

The Promotion of Gender Equality at Work in Australia through Law and Policy: A Work in Progress

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I. Introduction

Australian women have made significant progress towards achieving gender equality at work over the previous century. In 1969, for example, women gained the legal right to equal pay for work of equal value.¹ In addition, women have gained legal protections against discrimination at work on the basis of sex,² and other grounds. Women have also made significant gains in educational attainment and now make up 58.7% of graduates from Australian undergraduate degree programs (OECD 2017). Rates of women's promotions have also consistently risen: women now comprise 39.1% of all managers, and 43.3% of manager appointments in 2017–18 went to women (WGEA 2018: 3). These developments represent positive indicators towards attaining gender equality in Australian workplaces.

A closer examination of data on the experiences of Australian women, however, reveals that most continue to encounter inequality and disadvantage at work. Firstly, an examination of workforce participation data reveals ongoing gender-based differences in labour market participation (ABS 2018; Kaine and Boersma 2018: 318). Specifically, the participation rate for workers between 20–74 years of age is at 64% for women, compared to 75% for men. Furthermore, with respect to people aged 30–34 years old, women are more than three times more likely (25%) than men (7.4%) to be out of the labour force (ABS 2018: 7). This seems to reflect the disproportionate responsibility for caring work for dependent children that is borne by Australian women. Secondly, an examination of data on women's remuneration and working arrangements reveals ongoing gender based differences in remuneration and employment status. In particular, in 2018, men were on average paid \$25,717 per year more than women for the same work (WGEA 2018: 2), and gender pay gaps persist in every industry, occupation and manager category (WGEA 2018: 1; Kaine and Boersma 2018: 319). Marked gender differentials also exist with respect to superannuation,³ with the average balance in the 55–64 year-old age range being \$96,000 for women and \$166,000 for men (ABS 2018: 8). Women are also more likely than men

1. *Equal Pay Case* (1969) 127 CAR 1142. Commonwealth laws protecting equal remuneration for work of equal value are now set out in *Fair Work Act 2009* (Cth) (FW Act) and the *Sex Discrimination Act 1984* (Cth) (SDA). See, e.g., FW Act ss 161(c), 218(c), 302 and SDA s 14(2).

2. SDA s 5; *Equal Opportunity Act 2010* (Vic) ss 6(o) (EOA (Vic)); *Anti-Discrimination Act 1977* (NSW) s 24 (ADA (NSW)); *Equal Opportunity Act 1984* (SA) s 29(2) (EOA (SA)); *Equal Opportunity Act 1984* (WA) s 8 (EOA (WA)); *Anti-Discrimination Act 1991* (Qld) ss 7(a) (ADA (Qld)); *Anti-Discrimination Act 1998* (Tas) s 16(g) (ADA (Tas)); *Discrimination Act 1991* (ACT) s 7(1)(a) (DA (ACT)); *Anti-Discrimination Act 1992* (NT) s 19(1)(f) (ADA (NT)).

3. Superannuation is a compulsory, long-term saving plan established under statute. Employers are typically required to make contributions into an employee's super fund equal to 9.5% of the employee's salary. See *Superannuation Guarantee (Administration) Act 1992* (Cth).

to engage in casual employment,⁴ part-time work (particularly if they have young children),⁵ or experience underemployment.⁶ This data reveals that Australian women encounter greater employment and economic insecurity than men during their working lives. Thirdly, an examination of data on women's experiences of workplace harassment and discrimination shows that women are disproportionately impacted by gender-based discrimination. Nearly one in four (23%) women experienced sexual harassment in the workplace in 2017 (AHRC 2018: 8), and a national review conducted in 2014 revealed that one in two (49%) mothers reported experiencing discrimination in the workplace at some point during pregnancy, parental leave or on return to work (AHRC 2014: 1). Furthermore, in 2018, there was little improvement in the number of women appointed to boards, with 35.2% of boards and governing bodies having no female directors (WGEA 2018: 13). Overall, these statistics make clear that achieving gender equality in Australian workplaces remains a work in progress: Australian women continue to have lower workforce participation, earn less, retire with less and experience higher rates of harassment and gender-based discrimination.

The ongoing need to improve gender equality at work is a focus of public, academic and policy debate in Australia. Recent public debates have focused on gender pay equity, the adequacy and accessibility of paid parental leave and lack of affordable childcare (Kaine and Boersma: 330). A recent surge in public scrutiny, and reporting, of experiences of sexual harassment at work in Australia has also arisen in the context of the #MeToo global movement (AHRC 2014: 8). Recent academic studies have focused on a range of issues relevant to women's experience at work, including pay equity (Cook, Corr and Breitzkreuz 2017; Smith and Stewart 2017), women on boards and in leadership (Ahmed and Ali 2017), and workforce engagement (Kennedy et al. 2017). These studies acknowledge that the norms of the 'ideal' worker affect many different aspects of the workplace,⁷ including working time arrangements, leave entitlements, attendance requirements and performance appraisals. In addition, members of Commonwealth and State/Territory Parliaments sometimes discuss the challenges that women in the workplace face during parliamentary debates.⁸ From time to time, government attention has been given to issues relevant to workplace gender equality through law reform efforts, policy developments and the commissioning of public inquiries.

This article discusses Australia's experience of promoting workplace gender equality through laws and policies. It is divided into three main sections. The first section sets out an overview of four key areas of law that protect and promote gender equality at work. The second section describes four key policy initiatives introduced to protect and promote gender equality at work. The third section provides an overview of the regulatory system of monitoring and enforcement, which exists to enforce laws that protect and promote equality at work. This leads to a discussion regarding the effectiveness of this regulatory structure to promote and enforce workplace gender equality standards. It should be noted that it is not possible to provide a comprehensive account of all the laws and policies that aim to promote gender equality in Australian workplaces. Rather, this article sets out an overview of the key relevant laws and policies.

4. In 2018, 27% of women in the labour force were engaged in casual employment compared with 23% of men: ABS: 7.

5. In 2017–2018, only 16% of men in the labour force worked part-time compared with 44% of women, and 61% of women with a child under six: ABS: 7.

6. ABS: 7. Underemployment is experienced by persons who want, and are available for, more hours of work than they currently have.

7. The 'ideal' worker is one who is unencumbered by caring and other responsibilities of social reproduction, who is available for long hours and overtime at short notice, without the need for certainty, autonomy or leave to balance their caring responsibilities. Working environments which privilege workers who fit the traditional male model worker disadvantage workers including women who bear a disproportionate responsibility for caring for children (Williams 2000; Smith 2007).

8. Australia is a federation of six States which, along with two self-governing Territories, have their own constitutions, parliaments and laws. The national government of Australia is usually called the Commonwealth Government or Australian Government. The Constitution gives the law-making power of the Commonwealth to the Parliament. The Parliament consists of the Queen, Governor-General and two Houses of Parliament (House of Representatives and the Senate). The Parliament passes legislation. Proposed laws are called Bills and have to be agreed by both Houses of Parliament to become law. Members of Parliament are democratically elected representatives (Ministers). Constitutions in each State and Territory also give the law-making power of the State/Territory to the State/Territory Parliament. Accordingly, throughout this report reference is made to the Commonwealth Government, State/Territory Governments, Commonwealth Parliament and State/Territory Parliaments.

II. Laws promoting gender equality in Australian workplaces

Commonwealth and State/Territory laws include various protections and mechanisms that promote workplace gender equality. Four key categories of law, which aim to protect and promote workplace gender equality are human rights law, anti-discrimination law, industrial law and positive duty laws. Each of these legal doctrinal categories are discussed in detail, below.

Human rights laws

Unlike other comparable democracies, such as the United Kingdom and New Zealand, Australia does not have a national Bill of Rights (French 2010).⁹ In addition, the Australian Constitution is limited in terms of its protection of individual rights (Goldsworthy 2014).¹⁰ To the extent that Australian law has protected human rights, it has done so via statutes and the common law. Following a National Human Rights Consultation in 2009 (NHRCC 2009), the Commonwealth enacted the Human Rights (Parliamentary Scrutiny) Act 2011.¹¹ The intention of the Human Rights Act is to enhance human rights protection in Australia (Williams and Reynolds 2015). The Act establishes a Parliamentary Joint Committee on Human Rights,¹² and requires Bills before the Commonwealth Parliament to be accompanied by a Statement of Compatibility, which assesses whether the Bill is compatible with human rights.¹³ If, for example, a new law seeks to limit gender equality at work, its Statement of Compatibility will give parliament guidance on the law's human rights implications and assist the direction of parliamentary debate. The effect of the Human Rights Act is, therefore, to ensure human rights implications are taken into consideration when laws are enacted and that Members of Parliament introducing Bills justify any limitations on human rights.

Anti-discrimination laws

In addition, Commonwealth and State/Territory anti-discrimination laws, which apply in employment and other contexts, promote gender equality at work. The SDA, along with State/Territory laws, prohibit direct and indirect discrimination on grounds including sex, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding and family responsibilities.¹⁴ These laws also include other relevant protections against inequality. In particular, unlawful discrimination includes 'sexual harassment' by employers and their employees;¹⁵ employers can be held vicariously liable for the unlawful conduct of 'workers';¹⁶ and employers are prohibited from inciting, causing, instructing, inducing, aiding or

9. Note, two Australian jurisdictions (Victoria and the Australian Capital Territory) have enacted State/Territory-based human rights laws, which include protections which advance women's human rights: *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT). The *Human Rights Bill 2018* (Qld) has also been introduced in Queensland State parliament and is expected to be passed early in 2019.

10. The Australian Constitution expressly protects a limited number of individual rights, and has been found to imply certain other rights. Rights expressly protected by the Australian Constitution are: the right to trial by jury on indictment for an offence against any law of the Commonwealth (s 80); freedom of trade, commerce and intercourse with the Commonwealth (s 92); freedom of religion (s 116); the right not be subject to discrimination on the basis of the state in which one lives (s 117).

11. (Cth) ('Human Rights Act').

12. *Human Rights Act* s 4, 7. This Committee is responsible for examining laws and proposed laws (Bills) for compatibility with human rights.

13. *Human Rights Act* s 8(3). Note a failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth: *Human Rights Act* s 8(5).

14. Commonwealth and State/Territory anti-discrimination laws are not uniform, they overlap to a significant extent but the range of protections does differ.

15. SDA s 28A; EOA (Vic) ss 92–102; ADA (NSW) ss 22A–22J; EOA (SA) s 87; EOA (WA) ss 24–26; ADA (Qld) ss 118–120; ADA (Tas) s 17; DA (ACT) ss 58–64; ADA (NT) s 22.

16. SDA s 28A; EOA (Vic) ss 92–102; ADA (NSW) ss 22A–22J; EOA (SA) s 87; EOA (WA) ss 24–26; ADA (Qld) ss 118–120; ADA (Tas) s 17; DA (ACT) ss 58–64; ADA (NT) s 22.

permitting others to commit acts of unlawful conduct.¹⁷ Furthermore, these anti-discrimination laws set out similar procedures by which complaints of discrimination or sexual harassment can be filed, conciliated and determined.¹⁸ In most instances, complainants bear the onus of establishing that unlawful discrimination or sexual harassment occurred (Allen 2009). If a claim is successful, the complainant may seek orders, including for compensation for economic and non-economic loss.¹⁹ As noted by Belinda Smith, these laws are significant as they provide a mechanism by which women who experience discrimination at work may seek redress and also because they constitute a ‘...legislated, public policy statement on the right to equality’ (HREOC 2007: 53).

Industrial laws

Commonwealth industrial laws also include provisions intended to promote workplace gender equality. In particular the Fair Work Act (‘FW Act’), which is the principal statute regulating employment in Australia, includes an additional protection against discrimination at work by prohibiting ‘adverse action’ on grounds including sex, sexual preference, marital status, family or carer’s responsibilities and pregnancy.²⁰ This protection attracts a ‘reverse onus’ of proof (intended to assist persons to make complaints),²¹ and is a civil remedy provision.²² The FW Act also sets out ten National Employment Standards (‘NES’), several of which comprise rights that promote gender equality. Specifically, the NES include a right for eligible employees to request flexible working arrangements,²³ take unpaid domestic violence leave,²⁴ take parental leave and return to a pre-parental leave position.²⁵ Again, these protections are set out in civil remedy provisions.²⁶ These laws comprise important protections that are intended to address gender inequality at work. The right for eligible employees to take unpaid domestic violence leave was, for example, introduced by the Commonwealth Parliament late in 2018, on the basis that domestic violence (which affects one in three Australian women) compromises women’s workforce participation as it ‘...threatens workers’ ability to hold down a job—to provide for themselves and their families, to participate fully in the workplace and to fulfil their potential’ (O’Dwyer 2018).

Positive duty laws

Furthermore, Commonwealth and State/Territory equality laws set out regimes aimed at eliminating inequality of opportunity at work. Positive duty laws are different from anti-discrimination laws as they do not rely on individual complaints for enforcement (or provide remedies) but rather focus on removing barriers to equality. The primary statute setting out relevant positive duties is the Workplace Gender Equality Act

17. SDA s 105, EOA (Vic) s 105; ADA (NSW) s 52; EOA (SA) s 90; EOA (WA) s 160; ADA (Qld) s 122; ADA (Tas) s 21; DA (ACT) s 73; ADA (NT) s 27(1).

18. *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Part IIB (‘HRCA’); EOA (Vic) Part 8; ADA (NSW) Part 9; EOA (SA) Part 8; EOA (WA) Part VII Div 2; ADA (Qld) Chapter 7; ADA (Tas) Part 6; DA (ACT) Part 4; ADA (NT) Part 6.

19. HRCA s 46PO(4).

20. ss 342(6) 351. ‘Adverse action’ includes dismissal, ‘injuring an employee in his or her employment’, altering the position of an employee to his or her prejudice and ‘discriminating between the employee and other employees of the employer.’ Part 3-1 of the FW Act is a ‘civil remedy provision.’

21. FW Act s 361. The reverse onus means that where an applicant establishes that there was adverse action and one of the prohibited reasons applies, the onus of proof shifts to the organisation to prove that the adverse action was not taken for a prohibited reason.

22. A civil remedy provision is enforceable in the Federal Court or Federal Circuit Court by means of an order and/or the imposition of penalties.

23. FW Act s 65. An eligible employee: is a parent or has the responsibility for the care of a child who is school age or younger; is a carer; has a disability; is 55 years or older; is experiencing violence from a member of the employee’s family; provides care or support to a member of the employee’s immediate family, or a member of the employee’s household, who requires care or support because the member is experiencing violence from the member’s family.

24. FW Act ss 106A–106E.

25. FW Act ss 70, 84. An entitlement to paid parental leave was also introduced in 2010 via the *Paid Parental Leave Act*, which provides 18 weeks paid parental leave for the primary carer of a newborn or recently adopted child (at the federal minimum wage) and two weeks’ paid leave for a father or partner.

26. FW Act s 44(1).

(‘WGEA’).²⁷ The objectives of this statute include to ‘...promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace.’²⁸ The WGEA applies to women and men and includes ‘family responsibilities’ as an equality focus (Gaze and Smith 2017: 223). The Workplace Gender Equality Agency, which is established under the WGEA, has functions including education, reporting, research, advising and assisting employers and reviewing employers’ compliance with the WGEA and to list ‘non-compliers.’²⁹ The WGEA requires all private sector employers with more than 100 employees to complete and submit an annual report to the Agency, which is then made publicly available. The report must include a profile of the company, outlining the occupational and gender characteristics of the workplace, and a report on the company’s performance against six Gender Equality Indicators.³⁰ In addition, private sector employers with more than 500 employees are required to meet minimum standards for gender equality. Overall, the WGEA seeks to positively influence how employers approach gender equality at work by improving information disclosure, developing resources and facilitating public education.

III. Policies promoting gender equality in Australian workplaces

In addition to Commonwealth and State/Territory laws promoting workplace gender equality (including those set out above), the Commonwealth government has established various policies, and commissioned inquiries, which are intended to promote gender equality including in the workplace. Three key policies are the National Plan to Reduce Violence against Women and their Children, Towards 2025: An Australian Government Strategy to Boost Women’s Workforce Participation and the establishment of Offices for Women in each Commonwealth, State and Territory. A significant inquiry commissioned by the Commonwealth government is the National Inquiry into Sexual Harassment in Australian Workplaces. These are each discussed in further detail below.

National Plan to Reduce Violence against Women and their Children

The National Plan to Reduce Violence against Women and their Children is Australia’s key policy adopted to achieve aims including promoting workplace gender equality. The Plan was adopted in 2011 and sets out a 12-year framework for action that aims to reduce violence against women and children and improve access to services (Council of Australian Government 2010). The Plan articulates that violence against women is a workplace issue. The Plan includes several illustrations of the way in which domestic violence is a workplace issue: violence can affect work colleagues as well as affected women and their children; primary prevention of gender-based violence involves working to change underlying causes of the problem including where people work;³¹ and advancing gender equality at work is necessary to address ‘...unequal distribution of power and resources between women and men and adherence to rigid or narrow gender roles and stereotypes reflects gendered patterns in the prevalence and perpetration of violence.’ This Plan adopts a broad conception of the causes and context of the ‘epidemic’ of domestic violence in Australia and conceives of workplace gender equality as an essential component of achieving broader improvements in women’s access to equality and human rights (Malone and Phillips 2014).

27. (Cth) 2012 (‘WGEA’). Some States have enacted legislation that requires programs promoting gender equality in public sector employment. See, e.g., *Government Sector Employment Act 2013* (Cth) s 63; *Public Service Act 2008* (Qld) s 31.

28. WGEA s 2A(a). The first affirmative action statute in Australia was the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth). This was repealed and replaced by the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), which in turn was repealed and replaced by the *Workplace Gender Equality Act*.

29. WGEA s 19.

30. The GEIs are: Gender composition of the workforce; gender composition of governing bodies of relevant employers; equal remuneration between women and men; availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; consultation with employees on issues concerning gender equality in the workplace, and sex-based harassment and discrimination.

31. For example, the Plan states that strategies such as social marketing, school-based programs or work to promote positive and equitable workplace cultures are all examples of primary prevention.

Strategy to Boost Women's Workforce Participation

Another key policy adopted to promote workplace gender equality is An Australian Government Strategy to Boost Women's Workforce Participation (Australian Government 2017). The policy was adopted in July 2017 and sets out a strategy, which is intended to lay '...out the Australian Government's roadmap to meet its target of reducing the gap in participation rates between women and men (aged 15–64) by 25 per cent by 2025' (Australian Government 2017). The strategy addresses five key areas for action over the next decade: child care, workplace diversity and flexibility, jobs of the future, economic security, and financial incentives, and highlights six particular groups of women who face additional or different barriers to participating in the workforce.³² As part of the Strategy, the Commonwealth Government has adopted the Implementation Plan 2017–2018 (Australian Government 2017), which sets out four key actions for 2017–2018. These actions are to implement a new childcare system (including increased subsidies towards the cost of childcare); providing educational tools for families and childcare services to explain improvements to the childcare system; extend funding to enable children to access preschool education; improve coordination of childcare services and resources. Among other things, the Plan makes explicit that access to quality, affordable childcare is an essential resource necessary to increase workforce participation of women between 30–34 years old. The Plan also conceives of workplace participation by women as an 'economic priority' which, in turn, generally improves living standards and is a driver of economic growth.

Offices for Women

The Commonwealth and each State/Territory government has also taken the policy step of establishing Offices for Women. One objective of each Office for Women is to promote workplace gender equality. In particular, these offices are overseen by the relevant Ministers for the Status of Women. The Commonwealth Office for Women advises and supports the delivery of gender equality policies, particularly in relation to the priority issues of safety for women, supporting women's economic empowerment, and supporting women's leadership. It has adopted various policies including with respect to building women's financial capability, pay equity, superannuation and workforce participation. It provides funding and support to community organisations to achieve progress in each area of priority. The strategies and policy initiatives implemented by the Commonwealth Office for Women therefore seek to adopt a practical approach to addressing the barriers impacting on women's economic security and equality including at work.

Inquiry into sexual harassment and work

Furthermore, in June 2018, Australia's Sex Discrimination Commissioner announced a national 12-month inquiry into sexual harassment in Australian workplaces (AHRC 2018). The inquiry is being conducted pursuant to Terms of Reference, which require the Australian Human Rights Commission to submit a report on matters including the drivers of sexual harassment in the workplace, the use of technology, current laws and policies, examples of good practice by employers and recommendations to address workplace sexual harassment. The inquiry involves extensive public consultation through which victims of workplace sexual harassment can report on their experiences. The inquiry has been described as a 'world-first' (Borys 2018). The Commonwealth Minister for Women has stated that the inquiry is a policy decision designed to promote workplace gender equality as sexual harassment at work is more commonly experienced by women and the economic impact of workplace sexual harassment on victims can be wide-ranging and potentially ruinous (Ibid 2018).

32. These are: Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, mature age women, rural and regional women, women with disability, and young women.

IV. Enforcement of laws promoting gender equality in Australian workplaces

The human rights, anti-discrimination, industrial and positive duties legal frameworks, discussed in Part II above, are characterised by different mechanisms of monitoring and enforcement of non-compliance. Some of the key mechanisms are discussed in further below.

Anti-discrimination laws

Anti-discrimination laws, which promote workplace gender equality, are characterised by a private enforcement model.³³ A private enforcement model features a system that allows for persons affected by breaches of their legal rights (who are unable to negotiate a remedy) to rectify the breach (Morgan and Yeung 2007: 176–220). Under anti-discrimination laws, individual employees have the right to pursue complaints of discrimination against employers. Individuals are required to submit complaints to the statutory commission in their jurisdiction, or to the Commonwealth Australian Human Rights Commission ('AHRC'). Once a complaint is received, the commission is responsible for investigating it and determining whether it falls within its jurisdiction. If so, the commission will refer the complaint to conciliation, during which each party can talk through the issues with the help of a commission-appointed conciliator and, if the parties agree, settle the matter on their own terms. If a complaint is not resolved via conciliation, the complainant may pursue the claim through legal proceedings filed in a relevant court or tribunal.³⁴ Commissions may also 'intervene,' with leave of the court or tribunal, in any proceedings that involve issues including sex discrimination, human rights issues and equal opportunity in employment.³⁵ There is extensive academic commentary on the limitations of anti-discrimination laws to effectively address discrimination at work (see, eg, Chapman 2012; Gaze 2002; Gaze and Hunter 2010; Hunter 1992; Gaze and Smith 2017; Rees, Rice and Allen 2018; Smith 2006; Thornton 1990), as well as studies which specifically call for legal reform in order to expand the enforcement tools available to Commissions (see, eg, Smith 2014). Presently, the mechanisms for enforcement of anti-discrimination laws exhibit a problematic tension: they rely heavily on affected individuals to pursue legal claims and establish legal precedents that may benefit the wider community (Allen 2010), while at the same time promoting private dispute resolution (Blackham and Allen 2018).

Industrial laws

The framework of industrial laws, which promote workplace gender equality, is characterised by public, corporatist/industrialist and private enforcement models.³⁶ Firstly, a mechanism for public enforcement is set out in FW Act, which is the Fair Work Ombudsman ('FWO'). The FWO is an agency empowered to investigate compliance, including via interviews with employees and powers compelling the production of documents.³⁷ It also has the power to commence proceedings under the FW Act including in circumstances where employers engage in 'adverse action' or breach the NES.³⁸ The FWO has, for example, used these

33. For a discussion of types of regulatory systems and their features see Morgan and Yeung 2007: 176–220.

34. A complaint referred to a court or tribunal is adjudicated by a judge or tribunal member, respectively.

35. E.g., SDA s 48(1) (gb). The Commission may also, with leave of the court, participate as *amicus curiae*, in legal proceedings where could provide expert assistance that would otherwise not be available to the Court, the Commission may seek leave of the Court to intervene in the proceedings.

36. Under a public enforcement model, a state agency investigates compliance and is empowered to use a range of powers, processes and approaches to address non-compliance, and a corporatist/industrial relations model allows for 'institutionalized representation' of organised interests in enforcement. In this context, enforcement is through the industrial relations system established by the State. See further Morgan and Yeung 2007: 176–220.

37. FW Act, Part 5-2. On the effect of the FWO's enforcement activities see Hardy and Howe 2017.

38. The statutory functions of the FWO are set out in FW Act s 682(1). In summary, these are: promote harmonious, productive and cooperative workplace relations providing education, assistance and advice; monitor, inquire into and investigate potential non-compliance with Australian workplace laws; commence proceedings in a court or the Fair Work Commission to enforce the FW Act, industrial instruments or safety net contractual entitlements; and monitor certain 457 and 482 subclass visa arrangements. In addition

powers to successfully take action against an employer who engaged in pregnancy discrimination.³⁹ In addition, the Australian industrial relations system is described as a ‘tripartite’ model and, for much of the last century, trade unions were a significant agent in the enforcement of labour rights. While trade union membership has steadily declined in recent decades, unions continue to play a key enforcement role with respect to issues impacting on workplace gender equality (Hardy and Howe 2009). Trade unions have, for example, pursued key test cases before the Fair Work Commission (‘FWC’), which is Australia’s principal industrial tribunal.⁴⁰ Relevantly, these test cases have related to penalty rates;⁴¹ pay equity for early childhood educators (ACTU 2018; Smith and Stewart 2017); and inclusion of a model term in Modern Awards which improves on right to request flexible working arrangements set out in the NES.⁴² Thirdly, individuals are able to pursue claims for breach of the FW Act against employers, including for breach of the ‘adverse action’ provisions and the NES. These claims often commence before a Member of the FWC (and are subject to confidential negotiation and, if successful, settlement) and, if unresolved, can proceed to a court for adjudication. These types of claims predominantly settle (Blackham and Allen 2017), although a number of claims of ‘adverse action’ have established helpful legal precedents relevant to protecting workplace gender equality.⁴³ Industrial laws, therefore, have adopted a multi-dimensional model of promoting employers’ compliance with laws including those that promote workplace gender equality.

Human rights and positive duty laws

In contrast, the Human Rights Act and positive duty laws, described above, are characterised by mechanisms to detect and enforce employer non-compliance which may be described as ‘soft or light touch’ regulatory approaches (Howe and Landau 2007).⁴⁴ Firstly, the WGEA includes no sanctions for non-compliance. Rather, failure to comply with obligations under the WGEA may have consequences including that the Agency may name the employer (including details of non-compliance) in a report to the Minister and/or an employer may not be eligible to compete for contracts with the Commonwealth government or for Commonwealth grants or other financial assistance.⁴⁵ Rather, the model of enforcement set out in the WGEA relies on the premise that requiring large companies to disclose certain information enables stakeholders to exert the necessary pressure to force compliance (Manfre 2013). The WGEA also imposes other requirements on employers, including the requirement to consult with employees on gender equality.⁴⁶ These requirements are not primarily designed to promote compliance, but rather reinforce the norms and standards relating to gender equality set out in the WGEA and other laws. The Human Rights Act uses a similar regulatory mechanism with respect to Members of Parliament. That is, it requires Members of Parliament to disclose information about human rights compatibility, with the aim that consequent Parliamentary and public scrutiny will exert necessary pressure to force compliance with human rights standards. These mechanisms clearly depart from traditional methods of ‘command and control’ regulation and seek to co-opt non-State actors in regulation and compliance of laws

to the specific tools prescribed by the FW Act, the FWO has introduced a number of innovative tools including ‘proactive compliance deeds’ and contravention letters.

39. *FWO v WKO Pty Ltd* [2012] FCA 1129.

40. The FWC is established under the FW Act s 575.

41. See further Fair Work Commission, *AM2014/305 Penalty rates case*.

42. *4 yearly review of modern awards 2014 – Family Friendly Work Arrangements* [2018] FWCFB 6863. Modern Awards are legal instruments under the FW Act that outline minimum pay rates and conditions of employment for an industry or occupation. There are more than 100 industry or occupation awards that cover most people who work in Australia.

43. See, e.g., *Power v BOC Ltd & Ors* [2017] FCCA 1868; *Mahajan v Burgess Rawson & Associates Pty Ltd* [2017] FCCA 1560; *Sagona v R & C Piccoli Investments Pty Ltd & Ors* [2014] FCCA 875.

44. It should be noted that some leading commentators on labour regulation caution against using the terminology ‘hard’ and ‘soft’ regulatory approaches. This paper does, however, use these terms to differentiate between different enforcement mechanisms, which aligns with the conventional approach taken in the literature on this subject. For a discussion of terminology, see Freiberg 2010.

45. WGEA ss 18-19E.

46. This requirement comprises one of the ‘gender equality indicators’ about which employers must report. See WGEA ss 3, 13.

promoting workplace gender equality.

V. Discussion and conclusion

The Australian regulatory response to promoting workplace gender equality is clearly multi-faceted and reliant on multiple sources of law and regulation to achieve progress. This report has set out key laws that include provisions designed to promote gender equality in employment and/or protect persons experiencing discriminatory treatment at work. These laws include a range of legal prescriptions by which to promote workplace gender equality, from prohibitions against discrimination to the imposition of obligations on employers to take proactive steps towards introducing workplace practices that meaningfully advance gender equality. This report has also explored some recent policies, introduced by the Commonwealth government, with the primary, or ancillary, aim of advancing gender equality at work. Some of these policies helpfully recognise that continued inequalities experienced by women at work are inextricably connected to broader indicators of gender inequality in Australian society including women's experiences of domestic violence and disproportionate responsibility for childrearing.

Furthermore, this report has described a range of legal mechanisms that seek to achieve compliance with laws promoting workplace gender equality, and provide redress to persons impacted by non-compliance. Some regulatory shortcomings in the current framework of enforcement were described, particularly key limitations arising under anti-discrimination law. These failings of anti-discrimination law are likely to explain the expanded role of the 'adverse action' jurisdiction under the FW Act in protecting persons experiencing discrimination at work on the basis of sex, pregnancy and parental status. These failings also indicate that, to be more effective, the legal regulation of workplace gender equality should be more streamlined. This would mean mechanisms of enforcement, and relief from discriminatory treatment at work on the basis of gender, could be synthesised. Presently, there are many avenues by which persons experiencing discrimination at work may seek redress, which operate under different statutes and are administered by different government agencies. This itself may pose an early barrier, which deters persons experiencing discrimination at work on the basis of gender from seeking legal redress.

Consolidation of laws would also mean that regulation that is intended to promote compliance, such as educative and informational work performed by various agencies, would be rendered more consistent, streamlined and available from a single source. Overall, Australian legal regulation focusing on workplace gender equality is itself a work in progress that requires further attention, examination and recasting to address this complex issue.

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