Joint Submission

Women Lawyers' Association of New South Wales and Australian Women Lawyers

Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality

28 July 2008

Submission to

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Senate Standing Committee on Legal and Constitutional Affairs
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ABOUT THE WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES AND AUSTRALIAN WOMEN LAWYERS

The Women Lawyers' Association of New South Wales (WLA NSW) is the peak representative body of women lawyers in New South Wales, and Australian Women Lawyers (AWL) is the peak representative body for women lawyers' associations throughout Australia. Our membership is diverse and includes members of the judiciary, barristers, solicitors, government bodies, corporations, large and small city and country firms, legal centres, law reform agencies, academics and law students.

Since WLA NSW was established in 1952, and AWL was launched on Friday 19 September 1997, we have been dedicated to improving the status and working conditions of women lawyers in New South Wales and Australia. We have been active in advocating for and promoting law and policy reform, frequently making submissions on aspects of law and policy affecting women in the legal profession and women in the community.

Issues that impact on the capacity of women to participate equally in the workforce, such as sex discrimination, are a significant reason for the very existence of our organisations. Our dedication to equal opportunities for women in the legal profession in particular is demonstrated through our support for, and promotion of, equal opportunity policies for women in the profession, such as the National Equality of Opportunity Briefing Policy adopted by the Board of AWL on 20 September 2003.

Sex discrimination has always been a key issue on the agenda of WLA NSW and AWL. In 2005 WLA NSW made a written submission addressing the effectiveness of the *Sex Discrimination Act 1984* (Cth) (SDA) in response to *Striking the Balance: Women, Men, Work and Family*, discussion paper of the Human Rights and Equal Opportunity Commission (HREOC).[1] In 2002, AWL made a written submission in response to *A Time to Value – Proposal for a National Paid Maternity Leave Scheme (2002)*, report of HREOC,[2] and in June this year AWL made a written submission in response to the *Inquiry into Paid Maternity, Paternity and Parental Leave Issues Paper* of the Productivity Commission.[3]

The weight of our experience informs this submission.

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[1] Women Lawyers' Association of NSW, Submission to the Human Rights and Equal Opportunity Commission, in response to *Striking the Balance: Women, Men, Work and Family Discussion Paper*, [Internet - http://www.womenlawyersnsw.org.au/plr.asp?Page=V&ID=190 (Accessed 27 July 2008)].

[2] Australian Women Lawyers, Paid Maternity Leave submission, [Internet – http://www.womenlawyers.org.au (Accessed 22 May 2008).].

[3] Australian Women Lawyers, Submission to the Productivity Commission, in response to *Inquiry into Paid Maternity, Paternity and Parental Leave Issues Paper*, [Internet - http://www.australianwomenlawyers.com.au (Accessed 27 July 2008)].

TIMEFRAME FOR THE INQUIRY AND OUR SUPPORT OF THE SUBMISSIONS OF THE NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES AND HUMAN RIGHTS LAW RESOURCE CENTRE

WLA NSW and AWL have had an opportunity to consider the submissions of the New South Wales Council for Civil Liberties (NSWCCL) and the Human Rights Law Resource Centre (HRLRC) to this Inquiry, and we support the views expressed in the NSWCCL and HRLRC submissions, and make the following additional comments of our own.

WLA NSW and AWL note with concern the limited timeframe afforded for the preparation of written submissions to this Inquiry. It is a particular concern given the comprehensive nature of this Inquiry, which involves a review of a major piece of legislation that impacts significantly upon the lives of Australian women. Our previous work on the effectiveness of the SDA has focused on family responsibilities in particular, and given the timeframe for this Inquiry it has been necessary for our comments in this submission to draw upon this previous work. However, we are willing to and would appreciate an opportunity to comment more generally on the effectiveness of the SDA, through the provision of a further supplementary submission or oral evidence.

A. THE SCOPE OF THE ACT AND THE MANNER IN WHICH KEY TERMS AND CONCEPTS ARE DEFINED

WLA NSW and AWL strongly support the opinion of Beth Gaze, when she observed:

> my assessment of the SDA is that I wouldn't be without it. But after 20 years [now 25 years], it has aged. It has fundamentally changed our legal and social environment, but other changes have also occurred which have undermined some of its gains. It needs revitalising to continue to move the case for women's equality along in the modern context. Its limitations must be acknowledged, and efforts put into remedying them as well as developing other measures to end women's disadvantage.[4]

In 1994 the Australian Law Reform Commission (ALRC) published ALRC 69 "Equality before the Law: Women's Equality" (ALRC 69).[5] As noted in ALRC 69, the SDA remains only a partial response to women's legal inequality.[6] The limitations of the SDA include that:

- it only addresses individual acts of discrimination within specified fields of

[4] B Gaze, "Twenty Years of the Sex Discrimination Act: Assessing its Achievements," (2005) 30(1) *Alternative Law Journal* 3, at 8.

[5] Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Part II, ALRC69 [Internet – http://www.austlii.edu.au/other/alrc/publications/reports/69/vol2/ALRC69.html (Accessed 8 April 2005)].

[6] Australian Law Reform Commission, above, at [4.5].

activity for which a person may make a complaint;

- it fosters and is based on a limited understanding of equality;
- it is unable to address the issue of violence against women as discrimination other than in the framework of sexual harassment;
- it is unable to challenge directly gender bias or systemic discrimination in the context of the law;
- it concentrates on the treatment of individuals rather than the effect of law;
- it cannot strike down rules or laws;
- it exempts areas from its operation; and
- its protection is only activated by making a complaint.[7]

WLA NSW and AWL observe with emphasis the especial importance of the SDA being effective in eliminating discrimination and promoting gender equality following the repeal of unfair dismissal laws through the Work Choices amendments to the *Workplace Relations Act 1996* (Cth) in 2005. Prior to their repeal, unfair dismissal laws afforded women in particular with some level of protection from dismissal on the grounds of caring responsibilities or on return to work after a period of maternity leave. Women who are dismissed on such grounds are now heavily reliant on the SDA and state and territory anti-discrimination laws in seeking legal remedies for the injustices that they have been subjected to.

Amendment of the SDA is required not only so that it can better promote the case for women's equality in the modern context but also so that it can better promote the case for men's equality, particularly in accessing flexible and family friendly work arrangements. As recently expressed by HREOC:

> With the rapid ageing of our population there will be increasing pressure on workers to balance the caring of elderly parents with their paid work.
>
> With women continuing to carry out the majority of Australia's unpaid caring work, and men locked into being the "breadwinner", creating workplaces that support women and men to balance paid work and chare caring responsibilities is critical to achieving gender equality.[8]

WLA NSW has expressed its views that the declining birth rate and its relation to the issue of caring for children is not only a "women's issue".[9] WLA NSW has

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[7] Australian Law Reform Commission, above, n 5, at [4.5].

[8] Human Rights and Equal Opportunity Commission, *2008 Gender Equality: What Matters to Australian Women and Men the Listening Tour Report* [Internet - http://www.hreoc.gov.au/listeningtour/launch/index.html (Accessed 26 July 2008)], at 10.

[9] Women Lawyers' Association of New South Wales, Submission to the House of Representatives Standing Committee on Family and Human Services Inquiry into Work and Family Balance, April 2005 [Internet - http://www.womenlawyersnsw.org.au/plr.asp?Page=V&ID=193 (Accessed 27 July 2008)].

maintained that it is not necessarily women who are reluctant to have children – their partner has to be willing as well.[10]

The modern context is very much one in which promoting equality of opportunity for women in the workplace is about promoting equality for men in accessing flexible and family-friendly work arrangements: contemporary equality for women is dependent on equality for men. The evidence that fathers want to spend more time with their families,[11] and that men as well as women believe that housework and child care should be shared,[12] is encouraging. However, the current language and structure of the SDA fails to promote family and caring responsibilities as an issue for both men and women, and the SDA has proved to be of little assistance to men who might seek redress in response to barriers to accessing flexible and family-friendly work arrangements. This indicates that the object of promoting equality for men and women within the community, captured by section 3(d) of the SDA is not being met.

(i) Support for a national *Equality Act*

In 2005, WLA NSW called for a comprehensive Inquiry into the SDA.[13] In doing so WLA NSW was of the view that ultimately the sections of the SDA should be incorporated into a national *Equality Act* that incorporates other areas of discrimination in addition to sex discrimination.[14]

While the SDA may adopt gender neutral language referring to discrimination against "persons" and "people" rather than "women", the majority of the objects of the SDA stated in section 3, and the overall tenor of the SDA, create the impression that it is primarily an Act about affirmative action for women, and that family responsibilities are a "women's issue".

When the social and cultural barriers to men playing a more active role in the sharing of household responsibilities are taken into account alongside the language of the SDA, there appears to have been very little systemic and legislative motivation behind the few claims made by men under the SDA.

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[10] Women Lawyers' Association of New South Wales, "Flexible Working Arrangements not for the Unambitious, Slack or Soft," Press Release, 16 March 2005 [Internet – http://www.womenlawyersnsw.org.au/pdf/birth%20rate%20child%20care%20press%20mar05.pdf]; Women Lawyers' Association of New South Wales, Submission to the House of Representatives Standing Committee on Family and Human Services Inquiry into Work and Family Balance, April 2005, above, n 9.

[11] Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, Men. Work and Family*, Discussion Paper 2005, Sydney: Human Rights and Equal Opportunity Commission, 2005, at 54.

[12] Human Rights and Equal Opportunity Commission, above, at 53.

[13] Women Lawyers' Association of New South Wales, above, n 1.

[14] Women Lawyers' Association of New South Wales, above, n 1.

In ALRC 69, the ALRC suggested the passage of a federal *Equality Act* which would overcome the limitations of the SDA, and benefit both men and women consistent with Australia's obligations under human rights conventions that declare the equality of all people, both men and women.[15]

Adopting the provisions of the SDA into a federal *Equality Act*, and broadening the protections encompassed by the scope of the SDA, in addition to the adoption of the recommendations WLA NSW and AWL has made in this submission for amendments to the SDA, will contribute significantly to making the current family responsibilities provisions of the SDA more accessible for men.

WLA NSW and AWL recommend that the provisions of the *Sex Discrimination Act* 1984 (Cth) be adopted into a federal *Equality Act*, and that an *Equality Act* be drafted and passed by the federal government.

(ii) Support for a General Prohibition of Discrimination

WLA NSW and AWL support the arguments of the HRLRC in favour of the introduction of a general prohibition of discrimination in the SDA.

(iii) Objects of the *Sex Discrimination Act* 1984 (Cth)

The objects of the SDA are stated in section 3, they are:

> (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and
> (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
> (ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and
> (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
> (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

It can be seen that:

- the only human rights convention that the SDA seeks to give effect to is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a convention for the benefit of women but not men;
- the only object which expressly targets equality for both men and women is that in section 3(d), which aims to promote equality of men and women within the community rather than the workplace in particular; and
- section 3(ba) deals with family responsibilities but it only ensures that the Act aims to eliminate, as far as possible, discrimination involving

[15] Australian Law Reform Commission, above, n 5, at Chapter 4.

dismissal of employees on the ground of family responsibilities.

To ensure that the SDA adopts language and a systemic framework that targets equality for men and women, and to ensure that the scope of the SDA is not limited to eliminating discrimination on the ground of family responsibilities only where employees are dismissed, **WLA NSW and AWL recommend** that the following objects be added to section 3 of the *Sex Discrimination Act* 1984 (Cth):

- to give effect to certain provisions of the Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities;
- to eliminate, so far as possible, discrimination between employees on the ground of responsibilities as a carer.

If this recommendation is adopted, **WLA NSW and AWL further recommend** that section 3(ba) be removed from section 3 as a consequential amendment.

Family responsibilities are not always necessarily caring responsibilities and vice versa. Growing needs for aged and disabled care mean that bringing the SDA in line with the modern context and ensuring that it will continue to be effective in a future context requires that the objects of the SDA recognise the responsibilities of employees as carers rather than family members only. For these reasons WLA NSW and AWL has recommended that elimination, as far as possible, of discrimination between employees on the ground of responsibilities as a carer be incorporated into the objects of the SDA.

WLA NSW and AWL emphasise the importance of having Australia's international obligations fulfilled by giving effect to relevant provisions of all human rights conventions of which Australia is a party, and which promote equality between men and women in the workplace. Therefore, **WLA NSW and AWL further recommend** that any other human rights conventions, apart from the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, that aim to eliminate discrimination against men and women in the workplace be considered for adoption within the objects of the *Sex Discrimination Act* 1984 (Cth).

(iv) Preference for the term "responsibilities as a carer" over the term "family responsibilities"

The term "family responsibilities" is currently defined under section 4A of the SDA. The *Anti-discrimination Act* 1977 (NSW) (ADA) utilises the term "responsibilities as a carer" rather than the term "family responsibilities". Section 49S of the ADA defines a person's responsibilities as a carer. The main difference between the definition of "family responsibilities" under the SDA and "responsibilities as a carer" under the ADA is that the definition of responsibilities

as a carer includes responsibilities for caring for an adult step-child, step-parent, step-grandparent, step-grandchild or step-sibling of the employee.

WLA NSW and AWL are concerned that the term "family responsibilities" does not adequately take into account the growing imposition of responsibilities involving elder and disabled care on employees. In our submission, bringing the SDA up to date with the modern context and ensuring that it will continue to be effective in a future context requires that the SDA adopts the term "responsibilities as a carer" in place of the term "family responsibilities". To achieve this, and to allow the SDA to better reflect the diversity of family compositions in the modern context, **WLA NSW and AWL recommend** that section 4A of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

> **Meaning of ~~family~~ responsibilities as a carer**
>
> (1) In this Act, ~~family~~ responsibilities as a carer, in relation to an employee, means responsibilities of the employee to care for or support:
> (a) a dependent child of the employee; or
> (b) any other immediate family member who is in need of care and support.
>
> (2) In this section:
>
> "child" includes an adopted child, a step-child or an ex-nuptial child.
>
> "dependent child" means a child who is wholly or substantially dependent on the employee.
>
> "immediate family member" includes:
> (a) a spouse of the employee; ~~and~~
> (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee; and
> (c) an adult step-child, step-parent, step-grandparent, step-grandchild or step-sibling of the employee or of a spouse of the employee.
>
> "spouse" includes a former spouse, a de facto spouse and a former de facto spouse.

If this recommendation be adopted, **WLA NSW and AWL additionally recommend** that the following consequential amendments be made (suggested amendment marked up where appropriate):

- that the term "family responsibilities" be removed from the section 4 definition section of the *Sex Discrimination Act* 1984 (Cth), and replaced with the term "responsibilities as a carer".
- that section 7A of the *Sex Discrimination Act* 1984 (Cth) be amended to read:

> **Discrimination on the ground of ~~family~~ responsibilities as a carer**
>
> For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's ~~family~~ responsibilities as a carer if:

(a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and

(b) the less favourable treatment is by reason of:

(i) the family responsibilities of the employee; or

(ii) a characteristic that appertains generally to persons with family responsibilities; or

(iii) a characteristic that is generally imputed to persons with family responsibilities.

- that section 14(3A) of the Sex Discrimination Act 1984 (Cth) be amended to read:

Discrimination in employment or in superannuation

…

(3A) It is unlawful for an employer to discriminate against an employee on the ground of the employee's ~~family~~ responsibilities as a carer by dismissing the employee.

…

Some employers have gone beyond the list of relationships recognised under the ADA definition of "responsibilities as a carer".[16] They have been willing to take into account an employee's responsibilities to care for:

- a niece or nephew;
- aunt or uncle;
- cousin; or
- a friend who is not related to them who they don't have a legal guardianship arrangement for but who, for example, needs their care or support because they are old and frail with no-one else to care for them, or because they have a disability and have no-one else to care for them.[17]

WLA NSW and AWL submit that updating the SDA so that it is responsive to modern circumstances requires that consideration be given to expanding the definition of "family responsibilities" or "responsibilities as a carer". For this reason, **WLA NSW and AWL recommend** that consideration be given to expanding the definition of "family responsibilities" or "responsibilities as a carer", and that the above list of relationships of care be considered in doing so.

(v) Indirect discrimination: the reasonableness test

Beth Gaze has noted that:

> [the] test for the scope of indirect discrimination is vague and sets a standard significantly lower than the tests in the United Kingdom or the United States that seriously blunts the SDA's challenge to systemic discrimination … [and that] because of its open texture as a

[16] Ant-discrimination Board of New South Wales, "Carer's Responsibilities and Flexible Work Practices," [Internet – http://www.lawlink.nsw.gov.au/adb.nsf/pages/carersflex (Accessed 28 March 2005)].

[17] Anti-discrimination Board of New South Wales, above.

> test, "reasonableness" can be a vehicle for transmission of traditional views of social practices and rejection of any requirement for change.[18]

The test of indirect discrimination has been a factor preventing men from accessing the provisions of the SDA in seeking redress for systemic barriers to flexible and family friendly work arrangements.[19] It has also been a factor limiting family responsibilities provisions under the SDA to direct discrimination generally.[20]

WLA NSW and AWL are concerned about the serious restrictions that the reasonableness test for indirect discrimination is placing on access to family responsibilities provisions under the SDA. Accordingly, **WLA NSW and AWL recommend** that this test be reviewed and reformed as appropriate.

(vi) Special measures intended to achieve equality

Section 7D of the SDA provides a person with the capacity to introduce special measures for the purposes of achieving substantive equality between men and women, amongst other things. However, this does not include the introduction of special measures for the purpose of achieving substantive equality between employees with responsibilities as a carer and employees without such responsibilities. The use of the word "may" instead of "must" in section 7D provides a person in a position to introduce special measures with a discretion to do so. In an employer/employee relationship, this places the power to introduce flexible and family-friendly work arrangements within the hands of the employer.

As Beth Gaze has stated, "actually eliminating discrimination entails transferring resources or power away from some people towards others".[21] Improving access to flexible and family friendly work arrangements for men and women requires the introduction of special measures, and requires that resources and power be transferred from employers to employees. In order to achieve this, **WLA NSW and AWL recommend** that section 7D(1) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

> **Special measures intended to achieve equality**
>
> (1) A person ~~may~~ must take special measures for the purpose of achieving substantive equality between:
> - (a) men and women; or
> - (b) people of different marital status; or
> - (c) women who are pregnant and people who are not pregnant; or
> - (d) women who are potentially pregnant and people who are not potentially pregnant; or

[18] B Gaze, above, n 4, at 5-6.
[19] Human Rights and Equal Opportunity Commission, above, n 11, at 86.
[20] Human Rights and Equal Opportunity Commission, above, n 11, at 83.
[21] B Gaze, above, n 4, at 3-4.

(e) people with responsibilities as a carer and people without responsibilities as a carer.

Alternatively, if our recommendations to amend the SDA to replace the term "family responsibilities" with the term "responsibilities as a carer" are not adopted, **WLA NSW and AWL recommend** that section 7D(1) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

Special measures intended to achieve equality

(1) A person ~~may~~ must take special measures for the purpose of achieving substantive equality between:
- (a) men and women; or
- (b) people of different marital status; or
- (c) women who are pregnant and people who are not pregnant; or
- (d) women who are potentially pregnant and people who are not potentially pregnant; or
- (e) people with family responsibilities and people without family responsibilities.

(vii) Discrimination in employment or in superannuation

For reasons similar to those for amending section 7D(1),[22] **WLA NSW and AWL recommend** that sections 14(1) and (2) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

Discrimination in employment or in superannuation

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, responsibilities as a carer, pregnancy or potential pregnancy:
- (a) in the arrangements made for the purpose of determining who should be offered employment;
- (b) in determining who should be offered employment; or
- (c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, responsibilities as a carer, pregnancy or potential pregnancy:
- (a) in the terms or conditions of employment that the employer affords the employee;
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
- (c) by dismissing the employee; or
- (d) by subjecting the employee to any other detriment.

Alternatively, if our recommendations to amend the SDA to replace the term "family responsibilities" with the term "responsibilities as a carer" are not adopted, **WLA NSW and AWL recommend** that sections 14(1) and (2) of the *Sex*

[22] Above, at 10.

Discrimination Act 1984 (Cth) be amended to read (suggested amendments marked up):

> **Discrimination in employment or in superannuation**
>
> (1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, family responsibilities, pregnancy or potential pregnancy:
> (a) in the arrangements made for the purpose of determining who should be offered employment;
> (b) in determining who should be offered employment; or
> (c) in the terms or conditions on which employment is offered.
>
> (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, family responsibilities, pregnancy or potential pregnancy:
> (a) in the terms or conditions of employment that the employer affords the employee;
> (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
> (c) by dismissing the employee; or
> (d) by subjecting the employee to any other detriment.

(viii) Equal employment opportunity plans

Part 9A of the ADA requires all public sector organisations in Australia (including government department and authorities, Australian health authorities and hospitals and New South Wales universities) and all local councils to prepare equal employment opportunity management plans. In order to ensure that measures are in place to monitor the standards of equal employment opportunity arrangements within similar organisations across the Commonwealth, **WLA NSW and AWL recommend** that such requirements to prepare equal employment opportunity management plans be introduced into the provisions of the *Sex Discrimination Act* 1984 (Cth).

WLA NSW and AWL further recommend that consideration be given to expanding requirements to prepare equal employment opportunity management plans to organisations apart from public sector organisations and local councils.

(ix) Equal opportunity workplace programs and reporting requirements

In discussions that WLA NSW has held with the New South Wales Equal Employment Opportunity Practitioners' Association (NEEOPA), the adoption of a model of external reporting similar to that required by section 13 of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth) (EOWWA) has been raised.

WLA NSW and AWL support the reasons given by NEEOPA for adopting such external reporting requirements. Section 6 of the EOWWA requires employers

with 100 employees, or employers who had 100 employees but continue to have 80 and above employees, to develop and implement workplace programs. WLA NSW and AWL believe that consideration should be given to dropping the threshold of 100 employees in section 6 to less than 100 employees. Given that the EOWWA was derived from the more controversial affirmative action provisions of the Sex Discrimination Bill,[23] WLA NSW and AWL observe that the provisions of the EOWWA may assist in strengthening the provisions of the SDA if they are incorporated into the one act. This act might be an improved SDA or a national *Equality Act* that encompasses other areas of discrimination in addition to sex discrimination.

Accordingly, **WLA NSW and AWL recommend** that:

- the provisions of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth) be incorporated into a federal *Equality Act* along with the provisions of the *Sex Discrimination Act* 1984 (Cth); **or alternatively**
- that the provisions of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth) be incorporated into the *Sex Discrimination Act* 1984 (Cth) along with other amendments to this act; **and**
- that consideration be given to requiring employers with less than 100 employees to comply with the provisions of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth).

B. THE EXTENT TO WHICH THE ACT IMPLEMENTS THE NON-DISCRIMINATION OBLIGATIONS OF THE CONVENTION OF THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN AND THE INTERNATIONAL LABOUR ORGANIZATION OR UNDER OTHER INTERNATIONAL INSTRUMENTS, INCLUDING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

WLA NSW and AWL support the position of NSWCCL in relation to this term of reference.

C. THE POWERS AND CAPACITY OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION AND THE SEX DISCRIMINATION COMMISSIONER, PARTICULARLY IN INITIATING INQUIRIES INTO SYSTEMIC DISCRIMINATION AND TO MONITOR PROGRESS TOWARDS EQUALITY

WLA NSW and AWL support the position of NSWCCL in response to this term of reference.

[23] B Gaze, above, n 10, at 7.

We additionally note a likely effect of reinstating the functions of the Sex Discrimination Commissioner prior to the amendments implemented in 2000 is that the backlog of cases in the Federal Court will be reduced. In our submission the Standing Committee should give this factor significant consideration given the desirability of ensuring that efficient, effective and affordable court processes are in place, and ensuring that parties in discrimination cases have efficient, effective and affordable access to justice.

In saying this WLA NSW and AWL observe that there is an overall trend in other jurisdictions such as family law, towards introducing processes that encourage parties to reach an agreement without unnecessary reliance on court intervention. WLA NSW and AWL are concerned that the current emphasis on utilising adversarial court processes to address cases of discrimination is leading to victims of sexual harassment and sex discrimination becoming re-traumatised in accessing justice.

D. CONSISTENCY OF THE ACT WITH OTHER COMMONWEALTH AND STATE AND TERRITORY DISCRIMINATION LEGISLATION, INCLUDING OPTIONS FOR HARMONISATION

WLA NSW and AWL support the position of NSWCCL in response to this term of reference.

We additional refer to our submissions above under the heading **(iii) Preference for the term "responsibilities as a carer" over the term "family responsibilities"**.[24]

E. SIGNIFICANT JUDICIAL RULINGS ON THE INTERPRETATION OF THE ACT AND THEIR CONSEQUENCES

WLA NSW and AWL support the position of NSWCCL in response to this term of reference.

F. IMPACT ON STATE AND TERRITORY LAWS

WLA NSW and AWL support the position of NSWCCL in response to this term of reference.

[24] Above, at 7-9.

G. PREVENTING DISCRIMINATION, INCLUDING BY EDUCATIVE MEANS

WLA NSW and AWL recognise that progress towards achieving a balance between paid and unpaid work in one area may be positively or adversely affected by other areas.[25] Legal, workplace and social policy frameworks all significantly shape behaviour and attitudes toward men's and women's paid and unpaid work.[26] This applies more broadly to behaviour and attitudes towards sex discrimination in general. For these reasons attempts at reform must be multifaceted and target legislative change, social policy change, cultural change in the workplace and attitudinal change, in combination. The cultural and attitudinal barriers to women and men achieving equality in the workplace and the community cannot be addressed by legislative reform to the SDA alone.

Funding, education and co-ordination of agencies and services are the key to changing the attitudes which serve as barriers to men and women taking up flexible work options, and achieving equal opportunity in the workplace and community. **WLA NSW and AWL recommend** that the federal government provides subsidies to firms and organisations providing employees with education and training programs. Programs and resources targeted at addressing attitudinal barriers should be developed and funded. **WLA NSW and AWL further recommend** that awards given by government departments for work and family balance initiatives, such as the Equal Opportunity for Women in the Workplace Agency Awards, and the Australian Chamber if Commerce and Industry/Business Council of Australia National Work and Family Awards, should place a greater emphasis on recognising the value of educating and training male employees on flexible work arrangements and sexual harassment. Increases in the rate at which flexible work arrangements are taken up by male members of staff should be acknowledged as an achievement on the part of organisations applying for such awards.

WLA NSW and AWL additionally recommend that funding by federal and state governments be provided for the introduction of mentoring and networking programs for men and women employees, but particularly for women lawyers who seek to have a family while continuing on their career path.

I. ADDRESSING DISCRIMINATION ON THE GROUND OF FAMILY RESPONSIBILITIES

We refer to our submissions above in relation to family responsibilities, under the heading **A. THE SCOPE OF THE ACT AND THE MANNER IN WHICH KEY TERMS AND CONCEPTS ARE DEFINED**.[27]

[25] Human Rights and Equal Opportunity Commission, above, n 11, at 126.
[26] Human Rights and Equal Opportunity Commission, above, n 11, at 111.
[27] Above, at 7-12.

J. IMPACT ON THE ECONOMY, PRODUCTIVITY AND EMPLOYMENT (INCLUDING RECRUITMENT PROCESSES)

As professional bodies of working women lawyers, WLA NSW and AWL appreciate, and the personal experiences of our diverse membership support, the importance of enabling men and women to access flexible and family friendly work arrangements. The business case for flexible and family-friendly policies in the workplace is no secret.[28] Identified benefits of introducing flexible work measures include:

- competitive edge in recruiting and enhanced corporate image;
- improved ability to retain skilled staff and increase return on training investments;
- reduced absenteeism and staff turnover;
- improved productivity;
- reduced stress levels and improved moral and commitment; and
- potential for improved occupational health and safety records.[29]

The head of the Human Resources Department at law firm Blake Dawson Waldron has conservatively estimated that replacing a lawyer with five or more years' experience costs the company at least $75 000.[30] Other estimates argue that it costs about $120 000 to replace a lawyer with four years' experience.[31] The legal workplace is a diverse one, but independent of their size or financial capacity, law firms, legal centres, legal organisations and legal bodies all rely heavily on the talent of their staff. The legal workplace is certainly one in which access to flexible and family friendly arrangements for men and women makes good business sense.

It is crucial for the economy, productivity and employment (including recruitment processes) that the SDA and other discrimination laws are in step with the pressures and requirements of contemporary workplaces and communities.

L. EFFECTIVENESS IN ADDRESSING INTERSECTING FORMS OF DISCRIMINATION

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[28] Australian Workplace, "Why Family Friendly Policies are Good for Business," [Internet – http://www.workplace.gov.au (Accessed 28 March 2005)]; Equal Opportunity for Women in the Workplace Agency, "Why EO Makes Business Sense," [Internet – http://www.eeeo.gov.au/About_Equal_Opportunity/Why_EO_Makes_Business_Sense (Accessed 28 March 2005)].

[29] Australian Workplace, above.

[30] Equal Opportunity for Women in the Workplace Agency, "Attract and Retain the Best Talent," [Internet – http://www.eeeo.gov.au/About_Equal_Opportunity/Why_EO_Makes_Business_Sense. (Accessed 28 March 2005)].

[31] Australian Workplace, above, n 28.

We refer to our submissions above under the heading **(i) Support for a national *Equality Act***.[32] A national *Equality Act* would be a more effective mechanism for dealing with intersection forms of discrimination, and for ensuring consistency of federal discrimination laws than separate pieces of Commonwealth legislation, such as the SDA, that address the various types of discrimination.

[32] Above, at 5-6.