

30 October 2009

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EOWWA Act Review
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I am pleased to make a submission to the Review of the Equal Opportunity for Women in the Workplace Act (EOWWA) and Agency. My submission draws on my research on gender equality in paid work including within organisations that report under the EOWWA. Much of this work is directly relevant to the current Review as it explores the ways in which regulation designed to address gender inequality in employment is understood and 'practiced' in employing organisations. In particular, I was part of a research team that investigated the contexts and drivers of equal employment opportunity in 9 'best practice' organisations between 2003/2004. The work was undertaken and funded through the Australian Research Council Linkage program in partnership with the EOWW Agency and the (then) National Diversity Think Tank. I attach a pdf copy of the resulting 2005 publication: *Drivers and Contexts of Equal Employment Opportunity and Diversity Action in Australian Organisations*.

While I believe there is a very strong case for reforming many of the provisions and processes of the EOWWA and its Agency, I have not attempted to address all the terms of reference of the Inquiry. In this regard, unless otherwise indicated, I endorse other submissions already made to the Review including the one from the EOWW Agency, the model submission from the Australian Human Rights Commission, the short model submission from the University of Sydney's Women and Work Research Group and that from the ACTU. I have also drawn where appropriate on the submission I made to the 2008 Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the *Sex Discrimination Act* (SDA) and the Work + Family Policy Roundtable's submission to the House of Representatives Inquiry into Pay Equity. Both those submissions are attached.

My submission to the current Review focuses on the need for enforceable and adequately resourced regulation that requires large employing organisations to identify and address systemic discrimination against women and take positive action to advance gender equality. It also briefly touches on the broader institutional arrangements and the need for demonstrated political and institutional commitment to gender equality more broadly.

If you have any queries about my submission please contact me as below.

Yours faithfully,



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Background

Australia ratified the UN *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) in 1983. Under the terms of article 3 of CEDAW, Australia is required to take: ‘all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.’

In the area of employment there have been arguably four regulatory approaches to advancing gender equality in Australia.

- Industrial relations regulation that provides for minimum standards and the enforcement of those standards;
- Anti-discrimination and industrial relations provisions that facilitate individual remedial action in response to individual claims through complaint-based mechanisms;
- Anti-discrimination and industrial relations provisions that facilitate group/industry based remedial action in response to identification of systemic discrimination through complaint based mechanisms and/ or inquiry powers;
- Positive action that requires individual workplaces to identify and address systemic discrimination and take action to achieve equal opportunity for women regardless of the receipt of any complaints.

The last of these approaches underpinned the enactment of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (AAA), the predecessor of the *Equal Opportunity for Women in the Workplace Act 1999* (EOWWA). Its focus on what was termed ‘affirmative action’ and on sustained and forward-looking positive action within organisations is unique and goes well beyond the ‘special measures’ provided for in the *Sex Discrimination Act 1984* (SDA). In 1998 shifts in government policy and business concern over the cost of compliance led to a review of the AAA and the enactment of the EOWWA. The new Act significantly watered down the minimal reporting requirements of the AAA and excised any requirement for consultation with employees or the unions that represent them. It moved from an emphasis on compliance to ‘reasonably practicable’ actions, with the weak sanctions of the legislation only to be used ‘as a last resort.’ In essence these changes explicitly limit the achievement of EEO to the ‘capacity to comply’ of employers. The under-resourced implementation of the regulation has further undermined the potential of the original AAA provisions by relying on one-off initiatives by a few ‘best practice’ employers rather than any sustained action to address structural discrimination.

The impact of the EOWWA and the EOWW Agency

The few existing studies of the impact of the AAA/EOWWA and the relevant agencies on organisational practice suggest there is little relationship between mandatory reporting by organisations on basic indicators and the achievement of positive organisational outcomes for women (Sheridan 1995; Braithwaite 1993; Strachan and Burgess 2000). This is not surprising as compliance with the regulation is based on the submission of reports rather than action taken. Further as documented by the EOWWA Agency in their submission to this Review the flexible reporting format of reports has not only created uncertainty about standards to be applied to EEO programs but has failed to support outcomes-based reporting

Studies drawing on data from organisational reports paint a mixed picture of the impact of AAA/EOWWA regulation, suggesting some correlation between gender-specific HR strategies and equal employment opportunity (EEO) structures and increases of women in management positions yet little organisational action in the areas of recruitment and the promotion of women (French 2001; Strachan and French 2007). Industry-

specific and organisational studies reveal little connection made between conditions of employment and EEO or 'diversity' action with a striking lack of interaction between AAA/EOWWA regulation and enterprise bargaining in most large workplaces (Strachan and Burgess 1997, 2000; French and Strahan 2007; Charlesworth et al. 2005).

While the obligation to comply with the EOWWA through annual reporting to the Agency has worked in some organisations to raise awareness of the issue of EEO for women, that awareness is limited (Charlesworth et al 2005). The EEO 'problem' is still viewed in many organisations as about women's individual disadvantage and individual women's lack of access to equal employment opportunities rather than as structural discrimination against women and/or organisational cultures that prevent women from reaching their full potential and being fairly rewarded for the work they do. Even in best practice organisations there is often little discussion of gender equality as a goal of EEO or diversity initiatives that are reported to the EOWW Agency either within the organisation or even in the reports (ibid). EEO initiatives tend to be one-offs that do not disturb the gendered organisation of work either in terms of hierarchy or employment status. Further, there is little evidence of analysis of the EEO or gender equality implications of organisational policies and practices more generally. For example, consideration is rarely given to the EEO ramifications of HR indicators such as training spend.

There is very little evidence of progress around promotion and advancement of women within reporting organisations nor *any* evidence of recognition of systemic discrimination in poor quality employment for women in lower classifications, for those who are part-time or casual positions or for women who come from non-English speaking or Indigenous backgrounds. While the Agency has had a valuable focus on the advancement of women in senior positions, it has not been adequately resourced nor had political support to address the various manifestations of organisational 'blokey cultures' that work to denigrate women and keep them 'in their place'. There has also been very little focus in activity by the Agency on sex segregation within organisations or on the concentration of women within organisations in lower status and casual jobs. If one scans the EOWWA online report database what is apparent, apart from a glacial increase in women in supervisory and management positions, is an increased concentration of women in basic clerical and sales jobs at the bottom end of the hierarchy in casual part-time and low status jobs. Within organisations, the poor quality employment experienced by many of these women and the gendered organisation of work in many large organisations into core and peripheral workforces are rarely seen as gender equality or EEO issues or as even an issue at all. Indeed there are widening inequalities between women within organisations in access to quality or decent jobs. For many that fault line lies in the division between full time and part-time/casual work and that between occupations.

In my view the failure to realise the potential of the original 1986 regulation for positive action to advance gender equality within organisations lies in a mix of a number of factors. These include: the limited provisions and enforcement of the EOWWA, the inadequate resourcing of the Agency, the policy and political sidelining of gender equality, and the over reliance on a narrow business case to progress EEO. Over the period of the last government in particular we have seen a disappearance of gender equality from policy debates and a weakening of institutional structures that support the promotion of gender quality. While the current federal government is to be congratulated for the ratification of the Optional Protocol to CEDAW, the legacy of weak political and institutional support remains and is reflected in:

- Savage budget cuts to the Human Rights and Equal Opportunity Commission, now the Australian Human Rights Commission (AHRC), during the period of the last government. The current federal government has also instituted further budget cuts;
- Inadequate funding of, and political support for, the EOWW Agency;

- The relocation of the former Office of Status of Women from the Department of Prime Minister and Cabinet to the Department of Family and Community Services, where it now remains as the Office for Women; and
- A decline in funding for women’s advocacy and non-government organisations.

An important feature of the Australian approach to positive action has been the interrelationship of a ‘soft’ regulatory approach and a management-focused change process (Charlesworth et al 2005). This approach has been strongly supported over the last decade by the emphasis in government policy on the ‘business case’ to promote both family-friendly workplace arrangements and EEO for women. The short-term cost/benefit business case argument for EEO and the increased representation of women is not concerned with the gender division of labour, power differentials between men and women nor revaluing work at the bottom of the hierarchy. Its promise that advancing women is good for the business bottom line assumes that the business interests of employers are compatible with EEO and that the good of the business will further the good of all (Fredman 2002). This narrow version of the business case thus creates the space for inaction. Further it hides the business case for unequal opportunity, reflected most tangibly in the growing gender pay gap, and contributes to a privileging of the rights of business over the rights of women workers to equal employment opportunity both in public discourse and in policy responses.

Towards improved regulation

In my view there need to be extensive amendments to or indeed new regulation to create and implement a duty on all employing organisations of 100 or more employees to proactively promote gender equality. Such regulation would build on current requirements under the EOWWA that are considerably strengthened and made more transparent.

Keep the focus on women

Notwithstanding the limited effect of the EOWWA to date, there is no doubt specific regulation directed towards positive action for women is needed more than ever before. While individual men may be disadvantaged from time to time – they are *not* structurally disadvantaged in employment as are women as a group. The EOWWA is the *only* gender-specific regulation in place concerned with moving towards gender equality in employment. It is also the only piece of regulation dealing with positive action for women to address systemic disadvantage. In the SDA in contrast ‘special measures’ are still understood as an ‘allowable’ form of discrimination. A possible name for the revised Act would be the Equality for Women in the Workplace Act.

Recognise the intersectional nature of the women’s inequality in the workplace

To this end it is important any amendments or new regulation should recognise that the removal of sex-based barriers will require action to address additional barriers for women of diverse backgrounds, including Indigenous women, women with a disability, women from a migrant or non English speaking background, older women etc.

Coverage of the regulation

I support the EOWW Agency submission to extend coverage to all organisations employing 100 or more individual employees. This should include federal government agencies and departments. The head count of employees should include distinct parts of organisations including for example head office and branches. There is some anecdotal evidence that some organisations separately count different functional areas of the same organisation particularly where they are geographically separated. This leads to organisations that employ well over 100 employees in total considering they are not required to report to the Agency. This undermines the purpose of the EOWWA. Where large organisations have functionally distinct units that themselves have

more than 100 employees, they should be encouraged to provide disaggregated data for these units as well as aggregated data for the whole organisation.

I also support the EOWW Agency submission in respect of the potential role of the Agency in supporting and educating smaller employing organisations with a view to ultimately including them within the jurisdiction of the regulation.

Equality audits and plans

I generally support the EOWW Agency and ACTU submissions on gender equality audits and plans. As the ACTU argues, the setting of minimum EEO standards clarifies the expectations of employers both in reporting and in workplace practices. The new or amended regulation should clearly set out the obligation on respondent organisations to undertake a gender equality audit and report annually against specified targets on progress towards both gender equality standards set by the Agency and additional ones identified within the organisations.

The implementation of the UK Gender Equality Duty (which places the legal responsibility on public authorities to promote gender equality and eliminate sex discrimination, in respect of employment, the provision of services and policy making) provides a model of a useful *process* to consider in the audit, plan monitor and evaluate cycle of gender equality audits and plans in any new or amended regulation. Importantly this process emphasises transparency within the respondent organisations. In respect to their employment role, respondent organisations in the UK are required to meet special duties to identify and then take steps to eliminate disadvantage and inequality which include the following steps:

- Prepare and publish a gender equality scheme, showing how it will meet the organisation's general and specific duties and setting out its gender equality objectives;
- Consider, in formulating the organisation's overall objectives, the need to include objectives that address the causes of any gender pay gap;
- Gather and use information on how the organisation's policies and practices affect gender equality in the workforce;
- Consult stakeholders (i.e. employees and others, including trade unions) and take account of relevant information in order to determine the organisation's gender equality objectives;
- Assess the impact of the organisation's current and proposed policies and practices on gender equality;
- Implement the actions set out in the organisation's scheme within three years, unless it is unreasonable or impracticable to do so; and
- Report on the scheme every year and review it at least every three years.

In a very recent review of the UK equality duties, it was found that there was wide acceptance by the respondent organisations and that generally the data-driven performance management had been successful (Schneider-Ross 2009).

Unlike the EOWW Agency recommendations to the Review I do not believe that different gender equality standards should be set for different industries. There is room for industry specific standards to pick up particular issues of structural discrimination within certain industries (such as the large gender pay gap in the banking industry) but such standards should be *on top of* basic gender equality standards that apply to *all* reporting organisations.

Further it is crucial that equality audits and plans are placed in the public domain by being made accessible through the online report database. Over the last decade there has been an increasing tendency for reporting organisations to declare their reports to the Agency to be confidential and not to be placed in the public domain.

Employee consultation and involvement

While the increased employer support for the EOWWA and for the Agency reported in the Agency's submission is positive, one of the main deficits that needs to be urgently addressed is a requirement for consultation with employees *and* their unions, where present, in the equality audit and reporting process. This requirement existed in the AAA but was excised with the enactment of the EOWWA. Further, employees need to be advised of and enabled to comment on draft plans and targets which should contain a short readable summary that is also accurate.

In addition serious consideration needs to be given to developing and supporting a network of workplace equality representatives who would function in a similar fashion to OH&S representatives. I note that in introducing its equality duties the UK government provided funding to the Trade Union Congress to train workplace equality representatives. Further, given that barriers faced by female employees in male-dominated workplaces tend to be ignored or brushed aside, even where unions are present, there need to be mechanisms to ensure that the specific concerns of female workers are picked up in equality audits and can be addressed in the equality plans.

Compliance, Enforcement and Sanctions

In ensuring positive duties are implemented and are effective, there needs to be an appropriate compliance regime. Fredman argues for a number of steps in the compliance pyramid, moving from encouragement and support to promote a co-operative rather than adversarial approach, to scrutinizing report and equality plans and their implementation, with provision for sanctions if appropriate (2005).

I generally support the EOWW Agency recommendations on compliance, enforcement and sanctions and believe that the proposed role of the Office of the Fair Work Ombudsman (FWO) would be appropriate given the current inadequate funding for the Agency and its lack of powers in this respect. I note however that if the Agency relies on FWO Inspectors for compliance it will not develop its own expertise in inspections, compliance audits and notices. Perhaps more importantly is the issue of the extent to which the Agency will be able to influence the priority this work is given along with the many other functions of the FWO. If the Agency were to be empowered and funded to undertake the compliance functions of any new regulation then I would support the ACTU recommendation that this role remain with the Agency.

Data Collection

I generally support the EOWW Agency, ACTU and AHRC submissions in this respect. Disaggregated and consistent data collection in the equality plans reported to the Agency is critical and should be developed to enable rigorous monitoring over time against targets set out in gender equality plans, within and between reporting organisations, across industry sectors and against national and international gender equality benchmarks.

Additional regulation

In addition to amendments to the current EOWWA or the enactment of any new regulation several other regulatory changes need to be made to support both the effective implementation of the regulation and positive action towards gender equality in employment. These include:

- ***Transparency of pay***

As noted in the Work+ Family Policy Roundtable submission to the House of Representatives Pay Equity Inquiry, one of the difficulties in addressing the gender pay gap in Australia is the growing non-transparency of pay. Increasingly details of salaries and performance-based pay are made confidential and it is difficult, if not impossible, for a large number of employees to know how their own remuneration compares with that of their colleagues. This is particularly an issue in the Australian finance sector. Transparency around wages and

conditions is an essential precursor to the pursuit of fair pay that does not discriminate on the basis of gender. In the UK the new Equalities Act is to outlaw pay secrecy clauses and make it unlawful to stop employees discussing their pay. The UK Equality and Human Rights Commission is also conducting pay equity inquiries into particular sectors, including the financial services sector and the construction industry and will work to improve transparency about the pay men and women receive. Similar steps could be undertaken through amendments to the SDA and other appropriate regulation and through incorporating action to improve pay transparency into the roles of both the Agency and the AHRC.

- ***Procurement/industry assistance***

I support action to link compliance and sanctions with federal government procurement policy and practice. I note that the UK Equalities Review found that there was evidence that using procurement to 'buy' equality outcomes in employment is generally accepted by the business community to be a sensible approach for government to take and further that requiring suppliers to follow sound equality principles could have a profound impact. In

Other submissions have dealt in detail with the procurement issue so I will not go into detail here except to state that such an approach should also be extended to industry assistance. In my view all industry assistance and funding of services should be subject to the provision of compliance certificates where the relevant organisation is covered by the EOWWA. Federal government provision of industry assistance is considerable and needs to be strategically linked both to decent employment outcomes and with gender equality outcomes. For example, as highlighted below, instituting requirements for receipt of government financial assistance is already used in the development context: with Australia through AusAid requiring gender equality plans and demonstrated gender equality outcomes from countries to which it provides aid.

Structural Arrangements

To meet Australia's obligations under CEDAW to advance gender equality all four regulatory approaches canvassed earlier must be better integrated both in terms of structural arrangements and government policy. Action is needed on many fronts and legislation has an important role to play as a part of a comprehensive strategy for tackling inequality, discrimination and disadvantage (Dickens 2007). What counts, however, is how the legislation is operationalised in practice at the industry level, in organisations and by the bodies responsible for the legislation. Further, without substantial policy support, appropriate resourcing and explicit political commitment to gender equality by the federal government, the effectiveness of any further legislative amendments will be limited.

While I broadly support the EOWW Agency submission on structural arrangements including the relationship between EOWWA, the *Fair Work Act 2009* (FWA) and the SDA and their relevant agencies, the Agency as a statutory agency *should not* be moved into Fair Work Australia and should remain organisationally independent. While concerned with employment, the remit of FWA is quite different- it is concerned with adverse action and compliance with *minimum* standards of employment via the National Employment Standards, modern awards and enterprise bargaining – which while fundamental to women's equality in employment are not sufficient to ensure progress towards gender equality. To comply fully with our CEDAW obligations the linkages between Fair Work Australia, the FWO, the AHRC and the Agency need to be developed and enhanced. If the pay equity function ends up in Fair Work Australia or the FWO after the House of Representatives Inquiry into Pay Equity, the Agency still has a significant and critical role in driving positive action and progress towards gender equality in employment, including gender pay equity, at the organisational level. Given its sole concern is with the area of employment, albeit at the enterprise level, it would be appropriate as recommended in several submissions to link administrative support for the Agency within the Department of Education, Employment and Workplace Relations.

One way of establishing the basis for more effective linkages between the Agency, the AHRC, Fair Work Australia and the FWO and to provide for coherent government action in this respect would be for the government to develop a broad government-wide action plan for gender equality. An existing gender equality policy framework which the government could easily adopt into the domestic policy context is that that underpins the AusAid program.¹ Gender equality is stated to be ‘an overarching principle of Australia's aid program’. This means that ‘gender equality is integral to all Australian government aid policies, programs and initiatives’. This policy framework places emphasis on gender equality *outcomes* including the demonstration of progress towards the improved economic status of women and equal participation in decision making and leadership. In progress towards gender equality, the framework is designed to encourage strategic and well targeted interventions, which are informed by operating principles such as:

- Engaging with both men and women to advance gender equality
- Strengthening accountability mechanisms to increase effectiveness
- Collecting and analysing information to improve gender equality results

Given the clear and unequivocal expectations Australia has of countries that receive Australian aid, it would behove the Australian government to practice what it preaches within Australia itself. The federal government should insist that gender equality is integral to all Australian government policies, programs and initiatives, domestic and international, with the appropriate mechanisms put in place to operationalise this commitment.

Specific focus of the Agency

The Agency is crucial to the effective implementation of equality action at the enterprise level. I would argue that it needs to broaden its traditional focus. Over the last decade the Agency has tended to emphasise the continuing under representation of women at senior levels to the exclusion of issues of concern to women in blue collar and lower status positions. This emphasis is reinforced by the Agency website where the predominant images of women are of corporate and professional women. Both the Agency's focus, including in its education function and in its promotion of gender equality at the enterprise level, as well as its projected image need to be complemented by a focus on job quality and job design issues, issues experienced by low-paid women including job insecurity and underemployment, as well as issues experienced by different groups of women including younger women, older women, Indigenous women, women with a disability and women from a migrant or non-English speaking background.

Pay equity

Pay equity is the subject of many submissions to this Review. It is also the subject of a specific House of Representatives Inquiry, which has not yet reported. In my view the ideal situation would be to have a Pay Equity Commissioner located within Fair Work Australia to monitor and enforce the pay equity provisions of the FWA as well as pay equity in the implementation and review of modern industry awards. The FWO should also conduct broad industry audits of gender pay equity. The complementary roles of Fair Work Australia and the FWO would ideally be linked with that of the EOWW Agency, which would monitor and take action on pay equity measures at the enterprise level.

I endorse the ACTU submission in respect to reporting on pay equity. It would make sense to include pay equity in the detailed equality audits and associated plans which would not only provide public access to aggregated data but also enable the Agency to gain knowledge about what is occurring within organisations including around progress on gender pay equity. It is crucial that aggregated data from equality audits and plans be made publicly available.

¹ see http://www.ausaid.gov.au/publications/pdf/gender_policy.pdf.

Resourcing and broader and more effective government support

There can be no effective legislation without adequate resourcing. Two of the 3 major agencies that have the potential to address gender inequality in employment continue to be under-funded (for details see the Agency and AHRC submissions). This continued under funding sends a message to the community and to employing organisations that the government is not serious about addressing gender inequality and fulfilling its obligations under CEDAW. In my view the budget of the EOWW Agency needs to be significantly increased with provision for any additional functions assigned to the Agency after the Review being adequately costed.

While improved regulation will provide a framework for other action to move towards greater gender equality in employment it is not sufficient. To be effective such regulation needs not only decent resourcing but also:

- Political will/political champions
- Collection and publication of data
- Whole of government commitment
- Community education/consultation
- Ongoing evaluation/research

Finally, the federal government needs to take a leadership role in terms of its own employing agencies by modelling proactive compliance with the revamped EOWWA regulation. It also needs to reassert gender equality as a social and economic goal and engender public debate and ultimately policies and legislation to tackle different facets of gender inequality, including through the Agency, such as

- The consequences of sex segregation and poor job quality;
- The lower return on women's human capital,
- Chilly workplace climates and blokey male cultures,
- Both long hours of work and underemployment,
- The gendered scheduling and organisation of work.

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