



# Review of the *Equal Opportunity for Women in the Workplace Act 1999*

## Submission to the Office for Women

### Background

Victorian Women Lawyers (VWL) is an association formed in 1996 as an initiative of female solicitors in Victoria and has over 500 members. Its objectives include the advancement of women in the legal profession, promoting law reform and understanding and supporting women's legal and human rights. It also operates as a network for information exchange, social interaction and continuing education and reform within the legal profession and the broader community.

VWL's submission to the review of the Equal Opportunity for Women in the Workplace Act 1999 (**the Act**) comprises:

- (a) An examination of the objects and coverage of the Act, as set out below; and
- (b) An endorsement of the submissions made by both the Law Council of Australia (LCA) and the Public Interest Law Clearing House (PILCH).

### 1. Introduction

- 1.1. Women have actively participated in the practice of law in Victoria for approximately eighty years. Over the past 20 years, female representation in undergraduate and graduate law programs has been more than 50% on a national basis.<sup>1</sup> While this gender balance is reflected in the junior levels of the profession, it is not the case at the more senior levels.
- 1.2. Despite having high levels of education and training including the ability to negotiate, there is inequality in pay<sup>2</sup> and career progression<sup>3</sup> between

<sup>1</sup> The Law Society of New South Wales, *After Ada: A New Precedent for Women in the Law*, 29 October 2002

<sup>2</sup> Law Society of New South Wales, 2007 Profile of the Solicitors of New South Wales, (December 2007), p 35; 2008 Profile of Solicitors of NSW, 7 January 2009 prepared by the Law Society of NSW p 24; 2009 Member Survey Results prepared by the ACT Law Society p 7 to 8

men and women in the legal profession in Victoria and throughout Australia.

- 1.3. As noted in the Law Council of Australia's submission to the *Inquiry into Pay Equity*, comparison of the remuneration levels of male and female legal practitioners is complicated by the fact that men and women are not equally distributed across the legal profession. Female legal practitioners in general are younger and more recently admitted to practice than male practitioners. A greater number of female practitioners work part time or under a flexible workplace arrangement than male practitioners.
- 1.4. Men continue to hold a greater proportion of senior roles for which they receive higher levels of remuneration. Despite the fact that greater numbers of women than men have been graduating from Australian law schools over the past two decades, less than 20 % of all partners in law firms are female. If salaried partners are excluded, the number of female partners in law firms is as low as 15 per cent (13% in the ACT).<sup>4</sup> In 2006 it was found that 56% of practising lawyers under the age of 40 were women, however at the age of 40 that number almost halved to around 25%.<sup>5</sup>
- 1.5. The pay inequity and limited career progression experienced by women in the legal profession is not unique to the legal profession, it is VWL's belief that it is reflective of the broader Australian work force.<sup>6</sup>

### **International Law Principles**

- 1.6. VWL also suggests that the Office for Women be guided by international law principles. The Convention on the Elimination of Discrimination against Women (**CEDAW**), to which Australia is a party, specifically requires State parties to take 'all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights...'

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<sup>3</sup> 2008 Profile of Solicitors of NSW, 7 January 2009 prepared by the Law Society of NSW p 24; 2009 Member Survey Results prepared by the ACT Law Society p 6

<sup>4</sup> Anne Susskind, 'Billable Hours at Odds with Flexible Work Practices' (2008) *Law Society Journal* 20; Mahlab Recruitment, *Private Practice Australia & International Survey* 2006; 2009 Member Survey Results prepared by the ACT Law Society p 6

<sup>5</sup> A Paterson *Bendable of Expendable: Practices and Attitudes Towards Work Flexibility in Victoria's Biggest Legal Employers* Law Institute of Victoria and VWL 2006

<sup>6</sup> Australian Bureau of Statistics, *Household Income and Income Distribution, 2008-03*, Catalogue No 6523.0, Canberra (2008). OECD, *Employment Outlook 2008 Edition, Summary* ISBN 978-92-64-046337, page 3.

including *inter alia* the right to the same employment opportunities, and the rights to equal remuneration (Article 11).

- 1.7. CEDAW further provides guidance in the forms of Articles 1-5 which outline generally that women's human rights should be respected and upheld in respect to their equality before the law, irrespective of their religious, cultural, professional or relationship status. Article 5 (a) in particular highlights the requirement of State Parties to undertake measures with a view to '...the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'
- 1.8. The International Covenant on Economic, Social and Cultural Rights (**ICESCR**) is also instructive in relation to the rights to work. Australia ratified the ICESCR in 1975, thereby committing to take steps to fully realise the rights set out in the ICESCR. These rights include: (Article 7) the right to equal pay for equal work and equal opportunity for advancement, and (Article 6) the right to work. Article 3 of the ICESCR states the right to access the rights in the ICESCR, regardless of gender.
- 1.9. VWL believes that the spirit and principles behind these international law norms of non-discrimination should be prominent in an honest and complete consideration of the EOWW Act.

**2. Endorsement of submissions made to this review by the Public Interest Law Clearing House and the Law Council of Australia**

- 2.1. VWL endorses the submission of PILCH entitled *Eliminating Barriers to Workplace Equality* and its recommendations.

In particular, VWL endorses PILCH's examination of wrongful gender stereotyping, and supports the recommendations for the elimination of wrongful gender stereotyping in ensuring equal opportunity for women in the workplace. Further, VWL supports PILCH's call, and in its own voice calls for the Australian Government to immediately implement the strategies and actions in *The National Council's Plan for Australia to Reduce Violence against Women and their Children*. VWL recognises that an abuse of certain rights can adversely affect all rights. It is well understood that violence against women is a significant barrier to employment and opportunities within employment for women.

2.2. VWL also endorses the Law Council of Australia's submission and its recommendations. In particular, VWL supports the proposition that the Equal Opportunity for Women in the Workplace Agency (**Agency**) should collaborate with the legal profession's professional representative bodies to educate legal firms as to their obligations at law. This education should also raise awareness within the legal profession and the public in relation to gender bias and its current impact on women in the legal profession in terms of retention, progression and remuneration. VWL also agrees that the relationship between the Act and other legislative instruments, in particular the *Sex Discrimination Act*, should be clarified in relation to the concepts of special measures and principles of merit.

**3. Objects of the Equal Opportunity for Women in the Workplace Act 1999:  
Consultation questions 2.1, 2.2 and 2.3**

***Background***

- 3.1. Parliament has the role of establishing effective legislation to address the needs of Australian society. The Act, the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity (Commonwealth Authorities) Act 1987* were enacted to address the issue of discrimination and achieve substantive equality between the sexes in Australia.
- 3.2. In 2008 French J took judicial notice of the 'disadvantage' experienced by women practitioners in the legal profession in *Victorian Women Lawyers Association Inc v Commissioner of Taxation*<sup>7</sup> (**VWL Case**). The VWL Case concerned an application by VWL to the Australian Taxation Office to be exempted from the obligation to pay income tax. The exemption was sought on the basis that VWL is a charitable institution or an association established for community service purposes.
- 3.3. In its written submissions, VWL referred to the disadvantage of women in society and of women practitioners in the legal profession as a disadvantage so well understood it could be characterised as a social fact.<sup>8</sup> The bench was persuaded that the disadvantage was a matter of common knowledge generally, within the meaning of section 144 (1)(a) of the *Evidence Act 1995* (Cth). Indeed French J agreed that at this level of

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<sup>7</sup> *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008)

<sup>8</sup> *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008) at para 112

generality, the social fact of the historical and persisting disadvantage experienced by women in relation to their participation and career advancement within the legal profession could not be disputed.<sup>9</sup>

- 3.4. French J was asked to consider whether the advancement of women and women practitioners could accordingly be characterised as a public benefit. In answering, French J considered the objects of the Sex Discrimination Act.<sup>10</sup> His Honour noted that, '*The legislation and the convention to which Australia is a party can be taken as indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life*'.<sup>11</sup>

### **Recommendation**

- 3.5. The Act preserves the merit principle (limiting the use of affirmative action) by providing in section 3(4) that it does not require an employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit.<sup>12</sup> In contrast the Sex Discrimination Act is more broadly framed encompassing the notion of achieving substantive equality, so as to permit the use of quotas (affirmative action).<sup>13</sup> It is clear that the objectives of equality of opportunity and treatment have not yet been achieved in Australia for women in the legal profession.
- 3.6. Given the current inequality of opportunity, VWL believes that the Act should incorporate special measures. This would be with a view and purpose of ensuring the substantive equality of men and women. It should be recognised that special measures should be temporary in nature, and such measures should be removed once substantive equality is achieved.<sup>14</sup> Such special measures are particularly salient in the employment arena. VWL believes that special measures should be considered especially in relation to promotion of women to senior positions, such as on boards, to the judiciary, and to senior levels of law firms and government

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<sup>9</sup> *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008), para 116.

<sup>10</sup> *Sex Discrimination Act 1984* (Cth), section 3.

<sup>11</sup> *VWL Association Inc v Commissioner of Taxation* [2008] FCA 983 (27 June 2008), para 122.

<sup>12</sup> Beth Gaze, 'The Ambiguity of Affirmative Action in Australia' (1998) 15(2) *Law in Context* 136, 155.

<sup>13</sup> *Sex Discrimination Act 1984* (Cth), Section 7

<sup>14</sup> See CEDAW Article 4, which states that temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination.

departments and bodies. While we acknowledge that selection for positions should be based on merit, we believe that in some circumstances, it may be appropriate to consider preferential treatment to a woman candidate on the basis of gender, in order to overcome inherent biases and prejudices which perpetuate disadvantage amongst women in the workplace.

**4. Coverage of the Equal Opportunity for Women in the Workplace Act 1999:  
Consultation question 2.5.**

***Background***

4.1. Employers covered by the Act include private sector companies with more than 100 employees and requires these organisations to implement programs to eliminate discrimination and contribute to the achievement of equal opportunity for women in the workplace. Organisations must lodge an annual report recording their performance against the required steps, and failure to lodge a report results in that organisation being named in Parliament and on the EOWA Agency’s website.<sup>15</sup>

***Recommendation***

4.2. The large majority of law firms in Victoria employ less than 100 employees and therefore have no reporting obligation under the Act. VWL believes to more effectively achieve equality of opportunity in Australia among smaller employer organisation and thereby effect cultural change within our society, the coverage of the Act should be expanded to include a greater number of organisations. The content requirement of the current form of report is long, complicated and imposes a high administrative burden to complete. Larger organisations usually have the resources available to them, i.e. human resource practitioners/administration/management, and are more able to complete this reporting requirement. VWL believes organisations with less than 100 employees (say 50 to 100) should be required to submit a short report biannually. This report should include an organisational profile and addresses the “employment matters” set out on a simple, proforma.

4.3. VWL acknowledges that larger law firms which have a reporting obligation under the Act, (many of which have received an “Employer of

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<sup>15</sup> See <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

Choice for Women” citation<sup>16</sup>) and comply with that obligation usually provide more equitable and supportive working conditions for women.

- 4.4. Better working conditions and the “Employer of Choice for Women” citation provide those firms with a recruiting edge. VWL is concerned that within those law firms inequity in pay and lack of career progress exists and is due largely to under-representation of women at the partnership level. It is also noted that as these law firms are only required to report in relation to salaries of employees, their reports do not include partnership profit share which is primarily earned by men. Inclusion of this information would add weight to the existing evidence of the inequality of earnings between men and women in the legal profession.

### **Conclusion**

VWL welcomes the review of the Act and the Agency, as they are fundamental in championing equal opportunity for women in the workplace. While there has been some progress, our membership and our research inform us that in the legal profession, there are serious barriers to equal opportunity for women. VWL submits that the elimination of discrimination against women in all its forms is crucial in progressing toward substantive equality.

VWL would be happy to provide further information in relation to this review, and we encourage the Office for Women to contact us with any questions.

### **Victorian Women Lawyers**

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<sup>16</sup> In 2009 the following firms received the EOWA Employer of Choice for Women citation Allens Arthur Robinson, Blake Dawson, Clayton Utz, Corrs Chambers Westgarth, Freehills, Holding Redlich (Lawyers & Consultants), Maddocks, Mallesons Stephen Jacques and Minter Ellison.