

Mr John Carter,
Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600
By email: eet.sen@aph.gov.au

Dear Mr Carter,

Re: Inquiry into the *Workplace Relations Amendment (WorkChoices) Bill 2005*

Please find attached a Submission to the Senate Employment, Workplace Relations and Education Legislation Committee's Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005.

HREOC thanks the Committee for the extension of time for making this submission until 5pm 10th November 2005 and for this opportunity to make a submission. HREOC looks forward to your consideration of the matters raised.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Von Doussa', written in a cursive style.

The Hon John Von Doussa QC

10 November 2005

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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List of Abbreviations

AFPC	Australian Fair Pay Commission
AIRC	Australian Industrial Relations Commission
APCSs	Australian Pay and Classification Scales
AWAs	Australian Workplace Agreements
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
EOWA	Equal Opportunity for Women in the Workplace Agency
FMW	Federal Minimum Wage
HREOC	Human Rights and Equal Opportunity Commission
HREOCA	Human Rights and Equal Opportunity Commission Act
OWS	Office of Workplace Services
SDC	Sex Discrimination Commissioner
The Standard	Australian Fair Pay and Conditions Standard

Submission

1. HREOC

The Sex Discrimination Commissioner (SDC) on behalf of the Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005.

HREOC submits this document pursuant to its legislative functions under section 48 (1) of the *Sex Discrimination Act 1984* (the Sex Discrimination Act) and sections 11(1) and 31 of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA).

2. Introduction

The Australian Government's WorkChoices Bill places Australia at a critical point in its progress towards a more flexible, fair and productive workforce. It is important that workplace regulation and social policy combine to ensure that Australian workers are able to negotiate wages and conditions effectively and also to meet their social, in particular their family, obligations. These obligations include having time to care for children and elderly parents as well as to be able to provide a minimum standard of living.

HREOC has a number of significant concerns with the WorkChoices Bill.

While accepting the Government's stated commitment to further deregulation of the Australian labour market, HREOC is concerned that the measures proposed in the WorkChoices Bill may:

- significantly undermine the capacity of many, although not all, employees to balance their paid work and family responsibilities;
- fail to ensure equal remuneration for work of equal value; and
- fail to protect of vulnerable employees, particularly with disability, Indigenous people, those moving between welfare dependency and paid work and those in low wage jobs for which there are many competitors and consequently little individual bargaining power.

HREOC argues that it is vital to a flexible, fair and productive workforce that Australian workers be able to negotiate wages and conditions effectively and to meet their social, in particular their family, obligations. While HREOC's concerns derive primarily from its interest in promoting the important social values of equality of opportunity, non-discrimination and respect for human rights, it is important to note

that the measures for which HREOC advocates are also conducive to increased workforce participation and increased productivity.

This submission focuses on those areas that are of concern to HREOC, rather than a complete review of the Bill.

However, HREOC would like to place on the record that it has a number of concerns about the human rights implications of some of the elements of the Bill that the Inquiry will not be considering, particularly in respect of freedom of association and limitations on the right to strike in contravention of International Covenant on Economic, Social and Cultural Rights.

HREOC also records its concern that, given the complexity of the WorkChoices Bill and the fundamental and wide-ranging nature of the changes it proposes, there is not greater opportunity for detailed and considered analysis and debate of its provisions and their potential consequences.

3. Concerns and recommendations

3.1 Australian Fair Pay Commission

HREOC welcomes the introduction of a statutory Federal Minimum Wage (FMW). HREOC hopes that the introduction of the Australian Fair Pay Commission (AFPC) will favourably affect those employees currently receiving low wages as a result of working in award-free areas and will decrease under-payment by making it easier for employers to comply with minimum pay rates across the board.

HREOC notes that section 90ZR of the WorkChoices Bill provides for the principles embodied in anti-discrimination legislation to be taken into account by the AFPC. While HREOC supports this, it is concerned that:

- anti-discrimination considerations are not included in the wage setting parameters; and
- section 90ZR does not specify *how* the AFPC is to take these matters into consideration, raising the potential for complex issues such as indirect discrimination to go unaddressed.

The potential exists for indirect discrimination to permeate the setting of minimum wages if, for example, the parameters contain unstated bias about the value of certain skills or attributes. Such complex issues are unlikely to be identified in the absence of an effective process that will allow groups with expertise to have appropriate input.

HREOC therefore recommends that the WorkChoices Bill be amended to ensure that input from bodies such as HREOC is called for, to assist the AFPC in considering such matters before introducing or changing Australian Pay and Classification Scales (APCSs). This could be achieved through the development of a practice direction relating to direct and indirect discrimination, similar to the material provided by HREOC to the AIRC for its Bench Books during the section 150A award simplification procedures, or specific legislatively based processes that the AFPC must follow in order to identify and address indirect and direct discrimination.

HREOC also recommends that the Government require the AFPC to adjust the minimum wage on a regular, preferably annual, basis and take account of costs of living increases.

3.2 AFPC and pay equity

HREOC is of the view that the Government's proposals do not provide adequate or appropriate mechanisms for equal remuneration to be achieved between men and women.

While the proposed s 90ZR requires the AFPC to "...apply the principle that men and women should receive equal remuneration for work of equal value...", the WorkChoices Bill provides no guidance about how this is to be applied.

HREOC regards the existing equal remuneration provisions of the *Workplace Relations Act 1996* (the Workplace Relations Act) - and the previous *Industrial Relations Act 1988* - as having been singularly unsuccessful in achieving pay equity and is concerned that the WorkChoices Bill will not address this issue.¹

State industrial tribunals have been more successful in addressing the historical undervaluation of women's skills and in assessing the work value of occupations traditionally carried out by women employees. HREOC is concerned that the restriction of State industrial jurisdictions will remove an important avenue of redress for women employees seeking equal remuneration.

HREOC recommends that the Australian Government seriously consider introducing equal remuneration provisions similar to those in NSW or Queensland.

HREOC regards it as essential for gender pay audits and work value tests to be conducted before the FMW is set by the AFPC, and recommends that the WorkChoices Bill be amended to require this.

The reduction of the number of wage classifications may well mean that pay inequities remain low for low paid workers, but the WorkChoices Bill should require the AFPC to conduct cross-classification comparisons to ensure outcomes that are equitable for men and women. The AFPC should be required to take account of structural problems in the classification rates that may affect pay equity.

HREOC further recommends that:

- the AFPC be required to establish a specialist unit to develop and monitor pay equity mechanisms;²
- provision be made for individual complaints of pay inequities to be made, similar to the provisions in the UK *Equal Pay Act 1970*, which include that advice and assistance be provided to complainants in proceedings; and

¹ The AIRC has received few applications under equal remuneration provisions and to date no orders have been made. The HPM case (*AMWU vHPM Industries P9201 and Print Q1002*) was settled in 1998 after more than 3 years, by means of a new enterprise agreement.

² See Annexure 1 pages 35, 36.

- simplified procedures for pay equity claims similar to those in the UK *Employment Act 2002* be introduced.

Additional recommendations for improving pay equity include:

- a) requiring the Equal Opportunity for Women in the Workplace Agency (EOWA) to conduct workplace pay equity audits similar to those contained in the Canadian or UK legislation;
- b) requiring pay audits and/or action plans to be carried out by employers as part of enterprise bargaining under the WorkChoices Bill;
- c) requiring the Employment Advocate or the Office of Workplace Services (OWS) to investigate, research and regularly publish pay equity outcomes for all individual and collective agreements;
- d) requiring the Employment Advocate to conduct specific employer pay equity audits of AWAs lodged by individual employees;
- e) requiring Workplace Inspectors to conduct pay equity paper reviews during site visits;
- f) conducting broad reaching education campaigns targeting employers and the general public;
- g) providing incentives such as tax breaks for employers who comply with voluntary pay equity audits and action plans;
- h) developing stronger contract compliance regulation with regard to pay equity.

3.3 Removal of the “no disadvantage test”

Of real concern to HREOC is the removal from federal awards of the “no disadvantage” test currently contained in part VIE of the Workplace Relations Act. Section 170XA of the Workplace Relations Act states that:

“an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees ...”

By contrast, the proposed section 101B provides that protected award conditions are taken to be part of any agreement unless the terms of the agreement expressly exclude or modify them. HREOC is particularly concerned that the following award conditions may be excluded from application to employees:

- loadings for working overtime or for shift work,
- public holidays;
- annual leave loadings;
- penalty rates; and

- outworker conditions.³

The total package of wages and conditions offered to an employee is benchmarked only against the Australian Fair Pay and Conditions Standard (the Standard) contained in the proposed section 89(2), which provides a basic minimum standard of employment pay and conditions.

HREOC considers this Standard is too restrictive. HREOC's recommendations for broadening its coverage follow.

3.4 Australian Fair Pay and Conditions Standard - Parental leave

The WorkChoices Bill removes parental leave, including maternity and adoption leave from allowable award matters (currently contained in section 89A(2)(h) of the Workplace Relations Act). HREOC is pleased to see, however, that the proposed section 89 has retained parental leave and related entitlements as a minimum.

HREOC is nevertheless concerned that the Standard applied reflects only the current Schedule 14 to the Workplace Relations Act.⁴ Many awards around Australia currently deliver greater workplace flexibilities to employees with parental and caring responsibilities.

In particular, in the recent Family Provisions Test Case decision,⁵ the AIRC provided the following rights for employees with caring responsibilities.

1. The right for employees to request up to 24 months unpaid parental leave after the birth of a child, representing a doubling of the current 12 month entitlement.
2. The right for employees to request part-time work on their return to work from parental leave and before their children are at school.
3. The right for employees to request to extend the period of simultaneous unpaid parental leave up to a maximum of eight weeks;
4. A new Personal Leave entitlement which allows up to ten days of paid leave a year for the purpose of caring for family members or for family emergencies - double the former five day provision.
5. A new right for all employees, including casuals, to take up to two days unpaid leave for family emergencies on each occasion such an emergency should arise.
6. A duty on employers to not unreasonably refuse an employee's request for extended parental leave or return to work part-time.

HREOC strongly urges the Government to consider including these standards in the proposed Division 6 of Part VA. Annexure 1 also sets out in detail measures taken in the UK to assist working families and HREOC recommends that greater consideration be given to such measures being included in workplace reforms.

³ These are included in the definition of protected allowable award matters in the proposed section 101B(3), which, by the proposed section 101B(2) may be excluded from operation by the terms of an agreement.

⁴ Division 6 of Part VA of the WorkChoices Bill deals with parental leave with the proposed sections 94D(1)(3) and 94U(2)(3) providing for a period of 52 weeks' unpaid maternity and paternity leave respectively, reflecting the current position under Schedule 14 of the Workplace Relations Act.

⁵ AIRC Family Provisions Case Decision 8 August 2005 PR082005.

HREOC believes that such legislative requirements are key to facilitating widespread acceptance by employers of the need to assist Australian families to balance their paid work and family responsibilities, particularly in a de-regulated bargaining context. HREOC also reiterates the central recommendation of *A Time to Value: Proposal for a national scheme of paid maternity leave*, namely that a national scheme of paid maternity leave should be introduced in Australia.

HREOC also notes with concern that the proposed changes in the WorkChoices Bill do not provide for parental leave for same-sex couples,⁶ unlike under some State regimes.⁷ HREOC recommends that the definition of de-facto spouse be broadened to include same-sex de-facto spouse to avoid discriminating against couples in same-sex relationships contrary to HREOCA and its Regulations.⁸

3.5 Australian Fair Pay and Conditions Standard – Personal and carers’ leave

HREOC is pleased to note that the WorkChoices Bill provides for 10 days paid personal/carers leave per annum for a 38 hour per week employee,⁹ excluding casual employees. This is consistent with the decision of the AIRC in the Family Provisions Test Case.

HREOC is also pleased that casual workers, along with all other employees, are to be entitled to two days unpaid carers leave per occasion when a member of the employee’s immediate family, or a member of the employee’s household, requires care or support during such a period because of: (a) a personal illness, or injury, of the member; or (b) an unexpected emergency affecting the member.¹⁰

Paid compassionate leave is also legislatively provided for under Subdivision E of Division 5 of Part VA for employees other than casual employees. These provisions provide welcome protection for employees.

However, it is of concern that the personal leave entitlement may amount to indirect sex discrimination against women who are more likely to need to deplete their own leave entitlements to meet these responsibilities.¹¹

HREOC is also concerned that the provisions fail to properly recognise same-sex couples. While most employees in same sex couples will be able to access paid or unpaid carers’ leave on behalf of their same-sex de-facto spouse through the provisions of the proposed section 93(J)(1) as a member of the employee’s household, this is a more restricted coverage than is provided for a spouse, including a former de-facto spouse. One effect of this is to deny entitlements to leave for people formerly in

6 See the definitions of “spouse” and “de-facto spouse” in the proposed section 94A.

7 Same sex partners are currently recognised for the purposes of parental leave in a number of States and Territories including NSW, Queensland, Western Australia, the ACT and the Northern Territory: NSW Legal Access Information Centre *Hot Topics - Same Sex Families* State Library of NSW 2005

8 Section 3(b)(11) and reg 4 Human Rights and Equal Opportunity Commission Regulations 1989.

9 Proposed section 93F(2).

10 Proposed section 93J.

11 For example Jill Murray “Labour Law: reconciling work and care responsibilities” in *Alternative Law Journal* Vol 30 No 2 April 2005.

same-sex de facto relationships to care for children to whom they have parental responsibilities.

3.6 Hours of work

HREOC is concerned that the proposed section 91C(3) establishes a default position that hours of work will be averaged over a year in the absence of agreement to the contrary. This introduces a significant degree of insecurity for employees, particularly those with family responsibilities.

HREOC recommends that the WorkChoices Bill require that the averaging period for hours be a maximum of *one month* unless a longer period is requested by the employee.

3.7 WorkChoices and Welfare to Work

HREOC is concerned about the implications of the implementation of the Government's Welfare to Work changes at the same time as WorkChoices.

The capacity for more vulnerable employees to bargain effectively and to choose their employment arrangements is severely impinged upon by the existence of 'take it or leave it' individual bargaining arrangements contained in the proposed section 104(6). Allowing employers to make employment conditional on an employee taking up an AWA suggests that choices about employment arrangements, especially for those on minimum wages, are extremely limited.

HREOC recommends that this provision be deleted.

HREOC is also concerned about the potential effect on Indigenous Australians of WorkChoices at the same time as changes to the Community Development Employment Projects (CDEP) Scheme and the lifting of Remote Area Exemptions in relation to social security benefits. The additional pressure that is placed on Indigenous Australians to move to employment through these processes will potentially affect their ability to bargain effectively and achieve fair conditions of employment. This is particularly the case in rural and remote areas where there are limited employment opportunities.

As the issue of Indigenous employment and disadvantage is not considered in the WorkChoices Bill, HREOC recommends that this be given serious attention in the context of Welfare to Work changes and the review of CDEP.

3.8 Termination of agreements

HREOC has serious reservations about the proposed section 103R, which provides that once an agreement is terminated, neither that agreement nor an award operates. It would appear that employees previously covered by the terminated agreement are covered only by the very limited Standards dealt with under the proposed Part VA.

This means that an employer can terminate an agreement unilaterally under Subdivision D of Division 9 of Part VB of the WorkChoices Bill after the nominal

expiry date of the agreement, and all employees covered by the agreement revert to the Standard.

The proposed provision provides employers with a great deal of leverage over the terms and conditions of any new agreement. Even best practice employers would be tempted to introduce new terms and conditions below the standard of the now terminated agreement, particularly if this becomes common practice.

HREOC strongly recommends that the provision of an agreement be deemed to continue until it is replaced by another agreement, or alternatively, that the current rate of pay plus an applicable award apply.

3.9 Unlawful termination of employment

HREOC welcomes the establishment of the Unlawful Termination Assistance Scheme, however is concerned that the provision of \$4000 per application is likely to fall well short of the actual costs of pursuing an unlawful termination claim in the Federal Magistrates Court or Federal Court.

HREOC is also concerned that in the absence of alternative remedies of unfair dismissal, many employees are likely to pursue complaints with State and federal anti-discrimination agencies, placing significant pressure on existing complaints mechanisms both at a State and federal level.

3.10 Prohibited content in agreements

HREOC is concerned that prohibited content in agreements, for the purposes of the proposed section 101D, is not defined in the WorkChoices Bill, but is left to the discretion of the Minister. Prohibited content of agreements should be spelt out in the legislation, either in the WorkChoices Bill, or by Regulation over which Parliament can exercise scrutiny.

3.11 Outworkers

While recognising that the WorkChoices Bill has given consideration to the needs of outworkers,¹² HREOC believes that further provisions in relation to outworkers should be developed, in particular:

- allowing deeming of outworkers as employees;
- providing wider right of entry for unions in the Textile, Clothing and Footwear industry;
- restricting the use of AWAs for outworkers; and
- providing mechanisms for recovery of unpaid wages up the supply chain to assist in preventing false contractual arrangements.

¹² Conditions for outworkers are retained as an allowable award matter under the proposed section 116(1)(m). See also the proposed section 83BB(2).

3.12 Oversight and monitoring of agreements

HREOC has a number of significant concerns in relation to oversight and monitoring of agreements.

First, the proposed lodgement system for collective agreements and AWAs does not require certification or public scrutiny. Instead, workplace agreements are considered to be approved once they are dealt with according to the provisions of the proposed section 98C. Agreements are then required to be lodged with the Employment Advocate. It is a matter of significant concern to HREOC that there is no process to ensure that the agreement complies with any of the minimum standards in the legislation or that it does not contain discriminatory provisions or pay inequities.

Second, the proposed section 100(2) allows a workplace agreement to come into force even if the procedural requirements, many of which are devised to protect employees and ensure compliance with the protections of the legislation,¹³ are not met.

Third, there is no access to the terms of agreements by those who are not parties to that agreement. This significantly limits the prospect of agreements being reviewed by the AIRC where they may contain discriminatory provisions, as many employees will not be aware of the potential for such review or their rights to remove discriminatory content.¹⁴ Further, employees will be unable to compare their terms and conditions with those under other agreements to determine any potential areas of discrimination.

Fourth, despite the positive role of the Employment Advocate in promoting the interests of workers in disadvantaged positions and in assisting workers to balance paid work and family responsibilities,¹⁵ it is disappointing that this recognition has not led to the development of any detailed compliance requirements to be enforced by the Employment Advocate.

Fifth, while HREOC acknowledges the increase in the number of Workplace Inspectors from 90 to 200, it is concerned that this number will still fall well short of the number needed to provide adequate oversight and enforcement in a new national system.

HREOC makes the following recommendations:

- That greater powers and responsibilities be given to Workplace Inspectors, the Employment Advocate and the Office of Workplace Services (OWS) to provide monitoring and oversight of agreement making. HREOC strongly recommends that the functions of Workplace Inspectors explicitly include a requirement to investigate all allegations that a workplace agreement may be

13 For example, the proposed section 98D which provides that an agreement should not be lodged if it has not been duly approved by the parties under the proposed section 98C; or the proposed section 97A(2), in which a party must not refuse to recognise a bargaining agent.

14 Under section 111A of the current Workplace Relations Act, HREOC may refer any award or agreement that appears to be discriminatory to the AIRC for review. By the proposed sections 119B and 352A, the AIRC may vary the terms of a workplace agreement in a manner similar to the operation of current section 111A.

15 See proposed section 83BB.

discriminatory in its terms or in its effect by assessing that agreement against all other agreements in existence in that workplace.

- That the Employment Advocate be required to conduct regular audits of agreements to ensure compliance with procedural and substantive requirements of the legislation following lodgement and on termination of agreements.
- That strategies are in place within the OWS to make contact with vulnerable employees, particularly those in award free and non-unionised workplaces and to provide employees with specific information about their rights in the workplace.

3.13 Ongoing research and consultation

HREOC believes that in a context in which primary responsibility for employment matters is delegated to the workplace level, it is vital that the Government commits sufficient resources to ensure that it is able to research and monitor developments in workplace relations. The effect of workplace changes on employers, employees and their families and Australia's employment and productivity outcomes should be closely monitored.

HREOC is concerned, for example, that limited research emerges from the office of the Employment Advocate and recommends that the proposed section 83BB(1)(g) require the Employment Advocate to conduct and publish more extensive research on agreements, rather than only allowing the Employment Advocate to provide information on agreements to the Minister.

Annexure 1 notes that the work of the Department of Trade and Industry in the UK may be instructive in this regard.

HREOC recommends that the Australian Government ensure that the changes to workplace relations laws are clearly communicated to the Australian public, with particular communication strategies aimed at Indigenous Australians, those with disability, people living in rural and remote areas, young people and people moving from welfare to work. This should include information about changes to conditions of employment and entitlements of employees.

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Annexure 1: Discussion and evidence

A1.1 Context of WorkChoices

The industrial relations reforms of the 1980s and early 90s began a significant process of change in Australian workplaces with increasing decentralisation, while at the same time the community has experienced rapid employment growth and rises in real wages. Similar experiences in other OECD countries suggest a link between wage decentralisation and economic growth but also between economic growth and rising earned income inequality.¹⁶

Improvements in economic wellbeing have been extraordinary in historical terms over the last 50 years with average real growth in per capita GDP since 1973 effectively doubling living standards every 35 years. Gains in real incomes have been accompanied by an accumulation of assets that families can use when faced with difficult circumstances – the net worth of average households across the seven major OECD economies ranged between five and a half and seven times their annual disposable incomes.¹⁷

Again, like other OECD countries, Australia has invested in skills - the average amount of time spent in education has increased by a year each decade to a level of 11 and a half years across OECD countries in 2000.¹⁸

The rights and responsibilities of those who provide unpaid care, mostly women, in particular, need to be accommodated by these changes. Societies with high workforce participation rates for women as well as men become more reliant on employers for the provision of supports which enable them to meet their social responsibilities. This is both because of the amount of time paid work extracts from a day and because the reduced welfare benefits received by working people makes earned income and other entitlements their principle financial resource.

Over the past decade or more of industrial deregulation, there has been significantly increased focus on the need to ensure that Australian workplaces assist employees to balance their paid work with caring and family responsibilities. In part this has been in response to lengthening working hours for full time workers and in part to the increasing number of two income families where family time is consequently more limited. This is increasingly being seen not as an inefficient and costly indulgence by employers to their employees, but as a means of boosting productivity and removing

16 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005.

17 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005.

18 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005.

structural barriers to workers with caring responsibilities – overwhelmingly women¹⁹ - to participate in the paid workforce on equal terms.

If the Government’s reforms do not provide sufficient protections for those with family commitments, and in particular women, we may well see not only increasing inequities in the labour market but also in society, with social instability becoming more likely and children in low income families particularly at risk. There is a risk that some women with small children will be discouraged from participating in the labour market, while others will find themselves remaining in unskilled and poorly paid work with few benefits.

It is crucial that the Government retain sufficient regulation of workplace relations to ensure that the important work of integrating a family friendly approach to paid work continues. OECD evidence is that where the provision of family friendly conditions is left to the market, they tend to favour high to middle income earners and those in the public sector.²⁰ In Australia, for example, employer provided paid maternity leave is more available to high and middle income earners and public servants. By comparison paid maternity leave is almost unheard of in the hospitality or retail sectors.²¹

Australia has long been a leader in removing wage discrimination between men and women. In fact, Australia has had one of the smallest gender pay gaps in the world. This was delivered largely in the context of regulation.²² The Australian Government is urged to ensure that progress towards gender pay equity is a priority of the new system.

The social welfare safety net during was once seen primarily as an equity tool. However, in more recent times it has been recognised that income distribution and the welfare policies employed to achieve that distribution, including benefit withdrawal rates, also affect workforce participation, economic growth and national productivity.

HREOC is firmly of the view that the protection of the more vulnerable segment of Australia’s labour force makes an important contribution to other national objectives like economic prosperity. However, while equity is an integral part of achieving a number of national interest goals, it is important not to lose sight of the fact that it is also an important goal in its own right.

In that regard, greater efforts are required to ensure that some sections of our community are given appropriate support to move from welfare to paid work without coercion and to ensure that they do not suffer discrimination in paid work. The Government is urged to take particular care to ensure that WorkChoices processes sufficiently protect vulnerable sections of the workforce to accelerate the elimination of all forms of discrimination. This requires a number of different mechanisms within the law: discrimination is complex and the regulatory response should reflect that fact.

19 See Annexure 2.

20 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005

21 Martin Watts and William Mitchell 2004 “Wages and Wage Determination in 2003” *The Journal of Industrial Relations* 46 (2) pp 160-183.

22 This is discussed in more detail below.

However, anti-discrimination provisions are not the only workplace protections that vulnerable workers need to enable them to participate in the paid workforce. Australia has signed international conventions in relation to anti-discrimination, and has quite rightly legislated for anti-discrimination processes. Australia has also ratified ILO Conventions by which the Government has undertaken to provide processes to protect against unfair dismissal and provide due process to employees who have been dismissed from employment. It is likely that, once the unfair dismissal provisions are removed, many more employees will make use of the anti-discrimination provisions under the WorkChoices Act and federal and State anti-discrimination laws. It is inefficient and inappropriate for anti-discrimination provisions to be used for purposes for which they were not designed because Australia has removed other protections that it should properly provide.

The widening of inequality in the distribution of market incomes is common to many OECD nations where, as a consequence, sections of the population continue to miss out on the benefits of economic growth.²³ Australia is no exception to this although after the inclusion of government transfers this inequality is somewhat ameliorated. Widening income inequality particularly affects low skilled or other vulnerable groups such as people with disability or women returning to the workforce after an absence to care for families.

As the experience of other OECD countries makes clear, these problems cannot simply be addressed by relying on traditional economic policy levers of tax and public transfers, if for no other reason than the tax base is becoming increasingly stretched throughout the OECD by the demands of ageing populations.²⁴ It is important that full time paid work delivers an adequate wage to the employee.

It is not just the widening inequality which poses a threat to societies like Australia. The challenge is to be able to address inequality and poverty strategically in such a way that other national challenges, such as the affect of ageing on national prosperity or the impact of long working hours on family life, are also addressed.

The following sections provide background and research about HREOC's key concerns, arranged thematically.

A1.2 Paid work and family balance

A1.2.1 Introduction

Most employees achieve some balance between the competing demands of paid and unpaid responsibilities through the conditions of employment they are able to negotiate with their employer. These conditions include wages since wages enable the purchasing of services such as child care and prepared meals.

Family friendly workplace provisions such as flexible working hours and paid maternity leave can assist both female and male employees reconcile their work and family life. The most recent estimates are that around 60 per cent of the female

23 See below.

24 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005.

workforce has access to paid maternity leave²⁵ although the spread of provisions and length of entitlement varied widely. Up to 65 per cent of managers and 54 per cent of professional women have access to paid maternity leave while only 18 per cent of clerical, sales and service workers and 0.8 per cent of casual workers have an entitlement to paid maternity leave.²⁶

Other family friendly provisions are also not uniformly available across different industries, occupations and employer sizes. Family friendly arrangements are more likely to be offered to better trained and higher skilled employees.²⁷ Higher skilled professional employees are 14.4 times per cent more likely to have flexibility over hours than salespersons or personal workers.²⁸

Pay equity also has a significant impact on men and women's choices for balancing work and family life. Consultations conducted for HREOC's *Striking the Balance: Women, men, work and family* project indicate that pay inequity affects the ability of families to make real choices about how to balance work and family life.²⁹

There is no doubt that the choices that men and women currently make in relation to patterns of paid work and caring responsibility are heavily influenced by wage differences between couples. Families generally make economically rational decisions when deciding how they will best balance their paid work and family responsibilities. The continued gender pay gap only reinforces and perpetuates traditional roles of male breadwinner and female carer.

Many of HREOC's concerns in relation to the capacity of families to balance their paid work and family responsibilities arise from the move towards individual bargaining arrangements. The WorkChoices Bill explicitly gives primacy to individual as opposed to collective bargaining in Section 100A (Relationship between overlapping workplace agreements) as follows:

- “(1) Only one workplace agreement can have effect at a particular time in relation to a particular employee.
- (2) A collective agreement has no effect in relation to an employee while an AWA operates in relation to the employee.
- (3) If: (a) a collective agreement (the *first agreement*) binding an employee is in operation; and

25 Marian Baird and Adam Seth Litwin *Unpaid and Paid Maternity and paternity leave in Australia: Access, Use and Options for Broader Coverage* Paper Presented to the Association of Industrial Relations Academics of Australia and New Zealand Conference 2004.

26 Martin Watts and William Mitchell 2004 “Wages and Wage Determination in 2003” *The Journal of Industrial Relations* 46 (2) pp 160-183.

27 Matthew Gray and Jacqueline Tudball “Access to Family-Friendly Work Practices: Differences within and between Australian workplaces” (2002) 61 *Family Matters*, p 35. It should be noted that, although this article was published in 2002, it drew on 1995 data from the Australian Workplace Industrial Relations Survey (AWIRS) which has not been repeated. This, then, is the most recent and robust national workplace based survey information. Data available through the federal Department of Employment and Workplace Relations Workplace Agreements Database and acirrt's ADAM database only consider provisions available in registered collective agreements.

28 Matthew Gray and Jacqueline Tudball “Access to Family-Friendly Work Practices: Differences within and between Australian workplaces” (2002) 61 *Family Matters*, p 20.

29 This point was raised in most State and Territory consultations conducted around Australia throughout July – September 2005.

(b) another collective agreement (the *later agreement*) binding the employee is lodged before the nominal expiry date of the first agreement; the later agreement has no effect in relation to the employee until the nominal expiry date of the first agreement.”

Section 100B also provides that “[a]n award has no effect in relation to an employee while a workplace agreement operates in relation to the employee.

The WorkChoices Bill also encourages individual and workplace level agreement making through its Principal Object of:

“...ensuring that the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level...”³⁰

and replacing the certification and approval process for making agreements with a simpler, streamlined lodgement only process.³¹

A1.2.2 Hours of work

The most significant condition of employment for those seeking to balance their paid and unpaid responsibilities is hours of work.

Long working hours is a particular aspect of men’s working conditions which reduces their capacity to be actively engaged as parents and carers for family members, including their own parents. While a steady growth in part time work has masked the increase in average working hours for full time prime age employees, ABS data shows more than 85 per cent of employed men in full time work (the most likely group to be parents) work an average of 45.3 hours per week.³²

HREOC’s recent consultations with employers, unions and community groups throughout Australia confirms that men in many white collar, and in blue collar positions where there are labour market shortages, experience long working hours. Quite apart from the health consequences for men, their family arrangements tend to consist of having wives or female partners in part time or casual work who provide the bulk of family care and community contribution. If their marriages or partnerships break down, long working hours, absences from home and the man’s tiredness are frequently cited as part of the problem. These men almost invariably do not enjoy residential custodial arrangements after separation, which constitutes a loss for themselves and their children. It also creates economic loss and poverty for their former partners, who are often unable to find work that accommodates their sole parenting responsibilities and are forced to rely on welfare.

30 New section 3.

31 New Divisions 4-6 of Part VB.

32 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005.

It is mostly men and often fathers who work long hours in the workplace. In 2004 34.2 per cent of men worked 45 hours or more per week.³³ For couples, this pattern of work for men can affect their partner's ability to undertake work and increases their level of unpaid work in the home.³⁴ Long hours of work are also a barrier for men who wish to have a better balance of work and family life. There is evidence that fathers in particular are increasingly valuing their role as active parents and suffer if they cannot spend adequate time with family.³⁵

One of the principal areas of concern to HREOC in relation to workers with family responsibilities is longer working hours, which often feature in AWAs.

AWAs are often used by employers to increase 'hours flexibility', that is to increase the ordinary operating hours of a businesses. An analysis of working hours in AWAs demonstrates that while AWAs generally provide for longer working hours than collective agreements, they were normally paid at single ordinary time rates, not overtime rates.³⁶

A 2003 study of 500 AWAs found that:

- around a quarter provided for a fixed hourly, weekly or annual wage, regardless of how much overtime was worked;
- over a third permitted the employer unilaterally to require additional hours to be worked;
- more than a quarter provided no set ordinary hours of work;
- almost 15 per cent provided that hours could be worked at any time ;
- almost 15 per cent permitted the employer unilaterally to vary the hours of work ; and
- almost 15 per cent provided an employer could unilaterally vary hours within an unlimited span of hours.³⁷

While the AWAs included in this study may well have incorporated overtime into the employee's total remuneration, the open-ended nature of the hours frequently worked are a source of uncertainty and instability for the families involved. During HREOC's recent consultations people spoke of running households as if they were single parents, the difficulties of adjusting to having the man back in the family group for a short while, the disappointment and loss experienced by children with frequently absent fathers.

Hours of work averaged over a year means uncertainty for many hourly paid employees with no recompense for extended daily hours that might entail the

33 ABS *Forms of Employment* 2005 Cat No 6359.0, p 16. This is particularly pertinent when the median age for first time fathers is 32.5 years: ABS *Mothers Day 2004 and National Families Week* Media Release 10 May 2004.

34 Barbara Pocock, *The Work/Life Collision* The Federation Press, Sydney 2003, p 142.

35 HREOC *Striking the Balance: Women, men, work and family Discussion Paper 2005* Human Rights and Equal Opportunity Commission 2005, p 54.

36 David Peetz *The Impact of Workers of Australian Workplace Agreements and the Abolition of the 'No Disadvantage Test'* University of Sydney

37 Richard Mitchell and Joel Fetter 2005 'Human resource management and individualisation in Australian law' *Journal of Industrial Relations* 45 (3) September pp 292-325.

purchasing of extra child care or child care at a higher rate, depending on the amount of notice given, and no real capacity to exploit shorter working hour days.

Provisions for averaging of hours are already permitted in agreements, but the increase in individual agreements is likely to encourage such arrangements. Nine per cent of certified agreements in the last Department of Employment and Workplace Relations Report on Agreement Making contained provision for averaging of ordinary hours of work over an extended period of more than a month. Twenty-six per cent of AWAs contain averaging of hours provisions and while the vast majority average hours over a one to four week period, 15 per cent averaged hours over a year.³⁸

HREOC acknowledges that the AWAs are often applied to either middle management or workers in the mining and construction industries, where people are relatively well paid. HREOC would be concerned were these AWA conditions applied to more marginalised workers, including mothers, without the bargaining capacity at least to trade these unpaid and uncertain extended hours for better remuneration. Decreases in the availability of overtime and shift penalties, which often have the effect of increasing working hours, will also make it much more difficult for men and women employees to balance their paid work with other family commitments.

It should be noted that maximum and minimum number of hours for regular part time workers are not allowable award matters in the WorkChoices Bill.³⁹ This has the potential to create enormous difficulties for many working parents who rely on regular hours to fit in with childcare services.

British research indicates that workers who work non-standard hours have less time reading with their children, less capacity for doing homework together, and fewer shared meals.⁴⁰

HREOC is also concerned to note that while the new section 7C(3)(f) provides for State and Territory Governments to legislate for "the observance of a public holiday" those Governments are prohibited from legislating "the rate of payment of an employee for the public holiday". This provides the opportunity for employers to remove or trade off public holiday pay and increases the likelihood of employees working on public holidays.

One of the themes that has frequently been mentioned by employees during consultations on HREOC's *Striking the Balance* discussion paper is the dependence of families on penalty and overtime rates to meet their basic financial commitments.⁴¹

38 Department of Employment and Workplace Relations and the Office of the Employment Advocate *Agreement making in Australia under the Workplace Relations Act 2002 and 2003* DEWR and Employment Advocate 2004.

39 Section 116B(1)(e) and see also section 116B(2)((a) and (b).

40 Christine Millward "Effects On Family Life Of Parents Working Non-Standard Or 'Atypical' Hours" In *Health For Life! A Forum On Work, Health And Families* Old Canberra House ANU 25-26 August 2003 Proceedings National Centre For Epidemiology And Population Health (NCEPH).

41 The WorkChoices Bill removes the ability of awards to deal with loadings for casual workers under current section 89A(2)(k) (now dealt with under Division 2 of part VA). It is good that the AFPC is required to take account of the new section 90ZR relating to the anti-discrimination provisions, and that the default casual loading percentage is 20 per cent under section 90I.

While the aim of hours flexibility provisions in AWAs should be to include compensation on a regular basis for other entitlements, evidence suggests that both average earnings and wage rises tend to be lower for employees on AWAs than those covered by collective agreements.⁴² The capacity of employers to use AWAs to remove entitlements commonly found in collective bargaining arrangements such as redundancy pay, shift work penalty rates, weekend and public holiday pay rates, rosters, leave loading, casual loadings, and allowances, is of great concern, especially for employees in low paid industries and is likely to see increases in working hours.

A1.2.3 Insecure working conditions

Most mothers in the paid work force are in part time or casual work. While mothers in full time work frequently complain about the difficulties of managing their home and child-rearing responsibilities with a full time job, part time working mothers are in the main more contented with their hours of work although slightly less than one quarter would prefer longer hours.⁴³

HREOC's recent consultations on *Striking the Balance* found however that for women in low skilled employment, the uncertainty of casual work frequently meant difficulties in finding child care. Children could be left in less than desirable arrangements such as being cared for by an older sibling or with a neighbour occasionally checking on the child, while the mother took up a few hours work offered at little notice. Women reported being afraid to refuse work for fear of not being included on future rosters.

Women with regular work commitments, for example daily part time cleaning work, also reported uncertainty. It is already possible for employers to offer contracts stipulating a minimum number of hours to be worked each week, but with the possibility of extending those hours at ordinary time earning rates with little notice. Again, women in these jobs, mindful of the competition for work, were frightened of refusing to work unscheduled hours for fear of losing their jobs, even though it may mean leaving children unattended, or having to make last minute child care arrangements.

A1.2.4 The business case

At an individual level businesses are increasingly recognising the benefits of providing workplace flexibilities which assist employees as well as increasing corporate profits but much more needs to be done in this regard.

The provision of flexible work arrangements that permit employees to integrate their personal lives with their work lives has numerous benefits for both employee and employer. Employees who have access to flexible arrangements are likely to experience increases in morale, loyalty to the organisation and job satisfaction, in turn increasing productivity. For employers, the opportunity to develop and enhance the

42 David Peetz *The Impact of Workers of Australian Workplace Agreements and the Abolition of the 'No Disadvantage Test'* University of Sydney

43 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005 p 65.

workplace culture will result in savings through lower staff turnover and absenteeism and higher profits through increased staff productivity.⁴⁴

The federal Department of Employment and Workplace Relations has told HREOC that:

‘Many Australian businesses recognise the significant benefits of adopting flexible working arrangements. For these businesses, flexible working arrangements are a valuable business practice enabling them to attract and retain staff and increase productivity.’⁴⁵

The Equal Opportunity for Women in the Workplace Agency (EOWA) has identified the following “business case” arguments in favour of diversity and flexibility in the workforce.

1. Attraction and retention of the best talent. The costs associated with recruitment and staff turnover are considerable and include advertising costs, administration costs, time spent training, termination pay, loss of corporate and specialist knowledge and the possibility of low staff morale and reduced productivity.
2. Productivity and innovation. The diverse set of skills and experiences employees bring to their work, if harnessed, can lead to increased innovation and hence increased productivity.
3. Enhancement of a company’s management style. Increasingly a mix of female and male management styles are desired for the value and diversity of methods they bring to the workplace.
4. Attraction of more female customers. Women make up over 50 per cent of Australia’s population and, notably, Australian women are responsible for spending 90 cents in every household dollar. With this kind buying power it is in business’ best interest to keep women both as employees and customers.
5. Reduction of company risk. By considering reasonable requests and attempting to accommodate the needs of employees with caring responsibilities, employers are protecting themselves from possible legal action.⁴⁶

As the OECD points out, some employers clearly benefit from the social protections, such as family friendly workplaces, they provide and seek to maximise those benefits by providing high levels of workplace flexibility.⁴⁷

However, while this may be the case in highly skilled workforces and areas of skill shortages, the business case for greater hiring and retention of less productive workers is often weaker than for highly skilled employees and not generally understood. HREOC’s consultations have also confirmed that family friendly measures are sometimes used by the not-for-profit sector to attract staff because they are unable to

44 Submission to *Striking the Balance: Women, men, work and family Discussion paper 2005* by the Department of Employment and Workplace Relations, 7 October 2005, p 24.

45 Submission to *Striking the Balance: Women, men, work and family Discussion paper 2005* by the Department of Employment and Workplace Relations, 7 October 2005, p 24.

46 Australian Government Equal Opportunity for Women in the Workplace Agency (EOWA) *Why Equal Opportunity Makes Sense* at www.eowa.gov.au.

47 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005 p51.

offer attractive salaries. Clearly, there is a stronger business case for more highly skilled workers than those with lower skills who can be more easily replaced and the business case is most persuasive for public sector and high skilled employers. For the less skilled and thus more expendable employees, formal government regulation that protects those workers with family responsibilities is critical.

A1.2.5 Parental leave and paid maternity leave

Paid maternity leave is an important component of a family friendly workforce that allows parents to manage their paid work and family responsibilities.

The most recent estimates suggest that at least 40 per cent of the workforce has no access to paid maternity leave and women in female dominated industries are often the least likely to have access. As previously noted, up to 65 per cent of managers and 54 per cent of professional women have access to paid maternity leave while only 18 per cent of clerical, sales and service workers and less than half of one per cent of casual workers have an entitlement to paid maternity leave.⁴⁸

The WorkChoices Bill removes the allowable award matter contained in the current section 89(A)(2)(g) relating to “ personal/carers leave, including sick leave, family leave bereavement leave, compassionate leave, cultural leave and other forms of leave...” The WorkChoices Bill also removes current section 89A(2)(h) relating to “...parental leave, including maternity and adoption leave...”

While the key minimum entitlements retained in the WorkChoices Bill under section 89 include personal leave and parental leave and related entitlements, these remove many of the provisions currently contained in awards around Australia. In particular, the recent decision of the AIRC in the Family Provisions Test Case inserted a standard provision to allow employees to request up to 24 months unpaid parental leave after the birth of a child, representing a doubling of the current 12 month entitlement, the right to take simultaneous unpaid parental leave for up to eight weeks and the right for employees to request part time work on their return to work from parental leave and before their children are at school.⁴⁹

While HREOC is encouraged to see that parental leave and personal leave are retained as basic minima, there is real concern that these standards are well below the present standards available in awards. Division 6 of Part VA of the WorkChoices Bill deals with parental leave with new sections 94D(1)(3) and 94U(2)(3) providing for a period of 52 weeks’ unpaid maternity and paternity leave respectively, reflecting the current position under Schedule 14 of the Workplace Relations Act.

HREOC is however concerned about the interaction of States’ industrial legislation and minimum standards introduced via the WorkChoices Bill. HREOC notes that the WorkChoice Bill in Section 7D(1) provides that “[a]n award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency”. This is of particular concern in relation

48 Marian Baird and Patricia Todd 2005 *Government Policy, Women and the New Workplace Regime: A contradiction in terms and Policies* paper presented to the workshop Federal Government’s Proposed Industrial Relations Policy University of Sydney June 20-21 2005.

49 AIRC Family Provisions Case Decision 8 August 2005 PR082005.

to legislation in some States which offer superior conditions especially with regard to entitlements such as parental leave and carer's leave.

An example of such a situation would be where currently some State systems provide for parental leave for same sex couples,⁵⁰ which will no longer be available in the federal system.

Levels of paid maternity leave in the workforce have increased markedly in recent years. This increase is no doubt due in part to community discussion, including that generated by HREOC, and a corresponding increase in expectations by employers and employees of paid maternity leave entitlements.

The Government has asserted that workplace agreements can include a range of innovative and flexible practices to help employees balance their paid work and family responsibilities such as paid maternity leave, however the evidence suggests that individual bargaining does not accelerate access to paid maternity leave, in fact quite the opposite.

In 2004 only 11 per cent of AWAs contained any reference to maternity leave – paid or unpaid – and only seven per cent referred to paid maternity leave.⁵¹ Pocock has pointed out that these entitlements are not necessarily available to those who need them – 14 per cent more men than women on AWAs had any family leave available in their AWA.⁵²

It is apparent that with continued focus on individual bargaining, progress towards greater provision of employer funded paid maternity leave will be difficult. HREOC believes a wholesale move towards AWAs will see a reduction in business-provided paid maternity leave. With the exception of the small number of AWAs providing for paid maternity leave, most paid maternity leave has been provided by employers as part of informal workplace policy or as part of a collective enterprise bargaining agreement or award. In these cases employers offset the cost of the paid leave provision against other entitlements sought, including wage rises. For example the Australian Catholic University's recent grant of twelve months paid maternity leave to its staff was in exchange for a significantly reduced wage rise. The University considered it to have been the cheaper option although it was widely welcomed by staff.⁵³

As employees move to AWAs however, and there is no opportunity for offsetting through collectivisation, employers will require the woman negotiating the leave provision to offset this against the salary she will receive. Not to do so will result in

50 Same-sex partners are currently recognised for the purposes of parental leave in a number of States and Territories including NSW, Queensland, Western Australia, the ACT and the Northern Territory: NSW Legal Access Information Centre *Hot Topics - Same Sex Families* State Library of NSW 2005.

51 Marian Baird and Patricia Todd 2005 *Government Policy, Women and the New Workplace Regime: A contradiction in terms and Policies*, paper presented to the workshop Federal Government's Proposed Industrial Relations Policy, University of Sydney, June 20-21 2005.

52 Barbara Pocock *Industrial Relations Reform: Social and Economic Dimensions* Address to Brotherhood of St Laurence Conference University of Melbourne 11 October 2005.

53 Denise Thompson, Michael Bittman and Peter Saunders *The Impact of the Australian Catholic University's Paid Maternity Leave Provision* SPRC Report 3/04 Report Prepared for the Australian Catholic University Social Policy Research Centre University of New South Wales February 2004.

employers paying women with child bearing responsibilities more than other employees. As in other OECD countries, there will be increasing pressure on the Australian government to meet this gap.⁵⁴

Experience in the anti-discrimination jurisdiction indicates that it is on return to work after pregnancy and parental leave that many women experience real difficulties and serious direct and indirect discrimination. It is important that women and men returning to work following parental leave are given adequate protection from discrimination at those times.

Adequate protections for career progression and pay for parents at the times when discrimination is most likely, is important not only for ensuring a better pay equity outcome, but also for assisting parents to balance their paid work and family responsibilities better. It is disappointing that the Australian Government has not seen fit to provide better protection for parents and in particular, mothers, in the context of a stagnant pay equity gap, and given that there already exists a real alternative in the form of the AIRC Family Provisions Test Case outcomes.

In particular, in the recent Family Provisions Test Case decision,⁵⁵ the AIRC provided the following rights for employees with caring responsibilities.

1. The right for employees to request up to 24 months unpaid parental leave after the birth of a child, representing a doubling of the current 12 month entitlement.
2. The right for employees to request part-time work on their return to work from parental leave and before their children are at school.
3. The right for employees to request to extend the period of simultaneous unpaid parental leave up to a maximum of eight weeks;
4. A new Personal Leave entitlement which allows up to ten days of paid leave a year for the purpose of caring for family members or for family emergencies -- double the former five day provision.
5. A new right for all employees, including casuals, to take up to two days unpaid leave for family emergencies on each occasion such an emergency should arise.
6. A duty on employers to not unreasonably refuse an employee's request for extended parental leave or return to work part-time.

A1.2.6 Carers other than parents

HREOC's consultations also explored the affect of ageing on working Australians. Our ageing population means that an ever-increasing number of working Australians will not only face disability or period of illness themselves during their working lives, but will face increasing responsibility to care for frail aged family members and those with an illness or disability.

While the best employers, such as those recognised through EOWA's annual Business Achievement Awards, are already responding to this challenge, there is less awareness of the incentive for employers with low skilled, low waged employees to make

54 Rebecca Edwards, Reserve Bank of Australia *Maternity Leave and the Evidence for Compensating Wage Differentials in Australia* Paper for the IZA Social Policy Evaluation Annual Conference (SPEAC) Canberra February 23 - 25, 2005.

55 AIRC Family Provisions Case Decision 8 August 2005 PR082005.

changes to the way in which they carry out their business, in particular by providing flexible work practices to older workers.

Home-based caregivers (relatives, friends or others in the home) are estimated to provide about 75 per cent of care for frail aged people in Australia who need assistance with daily activities.⁵⁶ In the foreseeable future, a large part of this caring burden is expected to fall on women. Currently women comprise more than 70 per cent of primary carers of older people and people with disability. Of parents receiving informal primary care, more than 90 per cent are cared for by their daughters.⁵⁷

Nearly 38 per cent of all primary carers participate in the workforce, with 45.7 per cent working full time.⁵⁸ Twenty-four per cent of carers report that on average they need to take time off once a week to undertake their caring role.⁵⁹

For women with particular needs, especially women with disability who have care responsibilities, sole parents, and Indigenous parents and care givers, the difficulties of balancing paid work and family responsibilities are further compounded by lack of appropriate support services, lack of affordability and workplace discrimination.⁶⁰

HREOC is pleased to note that a number of the provisions arising from the Family Provisions Test Case have been included in the WorkChoices Bill, namely 10 days paid personal/carers leave per annum for a 38 hour per week employee,⁶¹ excluding casual employees.

HREOC is also pleased that casual workers, along with all other employees, are to be entitled to two days unpaid carers leave per occasion when a member of the employee's immediate family, or a member of the employee's household, requires care or support during such a period because of (a) a personal illness, or injury, of the member; or (b) an unexpected emergency affecting the member.⁶²

HREOC is however disappointed that the WorkChoices Bill continues the discrimination against employees in a same sex relationship. While most employees in same sex couples will be able to access paid or unpaid carers' leave on behalf of their same-sex de-facto spouse through the provisions of new section 93(J)(1) as a member of the employee's household, this is a more restricted coverage than is provided for a spouse, including a former de-facto spouse. This denies recognition of same sex couples and means that same sex former couples, who may share parenting responsibilities for children, are not entitled to the same leave as are heterosexual former de-facto couples.

56 Michael Bittman, Janet E Fast, Kimberly Fisher and Cathy Thomson "Making the Invisible Visible: The life and time(s) of informal caregivers" in Nancy Folbre and Michael Bittman (eds) *Family Time: The social organization of care* Routledge London 2004, p 70.

57 ABS *Disability, Ageing and Carers: Summary of findings* 2004 Cat No 4430.0, p 49.

58 ABS *Disability, Ageing and Carers: Summary of Findings* 2004 Cat No 4430.0, p 51. Almost fifty-three percent of all carers combine their caring role with full or part time work.

59 ABS *Caring in the Community* 1998 Cat No 4436.0, p 5.

60 Submission to *Striking the Balance: Women, men, work and family* Discussion paper 2005 by People with Disability Australia Incorporated, 13 October 2005.

61 New section 93F(2).

62 New section 93J.

A1.2.7 Opportunities within WorkChoices

In line with developments in other OECD nations, HREOC is of the view that the WorkChoices Bill has the opportunity do more to assist employees to balance their paid work and family responsibilities.

In countries such as the United Kingdom, legislation has been introduced in recent years to provide a structure for a better work-life balance and a more equal workplace climate. The UK *Employment Act 2002* provides measures to support working parents, including the right to request flexible working arrangements, and substantial extensions to paid maternity, paternity, and adoption leave. Eligible employees are able to request: a change to the hours they work; a change to the times when they are required to work or to work from home. This covers working patterns such as annualised hours, compressed hours, flexitime, home-working, job-sharing, self-rostering, shift working, staggered hours and term-time working.

Research shows that the majority of UK employers under the statutory scheme support the flexible employment provisions: according to 2004 statistics, employers are granting almost eight out of ten requests by parents to work flexibly.⁶³

Research carried out by the UK Department of Trade and Industry on the effect of the legislation on employers has found a range of positive outcomes, confirming the business case arguments made in the Australian setting.⁶⁴

It is noted that the UK Government has recently introduced a further package of extended measures to assist working families.⁶⁵ New measures in the Work and Families Bill 2005 and forthcoming regulations introduced last month include:

- extending statutory maternity pay and maternity allowance to nine months from April 2007 with the ambition of moving to a year by the end of the Parliament (including extending eligibility for additional maternity leave);
- a power to introduce new paternity leave for fathers, enabling them to benefit from leave and statutory pay if the mother returns to work after six months but before the end of her maternity leave period;
- extending the right to request flexible working to carers from April 2007;
- measures to help businesses manage the administration of statutory maternity pay, statutory paternity pay and statutory adoption pay;
- introducing keeping in touch days so that where employees and employers agree, a women on maternity leave can go into work for a few days, without losing her right to maternity leave or a week's statutory pay;
- extending the period of notice for return from maternity leave to two months enabling employees and employers to more effectively plan for return to work;

63 UK Department of Trade and Industry, *Second DTI Flexible Working Employee Survey 2005*

64 Stephen Woodland, Nadine Simmonds, Marie Thornby, Rory Fitzgerald and Alice McGee National Centre for Social Research 2003 *The Second Work-Life Balance Study: Results from the Employers' Survey* Employment Relations Research Series No 22 UK Department of Trade and Industry

65 UK Department of Trade and Industry Secretary Alan Johnson Media Release *Johnson delivers on family friendly promise* 19 October 2005

- making clear in the regulations that employers can make reasonable contact with their employees on maternity leave to help employers plan and ease the mother's return to work.

HREOC believes that such legislative requirements are key to facilitating widespread acceptance by employers of the need to assist working carers to balance their paid work and family responsibilities and recommends that the Government introduce similar regulation.

The Government could do much to assist working women and their families in Australia by providing improved minimum standards in relation to paid maternity leave. A government funded scheme would ensure that all eligible women are able to access a minimum acceptable level of income when they have a newborn baby. A government funded scheme means women will not have to trade off pay for employer provided paid maternity leave, thus assisting to promote more equitable pay outcomes for men and women.

HREOC believes that legislated standards, as previously suggested in *A Time to Value: Proposal for a national scheme of paid maternity leave*, should include a national scheme of paid maternity leave in Australia. This scheme should be entirely government funded and should be available to women who have been in paid work for 40 of the 52 weeks before the birth of their child, including small business women, contractors and other self-employed, casual and part time employees. Each eligible woman should be entitled to 14 weeks income replacement at a rate of up to the FMW. Not only is such a scheme in line with current sick leave provisions available to all workers under WorkChoices, there is international evidence that such a scheme contributes to a reduction in the neo-natal mortality rate and, by extension, the neo-natal morbidity rate.

HREOC is also of the view that minimum protections for workers with family and other caring responsibilities must go further in the Standard. A minimum entitlement which permits employees with caring responsibilities, apart from casual employees, to take up to 10 days of their paid sick leave entitlement to care for an immediate family member with an illness or injury provides welcome protection for employees. However, such an entitlement may amount to indirect sex discrimination against women who are more likely to need to deplete their own leave entitlements to meet these responsibilities.⁶⁶

HREOC is disappointed at the failure to include in the Standard the other entitlements arising from the Family Provisions Test Case, which while not guaranteeing workplace flexibility for employees with family responsibilities, certainly establishes a prima facie argument in favour of flexibility.⁶⁷

HREOC strongly recommends that the Government include in the Standard the provisions from the Family Provisions Test Case.

66 For example Jill Murray "Labour Law: reconciling work and care responsibilities" in *Alternative Law Journal* Vol 30 No 2 April 2005.

67 See below for further discussion

Monitoring, oversight and enforcement provisions are also an important part of any scheme to allow flexible working that assists employees to balance their paid work and family life. In the UK, employers have a statutory duty to consider seriously applications for flexible working from eligible employees. Knowledge of these requirements is critical for both employers and employees and surveys show that around two thirds of permanent employees and slightly more than half of temporary employees are now aware of their rights, with almost half becoming aware from media advertising and almost another third through their employer.⁶⁸

The UK arrangements provide for clear timelines and processes for employees and employers⁶⁹ which assist in enhancing compliance. Employees retain a right to appeal a decision but with the appeal process designed to be in keeping with the overall aim of encouraging both employer and employee to reach a satisfactory outcome at the workplace. In a minority of cases some employees will have grounds to pursue their request with third party involvement. This may be by referring their request to the Advisory, Conciliation and Arbitration Service, to an employment tribunal, or by using another form of dispute resolution. An employee is only able to take their claim to an employment tribunal in specific circumstances. In such cases, the employer must be able to demonstrate to the tribunal that they have followed the procedure correctly.

In addition to statutory regulation of employers, the UK Government has carried out ongoing research and wide ranging consultation with employers and employees on the implementation and efficacy of work and family provisions. This has ensured that regulation continues to operate effectively and has suggested directions for further legislative developments.

A1.3 Pay equity

A1.3.1 The pay equity situation in Australia – more needs to be done

Australian women working full time currently earn 85.1 per cent of the earnings of Australian men working full time, when comparing ordinary time earnings. Comparing full time total earnings, women earn 80.9 cents in the male dollar, a gap of 19.1 percent, but that gap blows out to 34 per cent when comparing all employees' total earnings, when women earn 66 per cent of the male dollar.⁷⁰

The gender pay gap in Australia is smaller than in many other comparable countries.⁷¹ This is primarily due to the historical advantage enjoyed by Australian women arising from the 1972 Equal Pay Case and the implementation of that decision through a

68 Heather Holt and Heidi Grainger 2005 *Results of the Second Flexible Working Employee Survey* Employment Relations Research Series No. 39 UK Department of Trade and Industry.

69 UK Department of Trade and Industry *Employment Legislation Flexible Working – The Right To Request* A Basic Summary (PL516 Rev 1) March 2003.

70 May 2005 trend estimates: Australian Bureau of Statistics Cat No. 6302.0 *Average Weekly Earnings* August 2005. The ABS considers that trend estimates provide a more reliable guide to the underlying direction of the original estimates and are more suitable than either the seasonally adjusted or original estimates for most business decisions and policy advice.

71 OECD *OECD Employment Outlook* Paris 2002, p 95. Belgium leads the way in pay equity with a six per cent wage gap, followed by Australia. The average wage gap for OECD countries was 16 per cent: pp 95-97.

centralised system of industrial awards covering most employees.⁷² The gap also reflects the small percentage of women in the full time work force (31 per cent of all full time workers are female) and the likelihood that many of these are women without dependent children who do not seek family friendly conditions offset against wage levels.⁷³

However, in a bargaining environment, award dependency dropped and growth towards pay equity stagnated. Since 1995 the gender pay gap has improved by only around one percent and has been hovering around the 84 cents in the male dollar mark since, despite the greater education and training of women.⁷⁴ It is also true however, that acute labour market shortages in blue collar male-dominated trades has contributed to more recent pressure on this gap.

This is not to suggest that HREOC would recommend a return to an industrial system based only around awards. HREOC recognises the benefits in flexibility and productivity that the bargaining framework has delivered to Australia.

A gender pay gap of 15 cents in the dollar is unacceptable in a country like Australia that prides itself on fairness and equality.

HREOC considers that the workplace reforms present an opportunity to take pay equity seriously and build in processes that will see our stalled progress result in improved outcomes.

HREOC urges that attention be paid to the pay equity outcomes for men and women in enterprise and individual bargaining.

Women are less likely to engage in enterprise bargaining than men. Nearly one third of women in the private sector depend on awards to determine their wages as opposed to only 17 per cent of men.⁷⁵ For those women on enterprise agreements, the level of wages negotiated tends to be lower.⁷⁶

HREOC notes that while wages for men on registered collective agreements and AWAs are not significantly different, women on AWAs (not including managers) currently earn 11 per cent less than women on collective agreements.⁷⁷

72 Victorian Pay Equity Working Party to the Minister for Industrial Relations *Advancing Pay Equity* Government of Victoria 2005.

73 The Final Report of the Victorian Government's Quality Part Time Work Project (October 2005) found that the most common reason for women working part time is because they are caring for children.

74 Australian Bureau of Statistics Cat No. 6302.0 *Average Weekly Earnings* August 2005.

75 Victorian Pay Equity Working Party *Advancing Pay Equity: Their Future Depends On It* Report to the Minister for Industrial Relations, February 2005.

76 In May 2004, women on registered collective agreements received average hourly earnings of \$22.50 compared to men's \$25.10, and on unregistered collective agreements received \$20.30 compared to \$22.00: ABS *Employee Earnings and Hours* Cat No 6306.0 May 2004. See also Marian Baird and Patricia Todd 2005 *Government Policy, Women and the New Workplace Regime: A contradiction in terms and Policies*, paper presented to the workshop Federal Government's Proposed Industrial Relations Policy, University of Sydney, June 20-21 2005.

77 David Peetz *The Impact of Workers of Australian Workplace Agreements and the Abolition of the 'No Disadvantage Test'* 2005 University of Sydney

Evidence suggests that women are already faring less well in individual versus collective bargaining. A comparison of non managerial employees' average hourly rates of pay in 2004 found a gap of:

- zero per cent between women and men on award only wages (\$16.40);
- 7.73 per cent between men and women on unregistered collective agreements (\$22 compared to \$20.30);
- 10.36 per cent between men and women on registered collective agreements (\$25.10 compared to \$22.50);
- 11.3 per cent between men and women on unregistered individual agreements (\$23.90 compared to \$21.20); and
- 20.32 per cent between men and women on registered individual agreements (\$25.10 compared to \$20.00).⁷⁸

Casual workers on AWAs are paid 15 per cent less than casual workers on registered collective agreements, and part time workers on AWAs are paid 25 per cent less than part time workers on registered collective agreements.⁷⁹ This is of great concern when almost 60 per cent of casual workers are women and 71 per cent of part time workers are women.⁸⁰

Some of these gender gaps are also the result of labour shortages in male dominated industries such as mining and construction, where AWAs prevail.

Anecdotally women are more likely to negotiate family friendly working conditions than men and trade off wages against conditions. These trade offs have obvious implications for fertility decisions and women's economic security, especially in single parent households.

HREOC urges the Government to consider extending the number of non tradeable working conditions that assist employees balance their commitments or expand the capacity of the welfare system to meet family commitments in working households.

A1.3.2 Bargaining arrangements and pay equity

The simplified lodgement system for both collective agreements and AWAs will not be subject to a process of certification or public scrutiny. Instead, workplace agreements (AWAs and collective agreements) are considered to be approved once they are dealt with according to the provisions of new section 98C. Agreements are then required to be lodged with the Employment Advocate. There is no process by which the Employment Advocate is required to scrutinise the provisions of the agreement to ensure that the agreement complies with any of the minimum standards in the legislation or that it does not contain any discriminatory provisions or pay inequities.

78 ABS *Employee Earnings and Hours* Cat No 6306.0 May 2004. See also Marian Baird and Patricia Todd *Government Policy, Women and the New Workplace Regime* paper presented to the workshop Federal Government's Proposed Industrial Relations Policy University of Sydney June 20-21 2005.

79 ABS *Employee Earnings and Hours* Cat No 6306.0 May 2004.

80 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005.

HREOC is concerned that new section 100(2) allows a workplace agreement to come into force even if the procedural requirements, many of which are devised to protect employees and ensure compliance with the protections of the legislation,⁸¹ are not met.

Under section 111A of the current Workplace Relations Act, HREOC may refer any award or agreement that appears to be discriminatory to the AIRC for a review. By new section 119B and new section 352A, the AIRC may vary the terms of a workplace agreement in a manner similar to the operation of current section 111A.

However, it is of concern to HREOC that there is no access to the terms of agreements by those who are not parties to that agreement. In the case of AWAs, many employees will not be aware of the provisions of new section 352A or of their rights to remove discriminatory content. Further, they are unlikely to be aware of discriminatory content at all, given that discrimination generally arises in the comparison between the terms and conditions of one person's terms and conditions with those of another. Without access to information about what are the terms and conditions of colleagues, there is unlikely in practice for evidence of direct discriminatory content to come to notice.

While the provisions of Part V of the current Workplace Relations Act are retained in the new WorkChoices Bill, and while the powers and functions may well allow Workplace Inspectors to investigate allegations of discrimination in workplace agreements, it is unclear that this is a required part of the duties of the Workplace Inspectors. HREOC strongly recommends that the functions of Workplace Inspectors explicitly include a requirement that the Inspectors investigate all allegations that a workplace agreement may be discriminatory in its terms or in its effect, when considered in relation to all agreements relating to all employees in the workplace. The same provisions should apply where it is alleged that agreements in a particular workplace contain pay inequities.

From the perspective of pay equity, particularly in regard to non-standard payments such as bonuses, performance payments or cars, the lack of transparency of AWAs is deeply concerning.

A1.3.3 Individuals' ability to bargain

Confidentiality provisions relating to AWAs will mean that employees will be unable adequately to assess the pay and conditions they are being offered compared not only to any objective standard, but to other employees in their workplace. The determination of the price of labour depends on a number of factors, including access to information for both buyers and sellers of labour. In fact few employees have access to sufficient economic information to estimate their worth to an organisation, and rely instead on comparative shopping. While these changes place increased pressure on employers to make their own commercial assessment of the price they are willing to pay for labour, employers too will be guided by comparisons with others.

81 For example, new section 98D which provides that an agreement should not be lodged if it has not been duly approved by the parties under new section 98C; or new section 97A(2), in which a party must not refuse to recognise a bargaining agent.

Evidence indicates that women have more difficulty in striking strong bargains on pay than men do. A recent study from the US found that women tended to shy away from competitive environments while men were keener to compete, despite there being no gender difference in their performance levels. Men were also more confident about their talent with three quarters believing they were the best in a group, compared to slightly more than 40 per cent of women.⁸² In the context of individual bargaining in the workplace, such research must be of concern.

A further American study into salary negotiations showed that many women found it difficult to negotiate for themselves - they undervalued themselves and their worth and they felt they lacked skills and experience.⁸³ Recent surveys of MBA graduates in Australia suggest that similar patterns emerge with women receiving substantially lower salaries than men for comparable jobs.⁸⁴ This is of particular concern when it is considered that MBA students have been specifically trained as part of their university education in the development of negotiation skills and in negotiating job offers in particular.

Women are likely to be more concerned with workplace flexibilities than men and may trade wages for flexibility. HREOC accepts that the aim of workplace reforms is to deliver to men and women the ability to bargain effectively on areas that matter to them. Under the Government's framework, it is not only acceptable but proper that women would prioritise workplace flexibilities and trade off pay to do so.

However, this will ultimately end in driving women's total remuneration down compared to men's depending on the value that is placed on these flexibilities by the employer. For example, it has been estimated that providing paid maternity leave delivers a net saving to employers.⁸⁵ Similarly, other work place flexibilities are estimated, despite administrative costs, to be of net benefits to the business.

Women will, in effect, be doing the same work for lower pay than men. HREOC considers it unfair and potentially discriminatory that because more women than men have assumed primary responsibility for unpaid caring work, they must suffer in increasing loss of lifetime earnings and less retirement savings.

As noted above, under collective bargaining arrangements all workers are able to join to make a salary trade off that is negligible for each. In individual contract arrangements, each employee has only his or her salary to trade away, meaning that the pay sacrifice for paid maternity leave will be significant for each.

HREOC is pleased to note that the Government has recognised the difficulties many groups of employees face in bargaining and that the Employment Advocate will be required “

82 Muriel Niederle and Lise Vesterlund *Do Women Shy Away From competition? Do Men Compete Too Much?* Draft Working Paper June 2005 Department of Economics Stanford University.

80 Deborah M. Kolb, Carol Frohlinger, and Judith Williams "Why Don't People Get Paid What They're Worth? (And Some Ideas About What To Do About It)" in *The Negotiator Magazine* January, 2003 at www.negotiatormagazine.com.

81 Mara Olekans "Harder for women on industrial front" in *The Age* 7 November 2005.

85 Rebecca Edwards, Reserve Bank of Australia *Maternity Leave and the Evidence for Compensating Wage Differentials in Australia* Paper for the IZA Social Policy Evaluation Annual Conference (SPEAC) Canberra February 23 - 25, 2005.

[i]n performing his or her functions relating to workplace agreements...[to] encourage parties to agreement-making to take account of the needs of workers in disadvantaged bargaining positions (for example: women, people from a non-English speaking background, young people, apprentices, trainees and outworkers).”⁸⁶

However, it is disappointing that this recognition has not led to the development of any detailed compliance requirements being enforced by the Employment Advocate.

Consultations conducted for HREOC’s *Striking the Balance: Women, men, work and family* project indicate that pay inequity affects the ability of families to make real choices about how to balance work and family life.⁸⁷ In households where men are the higher earners, men do progressively more hours of work and enjoy less time with their families. Meanwhile women who work increasingly less find themselves with reduced capacity for economic security, to contribute to their retirement savings and, in the case of marginalised worker-families, less able to contribute to household income should the man’s job be threatened or reduced in some way.

A1.3.4 Equal remuneration provisions

While new section 90ZR requires the AFPC to “...apply the principle that men and women should receive equal remuneration for work of equal value...”, the WorkChoices Bill provides no guidance about how this is to be applied. The Australian workplace is highly gender segregated, and women remain clustered in the low wage sectors of the workforce. It is important that a range of processes be established to ensure that there is a comprehensive application of the equal pay principle.

ILO Convention 100, Equal Remuneration for Work of Equal Value (the Equal Remuneration Convention) requires ratifying countries to *ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value* (Article 2(1)).

Article 11 of CEDAW requires that States Parties take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women:

- (c) The right to free choice of profession and employment, the right to promotion, job security **and all benefits and conditions of service** and the right to receive vocational training and retraining;
- (d) The right to **equal remuneration, including benefits**, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; ...

Evidence, such as found in HREOC’s 1992 research into sex discrimination in over-

⁸⁶ Section 83 BB (2).

⁸⁷ This point was raised in most State and Territory consultations conducted around Australia throughout July – September 2005.

award payments,⁸⁸ demonstrated that women have not been able to effectively bargain for over-award payments and that over-award payments are often paid in a manner which represented by direct and indirect sex discrimination. At the time the research was conducted, women earned only 54 per cent of the over-award payments made to their male counterparts. With the growth of in-kind payments over the past decade, over-award payments have become increasingly difficult to quantify. The most recent statistics show that 52.4 per cent of women compared to 83.5 per cent of men receive non-leave employment benefits in their main job including goods and services, transport and shares.⁸⁹

HREOC is of the view that the Government's proposals do not provide adequate or appropriate mechanisms for equal remuneration to be achieved between men and women, particularly given the removal of any capacity for employees to discuss or publicise details of their AWAs.⁹⁰

While the current Workplace Relations Act (and the previous *Industrial Relations Act 1988*) contains provisions to deal with equal remuneration, these have been singularly unsuccessful. To quote AIRC Commissioner Whelan:

“[t]hey have been notoriously unsuccessful in achieving their objective. The provisions are complex and uncertain in their application. The actual powers of the Commission, the capacity to use the provisions in conjunction with other provisions in the Act, application of orders to whole industries and the ability to look behind previous work value assessments are all open to challenge. The procedures, the definitions and the approach being taken are contestable and the process could hardly be described as user friendly. It is little wonder that in 12 years not one order has been issued.”⁹¹

The current provisions of the Workplace Relations Act in relation to equal remuneration are limited both by their terms and their interpretation. Currently a key feature of the AIRC's interpretation of the provisions is the reliance on discrimination as a threshold test of whether the objective of equal remuneration is met. There is a lack of clarity as to the meaning to be afforded to the term discrimination. Relying on discrimination provides that the applicants need to establish a discriminatory cause for any male/female earnings disparity that is the subject of an equal remuneration claim – effectively the test becomes one of sex based discrimination in the setting of pay rates.

This approach is problematic because it suggests gender pay inequity can only be proved by comparing a female dominated job with a male dominated job. Such comparator methodology has been historically difficult to prove and fails to incorporate the latest understandings of undervaluation.

⁸⁸ Elizabeth Fletcher *Just Rewards: A Report of the Inquiry into Sex Discrimination in Over-award Payments* AGPS Canberra 1992.

⁸⁹ ABS *Employee Earnings Benefits and Trade Union Membership* Cat No 6310.0 August 2004.

⁹⁰ Section 83BS places restrictions on disclosure by third parties of details of parties to AWAs with the offence punishable by six months imprisonment.

⁹¹ AIRC Commissioner Dominica Whelan *The Gender Pay Gap: Assessing Possible Futures In The Post-Inquiries Era* Speech to the University of Western Australia Perth 29 April 2005.

The terms of the federal equal remuneration provisions are further limited by the context in which they were introduced. Workplace relations reform has effectively reduced the scope for award-based remedies to labour market inequality. This makes equal remuneration even more difficult to achieve compared with earlier reforms, which provided remedies on an industry wide basis. The across-the-board solutions provided through the 1969 and 1972 equal pay principles are now only available in limited circumstances in an agreement context increasingly focussed on individual bargaining.

The most successful processes for evaluating the historical undervaluation of women's skills and in assessing the work value of occupations traditionally carried out by women employees have been in State industrial tribunals. From 1998, a number of States have undertaken inquiries into pay equity for women and equal remuneration principles have now been adopted in New South Wales, Queensland and Tasmania. Inquiries have recently been carried out in both Victoria and Western Australia with recommendations for achieving pay equity focused on actions which could be taken in State jurisdictions.

HREOC is concerned that the effective removal of State industrial jurisdictions will remove an important avenue of redress for women employees and advocacy bodies seeking equal remuneration in their industries and occupations unless a similar avenue is included in the federal system.

A1.3.5 Opportunities in WorkChoices

It is critical that the Government look to alternate avenues for achieving pay equity for men and women in Australia. The UK model would be a useful place to start since the UK still suffers from a pay equity gap and has taken a wide ranging and comprehensive approach to addressing the gap in recent years, with significant success. However, HREOC contends that stronger regulation, oversight and enforcement mechanisms would be needed in Australia.

In the UK remedies for achieving equal remuneration are individually based. The *Equal Pay Act 1970* provides direct recourse in relation to discrimination in pay. The legislation makes it unlawful to offer different pay and conditions where women and men are doing the same work, like work, work rated as equivalent in the same employment, or work of equal value.

The *Employment Act 2002* made it easier for women who have been discriminated against in relation to pay to take up an equal pay case by simplifying the existing procedures, and introducing a questionnaire procedure for use in equal pay cases. The questionnaire is used by an employee to seek information from her employer to help assess whether or not she is receiving equal pay. It can be sent to an employer either before a complaint is made or shortly thereafter.

Complaints about equal pay are made to Employment Tribunals. The Employment Tribunals attempt to conciliate the complaint and if conciliation is unsuccessful complaints will proceed to a hearing of the Tribunal.

The role of the UK EOC is to provide advice to people who are considering presenting complaints and conducting legal proceedings under the Equal Pay Act and the *Sex Discrimination Act 1975* and, if it thinks fit, assist an individual in handling a complaint which raises a question of principle, or which it is unreasonable to expect the individual to deal with unaided because it is complex or because of the relationship between the individual and others involved, or where there are other special considerations. The assistance may take the form of legal representation or other help, as appropriate. The EOC received 3600 calls about equal pay to their helpline in 2004-05 and over 100,000 downloads of the Equal Pay Act, the Code of Practice on Equal Pay and the equal pay review kit from their website.

Evidence in the UK has found that the vast majority of employers do not believe they have a gender pay gap and therefore do not believe an equal pay review is necessary.⁹² The UK Equal Opportunities Commission Taskforce on Pay Equity was firmly of the view that there would be little or no progress in closing the pay gap unless employers took the essential first step of examining whether they have gender inequalities in their pay systems and, the overwhelming evidence to date was that most will not do so voluntarily.

HREOC strongly recommends that the Government include a requirement that the AFPC conduct work value tests to ensure cross-classification consistency and gender pay equity in its wage setting functions.

It is also important that a range of workplace audit processes, monitoring and enforcement functions are given legislative foundation.

In a recent statement⁹³ New Zealand's EEO Commissioner highlighted the need for governments to carry out and strengthen a range of specific and deliberate strategies around pay equity because the gender pay gap has proved resilient to ordinary market approaches and bargaining mechanisms. A range of strategies are currently being undertaken in New Zealand including progressively improving the minimum wage, targeting specific sectors where women dominate in low paid work such as care-giving, and further work on occupational de-segregation. This is critically important in a heavily deregulated labour market in which the pay gap has again increased with women currently earning 82 per cent on average of men's wages, as compared to 86 per cent in 2004.⁹⁴

HREOC is pleased to note that the general matters which the AFPC must take into account include Commonwealth discrimination legislation, the need to the need to apply the principle of equal pay for work of equal value without discrimination based on sex and ILO Convention No.156 concerning Equal Opportunities and Equal

92 UK Equal Opportunities Commission Taskforce on Pay Equity 2001 *Just Pay: Equal Pay Task Force Report Summary* Equal Pay Taskforce.

93 New Zealand Human Rights Commission Media Release *Widening pay gap a concern* 13 October 2005.

94 The NZ Income Survey for the June 2005 quarter shows that pay for fulltime men went up approximately 6.3 % since the June 2004 quarter, compared with 3.2 % for women. The rates for part time male workers increased by 8%, as compared to 2.8 % for women: Statistics New Zealand *New Zealand Income Survey June 2005 quarter* Cat 63.900 Set 05/06 – 051 October 2005.

Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO 156).

ILO 156 seeks to create equality of opportunity between men and women workers with family responsibilities, and between men and women with such responsibilities and workers without such responsibilities.

The ILO has noted that full equality of opportunity and treatment of men and women in the workforce cannot be achieved without broader social changes because the 'excessive burden' of caring and household responsibilities is still borne disproportionately by women, which constitutes 'one of the most important reasons for their continuing inequality in employment and occupation'.⁹⁵

Consequently, ILO 156 recognises that employment practices aimed at assisting both male and female employees to manage better the conflict between paid work and family can bring about greater gender equality in the workplace as they enable men and women with family responsibilities to participate in the labour market more easily, and encourage men to take greater responsibility for family care.⁹⁶ Flexible work arrangements which are available to men and women also avoid further entrenching traditional, gendered divisions of family caring responsibilities.⁹⁷

In addition to individual and class action based mechanisms for improving pay equity, a number of countries internationally have begun developing more proactive models, particularly in the areas of pay equity reviews or audits. The UK have gone some way towards this by implementing a requirement on public service departments and agencies to undertake Equal Pay Reviews and New Zealand have embarked on a similar process requiring initially central government departments, and then the public health and education sectors, to progress pay and employment equity through a variety of mechanisms including audit mechanisms for pay and employment equity.⁹⁸

In Canada, the ability for the Government to assist further in achieving equal pay in the private sector has been taken one step further with the introduction of contract compliance regulation.⁹⁹ Federally regulated employers and contractors bidding for good and services contracts worth more than \$200,000 with the Canadian Government are required to implement employment equity plans under the

95 ILO *General Survey: Workers with Family Responsibilities* International Labour Conference 80th Session 1993 Geneva Report III Part 4B [25], [62] and ILO *Time for Equality at Work* International Labour Conference 91st Session 2003 Geneva Report I(B), [228]-[241].

96 *ibid.* See also Belinda Smith and Joellen Riley 'Family-friendly Work Practices and The Law' (2004) 26(3) *Sydney Law Review* 395-426.

97 ILO *Time for Equality at Work* International Labour Conference 91st Session 2003 Geneva, Report I(B), [241]. See also Belinda Smith and Joellen Riley 'Family-friendly Work Practices and The Law' (2004) 26(3) *Sydney Law Review* 395-426.

98 Taskforce on Pay and Employment Equity in the Public Service and the Public Health and Public Education *Sectors Report of the Taskforce on Pay and Employment Equity in the Public Service and the Public Health and Public Education Sectors* 1 March 2004 NZ Department of Labour.

99 Aileen McColgan *Government and Pay and Employment Equity: The Role of the State in Achieving Employment Equity in the Workplace* Paper for the Pay and employment Equity for women conference New Zealand 28 June 2004.

Employment Equity Act 1995 and failure to comply can result in ineligibility for further contracts.

Since 1977, section 11 of the Canadian Human Rights Act (CHRA) has specified that it is discriminatory to establish or maintain different wages for men and women doing work of equal value in the same establishment. The CHRA allows parties - usually individual employees or unions - to submit wage discrimination allegations to the Human Rights Commission for investigation. The Commission investigates the allegations and determines whether to dismiss the complaint, refer it to conciliation or refer it to the Canadian Human Rights Tribunal (a separate body). It may also approve a settlement reached by the complainant and respondent. Employers covered by the CHRA include the federal Government, federal public sector organizations such as Crown Corporations, and private sector firms in federally regulated industries, the largest of which are banking, telecommunications, and interprovincial/international transportation.

In 1986, following extensive consultations with interested parties, the Canadian Commission issued guidelines to assist in the interpretation of section 11. The current Equal Wages Guidelines provide information on topics such as which work may be compared, how wage adjustments should be calculated, and what "reasonable factors" may justify wage differences that would otherwise be deemed discriminatory.

A final step, and arguably the world's best practice for achieving pay equity in the private sector would be regulation such as Ontario's 1987 *Pay Equity Act* which outline steps and timetables for the achievement and maintenance of pay equity in the public and private sectors.¹⁰⁰ This proactive model has the advantage of ensuring broad implementation, removing the need for complaints, fostering management-union cooperation, reducing ambiguity, making non-discriminatory wages a priority, and achieving pay equity at a clear point in time.

The Pay Equity Act requires that jobs be evaluated and work mostly or traditionally done by women be compared to work mostly or traditionally done by men. If jobs are of comparable value, then female jobs must be paid at least the same as male jobs. An employer could, for example, compare the value of the work of a secretary, a traditionally female job, to the value of the work of a shipper, a traditionally male job. If the value to the organization is equal or comparable, the secretary must be paid at least the same as the shipper.

The Pay Equity Act covers all employees who work for any public sector employer or a private sector company with 10 or more employees in Ontario. The Pay Equity Act only excludes:

- students working during vacations;
- employees working for the federal government or an industry subject to federal jurisdiction such as banks, airlines, post offices, and television and radio stations;

100 Further discussion on this can be found in: Aileen McColgan *Government and Pay and Employment Equity: The Role of the State in Achieving Employment Equity in the Workplace* Paper for the Pay and employment Equity for women conference New Zealand 28 June 2004

- employees working for a private sector company with fewer than 10 employees in Ontario as of 1 January 1988.

Options for the Australian Government in improving pay equity could include:

- developing new legislation along the lines of Canadian or UK Equal Pay laws as part of the new workplace relations package which requires pay equity audits and action plans to be carried out either across the board in all workplaces, in the public sector and by government contractors. This could be carried out by EOWA;
- requiring pay audits and/or action plans to be carried out by employers as part of enterprise bargaining under the WorkChoices legislation;
- amending existing legislation such as the Sex Discrimination Act to introduce new processes and mechanisms for determining pay equity cases within the existing human rights jurisdiction (along the lines of provisions in the Canadian Human Rights Act). Such amendments would need to have the capacity for addressing systemic discrimination and representative complaints in the area of equal remuneration;
- setting up a specialist unit within the AFPC to develop and monitor pay equity mechanisms;
- requiring Employment Advocate or the OWS to investigate, research and publish regularly pay equity outcomes for all individual and collective agreements;
- requiring the Employment Advocate to conduct specific employer pay equity audits of AWAs lodged by individual employees;
- requiring Workplace Inspectors to conduct pay equity paper reviews during site visits;
- education campaigns targeting employers and unions;
- incentives such as tax breaks for employers who comply with voluntary pay equity audits and action plans;
- developing stronger contract compliance regulation with regard to pay equity for government contractors;
- introducing principles from State industrial jurisdictions into the federal system.

A1.4 Protection of vulnerable employees

A1.4.1 Minimum wages

In a recent social paper¹⁰² the OECD stressed “the importance of shifting the focus of social programmes from insuring individuals against a few, well defined, risks

101 If these companies grow in size to 10 or more employees, they must achieve pay equity immediately.

102 OECD *Extending Opportunities: How active social policy can benefit us all* OECD Paris 2005.

towards investing in their capabilities and making the best use of them.” The report advocates active social policy which does more than shore up minimum living standards, it is also concerned to realise human potential and thus mediate against future poverty.

While countries throughout the OECD have, like Australia, experienced significant economic growth and the development of social protection systems, in recent decades, this has not addressed the problems of widening inequality.

Between 1995 and 2001 the after tax equivalised incomes of the top 20 per cent of households rose by 14 per cent (\$111 per week) compared with just eight per cent (\$13) for the bottom quintile and 11 per cent (\$41) for the middle quintile. Wage dispersion is a key part of income inequality because wages still comprise the majority of household income and wage inequality has been at the heart of growth in household income inequality over the past 20 years.¹⁰³

There is some evidence that this greater disparity of income has enabled greater economic growth, but this proposition is still strongly debated by economists, as it has emerged at the same time as significant productivity increases from information technology advances.

HREOC has a range of concerns in relation to the capacity of an increasingly deregulated labour market to protect economic and socially vulnerable employees in particular women, people from a non-English speaking background, Indigenous Australians, employees with disability and young people.

The key to assessing the ability of individuals to gain fair and equitable outcomes in an increasingly decentralised labour market must be based on their capacity to bargain effectively and in a genuine manner.

The AIRC has stated that:

“the characteristics of the minimum rates workforce reinforce the point that award-reliant employees lack the capacity or bargaining power to negotiate an enterprise agreement. Data from wave 1 of HILDA illustrate that in 2001 employees earning the minimum wage or less were likely to be female, from a non-English speaking background, live in a regional area and/or work in a low skilled occupation.”¹⁰⁴

In Australia we need only examine the recent Productivity Commission report on Indigenous indicators¹⁰⁵ for evidence that the real economic gains of our society are not being equally shared.

103 Australian Council of Social Services *Submission to the AIRC National Wage Case* ACOSS Info 368 March 2005.

104 Safety Net Review of Wages 7 June 2005 AIRC Decision [PR002005] paragraph 290. See above for details of the gender earnings gap under AWAs.

105 Steering Committee for the Review of Government Service Provision *Overcoming Indigenous Disadvantage: Key Indicators 2005* Productivity Commission Canberra 2005.

The capacity for more vulnerable employees to bargain effectively and genuinely to choose their employment arrangements is severely impinged upon by the existence of ‘take it or leave it’ individual bargaining arrangements. This was illustrated in the case of *Meirbin Mushrooms* in which four women employees were dismissed following their refusal to sign AWAs, which would have reduced their take home pay by 25 per cent. While these employees were subsequently reinstated following Federal Court action by the Australian Workers Union, for new employees the Court has found that making employment conditional on agreeing to an AWA does not constitute duress.¹⁰⁶

The capacity of employers to both make employment conditional on an employee taking up an AWA suggests that choices about employment arrangements, especially for those on minimum wages, are extremely limited.

HREOC has serious reservations about new section 103R: that is, that once an agreement is terminated, any award that was displaced by the operation of the agreement does not return to operation. Rather, it would appear, the employees covered by the terminated agreement are covered only by the very limited APCS dealt with under new Part VA. This means that an employer can terminate an agreement unilaterally under Subdivision D of Division 9 of Part VB of the WorkChoices Bill after the nominal expiry date of the agreement, and all employees covered by the agreement revert to the APCS. By contrast, section 170LX of the Workplace Relations Act provides that, for example, a certified agreement ceases to be in operation if:

- “(a) its nominal expiry date has passed; and
- (b) it is replaced by another certified agreement”.

Under section 170 LX of the Workplace Relations Act, in the absence of an order by the AIRC terminating the certified agreement sections 170 LV or ME (relating to breaches of undertakings) or specific procedures for termination having taken place under sections 170MG, MH or MHA (relating to voluntary termination), the agreement will continue beyond its expiry date for an indefinite period.

This provides the employer with a great deal of leverage over the terms and conditions of any new agreement. Even best practice employers would be tempted to introduce new terms and conditions below the standard of the now terminated agreement. This is particularly so in the context of new section 104(6) which explicitly states that it is not considered duress to require an employee to make an AWA with an employer as a condition of employment.

HREOC is also concerned about the implications of the implementation of the Government’s Welfare to Work reforms at the same time as WorkChoices. For many people with disability and sole parents, new requirements to compete in the open job market may create substantial difficulties. A recent study by NATSEM commissioned by the National Foundation for Australian Women found significant changes for sole parents with the disposable incomes of affected sole parents up to around \$100 a week

¹⁰⁶ *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* [2000] FCA 1189 (24 August 2000).

lower under the proposed new system than under the current system and the losses for people with disabilities as high as \$120. The report also showed that effective marginal tax rates would be sharply increased under the proposed new system over a reasonably wide range of earned income for these two groups of people.¹⁰⁷

The wages floor for this group of workers is set by their welfare entitlements plus a premium to cover the cost of working. Should welfare beneficiaries be denied benefits in the future if they refuse to accept a job with minimum entitlements, then the real wages floor for this group of workers may well drop below the level of current welfare entitlements.

People with disability often confront substantial barriers in both obtaining and retaining employment in the open labour market, including discrimination on the ground of disability.¹⁰⁸ It is not unreasonable to conclude that a great many of this number will continue to confront such barriers and will experience disability discrimination at the points of recruitment, return to work, job retention, and termination.

Despite Government commitments to increase the availability and access to childcare places for sole parents, many single parents, mostly women, find it difficult to meet their work and family commitments. Frequently they seek only a limited range of working hours which would allow them to be at home with their children, for example, after school.¹⁰⁹ Their lack of access to family and community supports also limits them to work with certainty of hours, a requirement also shared by partnered mothers who are primary carers.

With diminished availability for people to take unfair dismissal action in the federal jurisdiction or in State industrial tribunals, there is no doubt that this will give rise to a substantial increase in allegations and complaints of discrimination and unlawful termination actions in the event of termination of employment. The WorkChoices Bill also removes the ability of awards to deal with redundancy for employees working in businesses with less than 15 employees under section 89A(2)(m).

This will place significant pressure on existing complaints mechanisms both at a State and federal level. It is also reasonable to assume that many people with disability and people with family responsibilities do not have information in relation to their rights as employees or rights contained within the Sex Discrimination Act or the Disability Discrimination Act. This will again place significantly increased pressure on the educative functions of both HREOC and State anti-discrimination agencies to ensure that people are aware of their rights in regard to workplace discrimination and unlawful termination.

107 Ann Harding, Quoc Ngu Vu and Richard Percival *Options for Reducing the Adverse Impact of the Proposed Welfare-to-Work Reforms upon People with Disabilities and Sole Parents* NATSEM Report to the National Foundation for Australian Women, National Centre for Social and Economic Modelling University of Canberra 3 November 2005.

108 Submission to *Striking the Balance: Women, men, work and family* Discussion paper 2005 by People with Disability Australia Incorporated 13 October 2005, p 7 and Submission to *Striking the Balance: Women, men, work and family* Discussion paper 2005 by Disability Council of NSW 30 September 2005, p 2.

109 National Council of Single Mothers and their Children Submission to the Commonwealth Parliamentary Inquiry into Balancing Work and Family April 2005.

In Australia, the tradition of minimum wage setting through the arbitration process in the AIRC has resulted in a majority of Australian employees being paid wages which compare favourably with other advanced nations. However, this has not resulted in the elimination of low pay. Many Australian employees at the bottom end of award classifications would be considered low paid workers, as are many who are either currently not covered by the award system or because unscrupulous employers fail to pay employees legal entitlements under an award.

HREOC welcomes the introduction of a statutory FMW and is hopeful that the introduction of the AFPC will impact favourably on those employees currently receiving low wages as a result of working in award free areas and will decrease under-payment by making it easier for employers to comply with minimum pay rates across the board.

However there are important equity and other social justice considerations relevant to the way in which the AFPC will operate and its process of setting minimum wages.

HREOC is concerned that section 90ZR of the WorkChoices Bill, relating to anti-discrimination considerations, is not included in the wage setting parameters, but are cross referenced only as a matter to be taken into consideration by the AFPC. New section 90ZR(1)(c) requires only that the AFPC "...take account of the principles embodied..." in the anti-discrimination legislation.

Of concern to HREOC is the fact that the new section 90ZR does not include any provision about *how* the AFPC is to take these matters into consideration.

While this provision reflects section 93 in the current Workplace Relations Act, it must be remembered that the circumstances of the AIRC and the AFPC are different. The AIRC functions as a tribunal and heard evidence from parties appearing before it in open hearings. The AIRC is able to take account of the principles of the anti-discrimination legislation because it hears from parties in submissions. Those parties regularly make use of the anti-discrimination laws in arguing cases.¹¹⁰

Courts have always found anti-discrimination legislation difficult to understand and apply.¹¹¹ The AIRC has parties and intervenors including HREOC to assist them in understanding the legislative provisions.

By contrast, the AFPC is not a tribunal and does not hear evidence from parties. It is therefore not required specifically to address submissions put to it by various

110 To date the AIRC has been required under the Workplace Relations Act to take account of anti-discrimination provisions in its functions generally but also specifically in relation to dispute settlement and prevention (Part V1), the setting of minimum wages and conditions (s88B(2)), reviews of awards and agreements (under S111A), certification of agreements (s170 LU(5)), and unlawful termination (s170CK).

111 Speaking of the Western Australian Equal Opportunity Act, Chief Justice Brennan and Justice McHugh said in *IW v City of Perth*: "...the Act like many anti-discrimination statutes, defines discrimination and the activities which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner...": *IW v The City of Perth & Ors* [1997] HCA 30 (31 July 1997).

stakeholders and may in practice overlook the principles and the particular relevance and application of the anti-discrimination legislation.

Without requiring the AFPC to follow particular processes for taking account of the principles in anti-discrimination legislation, there is concern that this will be overlooked, or at least there will be a lack of transparency about how those provisions are being taken into account.

HREOC recommends that further thought be given to the types of processes that could be put in place in the WorkChoices Bill to ensure that there are effective processes to address indirect discrimination.

Options could include a requirement to consult with HREOC before APCs are introduced or changed, the development of a practice direction relating to direct and indirect discrimination, similar to the material provided by HREOC to the AIRC for its Bench Books during the section 150A award simplification procedures, or specific legislatively based processes that the AFPC must follow in order to identify and address indirect and direct discrimination.

Evidence clearly demonstrates a number of groups of workers are overrepresented among the low paid – these are women, Indigenous employees, young people, People with disability, migrant workers, those employed in small business and non-unionised employees.¹¹² In an acirrt study profiling low waged Australian workers, it was found that even using a conservative measure of low pay, 16 per cent of female employees were low paid compared to 10 per cent of male employees. When the study looked at ‘black spots’ where low pay was most common, it found that three quarters of low paid employees were women and between a fifth and three quarters were from non English speaking backgrounds.¹¹³

An analysis of 2004 ABS earnings data found that the lowest weekly average earnings in Australia were to be found in those industries which are also the most award reliant.¹¹⁴ Of all Australian employees, 19.9 per cent, approximately 1.6 million people, are award dependent workers. More than 965,000, slightly more than 60 per cent of these low paid workers are women. Eighty-two per cent earn less than the median weekly wage and 46 per cent are casual employees. The most award reliant industries are retail, accommodation, cafés and restaurants.¹¹⁵

While HREOC welcomes new subsections 90R(2)(b) and (c) that provide that the minimum wage will not drop below absolute levels already set in the June 2005 Safety Net Review of Wages, HREOC is concerned that wages may well drop in real terms. International experience suggests that minimum wage setting based principally on economic conditions has resulted in less frequent wages increases which tend not to keep pace with inflation. As an example, since 1991 the federal minimum wage in New Zealand has failed to keep pace with inflation and in the United States the

112 Peter Brosnan *Can Australia Afford Low Pay?* University of Sydney 2005.

113 John Buchanan and Ian Watson 1997 *A Profile of Low Waged Employees* ACIRRT University of Sydney

114 Peter Brosnan *Can Australia Afford Low Pay?* University of Sydney 2005.

115 Safety Net Review of Wages 7 June 2005 AIRC Decision [PR002005].

federal minimum wage is currently US\$5.15 per hour and has not been adjusted for many years.¹¹⁶

There are also equivalencies in the numbers of low paid workers and the incidence of child poverty (eg in the US with 25 per cent of employees classified as low paid there is 25 per cent child poverty, in the UK 18 per cent of workers are low paid and 18 per cent of children live in poverty).¹¹⁷

In the UK, the Low Pay Commission which has provided a model for AFPC (as indicated by the Minister), has led to a minimum wage of close to 48 per cent of full time median earnings – in Australia at the moment the minimum wage is closer to 60 per cent of full time median earnings.¹¹⁸ To ensure poor families do not experience a further decline in their relative living standards and that opportunities for children in these families are not further curtailed by any future declines in real minimum wage rates, extensive government support will be needed to maintain living standards for low income working families.

Adequate minimum wages are critical in maintaining a decent standard of living for the increasing number of part time and casual workers. A study on incomes and poverty undertaken by the National Centre for Social and Economic Modelling (NATSEM) in 2001, estimates that the rate of income poverty among people in households headed by a part time worker is twice that of people in households headed by a full time worker. Women currently comprise more than 70 per cent of employees working part time.

HREOC recommends that the Australian Government:

- ensure that adjustments to the minimum wage are implemented on a regular, preferably annual basis;
- take account of costs of living increases;
- ensure that the OWS has sufficient resources to ensure that employers are complying with minimum wage rates; and
- provides a program of wide reaching advertising in relation to the minimum wage to ensure that employers and employees are aware of their obligations and entitlements.

A1.4.2 The Australian Fair Pay and Conditions Standard

HREOC welcomes the introduction of legislated minimum standards in relation to minimum wages, annual leave, personal/carer's leave, hours of work and unpaid parental leave which will cover all employees, including those in award free areas.

116 Marian Baird and Patricia Todd 2005 *Government Policy, Women and the New Workplace Regime* paper presented to the workshop Federal Government's Proposed Industrial Relations Policy University of Sydney June 20-21 2005.

117 Australian Council of Social Services *Submission to the AIRC National Wage Case* ACOSS Info 368 March 2005

118 Marian Baird and Patricia Todd 2005 *Government Policy, Women and the New Workplace Regime* paper presented to the workshop Federal Government's Proposed Industrial Relations Policy University of Sydney June 20-21 2005.

However HREOC is concerned these standards will be introduced at the expense of the removal of the ‘no disadvantage test’ which has the effect of preventing employers reducing pay and employment conditions below the level of an award safety net. Clearly the award safety net generally provides far greater protections than the limited protection five minimum standards in the Standard.

Commentators have suggested that the current system whereby the Employment Advocate applies the no-disadvantage test to individual AWAs through a confidential process already over-emphasises the aspects of the bargain that may be expressed in monetary terms, and under-emphasises the overall impact of the bargain on both work and home life.¹¹⁹ This is partly due to processes whereby the Employment Advocate encourages employers to use a no-disadvantage test calculator to place a monetary value on the benefits and detriments in the agreement. It is likely that the abolition of the no disadvantage test will only exacerbate problems of family unfriendly provisions.

One option for the Government could be to retain some limited aspects of the no disadvantage test against the most crucial of the allowable award matters and to alternatively to further legislate for additional minimum standards. HREOC would see these areas as including regulation of working hours, penalty rates, and the right to request workplace flexibility.

Further to the issue of additional regulation, HREOC is concerned that prohibited content in agreements, for the purposes of new section 101D is not defined in the WorkChoices Bill, but is left to the discretion of the Minister to make regulations as to what is prohibited content. It is difficult to ensure that sufficient protections are in place for vulnerable workers and those with family responsibilities under the provisions of new Subdivision B of Division 7 of part VB. Prohibited content of agreements should be spelt out in the legislation, either in the WorkChoices Bill, or by later amendment.

HREOC is pleased to note that enforcement of employee’s entitlements including compliance with the Standard will be improved through an expansion of the OWS. Protection of vulnerable employees in particular will rely heavily on information about employee and employer rights and responsibilities being made widely available and enforced through the OWS.

HREOC encourages the Government to ensure that strategies are in place within the OWS to make contact with vulnerable employees, particularly those in award free and non-unionised workplaces and provide them with specific information about their rights in the workplace.

While HREOC is also pleased to see that the Government will be increasing the number of Workplace Inspectors, although an increase from 90 to 200 Inspectors will fall well short of the number needed to provide adequate monitoring and enforcement in a new national system.

119 Carolyn Sutherland “Shakier Balance Between Work and Life” *The Age* 29 August 2005.

A1.4.3 Termination of employment

HREOC is pleased to note the Government's commitment to retaining protection from unlawful termination for workers on discriminatory grounds, including sex and family responsibilities.

However, it must be noted that Australia's international obligations with respect to the ILO Termination of Employment Convention (ILO 158) are severely compromised by the limiting of actions in relation to unfair dismissal to companies with more than 100 employees and by increasing the length of probationary periods.

ILO 158 provides in article 4 that employment may not be terminated by the employer unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking. This now will apply only to employers with more than 100 employees. Articles 7 and 8 of ILO 158 further provide that employment shall not be terminated for reasons related to the worker's conduct or performance before she or he is provided an opportunity to defend her or himself against the allegations made, and that a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator. HREOC strongly urges the inclusion of a suitable review mechanism for workers in operations of less than 100 employees to enable the Government to continue complying with ILO 158.

As noted above, HREOC notes that the AIRC is still to have a role with respect to conciliation where an employee alleges termination on unlawful grounds including sex, race, sexual preference or family responsibilities.

It is likely that many matters that would have been dealt with as unlawful dismissal matters would now be brought as unlawful termination cases in the AIRC or discrimination cases before HREOC. Applicants in many of these cases may well have had a choice of jurisdiction in the previous system, but is it surely likely that many cases will be marginally relevant to the remaining jurisdictions.

HREOC also welcomes the establishment of the Unlawful Termination Assistance Scheme, however is concerned that the provision of \$4000 per application is likely to fall well short of the actual costs of pursuing an unlawful termination claim in the Federal Magistrates Court or Federal Court.

A1.4.4 Outworkers

HREOC has a particular interest in ensuring that the WorkChoices Bill provides adequate protections for the estimated 300,000 outworkers in the Australian workforce. These workers are overwhelmingly immigrant, often refugee women, employed in the clothing industry.¹²⁰

Currently a range of protections are provided to outworkers through a combination of federal and State Clothing Awards, mechanisms to allow outworkers to recover

¹²⁰ *FairWear On The Web* at www.fairwear.org.au accessed 7 November 2005.

unpaid wages, a Retailers Mandatory Code and a voluntary Homeworkers Code of Practice along with state based deeming provisions. Such packages of protections have been introduced now across four States and are critical to ensuring comprehensive safeguards for outworkers.

Award conditions are currently extremely important in providing protection for this vulnerable group of workers and in a sector, in which there are particular difficulties in protecting workers, and it is not unreasonable to assume that some employers will use individual bargaining to opt out of current award provisions. HREOC is encouraged to note that outworkers' conditions will remain a protected allowable award matter¹²¹ and an allowable transitional award matter.¹²²

Changes to right of entry arrangements will mean that unions will not be able to enter workplaces where all employees are party to AWAs and increased limitations have been placed on access to employee's records. These changes will be extremely problematic in the clothing outwork sector, where effective monitoring is critical to ensure that outworkers are receiving correct entitlements.

HREOC is very concerned that overriding State deeming legislation (which currently allows workers to access collective bargaining and join industrial associations) will expose a number of vulnerable workers, including particularly outworkers, to exploitation.

For example, currently in NSW deeming provisions in workplace relations legislation permits workers including cleaners, carpenters, joiners, bricklayers, plumbers, painters and clothing outworkers to join unions which may bargain collectively on their behalf or seek award protections.¹²³

These provisions are designed to recognise that the relationships which exist is not, for many of these workers, substantively different to that of employer and employee and that many workers in these categories may be in weak bargaining positions.

While recognising that the WorkChoices Bill has given consideration to the needs of outworkers, HREOC believes that further provisions in relation to outworkers should be developed, in particular allowing deeming of outworkers as employees, providing wider right of entry for unions in the Textile, Clothing and Footwear industry, restricting the use of AWAs for outworkers, providing mechanisms for recovery of unpaid wages up the supply chain to assist in preventing false contractual arrangements.

A1.5 Productivity and competition

A number of authorities have recently begun to question the link between further deregulation of the labour market and increasing productivity.

121 Section 101B(3).

122 Subdivision B section 17(2).

123 NSW Government *Submission to the Senate Standing Committee on Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements* 12 August 2005.

Australia's employment protection legislation has been identified as one of the least restrictive in the OECD¹²⁴ while at the same time the Government argues that the WorkChoices Bill is designed to reduce the burden of cost and risk for business and increase national productivity.

In the Australian Financial Review's most recent quarterly survey of economists, few expected the package of workplace relations reform to substantially improve productivity growth which has fallen in the past five quarters.¹²⁵ ANZ chief economist Saul Eslake indicated that productivity gains as a result of workplace changes would be marginal compared with increasing investment in improving workforce skills, new infrastructure and reviving other microeconomic reforms. Commonwealth Bank senior economist Michael Workman and HSBC chief economist John Edwards both stressed that skill shortages and improved training were significant barriers to improved productivity which would not be addressed. RBC Capital Markets senior economist Michael Every further noted that issues concerning our ageing population would not be addressed.¹²⁶

The most comprehensive Australian studies into the link between employment arrangements and productivity found that that 'in particular workplaces, the overall data do not support the claim that individual contracts substantially and inherently enhance productivity'.¹²⁷ What has been found, especially in the services sector, is that individual contracts boost profits for the employer with wage costs going down and no actual change in productivity.

HREOC is of the view that reforms to workplace relations in Australia must focus on the key national concerns in relation to skills shortages, the ageing population, the capacity of employees to balance their paid work and family responsibilities, and reduction of economic and social inequality. Australia has made some steps forward in these areas in recent years and it is critical that the Government continues this progress.

124 OECD *Economic Survey of Australia 2004* OECD Paris 2005.

125 Kean Wong "Workplace overhaul won't boost productivity" *Australian Financial Review* 10 October 2005 p22.

126 Kean Wong "Workplace overhaul won't boost productivity" *Australian Financial Review* 10 October 2005 p22.

127 David Peetz *Is Individual Contracting More Productive?* Paper presented to workshop Federal Government's Proposed Industrial Relations Policy University of Sydney 20-21 June 2005.

Annexure 2. Snapshot of women in the workplace

A2.1 Participation

Women currently comprise 45 per cent of the Australian labour force, a figure which has been steadily rising for several decades.¹²⁸

The labour force participation of Australian mothers is significantly higher than in earlier decades. In 1985, 45.6 percent of mothers with dependent children were employed compared to 60.4 percent in 2003.¹²⁹ However, relative to comparable countries Australian women have a low level of workforce involvement. In 2000, of Australian women with two or more children, only 43.2 per cent were in the workforce, compared with 81.8 per cent in Sweden, 64.7 per cent in the United States and 62.3 per cent in the United Kingdom.¹³⁰

The pattern of women's participation in paid work changes according to the age of their children. Participation in the Australian workforce dips markedly for women around childrearing age, rising again as children grow older. The Longitudinal Study of Australian Children found that 40 per cent of mothers returned to work with a year of giving birth.¹³¹ When their youngest dependent child is aged less than five years, the employment rate for mothers is 46.3 per cent. This employment rate rises to 65.5 per cent when the youngest child is aged between five and nine years, and increases again to 69.5 per cent when the youngest child is between 10 and 14 years.¹³²

Women's workforce participation differs according to family type: 55 per cent of coupled mothers with dependent children in 2000 were in the workforce.¹³³ By comparison, 30.2 per cent of sole mothers were employed at this same time.

Average hours worked by full time workers in 2003-2004 was 40.4 hours per week, 41.9 hours for men and 37.5 hours for women.¹³⁴

A2.2 Employment conditions

There has been a growth in part time work for all employed people in recent decades: from 24.7 per cent in 1992 to 28.7 per cent in 2004.¹³⁵ Much of this part time work is

128 ABS *Australian Labour Market Statistics* 2005 Cat No 6105.0, p 36; trend data.

129 Iain Campbell and Sara Charlesworth *Background Report: Key work and family trends in Australia* Centre for Applied Research RMIT Melbourne April 2004, p 7.

130 *ibid*, p A2-12.

131 Department of Family and Community Services and Australian Institute of Family Studies *Growing Up in Australia: The longitudinal study of Australian children – Annual Report 2004* Commonwealth of Australia Melbourne 2005, p 11.

132 Iain Campbell and Sara Charlesworth *Key Work and Family Trends in Australia* Centre for Applied Research RMIT Melbourne April 2004, p A2-7.

133 ABS *Labour Force Status and Other Characteristics of Families* 2000 Cat No 6224.0, p 20.

134 ABS *Year Book Australia* 2005 Cat No 1301.0, p 175. Full time working hours grew strongly in the 1980s and early 1990s and have levelled off since the late 1990s: ABS *Australian Social Trends* 2003 Cat No 4102.0, p 119.

135 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005 p 22.

undertaken by women. Of the nearly 3 million people currently working part time, 72.1 per cent are women.¹³⁶

In July 2004, over a third (34 per cent) of women working part time indicated that they would prefer to work more hours than they currently worked.¹³⁷

In August 2004, 28 per cent of all employees were employed casually¹³⁸ Of the 28 per cent 53 per cent were female, 65 per cent were part time employees and 25 per cent worked in retail trade.¹³⁹ 18.9 per cent of women working casually are working full time while 81.1 per cent of casual women employees work part time.¹⁴⁰

A2.3 Nature of employment

Women are largely employed in four, female dominated industries:

- retail trade in which they make up 53 per cent of the workforce;
- health and community services in which they make up 77 per cent of the workforce – 76 per cent in health and 82 per cent in community services;
- education in which they comprise 68 per cent of the workforce; and
- hospitality (accommodation cafes and restaurants) in which they make up 57 per cent of the workforce.¹⁴¹

Other key areas of women's employment include government administration (51 per cent), personal services (63 per cent), and finance and insurance (56 and 63 per cent respectively).¹⁴²

136 ABS *Australian Labour Market Statistics* Cat No 6105.0 April 2005, p 37 trend data. Conversely, for the 7 057 500 full time workers, 34.4 per cent are women compared with 65.6 per cent of men.

137 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005, p 11.

138 ABS *Employee Earnings, Benefits and Trade Union Membership Australia* Cat No 6310.0 August 2004.

139 ABS *Employee Earnings, Benefits and Trade Union Membership Australia* Cat No 6310.0 August 2004.

140 ABS *Employee Earnings, Benefits and Trade Union Membership* 2004 Cat No 6310.0, p 34.

Note that the ABS defines casuals as those who reported that they did not have leave entitlements.

141 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005, p 49.

142 ABS *Australian Labour Market Statistics* Cat No 6105.0 October 2005, p 49.

Annexure 3: HREOC's expertise in workplace relations

HREOC is of the view that equality in employment and equality of economic outcomes are critical elements of achieving substantive equality between men and women.

Over the last 21 years, HREOC has taken a substantial role and interest in matters concerning equity in employment and economic opportunity. Some of our key work in this area is summarised below.

1. 1990: HREOC intervened in the Parental Leave Test Case, which established the standard clause for maternity, paternity and adoption leave, currently contained in awards.
2. 1994 and 1995: HREOC intervened in the AIRC test cases that established personal/carers' leave entitlements. Personal/carers' leave gives employees access to their own sick leave to care for a sick relative.
3. 1995: HREOC was represented on the AIRC central working party for the pilot award review process and subsequently intervened in proceedings to adopt the award review principles. A key aspect of this process was the removal of discriminatory provisions from federal awards and the inclusion of a model anti-discrimination clause.
4. HREOC intervened in a number of National Wage Cases, making submissions on minimum wage levels, particularly as they relate to the protection of living standards and the achievement of pay equity for women.
5. 1997: HREOC produced *Stretching Flexibility: Enterprise bargaining, women workers and changes to working hours*
6. 1997: HREOC produced *Glass Ceilings and Sticky Floors: Barriers to the careers of women in the Australian finance industry*
7. 1997-98: HREOC intervened in the Pay Equity Inquiry before the NSW Industrial Relations Commission (unreported, Glynn J, IRC 97/6320, 14/12/98)
8. 1998: HREOC produced *The Equal Pay Handbook*
9. 1999: HREOC produced *Pregnant and Productive: It's a right not a privilege to work while pregnant* report of the National Pregnancy and Work Inquiry
10. 2000: HREOC intervened in the Australian Metal Workers' Union application to the AIRC seeking an increase in the casual loading for workers under the metals award. The application argued that existing casual loadings no longer compensate employees for the range of entitlements available to permanent employees.
11. 2001: HREOC intervened in the AIRC test case that established unpaid parental leave entitlements for casual workers employed for more than 12 months with the same employer, through the award system.

12. 2001: HREOC produced *Workplace Pregnancy Guidelines*
13. 2002: HREOC intervened in the Pay Equity Case regarding pay equity for casual employees *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries Case* [Print P9210].
14. 2002: HREOC produced *A Time to Value: Proposal for a national scheme of paid maternity leave*
15. 2005: HREOC produced the Interim Report of the National Inquiry into Employment and Disability: *WORKability: People with Disability in the Open Workplace*
16. 2005: HREOC produced *Striking the Balance: women, men work and family*

As the federal complaint handling body in respect of complaints of unlawful discrimination under the Sex Discrimination Act, the *Disability Discrimination Act 1992* (the Disability Discrimination Act) and the *Racial Discrimination Act 1975*, HREOC also has expertise in relation to complaints of discrimination and sexual harassment in the workplace.

Annexure 4: Australia’s international obligations in respect of workplace relations

WorkChoices defines as “anti-discrimination Conventions ILO Convention 100, Equal Remuneration for Work of Equal Value (ILO 100), CEDAW, the Convention Concerning Discrimination in respect of Employment and Occupation (ILO 111) and articles 3 and 7 of the International Covenant on Social, Economic and Cultural Rights.

One of the Principle Objects of the WorkChoices Bill is “assisting in giving effect to Australia’s international obligations in relation to labour standards”.¹⁴³ Australia has accepted responsibilities towards its citizens under international agreements including:

- ILO Convention 156, Workers with Family Responsibilities (ILO 156);
- ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention;
- ILO Convention 98, Right to Organise and Collective Bargaining Convention;
- ILO Convention 158, Termination of Employment Convention.

Some of these international agreements are discussed in this Annexure. Reference is also made to the Convention on the Rights of the Child (CROC).

CEDAW

Australia ratified CEDAW on 28 July 1983. The preamble to CEDAW recognises that the ‘upbringing of children requires a sharing of responsibility between men and women and society as a whole’ and that ‘a change in the traditional role of women in society and in the family is needed to achieve full equality between men and women’.

Relevantly the operative provisions of CEDAW require Australia to take all appropriate measures to:

“...ensure that family education includes the recognition of the ‘common responsibility of men and women in the upbringing and development’ of their children”;¹⁴⁴ and

“...eliminate discrimination against women in all its forms, including in the area of employment”.¹⁴⁵

Article 11 of CEDAW states:

“1. States Parties shall take all appropriate measures to eliminate

143 New section 3(n).

144 See art 5(b).

145 See arts 1, 2 and 11.

discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

”2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.”

At its annual meeting in March 2004 the United Nations Commission on the Status of Women (CSW) confirmed its commitment to employment measures as a means of achieving gender equality.¹⁴⁶ At that meeting CSW urged States to:

“...adopt and implement legislation and/or policies to close the gap between women’s and men’s pay and promote reconciliation of occupational and family responsibilities, including through reduction of occupational segregation, introduction or expansion of parental leave, flexible working arrangements, such as voluntary part time work, teleworking and other home-based work.”¹⁴⁷

146 Commission on the Status of Women 48th Session New York 1-12 March 2004.

147 Commission on the Status of Women *The role of men and boys in achieving gender equality: Agreed Conclusions* 48th Session 1-12 March 2004 [6(m)].

ILO 100

The Equal Remuneration Convention requires ratifying countries to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value (article 2(1)).

ILO 111

The ILO Discrimination (Employment and Occupation) Convention, 1958 (ILO 111) is aimed at preventing and eliminating discrimination in employment.

‘Discrimination’ for the purposes of the ILO 111 is defined as:

“Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

Such other distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation...¹⁴⁸

The ILO has noted that this includes discrimination on the basis of family responsibilities or pregnancy.¹⁴⁹

The operative provisions of ILO 111 require Australia to undertake all appropriate measures to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination therein. It also requires Australia to:

“...seek the co-operation of employers’ and workers’ organisations and other appropriate bodies in promoting the acceptance and observance of that policy”;¹⁵⁰

“...enact such legislation ... as may be calculated to secure the acceptance and observance of that policy”;¹⁵¹ and

“...modify any administrative instructions or practices which are inconsistent with that policy”.¹⁵²

ILO Convention 156

ILO Convention No156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO 156) seeks to

148 art 1.

149 International Labour Organisation *General Survey: Workers with Family Responsibilities* International Labour Conference 80th Session 1993 Geneva Report III Part 4B [3].

150 See art 3(a).

151 See art 3(b).

152 See art 3(c).

create equality of opportunity between men and women workers with family responsibilities, and between men and women with such responsibilities and workers without such responsibilities.

The ILO has noted that full equality of opportunity and treatment of men and women in the workforce cannot be achieved without broader social changes because the ‘excessive burden’ of caring and household responsibilities is still borne disproportionately by women, which constitutes ‘one of the most important reasons for their continuing inequality in employment and occupation’¹⁵³

Consequently, ILO 156 recognises that employment practices aimed at assisting both male and female employees to manage better the conflict between paid work and family can bring about greater gender equality in the workplace as they enable men and women with family responsibilities to participate in the labour market more easily, and encourage men to take greater responsibility for family care.¹⁵⁴ Flexible work arrangements which are available to men and women also avoid further entrenching traditional, gendered divisions of family caring responsibilities.¹⁵⁵

The ILO has emphasised that the provisions of ILO 156 should be interpreted and applied broadly saying that, ‘it is evident from the terms of this instrument that its implementation requires measures to be taken in a number of distinct areas’¹⁵⁶. ILO Recommendation 165¹⁵⁷ spells out more concrete measures that can be taken by States to implement their obligations under ILO 156. ILO Recommendation 165 suggests that, in relation to States’ obligations regarding the terms and conditions of employment, States pay particular attention to measures aimed at providing employees with family responsibilities access to:

“...more flexible work arrangements, including in relation to work schedules and holidays”;¹⁵⁸

“...parental leave without any diminution of employment conditions or rights”;¹⁵⁹ and

“...leave in the event of the illness of a dependent child or other member of the employee’s immediate family”.¹⁶⁰

153 ILO *General Survey: Workers with Family Responsibilities* International Labour Conference 80th Session 1993 Geneva Report III Part 4B [25], [62] and ILO *Time for Equality at Work* International Labour Conference 91st Session 2003 Geneva Report I(B) [228]-[241].

154 *ibid.* See also Belinda Smith and Joellen Riley ‘Family-friendly Work Practices and The Law’ (2004) 26(3) *Sydney Law Review*.

155 ILO *Time for Equality at Work* International Labour Conference 91st Session 2003 Geneva Report I(B) [241]. See also Belinda Smith and Joellen Riley ‘Family-friendly Work Practices and The Law’ (2004) 26(3) *Sydney Law Review*.

156 See also Belinda Smith and Joellen Riley ‘Family-friendly Work Practices and The Law’ (2004) 26(3) *Sydney Law Review*.

157 Adopted by the ILO at the International Labour Conference, 67th Session Geneva 23 June 1981.

158 See cl 18(b).

159 See cls 22(1).

160 See cls 23(1) and 23(2).

CROC

The preamble to the Convention on the Rights of the Child (CROC) recognises the family:

“...as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities in the community”.

Relevantly article 18 of CROC requires Australia to take all appropriate measures to:

“...ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of children”;¹⁶¹ and

“...render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities”.¹⁶²

As the United Nations Children’s Fund (UNICEF) has noted in its guide to the implementation of CROC,¹⁶³ article 18 concerns the balance of responsibilities between parents and the State in the performance of parents’ child-rearing responsibilities.¹⁶⁴ It also reflects the provisions of article 3(2) in which States Parties are required to ensure a child such protection and care as is necessary for his or her wellbeing, and article 27(3) as regards a child’s right to an adequate standard of living.¹⁶⁵ In relation to the implementation of article 18, UNICEF has noted that ‘generous maternity and paternity leave and pay and “family-sensitive” working conditions clearly meet the needs of both children and working parents’.¹⁶⁶

161 See art 18(1).

162 See art 18 (2).

163 See art 18(2). UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (Revised Ed) 2002.

164 *ibid*, 243. See also Human Rights Committee General Comment 17 1989 (UN Doc HRI/GEN/1/Rev 5, 133) in which the Committee states, in relation to art 17 of the International Convention on Civil and Political Rights, which is similar to art 18 of CROC, that ‘since it is quite common for the father and mother to be gainfully employed outside the home, reports by States Parties should indicate how society, social institutions are discharging their responsibility to assist the family in ensuring the protection of the child’.

165 See art 18(2). UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (Revised Ed) 2002, p 250.

166 *ibid* 253.