



# **Equal Opportunity Commission of Western Australia**

## **Submission**

**Inquiry into pay equity and associated issues related to increasing female participation in the workforce**

**November 2008**

## **1. Background**

The Equal Opportunity Commission of Western Australia is responsible for administering the *Equal Opportunity Act 1984* which is an Act to promote equality of opportunity in Western Australia and to provide remedies in respect of discrimination on the grounds of sex, marital status, pregnancy, sexual orientation, family responsibility or family status, race, religious or political conviction, impairment, or age, or involving sexual or racial harassment or, in certain cases, on gender history grounds.

The Commission undertakes a range of community education activities aimed at preventing discrimination, the investigation and conciliation of allegations of unlawful discrimination and investigations into discrimination.

Since its inception in 1985 the Commission has investigated complaints of discrimination on the grounds of sex and sexual harassment. Other complaints on the grounds of marital status, pregnancy, family responsibilities and family status also show women's experience in the workforce.

### **Discrimination against women in employment in Western Australia**

Since the inception of the Equal Opportunity Commission, complaints relating to employment have made up over 60% of all complaints.

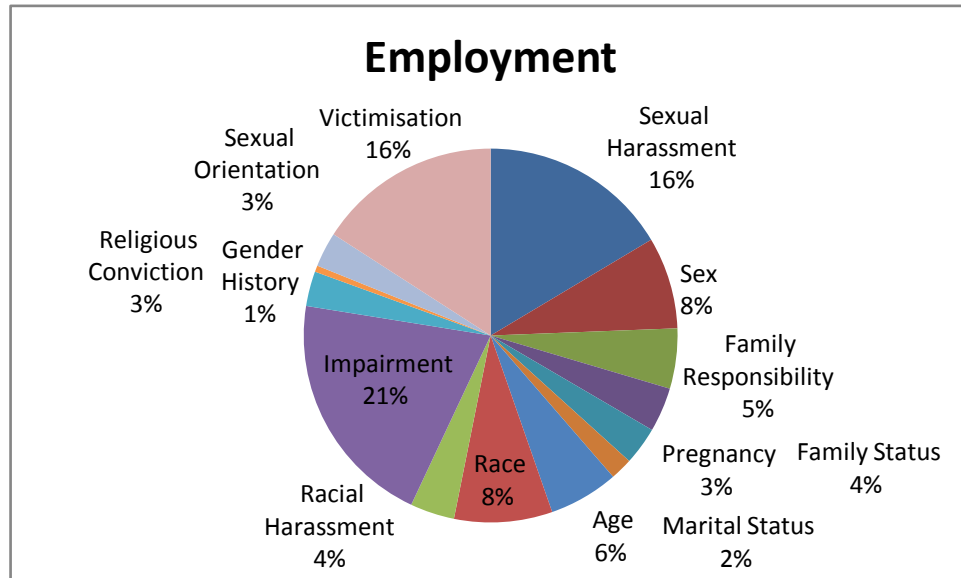
The Commission's first Annual Report in 1986/87 noted that of the 69 complaints of sex discrimination in employment, 43 were lodged by women.

Three women, independently complained that a firm of caterers had denied them employment because of their sex. The women alleged that they had been offered casual work, as table attendants, through a sub-contractor employment by the catering firm. Following conciliation, all women were offered employment.

In that first year 20 women (and 1 man) complained of sexual harassment in employment. A 15 year old female apprentice alleged that her employer was repeatedly making advances towards her of a sexual nature. She was threatened with the cancellation of her apprenticeship if she attempted to complain. An offer of settlement was made, but the young woman ultimately left her job.

By 2008 the pattern was much the same. Sex discrimination and sexual harassment complaints made up 24% of the employment complaints. Family responsibilities, family status, marital status and pregnancy together totalled another 14 per cent. Most of these were made by women.

Discrimination against women in the workforce is continuing and persistent.



### Types of discrimination against women in the workforce

The types of discrimination complaints received from women range from direct discrimination relating to the payment of wages, promotional opportunities and benefits to access to part-time work and issues relating to family status.

Examples of complaints which have been brought by women to the Equal Opportunity Commission:

- A complainant alleged that she was interviewed and hired by a large construction company. Her employment contract was with a labour hire firm. After a week's employment a male employee returned to site and it was clear that she was doing his job. The male employee was rude and aggressive and when she complained to management she was told "some employees refused to work with females". She also alleged that the "smoko room" had pictures of naked females and her employment was terminated because the male employees did not want to work with a female. Both respondents alleged that it was the woman's poor work performance which resulted in her dismissal. The matter could not be conciliated and was referred by*

*the Commissioner to the State Administrative Tribunal, where it was settled in mediation.*

- *A woman complained that she had been discriminated against on the basis of her age and sex when her application for leave was not granted by her employer. The woman says she was told that no leave was to be granted during a specific period however, a younger male employee had been granted leave for the same period. The Company denied discrimination. The complaint was resolved in conciliation with an apology and \$4000 compensation.*
- *A woman alleged that her employer discriminated against her on the ground of family responsibilities. She stated that her employer had failed to assist her accessing a part time position with the organisation when she was due to return from maternity leave. The complaint was conciliated and settled with a \$4000 ex gratia payment.*
- *A woman lodged a complaint of family status discrimination against her employer because they relocated her to a different position because of perceived problems due to her husband's supervisory role within the organisation. Conciliated with \$6000 payment, the Company agreed to amend its Harassment and Discrimination Policy; recredit leave; provide a letter of acknowledgement and training for staff on unlawful discrimination.*
- *A woman working in a male dominated area complained that her colleagues and subordinates subjected her to unacceptable behaviour and her complaints about the behaviour were ignored. A settlement included payment of \$15000, Equal opportunity training for management/staff; contact officer/peer support network to be set up; career coach and management training for the complainant.*
- *A female manager of a country supermarket chain lodged a complaint because she did not receive the same benefits as male managers. The company states that she is not entitled to the benefits as her circumstances are different. They reject the allegation of discrimination. The Commissioner has referred the matter to SAT.*

*A veterinarian nurse who worked part-time in a surgery complained that her employer had demoted her following her return from maternity leave. The Complainant was paid her outstanding leave entitlements and a sum of \$2640 gross, being the equivalent of eight week's pay.*

## **Pay equity in Western Australia**

In 2004 a review of the gender pay gap in Western Australia was conducted by Drs Trish Todd and Joan Eveline.<sup>1</sup> The Report identified that women in the WA labour market are, on average, paid less than men in WA and less than women elsewhere in Australia. WA has the largest gap between men's and women's wages of any Australian state. In the February 2004 quarter, WA women employed full-time earned, on average, 22.6% less than their male counterparts whereas at a national level the corresponding gender wage gap was 15.2%.

This report made 34 recommendations to Government on strategies to address the gender pay gap.

One of these was the establishment of a Gender Equity Unit. The Unit was set up in 2005 in the Department of Consumer and Employment Protection and has been providing information and support to government and private sector organisations to address pay inequities.

The Pay Equity Unit reports that that:

“In February 2008 the gender pay gap in Western Australia was 28%. This means that on average for every dollar earned by a full time male employee, full time female employees earn 72 cents.

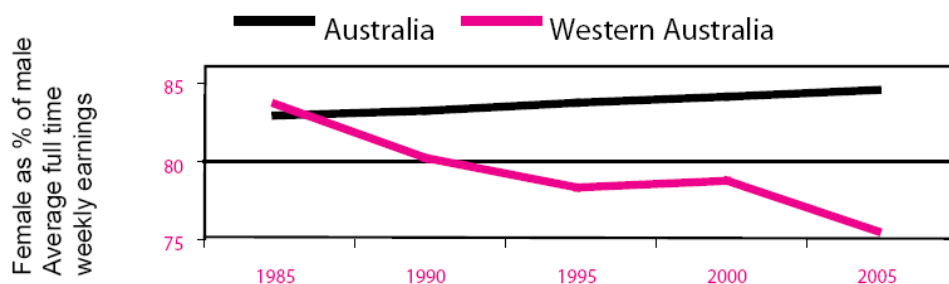
“This pay gap figure is based on full time adult ordinary time earnings figures compiled by the ABS. Part time and casual employees are not included, nor are overtime payments.”<sup>2</sup>

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<sup>1</sup> Todd, T and Eveline, J, (2004) Report on the review of the gender pay gap in Western Australia

<sup>2</sup> Understanding pay equity and the gender pay gap, Pay Equity Unit Department of Consumer and Employment Protection WA. 2008,

**Graph 1**  
**Gender pay gap by year Australia and Western Australia 1985-2005**



Despite legislation for equal pay having been in place since 1969 and 1972<sup>3</sup>, women are still paid less. These decisions were narrow in their intent and failed to enable the Industrial Commission to investigate and assess the gender based assumptions, which underlie womens' skills. The Todd and Eveline<sup>4</sup> report outlined the complexity of the causes of the persisting pay gap.

They pointed to a number of factors contributing to the pay gap:

- access to, and the nature of, part time and casual employment
- The ability of people to balance caring and work responsibilities. The Commission sees the results of this in complaints brought on the ground of family responsibilities where despite the existence of award provisions enabling flexibility, work-life balance is difficult for many women to achieve:

The impact on women of lack of flexibility shows clearly in the complaints relating to family responsibility which are brought to the Commission. Of all family responsibility complaints received in 2007/08, over 71% were lodged by women.

<sup>3</sup> *Equal Pay Case* (1969) 127 CAR 1142 established equal pay to be granted where the male and female workers were doing the same work and *Equal Pay Case* (1972) 147 CAR 172 widened equal pay to work of equal value.

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<sup>4</sup> Todd, T and Eveline, J, (2004) [Report on the review of the gender pay gap in Western Australia](#)

A complaint brought to the Equal Opportunity Commission goes to this point:

*A woman alleged that her employer discriminated against her because of her family responsibilities by refusing to re-arrange her shifts because of child-care difficulties. The complaint was conciliated after the employer accommodated the woman's needs.*

- WA's highly sex segregated labour market, leading to the clustering of women and men into separate occupations and industries.

The Commission has seen the incidence of sexual harassment complaints from women working in the mining industry increase over the last two years. In 2006/07, 23.5% of complaints received involving the mining industry related to sexual harassment. In the following year, 2007/08 this had climbed to 41.9%. Sex discrimination complaints during this period also increased from 17.6% to 22.6%.<sup>5</sup>

In 2008, nearly half of all women workers were employed in retail, health, community services or education.<sup>6</sup> This starkly compares with the percentage of women in the male dominated industries of construction and mining and 3% and 2% respectively.

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<sup>5</sup> Equal Opportunity Commission, Annual Report 2008/07

<sup>6</sup> ABS Average Weekly Earnings 6302 February 2008

**Table 1 - Employment by industry<sup>7</sup>**

| Industry                             | Percentage of WA women in industry | Percentage of total employment |
|--------------------------------------|------------------------------------|--------------------------------|
| Retail trade                         | 17%                                | 14%                            |
| Health and community services        | 18%                                | 10%                            |
| Education                            | 11%                                | 7%                             |
| Property and business services       | 14%                                | 13%                            |
| Accommodation, cafes and restaurants | 5%                                 | 4%                             |
| Government admin and defence         | 5%                                 | 4%                             |
| Manufacturing                        | 5%                                 | 9%                             |
| Personal and other services          | 5%                                 | 4%                             |
| Finance and insurance                | 4%                                 | 3%                             |
| Construction                         | 3%                                 | 11%                            |
| Cultural and recreational services   | 3%                                 | 3%                             |
| Wholesale trade                      | 3%                                 | 4%                             |
| Mining                               | 2%                                 | 5%                             |
| Transport and storage                | 3%                                 | 4%                             |
| Communication services               | 1%                                 | 1%                             |
| Electricity gas and water supply     | 1%                                 | 1%                             |

- Male dominated occupations and industries are historically more highly valued with ‘men’s work’ paid more than ‘women’s work’.

According to research undertaken by Barbara Pocock,<sup>8</sup> women who are employed in industries that were close to 100 per cent female earned 32 per cent less than women with identical job characteristics who were employed in industries that were close to 100 per cent male dominated.

- The skills and work associated with female labour have been seen as natural and innate to women and, hence, have not been highly valued in the labour market. This can be seen in the child care and aged care industries for example.

Women also received lower wages in female dominated occupations within industries. For example the gender pay gap, in 2008, in health and communities is 40%.<sup>9</sup> (Hospitals and Nursing Homes, Veterinary Services, Post School and Other Education, Libraries, Museums and Art Galleries, Welfare and Religious Institutions, Research and Meteorology Services, Business and Labour

<sup>7</sup> Pay Equity Unit, DOCEP, 2008, Employment by Industry fact sheet. [www.docep.wa.gov.au](http://www.docep.wa.gov.au)

<sup>8</sup> Pocock, B and Alexander, M (1999) ‘The Price of Feminised Jobs: New Evidence on the Gender Pay Gap in Australia’, *Labour and Industry*, 10(2), pp.75-100.

<sup>9</sup> Pay Equity Unit, 2008. *Women in the Western Australian Workforce*, Labour Relations Division, Department of Consumer and Employment Protection Western Australia.



Associations, Other Community Organisations, Other Community Services – including police, prisons<sup>10</sup>)

The existence of continuing and persistent discrimination against women in employment, manifesting in significant pay inequities is well documented.

In 1980 the WA Industrial Commission applied the principles adopted by the Australian Conciliation and Arbitration Commission in 1972, and fixed and same minimum wage rate for women and men adult employees. Further measures were introduced through the 1980s and 90s to promote equal remuneration for women which went some way to improving women's pay and recognising their skills.

Another attempt was made in 2002 with the amendment of the Industrial Relations Act 1979 to include in its objects the promotion of equal remuneration for men and women for work of equal value.'

The gender pay gap not only persisted, but increased in Western Australia.

The achievement of pay equity for women must involve a multi-faceted, co-ordinated approach, involving state and federal governments, as well as equal opportunity agencies around Australia.

## **2. Submission**

### **a. The adequacy of current data to reliably monitor employment changes that may impact on pay equity issues**

- i. The collection of data relating to pay equity is inconsistent and not monitored by any central agency. The WA Pay Equity Unit has an advisory and coordinating role. This is not mandatory. It can:
  - assist government and private sector agencies to implement pay equity audits; and
  - identify and implement appropriate strategies to address gender pay gaps informed by data from pay equity audits and other relevant sources.

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<sup>10</sup> *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2003* [www.abs.gov.au](http://www.abs.gov.au)

- ii. Requiring employers to undertake pay equity audits should be a first step in this data collection.
- iii. The Western Australian Pay Equity Unit has developed a Pay Equity audit tool for employers to first identify the gender pay inequities which exist in their work places and develop strategies to address these.
- iv. There is also a lack of data comparing industries, particularly as the Equal Opportunity in Employment Agency (EOWA) only collects data from employers with over 100 employees and the data collection standards vary.

**b. The need for education and information among employers, employees and trade unions in relation to pay equity issues**

- i. Education on pay equity is undertaken by a range of government agencies, such as equal opportunity and anti-discrimination commissions,
- ii. Resources should be made available specifically to undertake this education including:
  - Encouraging women to enter non-traditional employment where pay rates are higher
  - Education on unlawful discrimination and sexual harassment for employers and employees.

**c. Current structural arrangements in the negotiation of wages that may impact disproportionately on women**

- i. Deputy Prime Minister Gillard announced<sup>11</sup> the establishment of a Minimum Wages Panel to review minimum wages and casual loadings every year. We make the strong submission that the panel include members with expertise in gender, Indigenous, racial and disability equality.

**d. The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation**

- i. The Commission supports the contention that all legislation relating to the setting of wages and conditions, whether they are in the industrial relations frameworks or other legal mechanisms, provide the right to equal remuneration for work of

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<sup>11</sup> Speech to National Press Club 2007

equal value, consistent with ILO Convention 100 (Equal Remuneration Convention) and the related Recommendation 100.

- ii. The Commission recommends that the equal remuneration provisions of the *Workplace Relations Act* be reviewed so that the current requirements on employees and unions to prove discrimination and establish comparable work value are no longer required.

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- iii. The Equal Remuneration Principles established in Queensland and New South Wales should be used as models. These have shown that real gains can be made for women workers.

In NSW Industrial Commission's Ministerial report on the *Pay Equity Inquiry* was followed in 2000 by the decision of the NSW Industrial Relations Commission to include an equal remuneration principle based around a number of key factors including:

- work value principles, looking at “the work, skill and responsibility required, including the conditions under which the work is performed”.
- recognising the existence of a gender-based pay gap and that the gap broadens where the proportion of women in an industry is higher.
- A finding that claimants do not have to show discrimination, rejecting NSW Employers Fed arguments for it to be a threshold provision.
- limiting remuneration to award based pay, rejecting claims that total remuneration or overaward payments should be targeted.
- including “safeguards to protect wage relativities, to prevent any likelihood of “wage leapfrogging”, by inclusion of transitional arrangement in awarding wage increases.<sup>12</sup>

The Queensland Industrial Commission followed suit in 2002.

The Queensland Pay Equity Inquiry undertook a case study utilising the occupation of dental assistants to assess

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<sup>12</sup> Equal remuneration principle [2000] NSWIRComm 113 (30 June 2000).

and analyse the value of their work in gender neutral way through the “unpacking” the skills of a female dominated occupation and to assist in development of a pay equity principle and adopted a similar equal remuneration principle to NSW.<sup>13</sup>

Importantly the Queensland government also set aside funding to enable parties to mount such cases. <sup>14</sup>

These key decisions, have enabled unions representing workers such as librarians<sup>15</sup> and dental assistants to achieve significant pay increases on the basis of this principle.

In a statement by the Bench following the judgement of the Full Bench of the NSW Industrial relations Commission, which heard the librarians case, it was agreed that:

“Each of the parties in these proceedings acknowledges that in the female dominated occupations to be covered by their proposed new awards, the work of employees has been undervalued on a gender basis....

“...we find that the work of librarians, library technicians and archivists has been historically undervalued on a gender basis.

As a result of this decision up to 2000 librarians, library technicians and archivists received an average 16% pay rise.

**e. The adequacy of current arrangements to ensure fair access to training and promotion for women who have taken maternity leave and/or returned to work part time and/or sought flexible work hours.**

- i. Access to training is essential to build skills which determine promotion and progression to higher paid employment.

Todd and Eveline<sup>16</sup> reviewed the literature and reported that women have not had equal access to training. Some of the reasons for this include

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<sup>13</sup> Queensland Industrial Relations Commission (QIRC) (2001) *Valuing Worth: a Report of the Pay Equity Inquiry*.

<sup>14</sup> *Discrimination Alert*, Issue 170 - 22 Oct 2002

<sup>15</sup> Crown Librarians, Library Officers and Archivists Award Proceedings - Applications under the Equal Remuneration Principle, Re [2002] NSWIRComm

<sup>16</sup> Todd, T and Eveline, J, (2004) p39

- There is less training in feminised industries
  - There is more training in high-level jobs within these industries
  - Employers are more likely to provide training for permanent and full time employees
- ii. Women as a group should be targeted as a group to ensure their special training needs. This has been recognised by the Australian National Training Authority as recently as 2004.<sup>17</sup>
- ii. The limited 'right to request' flexible working hours, currently in the *WA Minimum Conditions of Employment Act* and proposed for the National Employment Standard will go some way to addressing the difficulties faced by women returning to work after maternity leave. In establishing this as a right, not a privilege or subject to the whim of employers, aids in establishing women as permanent and productive members of the workforce, entitled to the same training and promotional opportunities.

The Commission supports the inclusion of a broader right in Commonwealth industrial legislation.

**f. The need for further legislative reform to address pay equity in Australia.**

- i. In 2006, the WA Equal Opportunity Commission reviewed the EOA, the first in the Act's 20-year history.<sup>18</sup>

While the review made recommendations on a range of issues, including the grounds of discrimination, areas, remedies, and complaint investigation, some new concepts were considered. One of these was the creation of 'gender duty' that would apply to all public authorities when carrying out their functions.

- ii. Such duties exist already in the UK, the most recent being the 'gender equality duty' under the *Sex Discrimination Act 1975*, which has been in force since April 2007.<sup>19</sup> This follows the creation of disability

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<sup>17</sup> Todd, T and Eveline, J, (2004) p40

<sup>18</sup> 'Review of the Equal Opportunity Act 1984', Equal Opportunity Commission, May 2007

<sup>19</sup> *Sex Discrimination Act 1975*, as amended by the *Equality Act 2006*. A similar duty commenced under the *Disability Discrimination Act 1995* in December 2006 and under the *Race Relations Act 1976* in 2001.

duty under the UK *Disability Discrimination Act 1995*, and a race duty under the *Race Relations Act 1976*, in 2006 and 2001 respectively. Gender equality policy initiatives have also been formalised in Canada<sup>20</sup> and a number of countries in the European Union, where it is known as ‘gender mainstreaming’

- iii. The Commission believes that it is time for this type of approach to be recognised and applied, not just at policy level, but under Australian law. The existing rights-based approach to addressing discrimination, as formalised in the *Sex Discrimination Act 1984* (SDA) and the other Australian discrimination statutes, relies too heavily on the capacity and willingness of individuals to assert those rights and commence legal proceedings. As a start to shifting the burden off individuals and on to institutions, the SDA should be amended to incorporate a gender equality duty, to apply to all Australian public authorities when carrying out their functions. Such an approach is consistent with, and advances the objective of, Article 2 of Convention on the Elimination of All forms of Discrimination Against Women.

The Commission also believes the SDA should be amended so that the existing function of the Australian Human Rights Commission to initiate inquiries into matters relating to the grounds of discrimination covered by the SDA is broadened.

The Commission has made a detailed submission to this effect to the recent inquiry into the Sex Discrimination Act undertaken by the Senate Standing Committee on Legal and Constitutional Affairs. See Appendix A.

The inclusion of such a ‘duty’ has direct relevance to the achievement of pay equity. Over 30 years of experience of attempts to legislate in the industrial arena have not delivered pay equity to women. Research has shown that the solutions lie in a multi-faceted approach and one which is mandated. The UK legislation requires all public authorities to address the causes of the gender pay gap. Also included are the requirements to:<sup>21</sup>

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<sup>20</sup> ‘Federal Plan for Gender Equality’, administered by Status of Women Canada.

<sup>21</sup> Code of Practice, at 6-7

- to prepare and publish a gender equality scheme;
- to consider the need to include objectives to address the causes of any gender pay gap;
- to gather and use information on how the public authority's policies and practices affect gender equality in the workforce and in the delivery of services;
- to consult stakeholders in order to determine gender equality objectives
- to assess the impact of the authority's current and proposed policies and practices
- to implement the actions set out in the authority's scheme within 3 years, unless it is unreasonable or impracticable to do so; and
- to report against the scheme every year and review every three years.

### **3. Conclusion**

The Commission contends that the achievement of pay equity for women must involve a multi-faceted, co-ordinated approach, involving state and federal governments, as well as equal opportunity agencies around Australia.





## **Appendix A**

Our Ref: 04/08/0059

Mr Peter Hallahan  
Committee Secretary  
Standing Committee on Legal and Constitutional Affairs  
PO Box 6100, Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

### ***INQUIRY INTO THE EFFECTIVENESS OF THE SEX DISCRIMINATION ACT 1984***

Thank you for your letter dated 2 July 2008 inviting me to make a submission to the Committee's inquiry into the effectiveness of the *Sex Discrimination Act 1984* (SDA).

Please find attached the Commission's submission.

Yours sincerely

Yvonne Henderson  
**COMMISSIONER FOR EQUAL OPPORTUNITY**

## **SUBMISSION OF THE WA EQUAL OPPORTUNITY COMMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE EFFECTIVENESS OF THE SEX DISCRIMINATION ACT 1984**

Last month marked the 25<sup>th</sup> anniversary of Australia's ratification of the UN *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The Committee's inquiry is therefore timely and appropriate. The SDA was, and remains, a significant step towards the creation of a solid and enduring human rights legal framework in Australia. Since its enactment, all States and Territories have either enacted or expanded their own anti-discrimination laws. Like the SDA, the Western Australian *Equal Opportunity Act* (EOA) was passed in 1984, and came into force the following year. The provisions in the EOA dealing with unlawful sex discrimination were modelled on those in the SDA.

In 2006, the WA Equal Opportunity Commission ("the Commission") undertook a review of the EOA, the first in the Act's 20-year history.<sup>1</sup> Whilst the review made recommendations on a range of issues, including the grounds of discrimination, areas, remedies, and complaint investigation, some new concepts were considered. One of these was the creation of 'gender duty' that would apply to all public authorities when carrying out their functions. Such duties exist already in the UK, the most recent being the 'gender equality duty' under the *Sex Discrimination Act 1975*, which has been in force since April 2007.<sup>2</sup> This follows the creation of disability duty under the UK *Disability Discrimination Act 1995*, and a race duty under the *Race Relations Act 1976*, in 2006 and 2001 respectively. Gender equality policy initiatives have also been formalised in Canada<sup>3</sup> and a number of countries in the European Union, where it is known as 'gender mainstreaming'.

The concept of a positive duty on public authorities to eliminate discrimination is not new to Australia. Since 2005, the Commission has been responsible for overseeing the implementation of the Substantive Equality Framework, a policy which requires state government agencies to identify and remedy deficiencies in the delivery of services to Aboriginal people and people from ethnically and linguistically diverse backgrounds.<sup>4</sup> The guiding principle behind the Framework

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<sup>1</sup> 'Review of the Equal Opportunity Act 1984', Equal Opportunity Commission, May 2007

<sup>2</sup> *Sex Discrimination Act 1975*, as amended by the *Equality Act 2006*. A similar duty commenced under the *Disability Discrimination Act 1995* in December 2006 and under the *Race Relations Act 1976* in 2001.

<sup>3</sup> 'Federal Plan for Gender Equality', administered by Status of Women Canada.

<sup>4</sup> 'The Policy Framework for Substantive Equality: responding to the different needs and priorities of individuals and communities', Department of Premier & Cabinet, Equal Opportunity Commission, [www.eoc.wa.gov.au](http://www.eoc.wa.gov.au).

is the recognition that formal equality – where everyone is treated equally – does not necessarily result in substantive equality and, in fact, keeps systemic discrimination hidden from view.

In order to provide the same level of services to persons of different ethnic and racial backgrounds, an agency must first recognise their different needs, and the systemic practices that stand in the way of getting those services. Under the Framework program, each agency must go through five levels of implementation, starting with a commitment to implement, through to setting objectives and strategies, and concluding with review and evaluation. Although the Substantive Equality Framework addresses race discrimination, the model is applicable to different grounds of discrimination, as is the case in the UK.

The Commission believes that it is time for this type of approach to be recognised and applied, not just at policy level, but under Australian law. The existing rights-based approach to addressing discrimination, as formalised in the SDA and the other Australian discrimination statutes, relies too heavily on the capacity and willingness of individuals to assert those rights and commence legal proceedings. As a start to shifting the burden off individuals and on to institutions, the SDA should be amended to incorporate a gender equality duty, to apply to all Australian public authorities when carrying out their functions. Such an approach is consistent with, and advances the objective of, Article 2 of CEDAW.

The Commission also believes the SDA should be amended so that the existing function of the the Human Rights & Equal Opportunity Commission (HREOC) to initiate inquiries into matters relating to the grounds of discrimination covered by the SDA is broadened. This is discussed in more detail below.

## THE GENDER EQUALITY DUTY

Under the UK statutory model, the gender equality duty requires public authorities to have ‘due regard’<sup>5</sup> to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women.<sup>6</sup> The duty recognises that *identical* treatment of men and women in employment and in the delivery of services does not automatically result in *equal* treatment. Once it is accepted that many existing policies and practices may actually entrench systemic sex discrimination, public authorities can set about replacing or modifying them. The duty aims to address sex discrimination experienced by both men and women in their dealings with public authorities. The stated objectives of the duty include improved policy development, better

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<sup>5</sup> ‘Due regard’ means that authorities should give due weight to the need to promote gender equality in proportion to its relevance – ‘Overview of the gender equality duty’, Equality & Human Rights Commission (UK) [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

<sup>6</sup> *Sex Discrimination Act* s 76A (1)

quality services which meet varied needs, and more effective use of talent in the workforce.<sup>7</sup>

The duty is a positive one, supported by a set of specific duties. These specific duties are designed to address the most important gender equality issues in an authority's internal and external operations. Each authority is required to publish a 'gender equality scheme', explaining how it will meet the objective of complying with its general and specific duties. The duty complements the existing statutory right of an individual not to be discriminated against on the ground of sex.

The duty applies to all functions of all public authorities, with some exceptions.<sup>8</sup> A 'public authority' is a body whose functions are of a public nature.<sup>9</sup> This includes private entities or voluntary organisations carrying out public functions on behalf of the government or a public authority. Those functions include policy-making, the provision of services, employment, and any decision or discretion exercised under statute.

### *Specific Duties*

The specific duties are made and applied by order of the Secretary of State in consultation with the Equality and Human Rights Commission (EHRC).<sup>10</sup> The EHRC commenced operation in October 2007, replacing the Equal Opportunities Commission. The duties and the authorities to which they apply are set out in the statutory 'Code of Practice for England & Wales' and the 'Code of Practice for Scotland.'<sup>11</sup>

The specific duties<sup>12</sup> are:

- to prepare and publish a gender equality scheme;
- to consider the need to include objectives to address the causes of any gender pay gap;
- to gather and use information on how the public authority's policies and practices affect gender equality in the workforce and in the delivery of services;
- to consult stakeholders in order to determine gender equality objectives
- to assess the impact of the authority's current and proposed policies and practices
- to implement the actions set out in the authority's scheme within 3 years, unless it is unreasonable or impracticable to do so; and

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<sup>7</sup> 'Gender Equality Duty Code of Practice-England & Wales', Equality & Human Rights Commission (Code of Practice), at 7

<sup>8</sup> For example, the duty does not apply Houses of Parliament, General Synod of the Church of England, Security Service, Secret Intelligence Service, and judicial functions – *Sex Discrimination Act* ss 76A(3), 76A(4)

<sup>9</sup> *Sex Discrimination Act* s 76A(2)

<sup>10</sup> Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006

<sup>11</sup> *Sex Discrimination Act 1975* s 76E

<sup>12</sup> Code of Practice, at 6-7

- to report against the scheme every year and review every three years.

The Code of Practice provides authorities with detailed instructions on how to prepare a gender equality scheme, including choosing and prioritising objectives, who to consult, getting and using information, implementation, and analysis and monitoring. The EHRC can assist and advise authorities on how to develop and monitor their schemes.

### *Proportionality and Relevance*

Under the duty, authorities are expected to prioritise action to address the most significant gender inequalities within their spheres of responsibility, and take action which is likely to bring about the best outcomes. The duty requires the authority to have due regard to both existing and future policies and functions when doing this.

Although the duty applies to authorities of all sizes, the way in which it is implemented should be appropriate to the size of the authority and its functions. When assessing the degree of relevance the duty has to the authority's different functions, the impact and extent of the discrimination as well as the number of people affected should be taken into account. If an authority forms the view that changing a policy or practice would lead to improved gender equality, then greater weight should be given to the case for change than the case for no change.

### *Enforcement*

The Code of Practice itself does not impose a legal obligation on authorities; it is more of a practical guide. However, if an authority fails to follow the Code, it may be called upon to explain how it has otherwise met its legal obligations under the general and specific duties.<sup>13</sup> The EHRC has formal powers of enforcement in the event an authority fails to meet the gender equality duty, and informal measures are not acted upon. An authority may be served with a compliance notice, which requires the authority to meet its duty and provide information to the EHRC explaining what it has done to comply. If the EHRC believes that the authority has failed to comply or to provide information, it may apply to a court for an order.<sup>14</sup> An authority can also be made to comply with the duty by way of judicial review, on application of EHRC or a party with an interest in the matter.

### *The Private Sector*

In its current form, the gender equality duty does not apply to the private sector, except when a public authority contracts or partners with a private body to deliver its services. In its recent review of the *Victorian Equal Opportunity Act 1995*, the Department of Justice makes a range of recommendations for reform

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<sup>13</sup> Code of Practice, at 5

<sup>14</sup> *Sex Discrimination Act 1975* s 76D

of equal opportunity law in Victoria.<sup>15</sup> One of these is that the Victorian Act, to be re-named the *Equality Act*, contains a positive duty along the lines of the UK statutory duties.<sup>16</sup> However, the Department observes that as the Victorian Act already applies to the private sector, so should the duty.<sup>17</sup> As in the UK, enforcement would be initiated by the state equivalent to the EHRC, the Victorian Equal Opportunity & Human Rights Commission, without the need for a complaint to be lodged by an individual.

The Commission agrees in principle with the Victorian recommendation. Although, from an administrative and best practice point of view, it may be preferable that the public sector be the first to adopt the duty, ultimately there is no reason why a gender equality duty should not apply ‘equally’ to the private and public sectors.

### ENLARGING THE HREOC INVESTIGATION FUNCTION

Under the SDA, the HREOC may at its own initiative, or when requested by the Minister, report to the Minister as to the laws that should be made by Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination on the ground of sex, marital status, pregnancy or potential pregnancy, or sexual harassment.<sup>18</sup> The function does not specify that the HREOC is able to first carry out an investigation into such matters, although it may do anything incidental or conducive to the performance of the function.<sup>19</sup>

This function has been in the SDA since its enactment. Whilst there is little doubt the objects<sup>20</sup> of the SDA are advanced by such a function, it is still expressed in such a way that HREOC can only make recommendations about proposed laws or action the Commonwealth should consider in relation to the subject matter of the inquiry. By contrast, the equivalent function in a number of state and territory anti-discrimination statutes is considerably broader. For example, under the EOA, the Commission may at its own initiative carry out investigations, research, and inquiries relating to discrimination or sexual or racial harassment of the kinds rendered unlawful by that Act.<sup>21</sup> Findings and recommendations made pursuant to an investigation carried out by the Commission may be directed towards public and private bodies, a particular industry, or a particular practice.

The Commission is currently conducting one such investigation, into whether or not there are practices in the private rental market that discriminate against persons of different racial or ethnic background who are renting accommodation,

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<sup>15</sup> ‘An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report’, Department of Justice, June 2008 (Victorian Report)

<sup>16</sup> Victorian Report, at 41

<sup>17</sup> Victorian Report, at 40

<sup>18</sup> SDA, s 48(1)(g)

<sup>19</sup> SDA, s 48(1)(h)

<sup>20</sup> SDA, s 3

<sup>21</sup> EOA, s 80(a). See also NSW *Anti-Discrimination Act 1977*, s 119; QLD *Anti-Discrimination Act 1991*, s 235(b); TAS *Anti-Discrimination Act 1998*, s 6(c); NT *Anti-Discrimination Act 1992*, s 13(1)(f)

or seeking to. Unlike the HREOC, the Commission is not restricted to making recommendations as to what laws should be made, or action the government should take. Whilst changes to legislation may be relevant, the Commission is also able to make recommendations directly to private organisations and industry peak bodies about taking action to address discriminatory practices, if such practices are found to be occurring. Such a function is consistent with the objects of the EOA and within the Commission's remit. The Commission believes the HREOC should be given this same broad function under the SDA, and be permitted to initiate investigations and make recommendations beyond those currently provided for.