SUBMISSION TO THE PRODUCTIVITY COMMISSION

Paid Parental Leave: Support for Parents with Newborn Children Draft Inquiry Report

28 November 2008

Submission to

Paid maternity, paternity and parental leave inquiry
Productivity Commission
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ABOUT THIS SUBMISSION

This submission is the second submission of Australian Women Lawyers (AWL) to the Paid Maternity, Paternity and Parental Leave Inquiry of the Productivity Commission. It is a submission in response to the Commission's Draft Inquiry Report, Paid Parental Leave: Support for Parents with Newborn Children (the Draft Inquiry Report), and follows the appearance of Lee-May Saw, Treasurer of AWL and President of the Women Lawyers' Association of New South Wales (WLA NSW), and Kerry Clark, Director (for South Australia) of AWL and President of the Women Lawyers Association of South Australia, at the public hearing for the Inquiry held in Adelaide on 12 November 2008.

We thank the Commission for providing us with an extension of time to make this further written submission to the Inquiry.

PATERNITY LEAVE

As we indicated in our oral submissions to the Commission at the public hearing on 14 November 2008, it is our view that the term that best describes the two weeks of "paternity leave" as outlined in the Draft Inquiry Report is "supporting parent leave". We support the position of the Human Rights and Equal Opportunity Commission (HREOC) in this respect.[1]

In our submission it is simply inaccurate for any parental leave taken by the supporting parent in a female same sex couple to be referred to as "paternity leave". We note that any concerns about members of the community being confused about their entitlements to paid parental leave are likely to be realised by referring to this form of leave as "paternity leave" rather than "supporting parent leave". Further, any proposal for a scheme of paid parental that seeks to seriously recognise the broad range of family types in the contemporary Australian community should include some form of "supporting parent leave" and not "paternity leave" only.

AWL recommends that "paternity leave" as defined in the Draft Inquiry Report be called "supporting parent leave".

[1] Human Rights and Equal Opportunity Commission, sub 128, at 22; Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children, Draft Inquiry Report*, Commonwealth of Australia: Melbourne, 2008, at 4.39.

TRANSFER AND SHARING OF PAID PARENTAL LEAVE

Many women lawyers command salaries higher than their partners. In such families it may make financial sense for her partner to assume the role of primary caregiver within a relatively short time after the birth (or adoption) to allow the mother to return to full or part time work. Some women, lawyers especially, may be reluctant to spend a considerable period of time out of the workforce entirely due to a desire to maintain professional skills and contacts. Some parents may decide to "take turns", with one staying home to care for their first child and the other staying home after the birth of the second.

AWL considers that the decision as to which parent will be the primary carer at a given time or whether care should be shared, for example one parent working two days per week and the other three, is a decision which should be made by individual families, as far as possible without undue influence caused by an inflexible paid parental leave system. The system should support and encourage individual family decisions as to managing work-life balance, particularly those which enable both parents to spend more time with their young children.

Although the sharing or transfer of a portion of paid parental leave entitlements would increase the administrative complexity of the system, AWL submits that the associated cost is easily outweighed by the benefits to families of structuring flexible work and caring arrangements.

Furthermore, if the system acts as a barrier to shared care of children this will reinforce the outdated stereotype that it is a woman's role to stay at home with her children. AWL strongly recommends that the Commission's final proposal recognise the right of families to choose how best to manage work and caring responsibilities based on their individual circumstances.

AWL notes that since the introduction of the 2006 amendments to *Family Law Act 1975* (Cth),[2] there has been a significant emphasis in encouraging equal time and substantial and significant time arrangements between parents who are separated. Under equal time arrangements a child lives with each of their parents half of the time, for example, two weeks with one parent, followed by two parents with the other parent, and thereafter in an alternating two week rotation between each of the parents. Under substantial and significant time arrangements a child lives with one of their parents less than half of the time, but in many instances the difference in time they live with one parent compared to the other may not be much, for example, three days with one parent followed by four days with the other parent, and thereafter in an alternating three followed by four day rotation between each parent.

[2] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (No. 46, 2006).

Equal time and substantial and significant time cases are likely to be situations where parents will not agree on who is the primary carer, and moreover situations where both parents would be eligible under the current conditions of the scheme proposed in the Draft Inquiry Report. In such circumstances, the benefits of allowing both parents to take paid parental leave on a part time basis would be considerable as this would go a significant way to advancing the best interests of the child, by maximising opportunities for stability and security in the child's life at the earliest stage possible.

AWL recommends that, with the consent of the mother, any period of paid parental leave be able to be shared with or transferred to the child's other primary care-giver.

AWL recommends that the transfer of paid parental leave be allowed without the mother's consent in exceptional circumstances (for example death or incapacity of the mother).

AWL recommends that the sharing of paid parental leave not be subject to consent of the parents' employer(s).

AWL recommends that equal time and substantial and significant time arrangements be recognised as far as possible in legislative amendments to support the introduction of a scheme of paid parental leave.

AWL recommends that considerable administrative discretion be allowed in the implementation of primary parent and supporting parent leave, to ensure that the best interests of the child are always upheld.

ADOPTION LEAVE

AWL observes that adoption laws in Australia are State and Territory based, and are in desperate need of harmonisation. For adoptions by couples for example, the law varies on how long the couple needs to have been in a relationship for, depending on which State or Territory the couple reside in.

In South Australia, the couple must have been cohabiting together or living together in a marriage relationship (defined to include a de facto relationship) for a continuous period of at least 5 years,[3] unless special circumstances apply.[4] In Western Australia, the couple must have been married to each other or in a de facto relationship for at least 3 years.[5] In New South Wales, the couple must

[3] Section 12(1), *Adoption Act 1988* (SA).
[4] Section 12(2), *Adoption Act 1988* (SA).
[5] Section 67(2), *Adoption Act 1994* (WA).

have been living together for a continuous period of 3 years.[6] In the Australian Capital Territory, the couple must have, whether married or not, lived together in a domestic partnership of not less than 3 years.[7] In Tasmania, the couple must have been married to each other or have been the parties to a significant relationship which is the subject of a deed of relationship, for not less than 3 years.[8] In Victoria, the couple must have been married to each other or living in a de facto relationship for not less than 2 years.[9] In the Northern Territory, the couple must have been married to one another or have entered into a traditional Aboriginal marriage for not less than 2 years.[10] In Queensland, no length of relationship is specified.[11]

The requirements for adoptions by people who are single also vary between States and Territories, as does the length of relationship between a relative or family member of a child, required for the adoption of a child by a person who is a relative or family member of the child. The varying State and Territory requirements for relative or family adoptions are summarised in the table below.

State / Territory	**Requirements**
New South Wales	▪ Court must not allow the adoption unless the child has established a relationship of **at least 5 years duration** with the relative: section 29 (b), *Adoption Act 2000* (NSW)[12] ▪ Court must be satisfied that the adoption is **clearly preferable in the best interests of the child to any other action** that could be taken by law in relation to the child, including action under Care and Protection Law and Family Law: section 29 (c), *Adoption Act 2000* (NSW)
Victoria	▪ No requirement to prove established relationship of any duration between the child an the relative or family member: section 12, *Adoption Act 1984* (Vic) ▪ Court must be satisfied that **exceptional circumstances** exist which warrant the adoption: section 12, *Adoption Act 1984* (Vic)
Tasmania	▪ No requirement to prove established relationship of any duration between the child an the relative or family member: section 21, *Adoption Act 1988* (Tas) ▪ Court must be satisfied that **special circumstances** exist which warrant the adoption: section 21, *Adoption Act 1988* (Tas)
South Australia	▪ No requirement to prove established relationship of any duration between the child an the relative or family member:

[6] Section 28(4), *Adoption Act 2000* (NSW); there are current steps being taken to reduce this requirement to 2 years, see *Adoption Amendment Bill 2008* (NSW).
[7] Section 1(b), *Adoption Act 1993* (ACT).
[8] Section 20(1), *Adoption Act 1988* (Tas).
[9] Sections 10A, 11(1), *Adoption Act 1984* (Vic).
[10] Section 13(1), *Adoption of Children Act* (NT).
[11] Section 12, *Adoption Act 1964* (Qld).
[12] There are current steps being taken to reduce this requirement to 2 years, see *Adoption Amendment Bill 2008* (NSW).

	section 10, *Adoption Act 1988* (SA) ▪ Court will not allow adoption unless it is **clearly preferable, in the interests of the child, to any alternative** available under the laws of the South Australia or the Commonwealth: section 10, *Adoption Act 1988* (SA)
Northern Territory	▪ No requirement to prove established relationship of any duration between the child an the relative or family member: section 15, *Adoption of Children Act* (NT) ▪ Court must be satisfied that in the **opinion of the Minister, exceptional circumstances** exist which make the adoption of the child desirable: section 15, *Adoption of Children Act* (NT)
Australian Capital Territory	▪ No requirement to prove established relationship of any duration between the child an the relative or family member: section 18, *Adoption Act 1993* (ACT) ▪ Court must be of the opinion that there are **circumstances why the relationships within the family of the child should be redefined** in the manner that the adoption would redefine the relationships: section 18, *Adoption Act 1993* (ACT)
Queensland	▪ No requirement to prove established relationship of any duration between the child an the relative or family member: section 12, *Adoption Act 1964* (Qld) ▪ Chief executive must be satisfied that, **in the circumstances of the case, the welfare of the child would be better served by the adoption** than by legal guardianship or custody of the child: section 12, *Adoption Act 1964* (Qld)
Western Australia	▪ No requirement to prove established relationship of any duration between the child an the relative or family member: section 66, *Adoption Act 1994* (WA) ▪ **Step parents** are the **only** "relatives" or family members who can adopt a child: section 66(3), *Adoption Act 1994* (WA)

The following can be seen from the above summary that:

- Very stringent and varying requirements apply in each State and Territory for a relative or family adoption to take place;
- Alternatives to adoption include (court Orders or other legal means of allocating) parental responsibility, under State and Territory Care and Protection Law (in cases where State and Territory Departments of Community Services or Child Safety are involved) or Commonwealth Family Law, to a family member or non-family member of the child.

AWL notes that the Draft Inquiry Report distinguishes between "non-familial" and "familial" adoptions, and recommends that paid parental leave be available for "non-familial" adoptions only.[13] We note that reference is made to the National Employment Standards (NES) in part of the Draft Inquiry Report that addresses

[13] Productivity Commission, above, n 1, at 2.27.

adoption leave.[14] AWL has considered the NES and the *Workplace Relations Act 1996* (Cth) (WRA) as it currently stands, and in our submission, the distinction drawn between "non-familial" and "familial" adoptions in the Draft Inquiry Report is not necessarily equivalent to the concept of "placement" for adoption under the NES or the WRA.

It is our submission that the very stringent and varying requirements under current adoption laws for relative or family adoption, are an additional reason why the proposed distinction between familial and non-familial adoptions is questionable. Furthermore, it appears that the proposed distinction fails to recognise that the Australian community is a multi-cultural one where family adoptions may involve residents in Australia adopting relative or family member children from overseas, for example in the event of a family tragedy.

Given the possible geographical barriers to a relationship being developed and maintained between the child and relative or family member seeking to adopt the child, such an adoption may not necessarily be a "known" adoption, where the person to be adopted already has an established relationship with the prospective adoptive parents.[15] Such an adoption is even less likely to be a "known" adoption where the child and the relative or family member seeking to adopt the child come from a relatively large family network. One member of the AWL Board for example, comes from an Asian family background where there were fourteen children in her father's family and eleven children in her mother's family, the majority of whom are resident (or were resident, for those who are now deceased) outside of Australia.

Where residents in Australia adopt a relative or family member child from overseas, AWL is strongly of the view that the reasons advanced in the Draft Inquiry Report for adoption leave[16] may apply just as much in certain cases of familial adoption. In our submission, the reasons advanced in the Draft Inquiry Report in favour of adoption leave, essentially relate not only to the best interests of the child, but to the nature and quality of the relationship between the child and the person seeking to adopt the child. If any factors are to be implemented that limit the application of paid parental leave to certain cases of adoption, it is factors relating to the best interests of the child and the nature and quality of the relationship between the child and the person seeking to adopt the child that should be the determining factors, and not whether the adoption is a "non-familial" or "familial" adoption.

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[14] Productivity Commission, above, n 1, at 2.27.

[15] Linda Burney, New South Wales Minister for Community Services and Member for Cantebury, Legislative Assembly Minister's "Agreed to in Principle" Speech, 25 September 2008 [Internet - http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/bb98c036704acb7dca2574ce001be4d1!OpenDocument (Accessed 24 November 2008).].

[16] Karleen Gribble, Families with Children from China- Australia, transcript, at 466; Productivity Commission, above, n 1, at 4.16

AWL additionally observes that the Draft Inquiry Report does not recommend that paid parental leave be available in the case of long term foster parents.[17] We note that current steps that are being taken to change adoption law in New South Wales, involve the New South Wales Government making a commitment for foster carers to continue to receive the statutory care allowance for child and young people that have been in their care for a minimum of two years, following the making of an adoption order.[18]

We also note that in cases where long term foster parents who are not relative or family members of the child, seek to adopt the child, a "non-familial" and "known" adoption of a child is involved. In such a case the bonding and attachment between the child and the foster carer may well be stronger than the bonding and attachment between the child and the relative or family member in the example of overseas relative or family adoption described above.[19]

AWL recommends that paid parental leave be limited to cases of adoption where the following factors warrant the application of paid parental leave:

(1) The best interests of the adopted child;
(2) The nature, and quality of the relationship between the adopted child and the adoptive parent, including but not limited to:
    (a) whether the adoptive parent was a step-parent, relative, or family member of the child prior to the adoption;
    (b) the level of bonding and attachment between the adopted child and the adoptive parent prior to the adoption;
(3) The duration of the relationship between the adopted child and the adoptive parent.

AWL further recommends that the Commission consider the application of paid parental leave to cases where a court Order or other legal instrument (such as a parental plan) has been made allocating parental responsibility for a child to a family member or non-family member of the child. We note that it is our view that the factors listed in the recommendation immediately above may apply equally in certain cases where a legal allocation of parental responsibility occurs.

DEFINTION OF "SELF-EMPLOYED" AND COMPLIANCE FOR THE SELF-EMPLOYED

So far as the legal profession is concerned, the self-employed includes:

- sole-proprietors, meaning sole practitioner solicitors and barristers in sole practice at the Bar;
- solicitors in partnerships who are equity partners (as opposed to employed or non-equity partners).

[17] Productivity Commission, above, n 1, at 2.27-2.28.
[18] Linda Burney, above, n 14.
[19] Above, at 5-6.

AWL notes that even in the legal profession there is a significant diversity in the workplaces and roles in which a lawyer might be employed. The workplaces and positions of employment among our members include employment in community and government organisations, solicitors and barristers in sole-practice, the top five law firms with partners numbering in the hundreds, and in house counsel positions within large multi-national companies.

We note that the practical distinction between the self-employed / contractors and the employed, under the proposed scheme in the Draft Inquiry Report, is that the self-employed / contractors would receive paid parental leave as payment directly from a government body, and that employees would receive paid parental leave as payment initially provided by their employer with the employer to be reimbursed by government. The following recommendation of AWL takes into account this practical difference between the self-employed / contractors and the employed, and the administrative costs involved with a scheme involving initial payment by a employer.

AWL recommends that in setting a definition for the self-employed under the scheme of paid parental leave proposed in the Draft Inquiry Report, the following factors should be considered:

(1) whether the person receiving paid parental leave is a sole-proprietor;
(2) whether the person receiving paid parental leave is an equity partner in a partnership;
(3) the number of equity partners in the partnership of which the person receiving paid parental leave is an equity partner;
(4) the annual turnover of the business owned by the person receiving paid parental leave;
(5) the number of employees employed in the business owned by the person receiving paid parental leave.

AWL supports the proposal in the Draft Inquiry Report which would require the self-employed / contractors to swear a statutory declaration and obtain a sworn statutory declaration from an accountant, as proof of the employment status of the self-employed person / contractor.[20]

AWL recommends that the proposal in the Draft Inquiry Report which would require the self-employed / contractors to swear a statutory declaration and obtain a sworn statutory declaration from an accountant, as proof of the employment status of the self-employed person / contractor, be adopted.

CURRENT STATE OF THE NATIONAL ECONOMY AND IMPACT OF THE "GLOBAL FINANCIAL CRISIS"

[20] Productivity Commission, above, n 1, at 2.16.

AWL is highly concerned about recent reports that the federal government is considering shelving any proposal for a national scheme of government-funded paid parental leave, and is citing the state of the economy as a justification for this.[21]

AWL notes that this is the second national inquiry into paid parental leave, following the inquiry of HREOC in 2002.[22] We submit in the strongest terms possible that the failure to introduce a scheme of paid parental leave would be a totally unacceptable result. We note that it is especially during times of economic hardship that families are in need of the kind of financial assistance and support available through a scheme of government-funded paid parental leave, and that the birth or adoption of a child is accompanied by increased spending on goods and services by families which is consistent with current government policy targeted at encouraging market spending.

In our view it is inconsistent to cite a "global" financial crisis as a reason for delaying the introduction of a scheme of government-funded paid parental leave, and to continue to ignore the fact that on the "global" stage Australia continues to be one of only two OECD countries without a scheme of government-funded paid parental leave, at the same time. This is an embarrassing position for Australia to be in.

Given that the majority women employed in Commonwealth government departments currently have entitlements of up to 12 weeks of paid maternity leave,[23] and that the majority of other Commonwealth government employees currently have access to some form of paid parental leave which is in practical terms already being funded by the government / tax payers, AWL observes that an accurate calculation of the actual cost to government / tax payers of implementing a scheme of paid parental leave should take into account such factors as an existing cost.

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[21] Phillip Coorey, "Paid Maternity Leave Put on Hold, Sydney Morning Herald, 7 November 2008 [Internet - http://www.smh.com.au/news/national/paid-maternity-leave-put-on-hold/2008/11/06/1225561044355.html (Accessed 24 November 20080.]; Adele Horin, "Women Rage Over Paid Leave Delay", *Sydney Morning Herald*, Weekend Edition, 8-9 November 2008, at 7; Brad Norington, "Plea on Paid Maternity Leave", *The Australian*, 10 November 2008 [Internet - http://www.theaustralian.news.com.au/story/0,25197,24626697-5013404,00.html (Accessed 24 November 2008).]; Sydney Morning Herald, "Paid Maternity Leave Not a Sure Thing", *Sydney Morning Herald*, 23 November 2008 [Internet - http://news.smh.com.au/national/paid-maternity-leave-not-a-sure-thing-20081123-6enx.html (Accessed 24 November 2008).].

[22] Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*, 2002 [Internet - http://www.hreoc.gov.au/sex_discrimination/paid_maternity/pml2/index.html (Accessed 24 November 2008).].

[23] Section 6(3), *Maternity Leave (Commonwealth Employees) Act 1973* (Cth).

We urge the Commission to consider whether the current state of the national economy and any impact of the "global financial crisis" should delay the introduction of a scheme of paid parental leave.

AWL recommends that the Productivity Commission consider whether the current state of the national economy and any impact of the "global financial crisis" should delay the introduction of a scheme of paid parental leave.

AWL further recommends that in calculating the cost to government / tax payers of funding a scheme of paid parental leave, that the Productivity Commission take into account existing entitlements of government employees to any form of paid parental leave.

"WORST POSSIBLE OUTCOME PROPOSAL" OF THE WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES, SUPPORTED BY VICTORIAN WOMEN LAWYERS

The Commission may recall that at the public hearing on 12 November 2008, the Women Lawyers' Association of New South Wales (WLA NSW) put forward a position which varied from the position of AWL. This position has since also been adopted by Victorian Women Lawyers (VWL). WLA NSW was formed in 1952 and is the oldest women lawyers association in Australia. WLA NSW and VWL note that it continues to be the position of WLA NSW and VWL, that its preference is for the introduction of a scheme of paid parental leave as outlined in first written submission of AWL to this Inquiry.[24] However, should the Commission find that the state of the national economy and any impact of the "global financial crisis" requires amendments to the scheme proposed in the Draft Inquiry Report to be made, WLA NSW and VWL support the proposal outlined in the recommendation below as a "worst possible outcome" proposal.

WLA NSW and VWL recommend as a "worst possible outcome" proposal that the following be introduced immediately:

(1) 14 weeks paid parental leave for the primary carer;
(2) 2 weeks of paid parental leave for the supporting parent;
(3) Paid parental leave to be government / tax payer funded at the federal minimum wage;
(4) No requirement on employers to pay any superannuation entitlements for any period of paid parental leave;
(5) All employees required to have undertaken 12 months of continuous service full time with the one employer before they be entitled to government / tax payer funded paid parental leave;
(6) Full time employment to be defined as 38 hours per week as provided under the current Australian Fair Pay Condition Standards (AFPCS);
(7) Requirements for 12 months continuous service at full time hours be waived for the self-employed / contractors;

[24] Australian Women Lawyers, Submission 143.

(8) Payments of government / tax payer funded paid parental leave to be made directly to all individuals (whether employees or the self-employed / contractors) by Centrelink;
(9) Such a scheme to be reviewed in 12 months time;
(10) Such a scheme only to be introduced if the proposed entitlements are greater than current entitlements available to individuals through the Maternity Allowance and Family Tax Benefits.

In support of this proposal WLA NSW and VWL make the following observations:

- Current entitlements to the Maternity Allowance and Family Tax Benefits are not subject to tax or requirements on employers to pay superannuation, and are paid directly from Centrelink.
- The self-employed / contractors would not be entitled to payments for superannuation from any employer throughout any period of paid parental leave under the scheme proposed in the Draft Inquiry Report.
- The argument that requiring employers to pay superannuation during any period of paid parental leave, and to initially fund payments of paid parental leave before being reimbursed by the government, "normalises" paid parental leave is not likely to be justified when balanced against the financial and administrative impact such requirements will have on small businesses, especially small business feeling the effects of the national economy and "global financial crisis". Further this argument becomes questionable when it is considered that neither of these requirements will apply to the self-employed / contractors, and that where the self-employed are also employers of employees entitled to paid parental leave, it could be said that allowing the self-employed to receive their benefits free from either of these requirements could be said to systemically suggest that the entitlements of employees are not "normal" compared to the entitlements personally available to the self-employed.
- Employees who have not been employed for 12 months continuous service on a full time basis with the one employer would still be entitled to the Maternity Allowance and Family Tax Benefits.
- There is a clear inequity inherent in a scheme that allows a employee that has been employed part time for 10 hours, compared to an employee that has been employed full time for 38 hours (potentially more than three times the hours per week of a part time employee under the scheme proposed in the Draft Inquiry Report), to have access to the same entitlements to paid parental leave.
- A review of such a scheme is likely to allow evidence on the operation of the scheme to be made available, such as the cost of the scheme to small businesses;
- In 12 months time evidence of the impact of the current state of the national economy and any impact of the "global financial crisis" is likely to be available, including evidence of whether a recession has occurred / is occurring.

- Such a scheme is consistent with Articles 4 and 6 of ILO Convention 183 Maternity Protection (2000).
- It is not correct to assume that because women lawyers in NSW are lawyers and professionals that most or even the majority of women lawyers in NSW have access to employer funded paid parental leave and are on high incomes. Anecdotal evidence available to WLA NSW suggests that about the same percentage of women in the legal professional have access to employer funded paid parental leave as the percentage of women in the general community (53% according the Draft Inquiry Report). 28 % of respondents to the Law Society of New South Wales 2002 inaugural Remuneration and Work Conditions Survey reported that paid maternity leave was available to them, with 41% if respondents being unsure if their organisation offered paid maternity leave, and 9% of women participating in the survey reporting that they had accessed paid maternity leave.[25] In 2006, 75% of lawyers employed in community legal centres in NSW (the community sector of the legal profession) were women.[26] This figure was an increase from 63% in 2003.[27] WLA NSW is aware that the majority of private law firms in NSW do not have a paid maternity leave policy or scheme available, including the majority of medium to large firms. This is despite results of the Law Society of New South Wales 2006 Practising Certificate Survey indicating that for the 2004/2005 financial year, women with between six to ten years experience had closed the pay gap with their male counterparts, earning on average $96 000 a year compared to $95 400 for men.[28]

OTHER LEGAL ASPECTS

Apart from considering the current state of State and Territory Adoption Laws, State and Territory Care and Protection Laws, Commonwealth Family Law, the *Workplace Relations Act 1996* (Cth), and the National Employment Standards (to be incorporated into the *Workplace Relations Act 1996* (Cth) in 2010), AWL emphasises the importance of the need for amendments to be made to the federal *Sex Discrimination Act 1984* (Cth) (SDA) in conjunction with the introduction of a scheme of paid parental leave. Particularly considering that amendments to the SDA are likely to introduce significant measures to address concerns that the implementation of a scheme of paid parental leave may increase discrimination against women.[29]

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[25] The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 25.
[26] Law Society Journal, "Female Lawyers Favour Community Legal Centres", 44 (11) *Law Society Journal*, December 2006, at 23.
[27] Above, at 23.
[28] Julie Lewis, "Pay Gap Milestone: Mid-Range Women Catch Up", *Law Society Journal*, above, n 25, at 24.
[29] Productivity Commission, above, n 1, at 2.11.

We note that the Senate Legal and Constitutional Affairs Committee is currently conducting a current "Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality", and is due to present its final report by Wednesday, 3 December 2008.[30] AWL and WLA NSW have made a joint written submission to this Inquiry, which we attach as Annexure A to this submission for the Commission's interest and information.

As legal professionals it is often tempting to say that amendments to the law such as any amendments to the SDA and the introduction of the NES, should take place at the same time that any scheme of government / tax payer funded paid parental leave is introduced. However, it is the submission of AWL that the benefits of immediately introducing a scheme of government / tax payer funded paid parental leave, significantly outweigh the risks of delaying the introduction of such a scheme to allow for the development and passage of laws that catch up with the current needs of the Australian community.

At the public hearing of 12 November 2008, AWL was asked by the Commission whether we thought that the introduction of a scheme of paid parental leave would increase the number of legal actions for sex discrimination brought by women. This is a topic on which legal opinion is likely to differ. However, AWL is aware of anecdotal evidence in NSW that the impact of the economy (which is notably subject to pressures from both the state and national levels) and the current state of the job market in NSW has already lead to a noticeable increase in the amount of work for employment lawyers involving "bullying" and "restructure" cases.

AWL notes the findings of HREOC that:

> Most complaints under the Sex Discrimination Act have been made in the area of employment, reflecting the importance of workforce participation for women over the last 20 years … In the 20 years of its operation, over 13 000 complaints alleging discrimination under the Sex Discrimination Act have been received, 12 000 of them have been in the area of employment.[31]

AWL further observes that there are significant impediments under the SDA and current State and Territory anti-discrimination legislation for men seeking to bring legal action for discrimination on the grounds of family responsibilities or responsibilities as a carer such as paid parental leave. Of 16 complaints under the family responsibilities provisions under the SDA in 2001-2002, 3 were made

[30] Parliament of Australia Senate, "Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality" [Internet - http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/info.htm (Accessed 24 November 2008).].

[31] Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, Men, Work and Family*, Discussion Paper 2005, at 81.

by men; of 19 in 2002-2003, 3 were made by men; and of 14 in 2003-2004, 1 was made by a man.[32]

As HREOC has stated:

> Certain restrictions apply to men in their use of some provisions of the Sex Discrimination Act. They are unable to access the sex discrimination provisions to address discrimination on the basis of their family responsibilities, as women have done. This is because men cannot argue, as women have, that *as a sex*, they are more likely to take on family care obligations and that less favourable treatment because of family responsibilities is therefore attributable to their sex. Men have not traditionally had primary responsibility for caring work, and so could not argue that such responsibilities were associated with being a man …
>
> The application of the indirect sex discrimination provisions in these cases may, by protecting women but not men, actually serve to entrench traditional domestic arrangements as the responsibility of women and discourage a more equal sharing of caring an domestic work.
>
> Together with workplace cultures that may discourage men from claiming a better balance between their paid work and family responsibilities, this failure of the federal anti-discrimination framework effectively locks men into the breadwinner model.[33]

It is the submission of AWL that the scheme of paid parental leave proposed in the Draft Inquiry Report may increase the number of cases of discrimination against men attempting to access paid parental leave, especially considering that workplace cultures have traditionally prevented men from accessing flexible and family friendly work arrangements such as paid parental leave, and especially considering that there is evidence that increasing numbers of men would prefer to spend more time with their families and to have better access to flexible and family friendly work arrangements that allow this to happen.

In our view, it is highly concerning that the number of cases of discrimination against men attempting to access paid parental leave may increase without men necessarily have any legal remedy available for such discrimination due to the current state of the SDA and federal anti-discrimination law.

AWL recommends that serious consideration be given to the need to amend federal anti-discrimination law, especially laws relating to discrimination against men on the ground of family responsibilities or responsibilities as a carer, in conjunction with the introduction of a scheme of government / tax-payer funded paid parental leave.

[32] Human Rights and Equal Opportunity Commission, above, footnote 24, at 85.
[33] Human Rights and Equal Opportunity Commission, above, n 30, at 86.

ANNEXURE A

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

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
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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).[34] In 2002, AWL

[34] 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*

made a written submission in response to *A Time to Value – Proposal for a National Paid Maternity Leave Scheme (2002)*, report of HREOC,[35] 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.[36]

The weight of our experience informs this submission.

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

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Paper, [Internet - http://www.womenlawyersnsw.org.au/plr.asp?Page=V&ID=190 (Accessed 27 July 2008)].

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

[36] 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)].

> context. Its limitations must be acknowledged, and efforts put into remedying them as well as developing other measures to end women's disadvantage.[37]

In 1994 the Australian Law Reform Commission (ALRC) published ALRC 69 "Equality before the Law: Women's Equality" (ALRC 69).[38] As noted in ALRC 69, the SDA remains only a partial response to women's legal inequality.[39] The limitations of the SDA include that:

- it only addresses individual acts of discrimination within specified fields of 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.[40]

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

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[37] B Gaze, "Twenty Years of the Sex Discrimination Act: Assessing its Achievements," (2005) 30(1) *Alternative Law Journal* 3, at 8.
[38] 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)].
[39] Australian Law Reform Commission, above, at [4.5].
[40] Australian Law Reform Commission, above, n 5, at [4.5].

men to balance paid work and chare caring responsibilities is critical to achieving gender equality.[41]

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".[42] WLA NSW has maintained that it is not necessarily women who are reluctant to have children – their partner has to be willing as well.[43]

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,[44] and that men as well as women believe that housework and child care should be shared,[45] 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.[46] 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.[47]

While the SDA may adopt gender neutral language referring to discrimination against "persons" and "people" rather than "women", the majority of the objects of

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[41] 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.

[42] 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)].

[43] 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.

[44] 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.

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

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

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

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.

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.[48]

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.

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

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 **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".[49] 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.[50]

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.

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[49] 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)].
[50] Anti-discrimination Board of New South Wales, above.

(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 test, "reasonableness" can be a vehicle for transmission of traditional views of social practices and rejection of any requirement for change.[51]

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.[52] It has also been a factor limiting family responsibilities provisions under the SDA to direct discrimination generally.[53]

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".[54] 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**

[51] B Gaze, above, n 4, at 5-6.
[52] Human Rights and Equal Opportunity Commission, above, n 11, at 86.
[53] Human Rights and Equal Opportunity Commission, above, n 11, at 83.
[54] B Gaze, above, n 4, at 3-4.

(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 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),[55] **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;

[55] Above, at 10.

(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 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,[56] 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.

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

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.

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"**.[57]

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.

[57] Above, at 7-9.

F. IMPACT ON STATE AND TERRITORY LAWS

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

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.[58] Legal, workplace and social policy frameworks all significantly shape behaviour and attitudes toward men's and women's paid and unpaid work.[59] 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.

[58] Human Rights and Equal Opportunity Commission, above, n 11, at 126.
[59] Human Rights and Equal Opportunity Commission, above, n 11, at 111.

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**.[60]

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.[61] 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.[62]

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.[63] Other estimates argue that it costs about $120 000 to replace a lawyer with four years' experience.[64] 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.

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[60] Above, at 7-12.
[61] 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)].
[62] Australian Workplace, above.
[63] 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)].
[64] Australian Workplace, above, n 28.

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

We refer to our submissions above under the heading **(i) Support for a national *Equality Act***.[65] 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.

[65] Above, at 5-6.