Cth) defines a small business employer as:
- A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.
70. Furthermore, in order to balance the need for a wider coverage of the EOWW Act and the burden of the reporting requirements on small businesses, it is recommended the EOWW Act be amended to allow for different reporting requirements for small businesses (that is, businesses with more than 15 but less than 100 employees). For example, the EOWW Act could be amended to require small businesses to report every two years instead of every year.

Recommendation 2:

The coverage of the EOWW Act should be extended to businesses with more than 15 employees and the EOWW Act should be amended to allow for less onerous reporting requirements for small businesses (that is, businesses with more than 15 but less than 100 employees).

5.4 Self Identification and Disclosure

71. Under the EOWW Act, organisations are required to self-identify as 'relevant employers' for the purpose of implementing workplace programs and reporting obligations.
72. In 1999, a review of the EOWW Act (formerly Affirmative Action (Equal Opportunity for Women) Act 1986) was conducted (**1999 Review**). During the 1999 Review, it was identified that the number of organisations that do, in fact, report to the Equal Opportunity for Women Agency (**EOWA**) (some 3,000) is significantly below the number of organisations that should report under the EOWW Act.
73. Prior to the 1999 Review and resulting amendments, the majority of organisations covered by the EOWW Act were identified by the EOWA. After the 1999 Review, the EOWA considered that a system of employer self-identification would be a simpler, more efficient means of determining coverage under the EOWW Act. Under the current EOWW Act, the EOWA works in conjunction with employer organisations, to advertise the requirements of the EOWW Act and the need for organisations to register with EOWA.
74. At the time of preparing this submission, the HRLRC did not have access to statistics which indicate the success of the self-identification system under the EOWW Act.

The suitability of the system of self-identification can only be assessed upon review of such statistics and its efficiency can only be measured once more information is known about the number of employers complying with the EOWW Act and the results of EOWA coverage projects since the 1999 Review.

75. According to the Department of Families, Housing, Community Services and Indigenous Affairs (**FAHCSIA**), as of July 2009, there were 2,890 reporting organisations that submit reports on behalf of a total of 9,333 organisations. The difference in these numbers is because employers can either report on their workplace program individually or report as part of their company group. In the 2007–2008 reporting period, there were 1.2 million female employees covered by reports to the EOWA. A further 80,000 women worked in 154 organisations that did not submit a report in that year as their reporting obligations had been waived. There were a total of 4,930,100 women employed in the Australian workforce in July 2009.
76. Should current statistics suggest that the system of self-identification is not capturing all of the organisations to which the EOWW Act applies, then the implementation of a registration system similar to that which was in place prior to 1999 should be considered. A system which is linked to taxation reporting could be considered so as to ease the burden on the EOWA in having to identify relevant organisations through an independent registration system.

Recommendation 3:

The Government should conduct a review of the effectiveness of the self-identification system. Depending on the outcome of that review, the Government should consider the reintroduction of registration and EOWA identification of organisations.

6. Workplace Programs, Reporting and Compliance

6.1 Workplace Programs

77. Part II of the EOWW Act mandates the creation and implementation of workplace programs.
78. Section 6(1) requires an employer to which the EOWW Act applies to develop and implement a workplace program. A relevant employer must, prior to developing a workplace program, appoint an appropriate person to oversee the development and implementation of the program. An employer must also consult with employees, in particular female employees, where possible.
79. The development of a workplace program depends on the creation of a workplace profile. The EOWW Act does not specify the details to be included in a workplace profile. Instead, the EOWW Act merely states that the workplace profile must relate to the relevant workplace at a specified date not occurring more than 6 months before the start of the period to which the program relates. Once a workplace profile is completed, the employer must identify and analyse the issues relating to employment

matters which need to be addressed in order to improve gender equality in the workplace.

80. The EOWW Act provides little guidance as to what should be included in a workplace program. Section 8(4) of the EOWW Act states that the workplace program must provide for:

- (a) actions to be taken in relation to priority issues identified in the analysis; and
- (b) evaluation of the effectiveness of the actions in achieving equal opportunity for women in the employer's workplace.

No further guidance is provided in this respect by the EOWW Act.

6.2 Reporting Requirements

81. Part IV of the EOWW Act requires employers to prepare a public report on an annual basis that details the outcome of the employer's workplace program. That report must be lodged with the EOWA and is accessible by the public.

82. Provision is made for each public report to contain an evaluation of the effectiveness of the actions of the employer in achieving equal opportunity for women in the employer's workplace. However, section 13(3) enables employers to exclude this evaluation from the public report if it is submitted to the EOWA on a confidential basis.

83. An employer which has prepared and lodged a report for 3 consecutive years is entitled to apply for an exemption from preparing reports (the criteria the EOWA must apply before granting such a waiver is set out in section 13C of the EOWW Act). A failure to prepare and lodge a report may lead the EOWA to name the relevant employer in a report as an employer that has failed to prepare and lodge a report, or to the employer not being eligible to tender for government contracts or industry assistance.⁴⁸

6.3 Benefits and Limitations of the Current Regime

(a) Positive aspects

84. The EOWW Act's requirement to produce workplace programs 'arguably represents best practice in an international comparison.'⁴⁹ Indeed, a positive obligation to develop, implement and continually review workplace programs ensures that employers are aware of, and turn their mind to, the importance of addressing discrimination against women in the workplace on a regular basis. In addition, the current regime ensures that employers not only recognise the issue, but are encouraged to develop practical solutions to monitor and eliminate discrimination against women in the workplace.

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http://www.eowa.gov.au/Reporting_And_Compliance/What_Happens_if_my_Report_does_not_Comply.asp

⁴⁹ Strachan, G (2009) 'Are we getting there? Measuring change at Work', Presentation to the Women and Work Research Group EOWA Roundtable, 4 August 2009, Sydney.

(b) Limitations

85. The current workplace program regime has a number of limitations, including:
- (i) the 'priority issues' in relation to which employers must take action (section 8(4)(a) of the EOWW Act) are not defined, resulting in a possible mismatch between those issues regarded as important by female employees (and, potentially, the public generally) and employers;
 - (ii) employers are not required to measure the effectiveness of their programs against any standardised measure (for example, the standards that should be adhered to by a large multinational organisation as compared with those applicable to a medium sized organisation), arguably limiting the value of the review;
 - (iii) apart from the reporting requirements discussed above, no specific accountability mechanism is entrenched in the EOWW Act to promote compliance with workplace programs (see section 7.5 below); and
 - (iv) the current workplace programs require victims to initiate investigations of non-compliance.

6.4 Content of Workplace Programs

86. The value of workplace programs could be enhanced by amending section 8(4) of the EOWW Act to require 'priority issues' to be developed in consultation with female employees (not just an initial consultation with female employees but actual development of target issues). This would assist in ensuring that workplace programs identify and work to address those issues which are seen as most important to those persons whom the legislation is intended to protect, rather than leaving it to the employer to analyse 'issues' which may not practically assist in the removal of discrimination against women in the workplace.
87. Workplace programs could also be enhanced by requiring employers to include within the 'priority issues' key issues which have been internationally recognised as paramount to ensuring equality in the workplace, including:
- (i) the number of job vacancies in the workplace attracting women and men;
 - (ii) the number of training opportunities offered to women and men within the organisation;
 - (iii) the remuneration provided to women and men for similar services to the organisation;
 - (iv) the opportunity for women and men to join the union (if applicable); and
 - (v) the level of paid maternity or parental leave provided by the organisation (as recommended by the HRLRC in section 8 of this Submission).

88. In addition, the effectiveness of evaluations of workplace programs provided in section 8(4)(b) of the EOWW Act could be enhanced by imposing an obligation on employers to measure their workplace program's achievement of their 'priority issues' and against notional benchmark standards. As the EOWW Act currently stands, employers have discretion as to how their workplace programs are evaluated. This may result in ineffective and incomparable evaluations, or at worst, misleading or meaningless public reports. Evaluations would be more effective, consistent and comparable if the workplace programs were required to be evaluated against notional benchmarking standards including, for example, the use of statistics regarding comparisons of the types of jobs undertaken by women and men in the workplace,⁵⁰ the duration of time men and women hold these positions and the remuneration received by women and men for their positions, to name a few.

6.5 Accountability Mechanisms

89. The EOWW Act fails to impose an accountability mechanism in regards to workplace programs. Although the current regime imposes an obligation to develop and implement workplace programs on the employer, the regime fails to stipulate who will be held accountable for ineffective programs and fails to impose penalties for failure to adhere to workplace program requirements. The development of an accountability mechanism and penalties within the EOWW Act would promote the development of effective workplace programs and overall compliance with the EOWW Act.
90. Under the current workplace program regime, victims are required to initiate investigations of workplace program non-compliance. This reliance on individual complaints is insufficient to respond to discrimination that is systemic in nature. Further, it presupposes that employees have sufficient security, resources and knowledge to lodge a complaint. It would be more effective and appropriate for the EOWA to be responsible for monitoring employer's workplace programs and instigating investigations against employers who fail to comply with workplace program requirements. However, such additional responsibilities would require that additional resources be devoted to the EOWA.

6.6 Improvements to the Regime - Drawing on Approaches Overseas

91. The approach of other jurisdictions around the globe in the pursuit of gender equality in the workplace is diverse.
92. Below is an examination of some of those gender equality regimes containing initiatives that may be of benefit to the regime set out in the EOWW Act.
- (a) Canada - Employment Equity Plans**
93. In Canada, the equivalent to workplace programs in the EOWW Act are 'Employment Equity Plans' under the *Employment Equality Act 1995 (EEA)*.
94. Pursuant to section 10 of the EEA, an Employment Equity Plan must:

⁵⁰ Andrades, Carol (2000) 'Women, Work and Unfinished Business: The Equal Opportunity for Women in the Workplace Act 1999 (Cth)', 13 *AJLL* 171.

- (i) specify the positive policies and practices that are to be instituted in the short term for the hiring, training, promotion and retention of persons in designated groups and for the making of reasonable accommodations for those persons to correct any under-representation;
- (ii) specify the measures to be taken by the employer in the short term for the elimination of any employment barriers;
- (iii) establish a timetable for the implementation of the matters referred to in paragraphs (i) and (ii);
- (iv) where under-representation has been identified, establish short term numerical goals for the hiring and promotion of persons in designated groups in order to increase their representation in each occupational group in the workforce in which under-representation has been identified and set out measures to be taken in each year to meet those goals; and
- (v) set out the longer term goals for increasing the representation of persons in designated groups in the workforce and the strategy for achieving those goals.

(b) United Kingdom - Gender Equality Schemes

- 95. In the UK, the closest equivalent to workplace programs in the EOWW Act is the 'gender equality scheme' required by the *Equality Act 2006 (UK Act)*.
- 96. All public authorities⁵¹ must produce a gender equality scheme in a 3 year time period which outlines how it intends to fulfil the general and specific duties and the gender equality objectives that the authority has identified for meeting the duty.
- 97. While the UK system is similar to the Australian model in a number of respects, it has a more developed and elaborate mechanism for ensuring compliance and accountability. (Please refer to section 10.2). An aggrieved employee under the UK system has a wider array of remedial options available to them, and employers are subject to a greater degree of scrutiny, than in Australia.

(c) South Africa

- 98. The *Employment Equity Act (SA Act)* governs gender equality in the workplace in South Africa. Section 20 of the SA Act requires an employer to prepare and implement an employment equity plan 'which will achieve reasonable progress towards employment equality in that employer's workforce.' Section 20 comprehensively sets out what must be included in the equity plan:
 - (i) the objectives to be achieved for each year of the plan;

⁵¹ Public authorities for this purpose include government departments, local authorities, police services, educational institutions as well as public functions such as procurement. The definition also covers any person or private or voluntary body which exercises functions of a public nature; however, only in relation to the public functions of those bodies. This includes, for example, a private security firm that runs a prison.

- (ii) the affirmative action measures to be implemented;
- (iii) where under-representation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
- (iv) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
- (v) the duration of the plan, which may not be shorter than one year or longer than five years;
- (vi) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
- (vii) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
- (viii) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
- (ix) any other prescribed matter.

99. Section 20 of the SA Act also provides direction as to when a person is suitably qualified for a job and prohibits discrimination on the basis of a lack of relevant experience.
100. An employee or trade union organisation may complain about an alleged contravention of the SA Act. In addition, a designated labour inspector has the power to question employers, and enter and inspect workplaces. A labour inspector may require an employer to provide an undertaking to comply with the Act, or in the absence of receiving such an undertaking impose a compliance order on the employer. The SA Act has quite a comprehensive system providing for the making, hearing and resolution of complaints. It also enumerates the penalties which may be imposed on an employer as a result of that employer's failure to comply with the SA Act.

(d) Sweden

101. The Act on Equality between Women and Men (**Swedish Act**) governs gender equality in the workplace in Sweden. Section 13 of the Swedish Act requires employers to develop and implement a 'plan of action for equality.' The Swedish Act is more prescriptive than the EOWW Act, requiring that the plan for action cover the issues relating to workplace conditions and recruitment set out in sections 4 to 9 of the Swedish Act, in addition to a plan for pay parity in accordance with section 11. The plan must include the measures which the employer plans on implementing to address any issues of inequality relating to workplace conditions and recruitment. An evaluation report assessing the success of those measures is also required.

102. In contrast to the EOWW Act, the Swedish Act contains a more elaborate scheme for ensuring accountability and compliance. It stipulates that an aggrieved employee is entitled to receive damages for discrimination. It makes it clear that the Equal Opportunities Ombudsman is responsible for monitoring compliance with the Swedish Act and the Equal Opportunities Commission is responsible for penalising employers for a failure to comply. A complaint may be made by an employee, the Equal Opportunities Ombudsman or an employee group or union. A penalty may be imposed on an employer even where an employer does not respond to a complaint or fails to attend any required hearings. In addition to being able to impose a fine on an employer, either the Equal Opportunities Ombudsman or Equal Opportunities Commission can issue an order on an employer directing them to implement certain measures within a specified period of time.

6.7 Recommendations

103. An analysis of the approaches of various jurisdictions to the achievement of gender equality in the workplace through the use of equality plans demonstrates some of the weaknesses in the current workplace programs regime under the EOWW Act.

Recommendation 4:

The EOWW Act should be amended to provide greater prescription as to those matters which must be addressed in the workplace programs and should be included within a workplace profile, including outlining the procedures which the employer will utilise to address 'priority issues'.

Recommendation 5:

Employers should be required to ensure that 'priority issues' are developed with the consultation of female employees, and include key anti-discrimination factors such as:

- the number of job vacancies in the workplace attracting women and men;
- the number of training opportunities offered to women and men within the organisation;
- the remuneration provided to women and men for similar services to the organisation;
- the opportunity for women and men to join the union (if applicable); and
- the level of paid maternity or parental leave provided by the organisation.

Recommendation 6:

The EOWW Act should require a timeframe to be included within workplace programs within which 'priority issues' must be addressed.

Recommendation 7:

The Government should extend the role of the EOWA to instigate investigations of non-compliance with workplace programs and extend the parties which are entitled to make a complaint against non-compliance within the EOWW Act.

Recommendation 8:

The EOWW Act should provide for the 'effectiveness' of workplace programs to be measured against notional benchmarks.

Recommendation 9:

The EOWW Act should implement accountability mechanisms to promote employer compliance with workplace programs and setting out the penalties to be applied to an employer who fails to implement or comply with a plan.

7. Pay Parity

7.1 Statistics

104. Pay inequality places women at a considerable disadvantage in Australia. In May 2009, women earned 17.4% less than men on average per week, with the total earnings gap increasing to 35% per week when taking into account part time and casual work.⁵² This gap has increased over the course of the year, mainly due to slower growth in the nominal wages of women compared to men. At the current rate, the average 25 year old male can expect to earn \$2.4 million over the next 40 years, compared to \$1.5 million that the average female can expect to earn.⁵³
105. Part of the reason for this pay inequality is the type of occupations typically undertaken by women. For example, 28% of employed women are based in the clerical and services industry, whereas only 5% are employed as managers and administrators, with a greater proportion of men than women in senior leadership positions.⁵⁴ Cultural based reasons for gender pay inequality include:
- (a) the low value placed on the work women do;
 - (b) the unequal distribution of overtime, discretionary pay allowances and opportunities for promotion; and

⁵² Equal Opportunity for Women in the Workplace Agency, 'Pay equity statistics' (2009).

⁵³ 'She works hard for the money: Australian women and the gender divide' *AMP.NATSEM Income and Wealth Report*, Issue 22 (April 2009).

⁵⁴ *Ibid.*

(c) the lack of investment in women through training and development.⁵⁵

7.2 The Legal Framework

106. Under the *Fair Work Act 2009* (Cth) (**FW Act**), it is unlawful to treat a woman less favourably in the workplace on the basis of her gender.
107. The FW Act recognises the need to ensure that women are not disadvantaged in the workplace. The modern award system commences operation on 1 January 2010 and, together with the National Employment Standards, are designed to form a safety net for Australian workers.
108. The FW Act contains the 'modern award objective'⁵⁶ which provides that in making modern awards, Fair Work Australia must take into account 'the principle of equal remuneration for work of equal or comparable value'.⁵⁷
109. Further, Fair Work Australia must review a modern award if the modern award is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (Cth), which deals with discriminatory industrial instruments.⁵⁸
110. Importantly, the Sex Discrimination Commissioner is entitled to make submissions in the review.⁵⁹
111. Further, the FW Act requires Fair Work Australia to vary a modern award if it breaches any of the requirements of Part II of the SDA.⁶⁰
112. In addition to the equal pay obligations contained in the modern awards provisions of the FW Act, Part 2-7 of the FW Act deals with 'Equal Remuneration'. Section 300 provides: 'This Part allows Fair Work Australia to make orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value'.
113. Fair Work Australia is empowered to make 'equal remuneration orders' to ensure that there will be equal remuneration for work of equal or comparable value.⁶¹ Importantly, not only are employees who will be covered by the order given standing to apply, but the Sex Discrimination Commissioner also has standing to apply.⁶²
114. However, in order to make such an application to Fair Work Australia, the applicant must establish that there is not equal remuneration for work of equal or comparable value.⁶³ If an employer contravenes an equal remuneration order, the employer is in

⁵⁵ Alcoa and Equal Opportunity for Women in the Workplace Agency, 'EOWA Survey on Paid Maternity Leave, Sex-based Harassment and the Gender Pay Gap' (August 2009), 14.

⁵⁶ *Fair Work Act 2009* (Cth) s 134.

⁵⁷ *Fair Work Act 2009* (Cth) s 134(1)(e).

⁵⁸ *Fair Work Act 2009* (Cth) s 161.

⁵⁹ *Fair Work Act 2009* (Cth) s 161(2).

⁶⁰ *Fair Work Act 2009* (Cth) s 161(3).

⁶¹ *Fair Work Act 2009* (Cth) s 302(1).

⁶² *Fair Work Act 2009* (Cth) s 302(3).

⁶³ *Fair Work Act 2009* (Cth) s 302(5).

breach of a civil remedy provision and may face prosecution and the imposition of penalties.⁶⁴

115. Minimum wage setting is another part of the FW Act that considers equal remuneration for work of equal or comparable value. Minimum wages for employees not covered by modern awards are set by the Minimum Wage Panel of Fair Work Australia. One of the factors that Fair Work Australia must consider is 'the principle of equal remuneration for work of equal or comparable value'.⁶⁵
116. Fair Work Australia must ensure that all persons and bodies have a reasonable opportunity to make written submissions for consideration in the review of minimum wages.⁶⁶
117. The interaction between the SDA, the EOWW Act and the FW Act provide a strong legislative framework which can be utilised to ensure equal remuneration for work of equal value. The EOWA and the Sex Discrimination Commissioner need to better utilise the legal mechanisms now available to them, particularly under the FW Act, to reduce the pay inequality margin.

7.3 Problems with Existing Reporting Requirements from a Pay Equity Perspective

(a) No existing requirement to report on pay gaps

118. As it stands, the EOWW Act itself arguably has limited capacity to promote pay equity as between men and women, since it does not specifically require employers to report on gender-based pay gaps.
119. All reports to the EOWA must include a 'workplace profile'.⁶⁷ This workplace profile need not include data regarding remuneration of men and women in a particular workplace. The EOWW Act provides that the workplace profile must contain 'factual information as to the composition of the employer's workforce',⁶⁸ but gives employers considerable discretion as to the sort of factual information to include.
120. The EOWA has issued Compliance Guidelines (**Guidelines**) to assist employers in fulfilling their reporting obligations under the EOWW Act.⁶⁹ The Guidelines suggest that, at a minimum, a workplace profile should state the number of men and women who work at an organisation and the sort of jobs they typically perform.⁷⁰ The Guidelines go on to suggest that an employer may (depending on the nature of their business) wish to include information such as the average salaries of female

⁶⁴ *Fair Work Act 2009* (Cth) s 305.

⁶⁵ *Fair Work Act 2009* (Cth) s 284(1)(d).

⁶⁶ *Fair Work Act 2009* (Cth) s 289(1).

⁶⁷ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 13(2)(a).

⁶⁸ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 3.

⁶⁹ Compliance Guidelines can be accessed at *Equal Opportunity for Women in the Workplace Agency*, <http://www.eowa.gov.au/Reporting_And_Compliance/Complying_with_the_Act/How_to_Comply_with_the_Act/Compliance_Guidelines.asp> (26 September 2009).

⁷⁰ Compliance Guidelines, Ibid 7.

compared to male employees.⁷¹ Reporting on pay is not, however, a requirement of the EOWW Act.

121. The Guidelines also suggest employers should address seven 'employment matters' when identifying the existence of any equal opportunity issues faced by women in their workplace.⁷² One of these employment matters is entitled 'Conditions of Service'. Issues that might be discussed under this heading include rates of remuneration as well as availability of flexible working arrangements and paid parental leave. As employers can (but are not required to) discuss differential rates of remuneration as between men and women under this employment matter, there is a strong possibility employers may fail to adequately address the issue.
122. Research in the United Kingdom suggests that requiring employers to publish detailed information regarding pay differences between men and women (in the form of pay audits) improves transparency and promotes cultural change, by actively encouraging employers to reduce the pay gap between genders.⁷³ Requiring employers to report to the Agency on a gender pay gap within their organisation could increase the EOWW Act's efficacy in promoting pay equity.

(b) Difficulty in comparing progress on pay equity within an organisation

123. Under the EOWW Act, employers must comment on the efficacy of any measures taken in the last reporting year that were aimed at promoting equal opportunity for women in their workplace.⁷⁴ These comments can be included in the public report submitted to the EOWA.⁷⁵ Alternatively, the EOWW Act allows for employers to submit their comments on the efficacy of any measures taken in a confidential report.⁷⁶
124. Confidential reports submitted to the EOWA are, obviously, not publicly available. This restricts the EOWW Act's capacity to promote equal pay for men and women. An employer may repeatedly identify pay inequality as an issue requiring redress in their workplace, but choose to submit a confidential report regarding the efficacy of measures adopted to address this issue in any particular year. If this is the case, it becomes virtually impossible to meaningfully assess whether the employer is progressing on the issue of pay equity from one year to the next.

(c) Difficulty in comparing progress on pay equity between organisations

⁷¹ Ibid.

⁷² Ibid 8.

⁷³ Equality and Human Rights Commission, 'Financial Services Inquiry: Sex discrimination and gender pay gap report of the Equality and Human Rights Commission' (September 2009), 16.

⁷⁴ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss 13(3), 14.

⁷⁵ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 13(3).

⁷⁶ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 14.

125. Employers may choose to fulfil their reporting obligations under the EOWW Act by completing and submitting a 'Public Report Form' supplied by the EOWA.⁷⁷ However, employers are entitled to submit their report in a format of their own creation. This generates obvious problems in comparing the qualitative and quantitative material submitted by different employers on the issue of a pay equity.

7.4 Amending the EOWW Act to more effectively promote pay equity

126. Any amendments to the EOWW Act must balance the need to bring about pay equity with the need to ensure that reporting requirements and sanctions for failure to adequately report are not overly onerous on businesses and enforcement agencies.
127. We make the following recommendations in the belief they are the most effective way of driving cultural change, thereby narrowing the pay gap between men and women in Australia.

Recommendation 10:

As part of the EOWA's functions in section 10 of the EOWW Act, the Director of the EOWA be required to consider whether any recommendations should be made to the Sex Discrimination Commissioner regarding the seeking of equal remuneration orders under section 302 of the FW Act.

Recommendation 11:

As part of the EOWA's functions in section 10 of the EOWW Act, the Director of the EOWA be required to review modern awards to ensure that the principles of equal remuneration for work of equal or comparable value is reflected in modern awards and to recommend to the Sex Discrimination Commissioner that a review is sought if issues are identified under section 161 of the FW Act.

Recommendation 12:

As part of the EOWA's functions in section 10 of the EOWW Act, the Director of the EOWA be required to make submissions where appropriate to the Minimum Wage Panel of Fair Work Australia in relation to equal remuneration for work of equal or comparable value under section 289 of the FW Act.

Recommendation 13:

Section 13 of the EOWW Act should be amended to:

⁷⁷ The Public Report Form can be accessed at *Equal Opportunity for Women in the Workplace Agency*, <http://www.eowa.gov.au/Reporting_And_Compliance/What_do_I_Need_to_Include/Public_Report_Form.asp>..

- require employers to include information regarding any pay gap between men and women in their 'workplace profile';
- require employers to specifically comment on any existing pay gap when identifying equal opportunity issues under the employment matter entitled 'Conditions of Service';
- remove the option for employers to submit confidential reports on the efficacy of measures taken to address equal opportunity issues affecting women in their workplace program; and
- require that all employers submit their reports on their workplace program in the 'Public Report Form' supplied by the EOWA (this Form may need to be amended to take account of the above recommendations).

8. The Role of Men as Fathers and Carers

8.1 Introduction

128. While caring for young children requires a significant amount of attention and time, the division of child care tasks is not equally distributed between men and women. This affects both men and women's experience of being parents and their ability to combine child care with their employment.⁷⁸ Mothers, on average, spend a significantly larger amount of time with their young children as a primary activity (19.6 hours per week) than do their male partners (9.6 hours per week).⁷⁹
129. In the context the pay gap discussed in the previous section,⁸⁰ the absence of statutory parental leave acts to prevents fathers from taking leave to fulfil their portion of child care duties, which inevitably affects women's employment. Relative to comparable countries, Australian mothers have a low level of workforce involvement: in 2000, of Australian women with two or more children, only 43.2 per cent were in the workforce, compared with 81.8 per cent in Sweden and 62.2 per cent in the United Kingdom.⁸¹
130. Issues around parental leave are considered in detail in the Productivity Commission's inquiry into Paid Maternity, Paternity and Parental Leave which was publicly released in 12 May 2009.⁸²

⁷⁸ AHRC, 2005, *Striking the Balance: women, men, work and family*, Chapter 3 'Australian families and unpaid work', 32.

⁷⁹ Ibid.

⁸⁰ Assuming that the earnings of each partner are a factor that is taking into account when deciding who will give up full time work to take on caring responsibilities.

⁸¹ AHRC, 2005, *Striking the Balance: women, men, work and family*, Chapter 2 'Australian families and paid work', 14.

⁸² Available at <http://www.pc.gov.au/projects/inquiry/parentalsupport>

8.2 Statutory Paternity Leave - Current Australian Leave Policy

131. There is currently no general entitlement to statutory paid maternity or paternity leave in Australia. Australia has statutory entitlement to 52 weeks unpaid parental leave that can be shared between a mother and her spouse.⁸³
132. The portion of this parental leave entitlement taken by a man when his spouse gives birth is referred in the legislation as 'paternity leave' (up to one week at the time of the birth) and 'long paternity leave' (leave taken as the child's 'primary carer').⁸⁴
133. While short paternity leave can be taken simultaneously with the mother's maternity leave, long paternity leave cannot, and the total period of parental leave shared between the parents cannot exceed 52 weeks.
134. The *Workplace Relations Act* will be replaced by the *Fair Work Act 2009* (Cth), which will commence on 1 January 2010. The parental leave provisions in the *Fair Work Act* will be contained in the National Employment Standards, mainly in section 16. These provisions are on the same terms as those currently in place under the *Workplace Relations Act*.
135. There have been proposals from various organisations such as the Victorian Equal Opportunity & Human Rights Commission's submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave November 2008, which called for fathers (and other eligible partners) to be provided with a two week period of exclusive paternity leave including where the mother is not eligible for statutory paid parental leave.
136. This kind of legislative reform is regarded as significant in the effort to eliminate gender inequity and assist men and women to better balance their paid work and family responsibilities. Currently, the Federal Government is proposing to introduce a new shared, paid parental leave scheme in January 2011.

8.3 Policy Reasons for Paid Statutory Parental Leave

137. A statutory paid parental leave scheme must aim to reflect the dual role that men and women currently play in the areas of family and employment. Especially for women, a balance is crucial between their participation in the work force and their responsibilities of caring for their families. To achieve equality between men and women and, further, to improve the rights of children, there needs to be a social and cultural shift from the traditional notion of viewing men as 'breadwinner'. In this sense, legislative reforms on the policy of a paternity leave or parental leave regime that encompasses men as the equal partners of women in sharing the responsibility of childrearing is crucial for bringing out equal opportunities for women in the workplace.

⁸³ Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100, *International Review of Leave Policies and Related Research 2008*, Section 2 - Country notes on leave policies and research, 2.2 Australia, 121.

⁸⁴ Workplace Relations Act, s 282 - s 297.

8.4 Parental Leave Policies in Other Jurisdictions

138. To accommodate women's rights to equal opportunities in the workplace and men's rights to take a fair part in childrearing, there have been major policy changes on the international level. Some examples of such reform trends are:

- (a) most commonly, increasing entitlements for fathers and/or inducements for fathers to take leave by reinforcement of the non-transferability of the leave reserved for fathers;⁸⁵ and
- (b) increasing flexibility in the use of paternity leave and joint leave.⁸⁶

These trends are explained in more detail below.

139. It is also worth noting that, in many jurisdictions, leave has historically been, and still is, gender-based generally in three ways: some for mothers only, some for parents to divide up as they choose, and some for fathers only⁸⁷. However, the general trend on the international level is a 'gender neutral' approach.

140. Some examples of leave policies in other jurisdictions that Australia may consider adopting are as follows:

- (a) mandatory paternity leave: Portugal most recently has made a period of paternity leave obligatory (i.e. a mandatory legal requirement for men having children);⁸⁸
- (b) positive incentives: moving away from the initial negative incentives of penalising fathers for not taking up leave ('use it or lose it' base), Finland, Germany, Italy and Estonia offer additional benefits if fathers take leave, in particular a 'bonus period' if a certain amount of the basic period of leave is taken, or extra payments (e.g. Portugal and Basque country in Spain);⁸⁹
- (c) general transfer policy: Poland, Spain, Portugal and the UK allow women to pass their unused periods of maternity leave to fathers, either without

⁸⁵ Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100, *International Review of Leave Policies and Related Research 2008*, Section 2 - Country notes on leave policies and research, 2.2 Australia, 18

⁸⁶ Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100, *International Review of Leave Policies and Related Research 2008*, Section 2 - Country notes on leave policies and research, 2.2 Australia, 19

⁸⁷ Peter Moss, Thomas Coram Research Unit, Institute of Education University of London, 'Making parental leave parental: an overview of policies to increase fathers' use of leave', Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100 'International Review of Leave Policies and Related Research 2008', 79.

⁸⁸ Peter Moss, Thomas Coram Research Unit, Institute of Education University of London, 'Making parental leave parental: an overview of policies to increase fathers' use of leave', Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100 'International Review of Leave Policies and Related Research 2008', 80.

⁸⁹ *Ibid.*

requiring exceptional circumstances or in circumstances such as illness or death of mothers;⁹⁰ and

- (d) 'father's quota': Norway and Sweden have paid paternity leave to be used at the time of birth up to 14 or 10 days (respectively), and a further six weeks or 60 days (respectively) of 'father's quota', which is a part of the total parental leave that only fathers can use.⁹¹
141. The latest trend abolishes the idea of separate types of leave - maternity, paternity and parental - for a single period of post-natal leave, for fathers and parents to share as they choose.⁹²
142. Iceland is leading this trend by recently introducing nine months paid (at 80 per cent of earnings up to a ceiling) 'birth leave': three months for the mother, three months for the father and three months for the 'family' (3+3+3 Scheme). The law does not make any distinction between different types of leave taken by mothers and fathers.
143. Generally, as it is the case with the *Workplace Relations Act 1996* (Cth) in Australia, parental leave in other jurisdictions is addressed in the Acts that regulate employment and social welfare. Alternatively, in certain jurisdictions such as Denmark, for example, leave policy with regards to childbirth and childrearing comes under the *Act on Equal Treatment of Men and Women* but is administered by the Ministry of Labour.⁹³ In Norway, the *Work Environment Act 2005* is the primary legislation on parental leave, and the Ministry of Labour and Social Inclusion is the responsible body.⁹⁴ In the UK, the *Work and Families Act 2006* provides for statutory maternity and paternity pay and leave as well as a right to request flexible working conditions.
144. In summary, as Australia's parental leave policy on the Federal level is currently addressed under the WR Act and further future reforms to the same Act with regards to paid parental leave are being considered, there may be no further need to add to the EOWW Act similar provisions on the role of men as fathers and carers, without risking the provisions being general or abstract.

⁹⁰ Ibid.

⁹¹ Peter Moss, Thomas Coram Research Unit, Institute of Education University of London, 'Making parental leave parental: an overview of policies to increase fathers' use of leave', Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100 'International Review of Leave Policies and Related Research 2008', 100.

⁹² Peter Moss, Thomas Coram Research Unit, Institute of Education University of London, 'Making parental leave parental: an overview of policies to increase fathers' use of leave', Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100 'International Review of Leave Policies and Related Research 2008', 80.

⁹³ Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100, *International Review of Leave Policies and Related Research 2008*, Section 2 - Country notes on leave policies and research, 2.2 Australia, 171.

⁹⁴ Department for Business Enterprise & Regulatory Reform (the United Kingdom), Employment Market Analysis and Research, Employment Relations Research Series No. 100, *International Review of Leave Policies and Related Research 2008*, Section 2 - Country notes on leave policies and research, 2.2 Australia, 270.

145. While acknowledging and promoting the role of men as fathers and carers is crucial, and legislative reforms to better accommodate this purpose are needed, insertion of additional or separate provisions on paternity leave in the EOWW Act is not recommended in the presence of the WR Act, especially when reforms on statutory parental leave for men are not just for the equal opportunities for women, but also about men's rights as parents. In that sense, the EOWW Act is relevant, but an inappropriate Act to give Australian men legal rights on paid parental leave. However, the HRLRC submits that the EOWW Act be amended to require employers to include the level of paid maternity and paternity leave provided by the employer as a 'priority issue' in its workplace program.
146. It is beyond the scope of this review to consider the adequacy of the WR Act in this area.

9. Temporary Special Measures

9.1 Introduction

147. As discussed in Section 2.4 of this Submission, temporary special measures are measures that provide for positive action or preferential treatment with the aim of accelerating changes 'necessary to correct past and present forms and effects of discrimination', in this case against women.⁹⁵ These measures have included quota systems as a means of advancing women's integration into education, economy, politics and employment.

9.2 Quotas

148. The introduction of quotas is a type of temporary special measure that requires an organisation to hire or promote a fixed number of women during a given period for the purpose of achieving substantive equality.⁹⁶ The implementation of quotas has been criticised as implying that women are employed or promoted purely because of their gender, and not because of their qualifications. Moreover, it has been said to discriminate against men, as women are given preference for certain roles. However, proponents of the use of quotas argue that quotas for women do not discriminate, but rather they compensate for the actual barriers that prevent women from being represented in these positions.⁹⁷
149. Research indicates that women are less likely than men to occupy leadership positions within organisations. Statistics show that in the ASX200 only 10.7% of

⁹⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, above n 7.

⁹⁶ J. O'Brien, 'Affirmative Action, Special Measures and the Sex Discrimination Act', (2004) 27(3) *University of New South Wales Law Journal* 840

⁹⁷ Speech by Elizabeth Broderick (Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination) on 2 September 2009 found at: http://www.AHRC.gov.au/about/media/speeches/sex_discrim/2009/20090902_merit.html

executive managers are women and only 10% of board directors are women. In the ASX200 there are 49 male CEO's for every female CEO.⁹⁸

150. These disparate statistics are thought to be caused by various challenges women face in reaching (and then sustaining) senior leadership roles in the corporate sector.⁹⁹ A report commissioned by the Equal Opportunity for Women in the Workplace Agency released in November 2008, provides:¹⁰⁰

...at all stages of a woman board director's career from being selected from the talent pool to appointment to the board and finally, their experiences once serving as a board director...[they] face negative generalisations regarding their skills, abilities and potential to contribute as business leaders; contradictory criticisms about their behaviour in the boardroom and approach to decision making; and boardroom dynamics that strongly indicate that the boys' club prevails, perpetuating their exclusion.

151. This suggests that although women are afforded formal equality in the workplace, meaning that on the face of things women are treated equally to men, indirect and systemic discrimination is still rife. Indirect discrimination may occur when 'laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual affect have a detrimental impact on women'.¹⁰¹ Real equal opportunity does not exist simply because formal barriers have been removed. A complex pattern of hidden barriers and deeply engrained societal expectations and subconscious prejudices may prevent women from being represented equally in the workplace. Temporary Special Measures can be a means towards ensuring equality in substance as opposed to merely equality in form.

9.3 Mandatory Quotas

152. The EOWW Act does not currently impose any mandatory quotas or targets on employers.
153. The process of requiring employers to regularly review and analyse their workplace practices means that employers will identify any gender-imbalances in their organisation, generating awareness of discrimination. However, as discussed in section 6 of this Submission, the process and scope of programs used by employers as a means of countering any gender-imbalances is largely discretionary. Some minimum requirements for these programs may be useful in approaching the issue of gender discrimination in the workplace more fulsomely. As it stands, the EOWW Act

⁹⁸ Equal Opportunity for Women in the Workplace Agency (2008), EOWA Australian Census of Women in Leadership.

⁹⁹ Equal Opportunity for Women in the Workplace Agency and Egon Zehnder International, *Agender in the Boardroom - Executive Summary* (2008).

¹⁰⁰ Equal Opportunity for Women in the Workplace Agency and Egon Zehnder International, *Agender in the Boardroom - Executive Summary* (2008).

¹⁰¹ General Recommendation No 25 on Article 4 paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women on temporary special measures, Committee on the Elimination of Discrimination against Women, Thirtieth Session (12 - 30 January 2004).

seems to address inequality issues in the abstract rather than in a more practical and head on manner.

154. Further, the consequences for failing to comply with the EOWW Act reporting requirements (being named in the EOWA report to the Minister) do not amount to a real commercial incentive driving employers to comply.
155. The Australian Government has said that it does not support the use of quotas.¹⁰²

9.4 Use of Quotas in Other Jurisdictions

(a) Canada

156. There are a number of legislative initiatives in Canada which address the implementation of Temporary Special Measures as a means of gaining an equality of female and male representation in the workplace. These are examined below:

(i) Canadian *Human Rights Act* (CHR Act)

157. Pursuant to Section 16(1) of the CHR Act it is not discriminatory for a person to adopt or carry out a special program designed to prevent, eliminate or reduce disadvantages related to discrimination that are likely to be suffered by any group of individuals by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.
158. This provision is *permissive*: a special program *may* be implemented to ameliorate disadvantage.¹⁰³ It does not impose a positive obligation for a special program to be implemented.
159. Section 16(2) of the CHR Act empowers the Canadian Human Rights Commission (CHRC) to 'make general recommendations' regarding special programs. In its [policy statement] the CHRC discusses a variety of measures that can be adopted to advance equality, including 'positive management and hiring practices', flexible work hours, parental leave policies, improving workplace accessibility, and sensitivity training. Another option may include 'deciding that, for a limited period of time, the applications of 'qualified'...candidates from under-represented groups will be given careful consideration for a certain percentage of new openings.'¹⁰⁴

(ii) Canadian Charter of Rights and Freedoms

160. Section 15(2) of the Canadian Charter of Rights and Freedoms counteracts the argument that special measures are discriminative towards men, providing that equality provisions do not:

preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of...sex.

¹⁰² CEDAW NGO Report for Australia (July 2009). See: <http://www.ywca.org.au/pdfs/FINAL-CEDAW-NGO-Report-Australia-July09.pdf> at page 13.

¹⁰³ http://www.chrc-ccdp.ca/legislation_policies/special_programs-en.asp

¹⁰⁴ http://www.chrc-ccdp.ca/publications/chapter_862_chapitre-en.asp#861

(iii) *Employment Equity Act 1995 (Canada) (EEA)*

161. The EEA provides a *positive obligation* on employers to address any under representation of women in the workforce. In contrast to the CHR Act, under the EEA employers *must* implement practices that can ensure progress towards the full representation of women.
162. Section 5 of the EEA requires employers to institute 'positive policies and practices'. These practices are specifically aimed at ensuring that designated groups achieve a:
- (a) degree of representation in each occupational group in the employer's workforce that reflects their representation in the Canadian workforce, or
 - (b) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.
163. The Employment Equity Regulations made under the EEA reiterate that an employer is to conduct an analysis to identify and determine the degree of any under representation.¹⁰⁵ If so identified the employer shall conduct a review of its employment systems, policies and practices (e.g. with regard to recruitment, selection and hiring, promotion, retention and termination) in order to determine whether any systems and practices constitute an employment barrier.¹⁰⁶ Any such barriers must be eliminated via Employment Plans.
164. To aid in the interpretation of these legislative provisions, Canadian courts have provided the following principles to which special programs are to adhere in order to be consistent with underlying human rights principles:¹⁰⁷
- (a) a special program must advance equality - 'Inherent in the notion of a special program is the idea that in the pursuit of equality it may be necessary to treat individuals or groups differently in order to establish 'substantive equality';'
 - (b) a special program must address genuine disadvantage;
 - (c) a special program must be tailored to meet the actual needs of the disadvantaged group;
 - (d) the impact of the special program on third parties must be considered;
 - (e) special programs must be proportional to the degree of under-representation or disadvantage; and
 - (f) special programs are temporary.
165. Special programs can be implemented either at the discretion of the employer or by the direction of the CHRC or from a Tribunal order issued by the Employment Equity

¹⁰⁵ Employment Equity Regulations, r 6(1); document attached.

¹⁰⁶ Employment Equity Regulations, rr 8-9.

¹⁰⁷ Provided by the CHRC, see http://www.chrc-ccdp.ca/legislation_policies/special_programs-en.asp

Review Tribunal (ss 28-32, EEA). Where special programs are implemented by an employer at their discretion there is no explicit provision prohibiting the use of quotas. Presumably, quotas can be used in these circumstances. However, in situations where a special program is instigated through a direction or order, legislation specifically precludes the imposition of quotas as discussed below.

166. The CHRC may not give a direction and no Tribunal may make an order where that direction or order may cause undue hardship on an employer; require an employer to hire or promote persons who do not meet the essential qualifications for the work concerned; with respect to the public sector, require an employer to hire or promote persons without basing the hiring or promotion on merit; or impose a quota on an employer.

(b) Norway

167. Since 2003 the Norwegian Government has systematically introduced legislation requiring 40% female representation on boards.¹⁰⁸ The first of this program phase applied to state-owned and inter-municipal companies. The second phase applied to the top 500 publicly listed companies. There was a 2 year transition period in each case. Companies that were not yet registered had to fulfil the requirement as a prerequisite to registration.

168. The relevant legislation provides that both sexes must be represented on company boards. It provides that:
- (i) if the board has two or three members, both sexes must be represented;
 - (ii) if the board has four or five members, each sex shall be represented by at least two representatives;
 - (iii) if the board has six to eight members, each sex shall be represented by at least three representatives;
 - (iv) if the board has nine members, each sex shall be represented by at least four representatives, and if the board has more than nine members, each sex must make up at least 40 per cent of the representatives.

169. The legislation enables courts to dissolve companies that do not reach the quotas by the end of the transition period. Before a company may be dissolved, it must first receive two warnings, each providing a four week notice to comply with the rules. The second warning is publicly announced. Given the severe consequences of non-compliance, targets were achieved by the vast majority of companies within the two year period.¹⁰⁹

¹⁰⁸ Gender Equality Act and Public Limited Companies Act

¹⁰⁹ See: <http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-on-compan.html?id=416864>

(c) Germany

170. The *German Advancement of Women Act 1994 (GAW Act)* aims to reconcile the pressures of family and career for women employed by Federal administrative bodies and Federal courts by promoting a numerical increase of women in areas where women are under-represented.
171. Section 7 of the GAW Act requires the department¹¹⁰ to actively increase the number of women in appointments and promotions where there are smaller numbers of women than men. While there is no specific quota, it is a positive and mandatory obligation on employers to increase numbers of women in the workplace. The GAW Act explicitly states that absences due to family obligations may not negatively influence the assessment of the suitability of employees (men and women).
172. Section 8 of the GAW Act contemplates another type of Temporary Special Measure, requiring departments to encourage further training for skills necessary to undertake senior and management roles targeted at women. In developing and organising these training programmes consideration must be given to people with family responsibilities in order that they may take part in further training programmes. This may mean scheduling the training at a time where a partner can look after the child, or alternatively childcare facilities shall be made available.

(d) United Kingdom

(i) Treaty of Amsterdam 1999

173. This treaty recognises that affirmative action (i.e. temporary special measures) may be necessary to achieve real equality of opportunity and overcome deeply engrained forms of discrimination. Moreover, it provides that affirmative action may be legal (if it is to achieve a certain purpose, namely overcome discrimination).

(ii) *Equality Act 2006*

174. The *Equality Act 2006* amended the *Sex Discrimination Act 1975* to include a positive duty on public authorities to have 'due regard' in the exercise of their functions to:
- (a) eliminate discrimination and harassment that is unlawful under the *Sex Discrimination Act 1975*;
 - (b) eliminate discrimination that is unlawful under the *Equal Pay Act 1970*; and
 - (c) promote equality of opportunity between women and men (**'the gender duty'**).
175. The requirement to have 'due regard' means that the weight given to gender equality needs to be in proportion to its relevance to a particular function. The greater the relevance of a function to gender equality, the greater regard which should be paid to it

¹¹⁰ 'Department' is defined in the Act as: 'the individual authorities, administrative offices and operations in the administrations specified in section 1, together with federal courts'. Section 1 specifies that 'administrations' within the meaning of this Act shall include public enterprises managed under federally-owned administration, and other federal public undertakings.'

9.5 Are Quotas Appropriate in the Australian Context?

176. The Australian public, and indeed the Australian government, have not in the past supported the use of quotas in the context of gender equality in the workplace. This is largely due to the prevailing notion that the use of quotas constitutes favourable treatment for women and that this will undermine the principle of employment based on merit. This may occur either by promoting women who are not necessarily the best person for the job but merely because they are female, or by instilling greater prejudice against women in the workplace by creating the impression that they are not there on the basis of merit.¹¹¹ This means that any attempt by the government to introduce a quotas system in Australia would need to address these issues and be presented in such a way as to dispel notions of quotas undermining employment on the basis of merit.
177. Having looked at the different regimes used in other jurisdictions, some observations are made as to how these might be translated into an Australian model.
178. The use of a 'transition phase' would be useful in Australia. This would allow relevant companies or government bodies to prepare for the change. It would give opportunity for an advertising campaign (perhaps suggesting that quotas are not inconsistent with principles of merit) and for any necessary further training.
179. The evidence indicates that mandatory quotas produce a far more effective outcome than permissive quotas. A model specific to Australia, extracting elements from overseas jurisdictions, would need to be developed.

Recommendation 14:

That all Australian governments adopt a quota system for improving female representation on government-controlled boards.

Recommendation 15:

That all Australian governments develop supportive measures such as child care facilities and further training with the aim of improving women's participation on both government controlled boards and boards of public listed companies.

Recommendation 16:

That a transition period be developed during which public companies are encouraged to reach a target percentage of women on boards, perhaps providing incentives to those companies that reach these targets.

¹¹¹ Speech by Elizabeth Broderick (Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination) on 2 September 2009 found at: http://www.AHRC.gov.au/about/media/speeches/sex_discrim/2009/20090902_merit.html

Recommendation 17:

That after this transition period, a review take place to decide whether mandatory quotas should be invoked.

10. Role and Function of the EOWA

10.1 Role of the EOWA

180. The primary role of EOWA is to administer the EOWW Act and to provide information, advice, education and communication to reporting organisations and members of the broader community to achieve equal opportunity for women in the workplace.¹¹²
181. The functions and powers of the EOWA are outlined in section 10 of the EOWW Act, and include:
- (a) to advise and assist employers in the development and implementation of workplace programs;
 - (b) to monitor and evaluate the effectiveness of workplace programs;
 - (c) to undertake research and educational programs for the purpose of promoting equal opportunity for women in the workplace; and
 - (d) to promote understanding and acceptance, and public discussion of equal opportunity for women in the workplace.
182. The EOWA receives annual reports of approximately 3000 organisations on the progress of their workplace programs.¹¹³ These reports are assessed to determine each organisation's compliance with the EOWW Act. The EOWA then provides assistance to employers in developing their workplace program to achieve better outcomes for women and for business.¹¹⁴
183. The EOWA educates and assists employers by:
- (a) providing tools to assist organisations develop an effective workplace program;
 - (b) providing feedback on employers' workplace programs;
 - (c) conducting educational workshops; and

¹¹² Equal Opportunity for Women in the Workplace Agency. Annual Report 2007 - 2008. Commonwealth Government of Australia, p 10.

¹¹³ Equal Opportunity for Women in the Workplace Agency 2009, Commonwealth Government of Australia, viewed 27 September 2009
http://www.eowa.gov.au/About_EOWA/What_is_EOWAs_Role.asp

¹¹⁴ Equal Opportunity for Women in the Workplace Agency 2009, Commonwealth Government of Australia, viewed 27 September 2009
http://www.eowa.gov.au/About_EOWA/What_is_EOWAs_Role.asp

(d) initiating discussions and partnerships with business.¹¹⁵

184. Whilst the EOWA adopts a facilitative and educative approach to ensuring compliance with the EOWW Act, the HRLRC submits that the EOWA's role should be strengthened to better ensure compliance with the EOWW Act and make greater progress towards equality of women in the workplace. For the EOWA to be effective, systematic monitoring and evaluation of all measures aimed at promoting gender equality is required. This may include adopting measures such as the establishment of a system of rewards or incentives, the establishment of a system of penalties or disincentives, an obligation to report, and more punitive measures including fines.¹¹⁶ Whilst some of these measures have been adopted by the EOWA, the experiences of the UK and Canada provide a useful comparison to the array of powers which should be considered in seeking to strengthen the role of the EOWA.
185. This submission does not address the relationship between the EOWA and the Australian Human Rights Commission (**AHRC**). However, we note that there is significant overlap between the functions of the EOWA and those of the AHRC. This overlap is likely to become more pronounced if public the EOWA and AHRC are given a more significant monitoring and auditing roles in their respective fields of operation. If EOWA is to remain separate from the AHRC it will be important that the two bodies maintain close contact and work together in this area.

10.2 UK Experience

186. The legislative framework which provides for equality of opportunity for women in the workplace in the UK is more general than that which exists in Australia. Rather than specific legislative provisions, the UK system relies on broader equality and discrimination provisions to guarantee the position of women in the workplace. In this respect, the *Sex Discrimination Act 1975* (UK) seeks to render unlawful certain kinds of sex discrimination. The objects of equality were expanded by the introduction of the *Sex Discrimination Act 1975*, which established a positive 'gender' duty on public authorities to eliminate discrimination and promote equal opportunity of women in the workplace.¹¹⁷

(a) Gender duty

187. The gender duty means that public bodies must have due regard to the need to eliminate unlawful sex discrimination and harassment, and to promote equality of opportunity between men and women. In England, this requires all listed public bodies to produce a gender equality scheme showing how it intends to fulfil the

¹¹⁵Equal Opportunity for Women in the Workplace Agency 2009, Commonwealth Government of Australia, viewed 27 September 2009
http://www.eowa.gov.au/About_EOWA/What_is_EOWAs_Role.asp

¹¹⁶ United Nations Development Fund for Women 2009, United Nations, viewed 28 September 2009
http://cedaw-seasia.org/docs/Gender_Equality_Laws_Final.pdf

¹¹⁷ Equality and Human Rights Commission 2009, viewed 27 September 2009
<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/introduction-to-the-public-sector-duties/gender-equality-duty/>

general and specific duties.¹¹⁸ Compliance with this duty is monitored by the Equality and Human Rights Commission (EHRC).¹¹⁹

(b) EHRC

188. The EHRC seeks to protect, enforce and promote equality across a number of protected grounds, including age, disability, gender, race, religion and human rights. It does this by enforcing the law, influencing the development of policy, promoting good practice and conducting educational and media campaigns.¹²⁰ Its role may be compared to the Australian Human Rights Commission.
189. The EHRC has broad enforcement powers to ensure compliance with the *Sex Discrimination Act 1975*. These include:
- (a) conducting inquiries on any matter which relates to equality; and
 - (b) entering formal agreement with a person who it believes has committed an unlawful act, and put into place an action plan.
190. In this respect the EHRC has broad authority to investigate any instance where equality is effected. The weakness of such an approach is the lack of focus on equality of women in the workplace, and the potential lack of resources, which may affect enforcement.
191. The EHRC is granted more specific powers in monitoring compliance with the gender duty. This includes:
- (a) issuing compliance notices if it believes a public authority has not complied with its gender duty; and
 - (b) conducting assessments on public authorities to test compliance with the gender duty.
192. Further, if a compliance notice is not fulfilled, the EHRC may apply to the Court for an order to enforce compliance with the notice.¹²¹ This power, in particular, is significantly greater than the role of the EOWA. Even if not acted upon, the potential for legal sanction conveys the importance of ensuring equality for women.

(c) Procurement

193. Similar to the contract compliance policy utilised by the EOWA, the UK government has established a public procurement process. This has been used to ensure that equality issues, including gender pay gaps, are addressed by public sector contractors.

¹¹⁸ Equality and Human Rights Commission 2009, viewed 28 September 2009
<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/introduction-to-the-public-sector-duties/gender-equality-duty/>

¹¹⁹ Ibid.

¹²⁰ Equality and Human Rights Commission 2009, viewed 28 September 2009
<http://www.equalityhumanrights.com/our-job/what-we-do/>

¹²¹ Equality and Human Rights Commission 2009, viewed 28 September 2009
<http://www.equalityhumanrights.com/legislative-framework/enforcement/>

194. This policy is to be extended with the introduction of the *Equality Bill*. The Equality Bill includes a provision enabling Government to use the gender duty to impose specific duties on the procurement activities of contracting authorities.¹²²
195. The role and powers of the EHRC provide an interesting contrast to the system which exists in Australia. The differences may be explained by the existence of the *Human Rights Act 1998* (UK). Particularly, the UK framework focuses on ensuring equality with respect to public organisations, rather than private companies. In this regard reliance is placed on an individual taking action for discrimination rather than oversight by any government authority. This appears somewhat inadequate in seeking to improve equality for women in the workplace.

10.3 Canadian Experience

196. As mentioned above, the CHRC administers the CHR Act and is responsible for ensuring compliance with the EEA. The EEA requires employers to deploy proactive measures to improve the employment opportunities of specific groups, one of which is women. The purpose of the EEA is to ensure that federally regulated employers provide equal opportunities for women in employment. This aims to ensure that no person is denied employment opportunities and benefits for reasons unrelated to ability. It further requires employers to correct disadvantages in the workplace experienced by women.¹²³
197. The CHRC is responsible for ensuring compliance with the EEA Act. To this end, the CHRC conducts audits to determine whether employers meet the statutory requirements of the EEA.

(a) Audit Process

198. The EEA is enforced by the CHRC via a two-stage audit process. The focus of the audit is on determining how effectively the employer has made reasonable progress toward implementing its Employment Equity Plan to reduce under-representation. Assessments are made in part based on documentation provided by the employer and there may be an on-site visit by a Compliance Review Officer. The CHRC representative may interview employees, employee representatives and managers as part of the process for the validation and assessment or analysis of the information provided. The two stages of the audit process are:
- (a) Preliminary assessment phase - the employer is notified of the audit and complete an Audit Questionnaire. A review is conducted to determine whether the employer is in compliance with the EEA. If it is determined that an employer is not in compliance with the EEA, undertakings will be negotiated with the employer to assist in correcting any issues. The undertakings are required to within four months. After this time, if an

¹²² Equality and Human Rights Commission 2009, viewed 28 September 2009 http://www.equalityhumanrights.com/uploaded_files/PSD/25_meeting_the_gender_duty_in_procurement.doc

¹²³ Canadian Human Rights Commission 2009, viewed 28 September 2009 http://www.chrc-ccdp.ca/publications/ee_faq_ee-en.asp

employer is still not in compliance, the CHRC may issue a Direction. The employer must comply with this Direction. If they do not comply with the Direction, the CHRC may refer the employer to the Employment Equity Review Tribunal.¹²⁴

- (b) Progress Assessment Phase - three to five years after the preliminary assessment, a further assessment is conducted and to ensure that the employer continues to meet their audit requirements.

- 199. At the completion of the audit process, an audit report is issued describing the employer's compliance status.¹²⁵
- 200. The EEA requires that the CHRC monitor the performance of employers it has audited through annual reports submitted to Human Resources and Social Development Canada (regarding private sector employers) and to the Public Service Human Resources Management Agency of Canada (regarding public sector employers).¹²⁶
- 201. Such an extensive audit process provides the CHRC with a significant role in ensuring compliance with the EEA. As it is conducted on a random basis, its very existence encourages employers to ensure equality for women in the workplace.

(b) Employment systems review

- 202. An employment systems review is an in-depth assessment - carried out by the employer - of all employment systems, policies and practices and of the manner in which these are implemented, in order to identify barriers to the employment of women. The internal review must cover both formal and informal employment systems, policies and practices and must also include attitudes and behavioural barriers that may be limiting the employment opportunities of designated group members.¹²⁷
- 203. Such a review is required to take place if the employer is to successfully meet the requirements of the audit process. This imposed self-assessment, similar to the conduct of workplace programs, places responsibility for ensuring equality for women in the workplace directly in the hands of the employer. As this forms part of the audit process, conducting the review is critical to avoid sanctions.
- 204. The audit process and consequences for failing to operate in compliance with the EEA, provide the CHRC with significant power to ensure equality for women in the workplace. The risk of review by a Tribunal, coupled with the hassle if non-

¹²⁴ EEA ss28-32

¹²⁵ Canadian Human Rights Commission 2009, viewed 28 September 2009 http://www.chrc-ccdp.ca/employment_equity/audit_process-en.asp

¹²⁶ Canadian Human Rights Commission 2009, viewed 28 September 2009 http://www.chrc-ccdp.ca/publications/ee_faq_ee-en.asp

¹²⁷ Canadian Human Rights Commission 2009, viewed 28 September 2009 http://www.chrc-ccdp.ca/publications/ee_faq_ee-en.asp?highlight=1

compliance with the EEA is established, presents a persuasive reason for employers to ensure that workplace practices ensure equality for women.

Recommendation 18:

That EOWA be given the function of auditing compliance with workplace programs, and the power to impose penalties for non-compliance with the EOWW Act, and rewards or incentives for compliance:

- (a) Provide rewards and incentives, including public awards, recognition in public sector tendering processes access to state funding or formal recognition on a public register); and
- (b) Provide disincentives such as denying private organisation access to government benefits, publishing a public list of violators of the law, issuing orders for compensation payments or obtaining injunctions preventing them from committing future violations.

10.4 Complaint Function of the EOWA

205. It has been suggested that legislative reform allowing the EOWA to handle complaints from employees who believe that their employer is not complying with their EOWW Act obligations would be a positive step. However, this is not necessarily the case, due to:

- (a) broadly, the limitations of the complaints-based model; and
- (b) practically, the need to ensure clarity on the role of the EOWA and to avoid duplication of work by statutory bodies.

206. As noted in the EOWA Submission to the Senate Standing Committee, the approach emphasised by the EOWW Act is 'one of persuasion and education and not punitive action'.¹²⁸ It is recognised that the EOWW Act works on the organisational level, rather than focusing on individual woman and any complaints of discrimination that individuals may have.

207. By contrast, the SDA implements an individualised complaint-based model concerned with equality of treatment. It requires people and organisations to desist from certain behaviours, whereas the EOWA encourages employers to proactively implement programs.

208. International scholarship is increasingly highlighting the limitations of the individual complaints-based model in addressing discrimination.¹²⁹ This model places

¹²⁸ EOWA, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (1 October 2008) at [88].

¹²⁹ See, eg, Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369.

responsibility on an individual victim to name, blame and litigate to claim redress. Achieving equality in the workplace is a complex question not easily addressed through a complaints-based system focusing on formal rather than substantive equality, which requires an individual aggrieved by an act to be compared with a similarly situated man. Targeting harm done to a victim does not necessarily prompt structural change. Instead, the focus is usually on redressing harm done, rather than preventing harm or promoting equality.¹³⁰

209. Conferring upon the EOWA the function of handling complaints further entrenches the fault-based system whereby an organisation is prompted to action only where fault can be identified and attributed to it.¹³¹
210. Internationally, the trend has been for regulatory models for achieving equality to move from the individual-led complaints-based model, to a more proactive model targeting institutional change.¹³² Accordingly, shifting the focus of the EOWA from organisation-based change to complaints-based investigations of individual cases could be seen as a step backwards.
211. The HRLRC submits that, rather than incrementally increasing the functions of the EOWA into an area already largely covered by the AHRC the EOWA should maintain its focus on the bigger picture of employer's obligations.¹³³
212. Responsibility for achieving equality should properly be borne by people who hold power in society, rather than placed upon the shoulders of individuals prepared to undergo potentially lengthy, traumatic and costly proceedings to vindicate their rights and possibly become notorious within their industry.¹³⁴ The HRLRC submits that the EOWA should continue to work proactively with employers, and require those with capacity to identify and remove relevant obstacles to equal opportunity in the workplace.
213. The HRLRC submits that an extension of powers in terms of the types of complaints that could be investigated and properly considered in terms of a review of AHRC's powers. This was an area for reform that was considered in the Senate Committee on Legal and Constitutional Affairs' inquiry into the SDA (see discussion in section four). The Senate Committee noted its concern that the complaints process under the SDA was ill-equipped to handle compounded or systemic discrimination and was difficult to access for many individuals¹³⁵

¹³⁰ Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth) - Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 105.

¹³¹ Belinda Smith, 'It's about time - for a new regulatory approach to equality' (2008) 36 *Federal Law Review* 117 - 144, 132.

¹³² Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369.

¹³³ The assumption here is that the EOWA and AHRC will remain separate bodies. This submission does not consider whether this separation should be maintained.

¹³⁴ See, eg, *Dunn-Dyer v ANZ Banking Group Pty Ltd*, decision of the Human Rights and Equal Opportunity Commission (Keim C) 10 September 1997, unreported.

¹³⁵ Legal And Constitutional Affairs Report, above n [Insert], p.156-157.

214. The Senate Committee's Report makes a number of recommendations designed to strengthen the complaints process under the SDA. Recommendations include:
- (a) that the HREOC Act (now the AHRC Act) should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated (Recommendation 19);
 - (b) that subsection 46PO(1) of the HREOC Act be amended to make the standing requirements for lodging an application with the Federal Court or the Federal Magistrates Court consistent with the requirements for lodging a complaint with HREOC as set out in subsection 46P(2) of the HREOC Act (Recommendation 20);
 - (c) that subsection 46PO(2) of the HREOC Act be amended to increase the time limit for lodging an application with the Federal Court or Federal Magistrates Court from 28 days after termination of the complaint to 60 days (Recommendation 21);
 - (d) that a provision be inserted in the Act in similar terms to section 63A of the Sex Discrimination Act 1975 (UK) so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate (Recommendation 22);
 - (e) that the remedies available under subsection 46PO(4) of the HREOC Act where a court determines discrimination has occurred be expanded to include corrective and preventative orders (Recommendation 23); and
 - (f) that increased funding be provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for sex discrimination and sexual harassment matters (Recommendation 24).
215. Given the scope and limitations of EOWW Act and the EOWA, the HRLRC submits that the EOWA is not best placed to instigate such measures and that, unless the role and function of the EOWA and the AHRC are combined, these changes should be made to legislation regulating the AHRC.

Recommendation 19:

The EOWA should not be given the function of handling complaints from employees who feel that their employer is not complying with their EOWW Act obligations.

Recommendation 20:

The Government should implement recommendations 19-24 contained in the Senate Committee on Legal and Constitutional Affairs' report into the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality.

10.5 Education and Awareness Activities

216. The EOWA seeks to meet its duties and obligations through a variety of education and awareness activities including:
- the Employer of Choice for Women Award;
 - undertaking or commissioning research (for example, the EOWA Australian Census of Women in Leadership);
 - publishing an e newsletter;
 - producing workplace tools to assist organisation achieve the objectives of the EOWW Act, including the Pay Equity Tool to help employers audit and analyse the gender pay distribution through their workplace and the Bullying and Harassment Prevention Tool;
 - networking events including equal employment opportunity practitioners' associations and supporting strategic projects and events such as the Macquarie Graduate School of Management's Women, Management and Employment Relations Conference; and
 - public education programs.
217. It is not clear weather these various programs provide sufficient guidance to assist employers to distinguish formal and substantive equality or to recognise and address compounded discrimination. These two concepts are considered in detail in section two of this submission.
218. A better understanding of systemic and compounded discrimination would assist employers in achieving substantive equality. The EOWA should mainstream these issues in its education and awareness activities. In order to do this, the EOWA could enlist the assistance of the AHRC, which has significant experience and expertise in the field of human rights and equality for women.

Recommendation 21:

The EOWA should ensure that its private and public education programs adopt a human rights approach to equality for women in the workplace, including by emphasising systemic and compounded forms of discrimination.

Recommendation 22:

The EOWA should develop more public awareness of its existence and functions (rather than predominately providing education and awareness activities to subscribers). The EOWA could provide more public awareness through mail outs, posters or general advertising/talks.

10.6 The Cost of Complying with the EOWA Requirements

219. The cost of satisfying all the EOWA requirements may be quite substantial for some organisations. Developing and implementing a workplace program can impose costs on employers (eg, the additional costs to have a dedicated human resources staff member to ensure compliance with all the requirements, and also implementation costs of new programs and activities across the organisation).
220. Further, employees attending the EOWA's education programs all come at a cost (for example it costs \$440 (including GST) for an employee to attend a half day training session on developing an EOWA program and preparing a compliant report). However, organisations need to weigh these costs against the benefits, which may include enhanced productivity, reduced absenteeism and turnover, improved staff morale, and a positive corporate image. A recent report from Catalyst found that 'in four out of five industries in the United States, the companies with the highest womens' representation on their top management teams experienced a higher total return to shareholders than the companies with the lowest representation of women'.¹³⁶ Further research suggests that a lack of women in leadership positions results in greater scarcity in talent within organisations and reduced employee engagement.¹³⁷
221. To assist organisations to offset some of the costs, the Federal Government should offer subsidies to encourage training and education in gender equality in the workplace.
222. If the employee threshold for the application of the EOWW Act is not reduced (as per our recommendation is section 5.3 of this Submission), the HRLRC submits that the Government should at least make a subsidy available to organisations with less than 100 employees to encourage smaller organisations to develop a workplace program.

Recommendation 23:

Tax concessions, subsidies or other incentives should be introduced to enable organisations to implement a workplace program and promote gender equality training and education.

¹³⁶ Catalyst (2004), *The Bottom Line: Connecting Corporate Performance and Gender Diversity*, New York, pg. 2.

¹³⁷ Chief Executive Women (2009), *The Business Case for Women as Leaders: One Woman is Not Enough*, pp4-7.