

A.



Submission of the Law Council of Australia to the House of Representatives Standing Committee on Employment and Workplace Relations

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

Date: April 2009

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About the Law Council of Australia

The Law Council of Australia ('**Law Council**') is the peak organisation representing the Australian legal profession on issues of national and international concern. The Law Council advises governments, courts and other federal agencies on how the law and the justice system can be improved on behalf of the profession and for the benefit of the community.

The Law Council's Constituent Members comprise the state and territory law societies, bar associations and, as of 2007, the Large Law Firm Group (LLFG), all of which are more fully identified at **Attachment A** to this submission.

The Law Council relies on the work of its specialist committees and working groups to inform and guide the Board of the Law Council. The submission herein was prepared for and is endorsed by the Law Council's Equalising Opportunities in the Law Committee.

The Law Council is committed to the principles of equality of workplace opportunity, justice and the principle of equal remuneration for equal or comparable work. Accordingly, the Law Council welcomes the opportunity to respond by way of this submission to the House of Representatives Standing Committee on Employment and Workplace Relations *Inquiry into pay equity and associated issues relating to increasing female participation in the workforce* ('**Inquiry**').

Before turning to the questions posed pursuant to the Inquiry's Terms of Reference, the Law Council makes the following general comments.

General observations

Equal remuneration principle

1. From 1907 to 1969, the minimum wage for women was calculated as a proportion of the minimum wage set for men.¹ From 1969, the principle of equal pay for equal work became established in Australia.² The principle was expanded in 1972³ and through a series of Federal Equal Pay Cases further developed to encompass the concept of equal pay for work of equal or comparable value. The concept is known as the equal remuneration principle. The development of the principle over time has located the debate about pay inequity in industrial law discourse and produced measures largely responsive to instances involving direct discrimination.⁴
2. Deceptively simple, the concept that underlies the principle relies on defining and measuring factors that affect remuneration. Some labour law factors including employment type (such as full and part time) and wage measures (such as ordinary and overtime hours) are reasonably straightforward to quantify.
3. However, the concept of 'pay' is not without complexity. The contemporary remuneration package includes wages, bonuses, shares, discretionary allowances, performance incentives, merits or bonus payments and superannuation, as well as access to benefits such as a car, computer, mobile phone and other forms of indirect remuneration.
4. Further, quantifying 'work value' so it can be measured and logically compared can also be a vexed issue. While skill based relativities⁵ readily offer wage comparability, work performed in female-dominated occupations cannot always so easily be compared in an abstract sense to 'male' work,

¹ Pursuant to *Ex Parte HV McKay* (1907) 2 CAR 1 per Justice Higgins who determined what wages and conditions were 'fair and reasonable' in the context of the Excise Tariff Act 1906. By 1919, women's initial minimum wage was set as only 54% of that of their male colleagues performing the same work.

² The *Equal Pay Case of 1969- (1969)* 127 CAR 1142- resulted in adoption of the principle of 'equal pay for equal work', though by characterising women employees differently from men (as 'seamstresses' for example while men were styled 'tailors', the principle was circumvented.

³ The *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172

⁴ For example where women are remunerated at a lower level than men performing the same duties.

⁵ For example by focussing on similar productivity related characteristics.

notwithstanding that very few occupations are reserved exclusively for workers of one gender or the other.

The gender earnings gap

5. In 2008, the Australian Bureau of Statistics ('ABS') reported that when expressed as a ratio relative to men's earnings, Australian women overall earn .65 of men's total earnings, .81 of *full time adult* men's earnings and .84 of full time adult men's *ordinary time* earnings respectively.⁶
6. The statistics expressed by *full time adult* earnings exclude data about part time workers and *ordinary time* statistics exclude data about work that is performed other than during ordinary work hours (such as overtime).
7. As more women than men work part time, the differential in earnings statistics between men and women is more pronounced by the *all employees in total* category which expresses the earnings of all employees (both full and part time).

Australian Legal Practitioners

8. Comparing the remuneration of male and female legal practitioners is complicated by the fact that men and women are not equally distributed across the main employment sectors. The rate of entry and exit into the profession is mentioned further below.
9. The preponderance of female practitioners tend to be younger and more recently admitted to practice than male practitioners. Further, more female practitioners than male practitioners work part time or under a flexible workplace arrangement.
10. Men on the other hand continue to hold a greater proportion of the more senior roles for which they are accordingly better remunerated. Because of these factors it is perhaps more meaningful to consider income parity between the genders based on the incomes of full time private practitioners by reference to years since admission.⁷
11. From the very beginning of their careers within the legal profession, men are paid more than women.⁸ For example, in New South Wales when the incomes of solicitors with less than one year's experience were compared in 2002, men on average earned \$8,200 more than their female counterparts.⁹ In 2007 little had changed, the estimated mean income of male solicitors admitted between one and five years was calculated to be \$70,300 while that of female practitioners was \$63,500.¹⁰
12. Women barristers are understood to be in a similar position, particularly at the beginning of their careers at the Bar. Much anecdotal and empirical data¹¹ now evinces that women barristers and advocates are under-represented in courts in proportion to their numbers and the '*gendered division of work that hinders equitable participation in the workplace*'.¹²

⁶ Australian Bureau of Statistics (2008) *Household Income and Income Distribution, 2008-03*, Catalogue No 6523.0, Canberra.

⁷ Only legal practitioners that are licensed to practise can offer legal services. Admission to the legal profession is a prerequisite to being able to apply to be issued with an annual Practising Certificate. See for example Chapter 2, Division 2 of the Legal Profession Model Bill 2006. An applicant for admission must satisfy the minimum age requirement, academic and practical legal training requirements and must be able to demonstrate suitability as a fit and proper person.

⁸ Among Victorian law graduates, women make up the greatest proportion of those earning up to \$50 000 annually, while men made up the greatest proportion of those earning above \$50 000: J Ewing et al *Career Patterns of Law Graduates* Law Institute of Victoria Melbourne 1990, 33.

⁹ The Law Society of New South Wales *After Ada: A New Precedent for Women in the Law* October 2002 page 6.

¹⁰ The Law Society of New South Wales *2007 Profile of the Solicitors of New South Wales* December 2007 page 35.

¹¹ See for example S F Israel and K McDonald, "Gender Issues for the Legal Profession - A Report on the Keys Young Survey" (1999) 37(4) *Law Society Journal* (NSW) 60; S F Israel, "Disparities Continue Between Women and Men in the Legal Profession - Gender Issues in the 1999-2000 Practising Certificate Survey" (2001) 39(1) *Law Society Journal* (NSW), 63; *Equality of Opportunity for Women at the Victorian Bar*, report on the 1998 Bar Council Report, in *Victorian Bar News*, 26 at 29.

¹² Victorian Department of Justice, Barristers Briefing Report 2006- 2007 at p.2 downloaded from: [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/JUSTICE+-+Victorian+Government+Barristers+Briefing+Report+2006-2007+\(PDF\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/JUSTICE+-+Victorian+Government+Barristers+Briefing+Report+2006-2007+(PDF))

13. The Law Council in 2004 adopted and released a Model Equal Opportunity Briefing Policy ('MEOBP') which recognises the need for broad cultural and attitudinal change not merely within the legal profession but more broadly and encompassing organisations and government entities that are involved in briefing counsel.
14. In this regard, the Law Council acknowledges and refers to the Victorian Bar Association¹³ submission to the Inquiry.
15. The Model Briefing Policy recommends that organisations adopting the MEOBP develop the capacity to collect data and report on the comparative allocation of work between male and female barristers showing, specifically, the number, practice area, type (including hearing type) and gross value of such services. At present the Model Briefing Policy does not recommend the collection of data (such as a breakdown of gross fees by reference to barristers' seniority) that would allow direct comparison of the fees paid to female and male barristers of similar seniority and experience. The Briefing Reports nevertheless provide evidence of pay equity as it affects barristers and may explain why women barristers' opportunities for advancement lag behind those of men. The Law Council is currently considering amendments to the MEOBP directed at gathering better information about the range of fees women barristers receive in comparison to their male counterparts.

Recommendation 1: That States and the Commonwealth Governments implement mandatory reporting on legal services expenditure that details the briefing of women and men by number of briefs and by total fees paid and requires improvements in reporting requirements to enable accurate comparisons to be made between fees paid to male and female barristers of similar experience and seniority.

Recommendation 2: That the private profession also be encouraged to adopt reporting on legal services expenditure in a similar manner for non-government work.

Recommendation 3: That adopting agencies and governments consider further refinements to the MEOBP as they are developed, to ensure the policy remains responsive to issues of inequality that result from discriminatory briefing practices.

Room for further improvement

16. While pay inequity persists, ABS research suggests the wage gap has narrowed over time.¹⁴ Indeed, the Organisation for Economic Co-Operation and Development ('OECD') also reported in 2008 that amongst OECD countries, Australia has the eighth lowest gender wage gap and New Zealand has *the* lowest.¹⁵ Australia's improvement in this area is generally acknowledged to be the product of both legislative and social measures.
17. Significant amongst these measures are the implementation of the *Sex Discrimination Act 1984* (Cth) ('SDA') and the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ('EOWW'), women's increased access to educational opportunities, workplace reforms such as greater availability of childcare and the greater opportunities afforded women by periods of economic growth and high employment.
18. The EOWW replaces the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*. However, the EOWW only requires companies, organisations and other employers involving 100 or

¹³ Submission Number 141 of the Victorian Bar in *Response to the Inquiry Into The Causes of Potential Disadvantage in Relation to Women's Participation in the Workforce*, 06/03/09 at paragraph 8.

¹⁴ See for example ABS *Australian Social Trends 2008*, ABS Cat No.4102.0, p1.

¹⁵ OECD, *Employment Outlook 2008 Edition, Summary* ISBN 978-92-64-046337, page 2, downloaded 15 September 2008 from: <http://www.oecd.org/employment/outlook>

more people to establish workplace programs to remove barriers to the entry and advancement of women within their organisation.

19. The SDA makes unlawful discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy in many areas of public life including employment and remains the major mechanism through which complaints are addressed.¹⁶ However, the mechanisms under EOWW and SDA largely rely on individuals to raise complaints or exhaust all domestic avenues of redress for discriminatory workplace practices.
20. The Law Council recently examined issues relating to the effectiveness of the SDA as part of a joint submission with the New South Wales Bar Association to the Senate inquiry into the *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*.
21. Notwithstanding that female employment rates have expanded considerably and the gender employment wage gaps have narrowed, women on average in OECD countries, still have 20% less chance of having a job than men, and are paid 17% less than their male counterparts.¹⁷
22. It is submitted there is room for improvement to further reduce the wage gap and pay inequity that remains particularly given Australia's obligations pursuant to international instruments including for example:
 - *International Labour Organisation ('ILO') Convention (No 100) concerning Equal remuneration for Men and Women Workers for Work of Equal Value* (Geneva, 29 June 1951)[1975] ATS 45;
 - *ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation* (Geneva, 25 June 1958) [1974] ATS 12;
 - *ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (Geneva, 23 June 1981) [1991] ATS 7.

Pay equity issues and the legal profession

Feminisation of the Australian Legal Profession and Career Progression

23. While women in Australia have been involved in the legal profession for over a century,¹⁸ reference to their comparatively recent appearance into the profession of law is sometimes cited to explain the comparatively stunted career progress experienced by women lawyers today.¹⁹
24. In 1994, the Australian Law Reform Commission reported that women already made up 50 per cent of law school graduates and 25 percent of the legal profession as a whole.²⁰ Yet even then, it was also observed, that women exited the profession at a much higher rate than men, and of those that remained, women did not progress to senior roles in proportion to their numbers.²¹
25. In 2007, 56% of Australian law graduates were women²² who tended to also feature disproportionately among top graduates.²³ In terms of the demographics of the practising profession²⁴ women now constitute about 38% overall of Australian legal practitioners.²⁵

¹⁶ Australia acceded to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women* March, 2009 providing a further mechanism for complaint when all domestic avenues have been exhausted.

¹⁷ OECD, *Employment Outlook 2008 Edition, Summary* ISBN 978-92-64-046337, page 3.

¹⁸ L Kirk, *Portia's Place Australia First Women Lawyers 1995 1 (1) Australian Journal of Legal History* 75-91, 75.

¹⁹ See for example the statistics in Hunter R *Women in the Legal Profession: The Australian Profile* in Schultz U and Shaw G (eds) *Women in the World's Legal Professions: A Challenge to Law and Lawyers*, Oxford Hart, 2002.

²⁰ Australian Law Reform Commission, Report 69, Part 1, *Equality Before the Law: Justice for Women* (1994) at Para 2.24, downloaded 1 April 2009 from: <http://www.austlii.edu.au/au/other/alrc/publications/reports/69part1/>

²¹ Op cit.

²² ABC (Australian Broadcasting Corporation) Radio National *Women in Corporate Law Firms* Law Report, 3 June 2008 transcript downloaded 3 June 2008 from <http://www.abc.net.au/rn/lawreport/stories/2008/2262012.htm>

26. In the twelve years from 1988 to 2000 the profession grew at an annual average growth rate of 3.8% representing an increase of almost 57%. Within this general growth pattern, the number of female solicitors grew by 169% (male solicitors 28.5%) at an average growth rate of 8.6% (male solicitors 2.1%). From October 2006 to October 2007, 2,696 solicitors were issued with a practising certificate for the first time in New South Wales. This represents an overall growth rate of 4.5 %, the number of female solicitors rising by 7.7% (male solicitors by 2.2%).²⁶
27. The increase in the number of women entering the legal profession is also reflected in Victoria where a similar profile emerges. A recent report found 56% of practising lawyers under the age of 40 were women, at age 40 that number almost halved to around 25%.²⁷
28. While the number of young women entering the profession has increased there has not been a corresponding rise in the numbers of women attaining law firm partnership. A 2006 survey²⁸ of partnership appointment found that at 24 of Australia's leading law firms, women make up on average just 18.1% or 429 of 2364 partners.²⁹ When ranked, the survey found that it was possible to identify a handful of firms at which women tended to have a much higher chance of realising their aspirations of becoming partners of the firm. However, ranking also highlighted the worst individual performance on this measure. Notably one firm's female partnership comprised 10.8 %.³⁰ Fewer women tend to select to practice law in the manner of a barrister. Nevertheless the position is similar in that a small proportion of female barristers (about 3.3 % to 7%) compared to male barristers progress to the ranks of 'seniors' at the bar.³¹

Disadvantage

29. Through the SDA mechanism a body of jurisprudence has developed, two decisions of which are of particular relevance to the Inquiry.
30. While *Hickie v Hunt and Hunt*³² was decided prior to the 1995 amendments to the SDA³³, the case nevertheless typifies the discrimination that women lawyers face as they attempt to balance work life and family responsibilities.
31. It was held in *Hickie* that the requirement for a 'contract' partner (salaried rather than equity) in a law firm to have to work fulltime upon her return from maternity leave amounted to indirect discrimination. The fact that *Hickie* was pregnant when she was appointed was known to the firm. She returned from

²³ M Thornton and J Bagust, *The Gender Trap: Flexible Work in Corporate Legal Practice* *Osgoode Hall Law Journal*/Vol 45 No 4 2007 773 at page 774.

²⁴ Pursuant to Legal Profession legislation (or its counterparts) candidates eligible for admission are admitted as Australian legal practitioners. However once admitted practitioners may select to practice in the manner of a solicitor or barrister.

²⁵ ABC, Radio National, *Women in Corporate Law Firms* Law Report, 3 June 2008 transcript downloaded 3 June 2008 from <http://www.abc.net.au/rn/lawreport/stories/2008/2262012.htm>

²⁶ The Law Society of New South Wales, *2007 Profile of the Solicitors of New South Wales* December 2007

²⁷ A Patterson *Bendable or Expendable: Practices and Attitudes Towards Work Flexibility in Victoria's Biggest Legal Employers* Melbourne Law Institute of Victoria 2006.

²⁸ Mahlab Recruitment *Private Practice Australia & International Survey* 2006

²⁹ Mahlab Recruitment *Private Practice Australia & International Survey* 2006 page 2.

³⁰ Mahlab Recruitment *Private Practice Australia & International Survey* 2006 page 2.

³¹ Statistics mentioned in Moyle S and Sandler M *Effective Law Effecting Change: The Sex Discrimination Act and Women In The Legal Profession* ALRC Reform Issue 83 Spring 2003 suggest only 3.3% downloaded 24 July 2008 from : <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform83/3.html>

However statistics mentioned in the Victorian Department of Justice, *Barristers Briefing Report 2006- 2007* at p.5 suggest women make up about 7 % of Queens's Counsel or Senior Counsel at the Victorian Bar. Report downloaded from: [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/JUSTICE+-+Victorian+Government+Barristers+Briefing+Report+2006-2007+\(PDF\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/JUSTICE+-+Victorian+Government+Barristers+Briefing+Report+2006-2007+(PDF))

³² *Hickie v Hunt and Hunt* [1998] EOC 92-910.

³³ The 1995 amendments to the SDA included the introduction of SS7B and 7C which displaced from the complainant to the respondent the onus of (dis)proving reasonableness as a defence to indirect discrimination.

- leave to work part time, however her practice had run down. Hickie claimed to have been the victim of discrimination based on the firm's failure to properly support her practice during her absence and her later period of part time work. She claimed the decision not to renew her contract in the circumstances, amounted to unlawful discrimination based on her being treated less favourably on grounds of sex, marital status, pregnancy, potential pregnancy and family responsibilities.
32. Presiding over the hearing, the [then] Human Rights and Equal Opportunity Commissioner Elizabeth Evatt held that the requirement to work full time would inevitably disadvantage women practitioners who, like all women, carry the majority of family carer responsibility. The Commissioner reached her decision by focussing narrowly on the particular facts of the case. Accordingly it is unfortunate that the decision provides little guidance on the principles that could inform future courts and tribunals.
 33. In 2008, in the matter of the *Victorian Women Lawyers Association Inc v Commissioner of Taxation*,³⁴ French J of the Victorian Supreme Court was invited to take *judicial notice* of the 'disadvantage' experienced by women practitioners in the legal profession.
 34. The facts in so far as they are relevant, concerned an application from the Victorian Women Lawyers (VWL) to the Australian Taxation Office to be exempted from the obligation to pay income tax. The exemption was sought on the basis that VWL is a charitable institution or an association established for community service purposes.
 35. In its written submissions the VWL referred to the disadvantage of women in society and of women practitioners in the legal profession as a disadvantage so well understood it could be characterised as a social fact.³⁵ The bench was persuaded that the disadvantage was a matter of common knowledge generally, within the meaning of section 144 (1)(a) of the *Evidence Act 1995* (Cth). Indeed French J agreed that at this level of generality, the social fact of the historical and persisting disadvantage experienced by women in relation to their participation and career advancement within the legal profession could not be disputed.³⁶
 36. French J was asked to consider whether the advancement of women and women practitioners could accordingly be characterised as a public benefit. In answering French J considered the objects of the SDA which are contained at section 3 of the Act. He said that the legislation and the convention to which Australia is a party can be taken as indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life.³⁷

Retirement savings

37. Every aspect of a worker's professional reward package is affected by pay inequity including the loss of the opportunities such as those offered by tax streaming and offset arrangements, bonus and performance pay as well non-monetary benefits that are calculated based on income bracket.
38. In terms of flow-on effects, gender pay gaps will have an obvious impact on retirement planning and funding.
39. It is hardly surprising that the superannuation savings of Australian men and women disclose a significant gap. Australia's current superannuation system is linked to paid work and accordingly, overwhelmingly disadvantages women who move in and out of paid work to care for family members. Indeed pay inequity, career breaks to raise children, part time and casual employment³⁸ and the

³⁴ *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008)

³⁵ *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008) at para 112

³⁶ *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008) at para 116

³⁷ *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008) at para 122.

³⁸ Superannuation Minister Nick Sherry, *Give women a tax break*, reported in *Adelaide Advertiser*, 22 July 2007.

ongoing under representation of women in senior roles are responsible for the gender gap in retirement savings that accounts for far greater numbers of older women than men living in poverty.³⁹

40. It remains the fact that women continue to earn less than men and are more likely to be engaged in part time and casual work which are significant contributing factors to the gender gap in retirement savings.
- Women working full time in Australia earn 16 per cent less than men⁴⁰.
 - Women have significantly less money saved for retirement – half of women aged 45 to 59 have \$8,000 or less in their superannuation funds, compared to men in that age bracket \$31,000⁴¹.
 - The average superannuation payout for women of \$37,000, represents a third of the average payout for men of \$110,000⁴².
41. Compulsory employer contribution to superannuation was introduced in 1992. Since 1975 the Family Court of Australia has grappled with how to treat superannuation. This resulted in often unsatisfactory results where typically women left a union *asset rich* and *super poor* while the position for men was the inverse. In December 2002 new super splitting laws came into effect. Unfortunately the super splitting legislation is complex and contains a series of formulas that make it difficult to understand the rationale behind valuations or how valuation is achieved.⁴³
42. Studies into other aspects of work and retirement point to the strong inverse relationship between economic well being and retirement intentions.⁴⁴ In other words, the more financially secure an individual perceives themselves to be, the more likely they are to retire and also be satisfied with their retirement experience. In both work and retirement women earn significantly less on average than men. Not surprisingly women are less satisfied than men with their income and are more concerned about economic well being. Lower incomes for females are associated with lower levels of labour force engagement over time combined with reliance on single sources of income. Males tend to have greater private income sources when compared with women with 49% of men receiving income from superannuation compared with 36% of women and 29% of men receiving income from savings or term deposits compared with 18% of women.

Women's participation in the workforce

43. The ABS produces a range of data on labour force participation including a monthly Labour Force Survey and five yearly Census of Population and Housing, from which the ABS bases its reports that women's participation in the workforce has steadily increased from 49% in 1984; 50% in 1988 and 58% in 2006.⁴⁵
44. The *22nd AMP.NATSEM Income and Wealth Report* confirms that over the twenty years to 2008 women's participation in the workforce has increased 10% to 58.2%.⁴⁶

³⁹ K Hannon, *Work not over on job discrimination*, Canberra Times 22 July 2007.

⁴⁰ Australian Bureau of Statistics, *Average Weekly Earnings, Australia*, February 2008.

⁴¹ S Kelly, *Entering Retirement: the Financial Aspects* (paper presented at the Communicating the Gendered Impact of Economic Policies; The Case of Women's Retirement Incomes, 12-13 December 2006.

⁴² R Clare, *Are retirement savings on track?* Association of Superannuation Funds of Australia Limited 2007.

⁴³ See for example, N Wahhab, *Supersplitting after the marriage has split*, the Argyle Partnership Lawyers.

⁴⁴ S Dann M Drew and J Drew, *Women work and retirement in Australia*, National Senior Productive Ageing Centre, 2006 downloaded November 2008 from: www.productiveageing.com.au/docs/dann_ifa_2006.pdf

⁴⁵ Australian Bureau of Statistics (2006) *ABS 1986-2006 Censuses of population and housing*. Downloaded 30 September 2008 from: [http://www.abs.gov.au/AUSSTATS/abs@nsf/Lookup/4102.0Chapter 7002008](http://www.abs.gov.au/AUSSTATS/abs@nsf/Lookup/4102.0Chapter%207002008)

⁴⁶ *22nd AMP.NATSEM Income and Wealth Report*, Issue 22- April 2009 at p 1 downloaded from <http://www.canberra.edu.au/centres/natsem/>

45. Compared to selected OECD countries Australia has the tenth highest workforce participation rate for women and fifth highest for men.⁴⁷ Further, the OECD reports that member countries that have implemented labour market reforms have been rewarded with increased labour market participation.
46. Reforms reported to be relevant to the increase of women's workforce participation include the introduction of flexible working arrangements, adequate provision for parental leave⁴⁸ and good quality affordable child care.

Adequacy of current data to reliably monitor employment changes that may impact on pay equity issues.

47. The main sources of data that can be used to monitor workplace conditions relevant to pay equity issues in the general population include:
 - The Australian Bureau of Statistics' quarterly Survey of Average Weekly Earnings (AWE);
 - The ABS Biennial Survey of Employee Earnings and Hours (EEH); and
 - The Equal Opportunity for Women in the Workplace Agency and Australian Human Rights Commission.
48. The AWE measures earnings collected at business level based on total earnings (ordinary time and overtime) as paid to employees and the total number of employees (full time employees and others) in the business. From these data the following statistics are produced:
 - Average weekly earnings of all employees;
 - Average weekly total earnings for full time employees; and
 - Average weekly earnings ordinary time earnings for full time adults.
49. The EEH's two-yearly data reflect statistics on composition and distribution of employee earnings, hours paid for and methods used to set employees pay rates. The EEH were produced annually since 1974, but since 1996 they have been cut back to two-yearly surveys.
50. The information available from these ABS resources is useful because it allow variables relevant to the analysis of pay equity issues to be isolated and considered. These variables include:
 - Industry type;
 - Sector public/private;
 - Employer unit size;
 - State or territory;
 - Managerial/non managerial role;
 - Occupation by reference to broad groupings;
 - Gender of employees and employer;
 - Full or part time status;
 - Adult or junior;
 - Whether pay setting mechanism is by way of award, collective agreement or individual agreement ⁴⁹; and
 - Hours paid for.

⁴⁷ OECD, *Employment Outlook 2008 Edition, Summary* ISBN 978-92-64-046337, page 2, downloaded 15 September 2008 from: <http://www.oecd.org/employment/outlook>

⁴⁸ Australia remains one of only two OECD member countries yet to introduce a publicly funded paid maternity leave scheme.

⁴⁹ Notwithstanding the impact of the *Fair Work Act 2009* (Cth).

51. However these ABS data are also limited in what they can tell researchers about organisational characteristics, workplace relations management, human resources practices and 'firm/organisational level' performance in relation to pay equity issues. In terms of the legal services industry, the banding of occupations into categories makes it difficult to isolate information for example, relating to employees who work part time or flexibly.⁵⁰
52. It is submitted that what is needed are comprehensive industry specific data sets to track 'performance over time' data of employees' earnings and hours. Such data would need to be regularly collected, collated and reported upon. Further, national workplace and employee level data are required to comprehensively monitor employment changes capable of influencing pay equity.
53. Further, while the ABS provides primary data, much of the detailed analysis of available information is predominantly undertaken by academics and interested persons in the course of research. The absence of a dedicated research unit means that the capacity to track Australia's progress particularly to monitor the impact on pay equity of changing workplace relations policy and legislation is irregular and incomplete.

Recommendation 4: That the ABS annually collect and publish comprehensive and industry specific data sets capable of tracking performance over time data of:

- earnings and ordinary hours; and
- earnings and overtime.

54. The Equal Opportunity for Women in the Workplace Agency undertakes research and makes available a good range of quality information products and tools on the topic of pay equity. However it is submitted that more needs to be done to raise awareness of the topic for these materials to be used to greatest advantage.

Recommendation 5: That programs be developed to encourage industry and occupational associations to investigate pay equity issues within their sectors and avail themselves of existing resources particularly those available from Equal Opportunity for Women in the Workplace Agency which suggest action plans.

Recommendation 6: That existing resources be linked and cross referenced to general workplace relations websites including for example, the Australian Government Workplace Ombudsman and the Australian Government's new industrial umpire Fair Work Australia.

Recommendation 7: That a research unit be established to analyse pay equity and senior role disparities data to produce industry specific benchmarking information and conduct further primary research into the causes of pay equity be funded and conducted with a view to generating effective mechanisms for improvement.

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

55. Research findings consistently indicate that employees and employers have little understanding or awareness of pay equity issues or the magnitude of the gender pay gap.⁵¹ Findings suggest that

⁵⁰ In a speech entitled *Flexible working practices in the law* given by E Broderick, Federal Sex Discrimination Commissioner to the New South Wales Law Society and New South Wales Women Lawyers Network at the Work2Suit Forum, 5 June 2008, it was estimated that in excess of 20% of employees works under a flexible work arrangement.

⁵¹ For example see the comments of the Diversity Council of Australia on its polling research entitled *Pay Equity Poll on General and Business Community Awareness*. Commissioned by the EOWA to assess community awareness of pay equity by way of a quantitative survey of Australians attitudes to pay equity was conducted in September 2008. The survey aimed to examine Australians' understanding of what

employers, employees and their representatives remain unclear about what constitutes pay equity and what can be done to improve or redress the situation.

56. It is submitted that there is a need for effective education and information programs to be implemented with the aim of raising community and business sector awareness about pay equity.
57. Pay equity is generally taken to be the product of a complex range of social industrial and historical factors⁵², one of which is discrimination. Indeed, evidence across OECD labour markets, indicates that notwithstanding some amelioration, discrimination on the grounds of gender or ethnic or racial origins persists, such that *at least* 8% of the variation in gender employment gaps and 30% of the variation in wage gaps can be explained by discriminatory practices in the labour market.⁵³
58. Accordingly, it is submitted there also exists a need for effective workplace discrimination training including encouragement for institutional level payroll audits to be undertaken with an emphasis on the productivity benefits of valuing diversity.

Recommendation 8: That an effective program be developed to alert all sectors of the Australian community about pay equity issues and promote the workplace benefits of inclusionary practices.

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

59. More women than men work part time, flexibly and in casual roles so as to accommodate carer responsibilities.⁵⁴ This partially explains why a greater proportion of women are clustered in lower paying jobs.⁵⁵ However, it also suggests that these workers have little or no meaningful capacity to negotiate wages or indeed conditions since these workers have little bargaining leverage upon which to draw.
60. It is submitted that interventions, including the need for regulatory measures to be imposed, may assist workers who are at a disadvantage in negotiations for wages and conditions. A range of pay equity regulatory regimes are in place internationally, some of the features of which that could be adapted include:
- Adopting a human rights or industrial/employment based focus;
 - Developing capacity for both complainant and proactive regulatory investigations to be triggered voluntarily and mandatorily in certain circumstances;
 - Developing a range of remedies that can respond to individual complainants or as workplace/employer or industry specific measures; and

constitutes 'pay equity', perceived differences in earnings of men and women in Australia and Australians desire for steps to be taken to close the gap. The findings validated the anecdotal view that both the business and general communities have a little awareness or understanding of the issues and often underestimate the magnitude of the gap; similar findings are reported by the Australian Institute of Mining and Metallurgy, *Gender pay equity and associated issues for women in mining*: Survey Report 2009 available from:

http://www.ausimm.com.au/content/docs/gender_pay_equity_wim_report.pdf

⁵² For example see the report of the Queensland Industrial Relations Commission, *Pay Equity- Time to Act* September 2007 which refers at page 1 to gender segregation of the Australian workforce; undervaluation of work predominantly performed by women; concentration of women in lower level classifications with fewer opportunities for training and skills development; caring responsibilities being undertaken by women and the effect of breaks in workforce participation.

⁵³ OECD, *The Price of Prejudice: Labour Market Discrimination on the Grounds of Gender and Ethnicity*, Employment, 2008, vol 2008, No 5 at 168

⁵⁴ See for example Australian Bureau of Statistics, *Average Weekly Earnings*, Australia, February 2008.

⁵⁵ Note the statement of the Deputy Prime Minister Ms Julia Gillard reported by S Maiden in the Australian, *Equal pay still a battle: Gillard*, 3 March 2008 and available from::

<http://www.theaustralian.news.com.au/story/0,25197,23307607-5013404,00.html>

- Developing a capacity to investigate and publish industry specific market rates of pay.

Recommendation 9: That further research be funded and conducted into need for regulatory protections.

Adequacy of recent and current equal remuneration provisions in state and federal workplace legislation.

61. The commissioned case studies and pay equity inquiries conducted at state level have led to the development of advanced industrial relations measures for dealing with pay inequity through the combination of legislation and the adoption of the Equal Remuneration Principle as a Statement of Policy by state based industrial relations commissions or their counterparts.⁵⁶ However, the introduction in 2006 of Work Choices⁵⁷ legislation has affected the conduct of industrial relations by transferring significant proportions⁵⁸ of employees from state based industrial relation systems to the federal system and by changing wage setting arrangements.
62. It is noted that the *Fair Work Act 2009* (Cth) 'FWA' gained royal assent 7 April 2009. In her Second Reading Speech to the Bill⁵⁹, the Minister for Employment and Workplace Relations said the Bill aims to restore the employment safety net of basic industrial rights lost under Work Choices. In particular, the FWA contains protections against discrimination and refers to the restoration of 'fair and relevant minimum safety net terms and conditions' taking into account a range of factors including the principle of equal remuneration for work of equal or comparable value and providing a regime for equal remuneration orders to be made.⁶⁰
63. While measures that strengthen the equal remuneration principle and introduce measures to assist employees to better balance their work and family responsibilities are welcome it is as yet unclear precisely how the regime for Equal Remuneration orders will operate.

Recommendation 10: That prior to the implementation of new measures aimed at giving force to the Equal Remuneration Principle, data establishing the effectiveness of existing structures be captured as a basis of measuring improvement.

Recommendation 11: That the effectiveness of any new measure be critically evaluated against stated objectives.

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.

64. While it is arguable that at various times in their professional lives women may choose to engage in part time or casual work to accommodate their family responsibilities, it is equally the case that factors such as the availability and affordability of childcare and inflexible working arrangements associated with ongoing full time jobs limit the options available to working mothers. Further limitations are also

⁵⁶ See for example the history of the Queensland Industrial Relations Commission *Pay Equity – Time to Act* September 2007; Industrial Relations Victoria *Pay Equity: How to Address the Gender Pay Gap* February 2005 and counterparts in New South Wales and other jurisdictions.

⁵⁷ The *Workplace Relations Act 1996* (Cth) as amended by the *Workplace Relations Amendment Act 2005* or Work Choices came into effect March 2006.

⁵⁸ Note: in Victoria, Work Choices covered all employees.

⁵⁹ Available from: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-03-11/0008/hansard_frag.pdf;fileType%3DApplication%2Fpdf

⁶⁰ See for example Section 134 of the FWA and Section 284 which includes as the equal remuneration principle as a factor to be considered as part of the safety net of minimum wages and Part 2-7 which establishes a regime for equal remuneration orders to be made etc

experienced when working mothers return to work and are appointed to specially designated roles ('special counsel' for example) with reduced prospects of further promotion or work less likely to support promotional prospects in the future.

65. Historically, differences in education in workforce experience have also been a contributing factor to the gender pay gap. However, as women have increased their participation in both education and the labour market these factors have become less significant. Access by part time employees to on-the-job training and promotional opportunities remains limited and continues to be an important factor in pay inequity.⁶¹
66. Employers that are subject to EOWA workplace compliance reporting⁶² must disclose measures relating to a range of matters including:
- Recruitment and selection;
 - Promotion transfer and termination;
 - Training and development;
 - Work organisation;
 - Conditions of service;
 - Arrangements for dealing with gender based harassment; and
 - Arrangements for dealing with pregnancy and related matters.
67. It is submitted that all employers should be encouraged to consider developing a workplace profile that refers to organisational policy on these criteria and that such policies be promoted to the organisation's workforce.

Recommendation 12: That employers be encouraged to conduct pay audits in their workplaces, provide transparent pay scales, promotion criteria, understand the role of a meaningful work valuation assessment, offer flexible work practices to all staff and that the implementation of such measures form part of annual reporting practices.

Need for further legislative reform to address pay equity in Australia.

68. It is submitted that complaints based mechanisms that rely on affected individuals limit the advancement of pay equity issues. Consideration should be given to attacking pay inequity pursuant to both enforcement of human rights and through the industrial relations systems. Further, legislative reform allowing the introduction of representative complaints, non-complaint-based investigations and other proactive measures would also assist in redressing pay equity issues arising from systemic and indirect discrimination.

Recommendation 13: That, rather than relying on individual complaints the Australian Human Rights Commission and the new industrial umpire, Fair Work Australia be given power and resources to initiate investigations, enter enforceable undertakings and issue compliance notices.

Recommendation 14: That initiatives taken by some of the states to address gender pay inequity be analysed and considered in development of a federal model.

⁶¹ For a recent example of a report that has made this finding see *22nd AMP.NATSEM Income and Wealth Report*, Issue 22- April 2009 downloaded from <http://www.canberra.edu.au/centres/natsem/> which reported at p 11 and 12 that women employed fulltime with dependant children spend on average 15 hours on housework and childcare.

⁶² *EOWA Act 1999* (Cth), Section 8(3)

69. Equality before the law means more than merely formal equality or equal treatment. True equality requires a legal system in which women's needs and experience are understood and a workplace culture that permits a woman to live a life without disadvantage.
70. The reduction of the gap in disparity of incomes, education and labour market participation suggests that gender bias in Australia has been substantially reduced relative to the position in the 1960's and 1970's.⁶³
71. The OECD's ⁶⁴ annual *Employment Outlook 2008* ⁶⁵ reports that structural reforms *per se* are likely to improve the employment prospects of under-represented groups by reducing the scope of discriminatory behaviors.
72. Anti discrimination legislation and other policies are needed to effectively combat discrimination. However, the legal prohibition of discriminatory conduct can only be effective if it is enforced. Enforcement predominantly relies on the victims' willingness to assert their rights which remains an intrinsically difficult and costly procedure.
73. The EOWW and SDA mechanisms will be more effective if supported by other measures that address labour discrimination including:
 - Long term investment in education campaigns and training to better inform people of their rights and employers of their obligations;
 - Structural reforms to promote more sustainable economic growth that will increase demand for employees, creating a more competitive environment that forces managers to drop discriminatory hiring and promotion of practices; and
 - Reviewing anti discrimination legislation such as SDA and the operation of the EOWW to ensure the protections they offer are supported by effective enforcement capable of addressing the more insidious forms of indirect discrimination; and
 - Enforcement agencies should be empowered even in the absence of individual complaints to investigate evidence of discrimination and act against offenders so as to develop a body of precedent law.

⁶³ F Argy, *Equality of Opportunity in Australia Myth or Reality*, the Australia Institute Discussion Paper Number 85 April 2006 p15

⁶⁴ Australia is a member of the OECD, an international organisation of thirty seven member countries that accept the principles of representative democracy and free market economy. <http://www.oecd.org/dataoecd/54/57/40846335.pdf>

⁶⁵ OECD *Employment Outlook 2008* downloaded 25 July 2008 from:
http://www.oecd.org/document/46/0,3343,en_2649_33927_40401454_1_1_1_1,00.html

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.