



Attn: Hon Robert McClelland MP, Attorney-General
cc: Stuart Woodley
Attorney-General's Department
Central Office
3-5 National Circuit
BARTON ACT 2600

Attn: Senator the Hon Penny Wong, Minister for Finance and Deregulation
cc: Yvonne Chia
Department of Finance and Deregulation
John Gorton Building
King Edward Terrace
PARKES ACT 2600

22 February 2011

Dear Attorney-General and Minister Wong,

Submission regarding a consolidated federal anti-discrimination law

Victorian Women Lawyers (**VWL**) is the peak body for women lawyers in Victoria, with over 550 members. VWL aims to promote and protect the interest of women lawyers. VWL's objectives include:

- to work towards the reform of the law;
- to participate as a body in matters of interest to the legal profession; and
- to promote the understanding and support of women's legal and human rights.

In the absence of a formal consultation process regarding the consolidation of the federal anti-discrimination laws, VWL makes the following submission addressing the key aspects that any consolidated anti-discrimination legislation should address.

In a press release dated 21 April 2010, the Attorney-General Robert McClelland MP and the then Minister for Finance and Deregulation Lindsay Tanner MP announced the Government's intention to streamline federal anti-discrimination law by creating one consolidated, federal anti-discrimination law (**Consolidated Act**).

VWL strongly supports measures which will simplify and strengthen the protections against sex discrimination and increase transparency, accountability and enforceability in relation to those protections. VWL's particular concerns in relation to a Consolidated Act from the perspective of sex discrimination are outlined in this submission.

In summary, VWL submits that:

- a Consolidated Act should not result in any diminution of existing protections in the law;
- a Consolidated Act should reflect a best-practice approach to providing protection from discrimination;
- a Consolidated Act should be developed with reference to international law principles;
- a Consolidated Act should include the object of achieving substantive equality between men and women;
- the definitions of discrimination should be simplified to remove undue technicalities;
- the prohibition on discrimination on the ground of family responsibilities should be extended beyond dismissal in employment, to all areas of work;
- a Consolidated Act should not include exceptions on the basis of gender;
- any exemptions in the Consolidated Act must be temporary and reviewable;
- the AHRC should develop guidelines for the granting of exemptions, in line with the objectives of the Consolidated Act;
- the Consolidated Act should include a positive duty to take reasonable and proportionate measures to eliminate discrimination;
- the AHRC (or alternative body) should be empowered to investigate complaints of discrimination and implement and enforce compliance measures;
- a Consolidated Act must be accompanied by comprehensive, funded community education campaign;
- a Consolidated Act must be accompanied by increased funding for legal information and advice; and
- a Consolidated Act should include a presumption that each party is responsible for their own legal costs, unless the court finds that a party has acted unreasonably.

Introduction: discrimination and women lawyers' experiences

Women have actively participated in the practice of law in Victoria for approximately eighty years. Over the past twenty years, female representation in undergraduate and graduate law programs has been more than 50% on a national basis.¹ While this gender balance is reflected in the junior levels of the profession, it is not the case at the more senior levels.

Despite having high levels of education and training including the ability to negotiate, there is inequality in pay² and career progression³ between men and women in the legal profession in Victoria and throughout Australia. The Federal Court accepted this fact on judicial notice⁴.

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

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

² 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.

³ 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.

⁴ *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983, at 116.

practitioners. A greater number of female practitioners work part time or under a flexible workplace arrangement than male practitioners.

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).⁵ 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 more than halved to around 25%.⁶

The pay inequity and limited career progression experienced by women in the legal profession is not unique to the legal profession. Indeed it is likely that this is reflective of the broader Australian work force.⁷

While women lawyers demonstrate high levels of education and awareness of work rights, they still face barriers in career progression in contrast to male lawyers. Inequitable briefing and promotion practices impact on female lawyers' progression in a systemic and subtle way. In the experience of female lawyers in Victoria, the division between 'direct' and 'indirect' discrimination is arbitrary and does not reflect the reality of what discrimination constitutes in practice.

While over half of law graduates are women, currently only a minority attain promotion to partner level. For example, a June 2010 partnership survey of the largest national law firms undertaken by the Australian and the Australian Financial Review indicates that the highest percentage of women at partner level in a firm is 36.4%.⁸ Women currently account for approximately 45.5% of solicitors in Victoria, and are expected to overtake men in coming years. However, in the first half of 2010, women only accounted for 21.9% of lawyers promoted to partner level.⁹

A multitude of reasons for this imbalance exist, one of which being a work culture which is intolerant of commitments outside of the office. A VWL study into work practices found that while law firms offer flexible work practices, women who were able to obtain part-time work felt that it was commonplace that they were unable to progress through the career hierarchy.¹⁰

The experiences of women in law firms indicate that even women who have a high awareness of legal rights nevertheless find it difficult to challenge discrimination given it is structural and systemic, rather than 'direct' and explicit. Given that women still assume primary caring

⁵ 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.

⁶ A Paterson Bendable of Expendable: Practices and Attitudes Towards Work Flexibility in Victoria's Biggest Legal Employers Law Institute of Victoria and VWL 2006.

⁷ 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.

⁸ The Australian, 'The Firms where Women do Well', 25 June 2010, <<http://www.theaustralian.com.au/business/legal-affairs/the-firms-where-women-do-well/story-e6frg97x-1225884165173>>, accessed 4 February 2010.

⁹ Virginia Harrison, 'Women slide in partnership ranks', The Australian, 25 June 2010, <<http://www.theaustralian.com.au/business/legal-affairs/women-slide-in-partnership-ranks/story-e6frg97x-1225884034943>>, accessed 4 February 2010.

¹⁰ Victorian Women Lawyers, 'A 360 degree Review: Flexible Work Practices. Confronting myths and realities in the legal profession', November 2005, <http://www.vwl.asn.au/index.php?page=publications&sub=vwl_pub>, accessed 5 February 2011.

responsibilities the general pressure at law firms to 'work past 5' effectively blocks female career progression. Additionally, the emphasis placed by law firms on meeting 'budgets' and earning income for the firm, where high billers are rewarded, tends to disadvantage women lawyers. Women lawyers are less likely to be in a position to bill clients over and above prescribed 'normal' full time hours.

Another indicator which links women lawyers' experiences to other women in the paid workforce in general is lower pay. A Law Council December 2009 study indicates that women at the bar were earning substantially less than their male counterparts.¹¹ Women barristers appeared in just 13 per cent of hearings in Victoria, despite comprising 22 per cent of the bar population. The survey also revealed women fell behind in the commercial sector, with female barristers receiving just 14 per cent of briefs from private law firms, compared with 86 per cent for men, while women on average appeared for 2.8 hours in contrast to men appearing 3.8 hours in court, suggesting women were missing out on briefs on complex commercial matters and consequently more lucrative work.

Overall, the limited data available indicates that Victorian women lawyers suffer in terms of career progression and also financially due to discrimination. Such discrimination, however, would usually be classed as 'indirect discrimination' because it operates at a systemic and or structural level, by creating barriers to equal participation.

VWL's recommendations for a consolidated federal anti-discrimination law

1. Overarching themes

VWL submits that a Consolidated Act should not result in any diminution of existing protections in the law. Furthermore, the government should adopt a best-practice approach to providing protection from discrimination.

VWL also submits that a Consolidated Act be developed with reference to international law principles. International law should also be used as a source of guidance in the application of a Consolidated Act.

We note that it is not clear to what extent the government is considering the interaction of anti-discrimination law with other laws. VWL submits that the review should consider the interaction of federal anti-discrimination laws with other laws, in particular the *Fair Work Act 2009*.

2. Definitions of discrimination

VWL supports a consolidated federal discrimination law that can be readily used and understood. We note that the current tests of discrimination can be difficult to apply and do not address situations of discrimination, such as those experienced by women lawyers as discussed above.

¹¹ Law Council of Australia, 'Court Appearance Survey', 4 December 2009, <<http://www.lawcouncil.asn.au/programs/national-policy/eol/survey.cfm>>, accessed 3 February 2011, Nicola Berkovic, 'Women are missing out on the big bucks, says a survey', *The Australian*, 4 December 2009, <<http://www.theaustralian.com.au/business/legal-affairs/women-are-missing-out-on-the-big-bucks-says-a-survey/story-e6frg97x-1225806754157>>, accessed 4 February 2010.

In the field of direct discrimination, it is necessary to show there has been 'less favourable treatment' than a comparator to make out a claim of discrimination. The difficulty of establishing an appropriate comparator is well established.¹² An alternative approach would be simply to define direct discrimination as unfavourable treatment because of an attribute. This is the approach adopted in the Victorian *Equal Opportunity Act 2010*.¹³

Current federal anti-discrimination laws, with the exception of the *Racial Discrimination Act 1975 (RDA)*, target direct and indirect discrimination separately. Importantly, this explicitly recognises that indirect, as well as direct, discrimination is unlawful. As was set out in our introduction, women lawyers can face systemic and structural disadvantage in achieving equality with men.

VWL submits that achieving substantive equality between men and women should be an object within a Consolidated Act.

VWL considers that alternative mechanisms should be used in a Consolidated Act to tackle systemic discrimination.

The main mechanism used in anti-discrimination legislation to approach systemic discrimination is to provide definitions of discrimination that include indirect discrimination. However, the technicality of such definitions has made it difficult to apply.

Under the *Sex Discrimination Act 1984*, the need to establish a 'requirement, condition or practice' has been applied with varying results. In some cases, where a woman requests part-time work and none of her colleagues do so, this may be seen as the conferral of a benefit, rather than the imposition of a condition or requirement.¹⁴ This means that it is difficult to challenge an employer's practices (even if they are discriminatory) as long as they have been applied consistently. That is, it would be possible to challenge an employer who consistently provided part-time work, but later declined to do so, but not an employer who consistently did not provide part-time work.

The approach in the RDA could provide a simpler way of defining systemic disadvantage. Under the RDA:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.¹⁵

Such a definition does not call up a distinction between direct and indirect discrimination. We note this definition is explicitly based on definitions in international law. We restate our support for using international law principles to guide the consolidation, and application of anti-discrimination laws.

¹² See for example, the discussion, and outcome, in *Purvis v New South Wales* [2003] HCA 62.

¹³ *Equal Opportunity Act 2010* (Vic), s 8(1).

¹⁴ *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584.

¹⁵ *Racial Discrimination Act*, section 9.

If it is considered necessary to establish a test of reasonableness, the legislation should provide this with specific criteria for decision-makers to apply. An alternative test could be that used in international law, that is any limitation on a person's human rights be legitimate, necessary and proportionate. The criteria set out in the *Charter of Human Rights and Responsibilities* may provide useful guidance of the factors to take into account when assessing reasonableness.¹⁶

VWL also submits it is essential that the prohibition on discrimination on the ground of family responsibilities should be extended beyond dismissal in employment, to all areas of work. We note this is proposed in the *Sex and Age Discrimination Bill 2010*. In the event this Bill does not pass, the proposed amendments should be submitted as part of the consolidation project. A best practice approach supports including a broader prohibition on the ground of family responsibilities in a Consolidated Act. The proposed amendments in the bill, stated in gender neutral terms, also provide normative support for both men and women undertaking family responsibilities.

Recommendations:

- A Consolidated Act should include the object of achieving substantive equality between men and women.
- The definitions of discrimination should be simplified to remove undue technicalities.
- The prohibition on discrimination on the ground of family responsibilities should be extended beyond dismissal in employment, to all areas of work.

3. Exceptions and exemptions

VWL considers that the removal of exceptions and restriction of exemptions is a key step in eliminating discrimination. VWL submits that the right to equality of treatment and opportunity should be considered a fundamental human right and thus, exemptions from equality of treatment must be restricted as far as possible in line with Australia's human rights obligations under international instruments including the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

It is important that a Consolidated Act recognise the significance of sex discrimination. The current federal anti-discrimination legislation effectively endorses a hierarchy of discrimination. We note that the *Racial Discrimination Act 1975* (Cth) does not permit any exemptions whereas the *Sex Discrimination Act 1984* (Cth) allows for exemptions based on religion. Given the widespread nature of sex discrimination and gender stereotypes, VWL submits this is unwarranted and calls for:

- the removal of exceptions in a Consolidated Act;
- the limitation of exemptions to those that are temporary and reviewable; and
- clear guidelines as to the granting of exemptions, in line with the objectives of a Consolidated Act.

VWL considers that 'contracting out' of anti-discrimination law should be prohibited. This is a practice which contradicts the aims of anti-discrimination law and which creates uncertainty for members of the community.

¹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

VWL submits that temporary special measures should be allowed on the basis that they are required in some sectors in order to promote equality. For example, a temporary special measure could encompass Norway's recent recommendation pursuant to Australia's Universal Periodic Review, that Australia institute quotas to increase the proportion of women on public and private sector boards from the current average of 8.4%¹⁷ to 40%.¹⁸ Special measures should be temporary in nature, and able to be removed once equal status between women and men is achieved.

Recommendations:

- A Consolidated Act should not include exceptions.
- Any exemptions in a Consolidated Act must be temporary and reviewable.
- The AHRC should develop guidelines for the granting of exemptions, in line with the objectives of a Consolidated Act.

4. Mechanisms to address discrimination

VWL supports the implementation of new mechanisms to address discrimination. VWL believes that a critical element in addressing discrimination is improving the community's access to protections accorded under anti-discrimination legislation.

VWL is in favour of a positive duty on employers and service providers to prevent discrimination. VWL considers that Australia's anti-discrimination legislation can be more effective in reducing discrimination if it prescribes proactive measures to promote equality.¹⁹

We note that the current structure of anti-discrimination law relies on individuals being willing and able to assert their rights, usually by bringing a complaint and/or commencing legal proceedings.

A positive duty, coupled with the provision of enforcement powers on the AHRC (discussed below), is a critical element in the structure of anti-discrimination law. A positive duty encourages employers to maintain non-discriminatory practices, such as flexible work place arrangements, educating staff on unacceptable workplace behaviour, self auditing and equality performance measures. The Victorian Government endorsed this position through its implementation of a positive duty in the *Equal Opportunity Act 2010* (Vic).²⁰ We submit that a similar duty should be established under a Consolidated Act to promote reasonable and proportionate steps to eliminate discrimination.

A method of effectively addressing anti-discrimination practices is to permit relevant bodies to monitor and enforce individual complaints. At present the Australian Human Rights Commission

¹⁷ Equality of Opportunity for Women in the Workplace Agency, '2010 EOWA Australian Census of Women in Leadership,' December 2010, <http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/2010_Australian_Women_In_Leadership_Census.asp>, accessed 5 February 2011.

¹⁸ Draft report of the working group, Universal Periodic Review – Australia, January 2011, <<http://www.ohchr.org/EN/HRBodies/UPR/UPR%5CPAGES%5CAUSession10.aspx>>, accessed 5 February 2011.

¹⁹ HRLRC, Submission to Inquiry into the Sex and Age Discrimination Legislation Amendment Bill, 'Advance Australia Fair': An Agenda to Promote Equality and Address Discrimination in Australia, Commonwealth of Australia, 2010.

²⁰ See for example, *Equal Opportunity Act 2010* (Vic) s 15.

does not have the power to enforce Australia's anti-discrimination laws. VWL recommends that the AHRC be empowered to proactively investigate complaints without relying on individual complaints. The AHRC should also be permitted to commence own-motion investigations. These powers should be coupled with an enforcement role. This framework is essential for effective regulation.²¹ For example, the AHRC could be given the power to issue compliance notices and enforce penalties for non-compliance in a manner similar to agencies such as the Fair Work Ombudsman and Worksafe Victoria.²²

VWL submits that an essential factor in the success of a Consolidated Act is educating the community about its rights and obligations. As we highlighted above, rights regarding discrimination are not well understood. The Department of Victorian Communities 'CALD Women's Project' recommended the development of educational programs for migrant women because many women do not understand their rights and entitlements in the workplace and are less clear about discriminatory practices.²³ This experience is not limited to migrant women. We note that there are well-developed programs in place to inform the community about work entitlements and workplace injuries, but there is an absence of a strategic federal anti-discrimination education campaign. Targeted education campaigns are critical to informing the community about the definition of discrimination and protections available under the consolidated Act. Adequate funding for community education must accompany a Consolidated Act.

VWL supports a procedural framework that improves access to the complaints process. We note that the considerable costs involved with proceedings can be a deterrent for complainants to pursue matters beyond conciliation. Therefore, for the complaints process to be accessible, greater emphasis should be placed on low cost resolution methods. We highlight that for conciliation to be an effective method of addressing discrimination, it is important to include mechanisms that address any potential power imbalance between parties.

A crucial step in empowering people is to increase their access to legal assistance. If a complainant has not received legal advice before conciliation, the complainant's position may be significantly weakened. VWL submits that people must have information about, and access to advice about, their legal rights. Free or low cost legal assistance should be available for complainants to provide advice. For example, agency operated advice lines and established specialist legal centres are key effective services that are easy to access and are well established in the community. We note that the provision of ongoing assistance from these services, rather than merely initial advice, is critical in ensuring that complainants are well supported and prepared. VWL submits that the Consolidated Act must be coupled with appropriate funding levels to support access to legal information.

To instil faith in out-of-court settlements, VWL proposes that the Act permit the registration of conciliation agreements with a court of federal jurisdiction. It is appropriate for the AHRC to be able to monitor and enforce compliance of these agreements. By doing so, it provides a certain level of protection for individual complainants if respondents fail to comply with the agreement, without initiating expensive proceedings. In addition, it will provide the community with more information about the types of matters heard at conciliation, which enables public scrutiny and a better understanding for advocacy bodies.

²¹ See the discussion of potential regulatory models in Belinda Smith, 'Not the Baby and the Bathwater- Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 8(4) *Sydney Law Review* 689-732.

²² This may require the separation of conciliation functions and enforcement/educative functions of the AHRC.

²³ Success Works, CALD Women's Project Final Report (Department for Victorian Communities, 2005), 85.

When matters proceed to court, VWL favours the inclusion of a presumption that each party is responsible for their own legal costs, unless the court finds that a party has acted unreasonably. We believe this presumption is necessary to combat the deterrent impact a potential adverse costs order has on complainants.²⁴

Recommendations:

- The Consolidated Act should include a positive duty to take reasonable and proportional measures to eliminate discrimination.
- The AHRC (or alternative body) should be empowered to investigate complaints of discrimination and implement and enforce compliance measures.
- A Consolidated Act must be accompanied by comprehensive, funded community education campaign.
- A Consolidated Act must be accompanied by increased funding for legal information and advice.
- A Consolidated Act should include a presumption that each party is responsible for their own legal costs, unless the court finds that a party has acted unreasonably.

VWL would welcome the opportunity to provide further comments on the consolidation project as it progresses. For further information, please contact the Co-Chairs of VWL's Law Reform Committee, Akane Kanai (PH: (03) 9670 5088) and Emily Hart (PH: (03) 9605 2780).

Yours sincerely,



Kate Ashmor
Convenor, Victorian Women Lawyers

²⁴ Discrimination Law Experts, Report on recommendations for a consolidated federal anti-discrimination law in Australia, Discrimination Law Experts' Roundtable, 29 November 2010, 17-18.