Achieving pay equity through human rights law in Australia

Ronnit Redman and Karen O'Connell*

Introduction

Pay equity is an issue that has been on the human rights agenda since the inception of the international human rights system.[1] Since 1919, a range of international instruments have demonstrated that paying men and women equally is considered by the international community to be a crucial component of women's equality. In Australia, State and federal legislation, as well as equal pay cases, have responded to pay inequities both in relation to 'obvious' discrimination in women's pay and the more subtle undervaluation of women's work.

The issue of pay equity has recently attracted a resurgence of attention, both in Australia and internationally. Internationally, the Canadian case of the *Public Service Alliance of Canada v Treasury Board*,[2] recently focused attention on pay equity when the Canadian Human Rights Commission decided that female federal public sector employees had been underpaid relative to male workers for the past 13 years. The

* Karen O'Connell is a doctoral student at Columbia University and a former Senior Policy Officer at the Human Rights and Equal Opportunity Commission. Ronnit Redman is a Senior Legal Officer at the Human Rights and Equal Opportunity Commission. The opinions expressed in this article are personal and should not be taken as the opinions of the Commission.

This article was submitted for publication prior to the report of the NSW Pay Equity Inquiry, which was published in December 1998. The Report takes a broad view of the causes and potential remedies for the undervaluation of women's work. Essentially, the Report concludes that the industrial system in NSW is the most effective way to remedy gender pay inequities and recommends amendments to the industrial legislation to facilitate this. The full scope of the Report and its implications for the arguments advanced in this article will form the subject of further research by the authors.

1 The foundation documents of the International Labour Organisation, originating from the 1919 Paris Peace Conference, stated that the principle that men and women should receive equal remuneration for work of equal value was of great importance.

2 Unreported, Canadian Human Rights Commission, 29 July 1998.

decision means that the Federal government has to retrospectively compensate up to 200,000 workers, most of whom are low-paid female administrative workers, for up to 13 years of inequitable salaries.

While in Australia pay equity activity has been less dramatic, attention to the issue has been heightened due to the recent NSW Pay Equity Inquiry undertaken by Ministerial Reference pursuant to the *Industrial Relations Act 1996* (NSW) (NSW IRA) and a case brought by the Australian Council of Trade Unions (ACTU) and the Australian Metalworkers Union (AMWU) in relation to the remuneration of women at metal manufacturing sites.

Despite the renewed attempts at redressing inequities in women's pay, pay equity has been described as 'a claim won over and over', because every time measures are taken to remedy pay inequity further problems surface which require further remedies.[3]

In this article we consider some of the barriers to addressing pay equity through human rights. Pay equity is a human rights ideal, but it is dealt with in Australia by a human rights system (manifested in anti-discrimination law) that focuses on individual rights, and an industrial system which, while addressing the collective aspects of the problem, has not adequately absorbed human rights principles. We will discuss the inherent weaknesses in this system, and look at ways of overcoming its limitations.

Pay equity as a human right

While human rights principles are commonly accepted as the basis of anti-discrimination law, there is still a tendency to think of industrial processes as part of a separate, specialised and closed system. Yet the reality is that human rights are an integral part of the industrial system. The interconnection of industrial and international human rights systems is clear from the work of the International Labour Organisation (ILO).[4]

---

3 Scutt J *The incredible woman: power and sexual politics* (Artemis Publications, 1997) p 15.

4 The Constitution of the International Labour Organisation links social justice, peace and equality with conditions of labour thus: 'Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement to these conditions is urgently required; as, for example, by ... recognition of the principle of equal remuneration for work of equal value ... and other measures; Whereas also the failure of any nation to adopt human conditions of labour is an obstacle in the way of

Many major human rights documents also link equality to conditions of labour and, more specifically, to equal pay.[5] Equal remuneration for work of equal value is stressed in two conventions specifically addressing the rights of women workers: the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW)[6] and the *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951* (ILO 100).[7]

There is no doubt that pay equity is a question of the fundamental equality of men and women and a human right. The problem, so often raised in human rights law, is how to translate the principles of human rights into changed practices. One of the ways that this can be done in Australia is to use communicative 'crossover' points between domestic human rights statutes and the industrial system. These can help to infuse the industrial system with an understanding of human rights principles. First, however, we will examine the structures that have been created or used in attempts to remedy pay equity thus far, and the limitations and advantages that have emerged.

---

other nations which desire to improve the conditions in their own countries; The High Contracting Parties ... agree to the following Constitution of the International labour Organization': Preamble to the Constitution of the International Labour Organisation, 1944.

5 The *Universal Declaration of Human Rights* recognises a general right to equal treatment in Article 2, as well as rights to just and favourable conditions of work (Article 23(1)), the right to equal pay for equal work (Article 23 (2)) and to just and favourable remuneration (Article 23 (3)). The *International Covenant on Economic, Social and Cultural Rights* also recognises the equal rights of men and women to a range of labour based rights such as the right to work, the right to technical and vocational guidance and training programs, and just and favourable conditions of work (Article 7), which ensures: '(a) Remuneration which provides all workers, as a minimum, with ... (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work ... (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.'

6 *Convention on the Elimination of all Forms of Discrimination Against Women* Article 11.

7 The ILO has further reinforced the Equal Remuneration Convention in its *Recommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (ILO Recommendation 90). The European Community is separately committed to achieving equal pay for men and women workers through the *Equal Pay Directive* 75/117/EEC.

Remedying pay inequity

What causes pay inequity?

While a large number of factors can cause pay inequities, it is primarily a structural issue and extends beyond particular employers paying individual women less than men. It is not simply about women being treated differently or being offered inferior terms and conditions of employment. It is bigger than the imposition of working conditions that impact differently on women.

Pay inequities result from a combination of entrenched historical practices, the invisibility of women's skills, the lack of a powerful presence in the industrial system, and the way that 'work' and how we value work is understood and interpreted within the industrial system. The system by which monetary compensation has been allocated has often failed to recognise skills possessed by women as being worthy of compensation. Often, women's skills are not 'named' as industrial skills and are devalued by their perceived association with the domestic (private) sphere. Skills that are coded as industrially valuable are those traditionally associated with the sort of work that men customarily do. This devaluation is a subtle process and precludes an objective assessment of the true value of the work that women perform, free of discriminatory assumptions and stereotypical assessments of what is 'natural' and what is a 'skill'.

Models of pay equity

International experience tells us that there is no one way to approach the goal of equal remuneration for men and women doing work of equal value. A myriad of approaches is used, but they may, for convenience, be classified into three main categories.[8]

The first type of system is the pure complaints-based individual human rights model.[9] This approach deals with pay equity through individual claimants approaching human rights tribunals (or, in the UK for example, industrial tribunals) seeking orders that they have been underpaid relative to some identified male comparator. The onus rests upon the individual employee to identify a suitable comparator (almost always within the same enterprise), and to prove that undervaluation has occurred.

---

8 We are indebted to the publication of the NSW Pay Equity Taskforce, *A woman's worth: pay equity and the undervaluation of women's skills in NSW* (1996) 63ff for this categorisation.

9 For example: in Australia, *Sex Discrimination Act 1984* (Cth); in Canada, *Human Rights Act 1977*; in the UK *Equal Pay Act 1970*; in the US, the *Equal Pay Act 1963* and Title VII of the *Civil Rights Act 1964*.

The second type of system relies on a centralised wage fixing system to deliver pay equity outcomes. The best example of this is the Australian industrial system, both federal and state, where collective mechanisms yield outcomes for large numbers of women across industries. It is frequently stated that the gender wage gap in centralised systems tends to be low because gains won in one area can be passed on across the board to other women.[10] The collective aspect of such a system removes the onus for pursuing redress from individual women and utilises group process to seek remedies in relation to entrenched structural discrimination.

Finally, some systems do not wait for the individual or collective to bring claims but impose positive, proactive obligations on employers to eradicate gender wage differentials in their establishments. The most developed system of this kind is the *Pay Equity Act 1987* of Ontario, Canada. These systems require the lodging of pay equity plans and mandate specific steps to remove pay inequities.

Overview of pay equity structures in Australia

In Australia, the issue of gender equity in remuneration has historically been considered within the collective system of industrial arbitration. From the early days of the federal conciliation and arbitration system,[11] the question of wage rates for women was determined in the context of an entrenched gender wage differential justified on the basis of the 'male breadwinner' as paradigmatic wage earner.[12] This reflected a highly gendered and discriminatory notion of what constituted a 'worker' which has had significant deleterious effects for women workers, not only in respect of remuneration, but in relation to all aspects of women's ability to participate within the workplace as full industrial citizens.

Equal pay — the idea that women should be paid the same as men for doing the same jobs — became a feature of industrial legislation and regulation only in the late 1950s.[13] Federally, the matter was dealt with directly through the arbitration system,

10 Whitehouse G 'Legislation and Labour Market Gender Equality: An Analysis of OECD Countries' (1992) 6 *Work Employment and Society* 80.

11 And prior to this in relation to the State systems.

12 *Ex Parte HV McKay* (the Harvester case) (1907) 2 CAR 1; *Rural Workers' Union and United Laborers' Union v Mildura Branch of the Australian Dried Fruits Association* (the Fruitpickers case) (1912) 6 CAR 61.

13 See, for example, the *Female Rates (Amendment) Act 1958* (NSW) requiring employees to be paid equally 'for performing work of the same or like nature and of equal value'.

and in 1969 the Conciliation and Arbitration Commission laid down a principle of equal pay for equal work. For work to be equal it was required to be work of a same or like nature. Significantly, work usually undertaken by women was not subject to the principle.[14] On the other hand, pay equity — the idea that women should be paid as much as men for doing jobs that were of equal value — was a later development[15] and it is this development which is still unfolding in legislation,[16] in policy[17] and through various industrial processes.[18]

Alongside this collective arbitral system is a human rights framework which is given effect to by sex discrimination legislation federally and in each State and Territory. The anti-discrimination statutes provide individuals with redress for differential treatment or impact on the basis of sex. This legislation is adequate to capture inequities which result in pay differentials and which can be identified as having clear individual ramifications: failure to give a promotion, unavailability of flexible working hours, underpayment relative to a male predecessor. Although representative complaints are available,[19] the legislation is less successful when dealing with claims with a collective aspect and which involve fundamental structural questions such as the overall valuation of women's skills. It is these latter questions which have more recently formed the basis of the pay equity debate.

One of the strengths of the Australian system is that it utilises a model which is 'mixed'. Taken as a whole, the Australian system uses elements of all three-system types described above. Thus, although the primary mechanism is centralised and collective, there are clear individual aspects to it, such as the Equal Remuneration Division of the *Workplace Relations Act 1996* (Cth) (WRA) and anti-discrimination statutes. In addition, there is affirmative action legislation, which mandates employers to take certain steps in relation to implementing equal employment opportunity plans.

However, while in theory Australia has an ideal 'model' for addressing pay equity, it is a truism that the major difficulty in relation to pay equity is with

14 *First Equal Pay Case* (1969) 127 CAR 1142.

15 *Second Equal Pay Case* (1972) 147 CAR 172; *Comparable Worth Test Case* (1986) 13 IR 108.

16 See, for example, Equal Remuneration Division, *Workplace Relations Act 1996* (Cth).

17 See, for example, the NSW Government's Pay Equity Strategy.

18 See, for example, the Pay Equity Inquiry held by Ministerial Reference pursuant to s 146 of the NSW IRA.

19 See, for example, *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889.

implementation.[20] In achieving a more successful implementation of this 'mixed' model and moving further towards closing the gender wage gap, one of the areas that could be strengthened is the *relationship* between the various elements of the system, in particular the communicative points between the human rights and individual aspects, and the industrial and collective.

Theoretical limitations of anti-discrimination law

Equality is the essence of human rights. All international human rights instruments aim to achieve equality for disadvantaged groups. Equality in international human rights instruments is broad and structural: it takes account of the underlying social structures that shape inequality and aims to overcome their effects. The focus on an equality of result is *substantive* equality. However, when human rights principles are translated into domestic legislation they tend to take a more limited approach, depending on the aim of the legislation. In the case of anti-discrimination law, the substantive equality model was exchanged for one that focuses on *formal* equality.

Formal equality looks to process rather than outcome. It is based on an assumption that inequality can be addressed by making conditions gender-neutral. The formal approach presumes that if men and women are subject to laws, rules and conditions that apply to each in the same way, then equality will result. This approach is effective in overcoming some forms of inequality, because it 'overcomes the obstacles faced by women when they are given less favourable treatment than men by ensuring that rules make no distinction on the grounds of gender'.[21]

Both the Australian Law Reform Commission (ALRC)[22] and the Federal Parliament[23] have recognised the limitations of a formal equality approach. The ALRC, in its report *Equality Before the Law*, stated that the formal approach 'does little to enable women to overcome the effects of past inequalities or present disadvantages' and decided on the following, more substantive, approach to equality:

---

20 NSW Pay Equity Taskforce, *Pay Equity and the Undervaluation of Women's Skills in NSW* (1997) 26; Kainer J 'Pay Equity Strategy and Feminist Legal Theory: Challenging the Bounds of Liberalism' (1995) 8 *Canadian Journal of Women and the Law* 440 at 442 (pointing to the practical difficulties of implementation which may undermine pay equity strategies).

21 Australian Law Reform Commission, *Equality Before the Law*, Discussion Paper No 54 (1993) para 3.11.

22 Above, note 21.

23 House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992) paras 10.1.27-10.1.31.

> All people are entitled to enjoy human rights on the basis of equality. However, gender neutral treatment on the face of the law may not lead to equality in effect or result in all cases. In examining whether there is equality in fact, the effect or result of the law must also be considered. If there is inequality in effect or result, there may be inequality in the enjoyment of a right. If the law contributes to the inequality or fails to alleviate inequality or disadvantage, it should be changed.[24]

A formal equality model is more suited to the limited aims of anti-discrimination law, which are to redress individual circumstances of disadvantage in relation to conduct in defined spheres, such as employment and education. The intention of complaints-based anti-discrimination law was never to provide a complete response to discrimination,[25] although there is some attempt made in the legislation to redress more subtle forms of discrimination via the inclusion of indirect discrimination. The indirect discrimination test however, reliant as it is on broad notions of reasonableness and complex legal formulations, is a limited and problematic means of redress.

For this reason, it is necessary to look behind the legislative formulations of discrimination to the foundational ideas of equality which lie behind them. This focus on the basis of human rights norms brings the fundamental issue to the fore. This fundamental issue is that of equality. International human rights law recognises a substantive vision of equality which aims to remove the structural conditions of disadvantage which pertain to various groups in our society. In relation to sex or gender equality, this conception of equality looks beyond formal comparisons, beyond formal equations between people and looks to practices and structures, which *systemically* operate to retain women in a position of disadvantage.

This systemic type of discrimination is the non-specific, but pervasive, devaluing of women through stereotyped assumptions, entrenched cultural practices and the often unconscious acceptance of women's subordination. Systemic discrimination is difficult to target because it is usually subtle, indirect and its effect may not be created or intended by any identifiable individual or group of individuals.

---

24 Australian Law Reform Commission, above, note 23, para 3.16.

25 For example, in the second reading speech of the Anti-Discrimination Bill in 1976, then Premier Neville Wran stated: 'The Government is not under any illusion that this Bill is a panacea for all the problems relating to discrimination in our community ... The Government will concede that this provision for individual remedies is *a step-by-step mopping up of individual pockets of discrimination* rather than an attack on the cause of that discrimination' (emphasis added) New South Wales, *Hansard*, House of Representatives, 23 November 1976, p 3347.

Anti-discrimination legislation cannot respond effectively to systemic discrimination because it is directed at identified discriminatory acts or practices that have disadvantaged an individual. In employment cases, anti-discrimination legislation relies on a complaint being made by an individual employee against a single employer. International human rights instruments differ from discrimination law because they address inequality based on a more collective and systemic model.[26] This is because they recognise that inequality is often based on membership of a particular group and on that group's position in society.

Practical limitations of anti-discrimination law

The theoretical limitations of anti-discrimination law translate into practical limitations. The complex phenomenon of pay equity is not easily addressed by means of an anti-discrimination complaint mechanism that requires an individual aggrieved by an act and comparison with a similarly situated man, and which focuses on formal rather than substantive equality.

At a federal level, the human rights statute that relates to pay equity is the *Sex Discrimination Act 1984* (Cth) (SDA). It is discussed here by way of example and similar comments may be made in relation to the State anti-discrimination statutes. The SDA encapsulates the human rights ideal of equal treatment without regard to sex, translated into an individual remedy. However, it also contains some broader powers and remedies that have the potential to bridge the gap between human rights principles and practice.

The SDA makes direct and indirect discrimination in employment on the grounds of sex, marital status, pregnancy, potential pregnancy and family responsibilities unlawful,[27] and this may provide some limited redress for pay inequity that occurs through discrimination:

---

26 'Most rights declared in the human rights instruments have an individual character. Many of them are at the same time germane, indeed essential, to the formation of groups ... Other types of rights that are characteristically expressed in individual terms ... also have a group aspect. The prohibited governmental conduct amounts to the disadvantaging of an individual because of that individual's group characteristic or identity. It is the individual's link to the group that provides the very occasion for discrimination': Steiner H and Alston P, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 1996) p 993.

27 In the case of family responsibilities, discrimination in relation to *dismissal* is the only grounds for a complaint under the legislation: SDA s 14(3A).

- in the terms or conditions[28] on which employment is offered (s 14(1)(c));
- in the terms or conditions of employment afforded the employee (s 14(2)(a));
- by denying the employee access to opportunities for promotion, transfer, training or any other benefits associated with employment (s 14(2)(b)); or
- by subjecting the employee to any other detriment (s 14(2)(d)).

For a number of reasons there have been very few complaints of discrimination under the SDA concerning pay equity and it has become increasingly clear that the human rights statutes are inadequate to deal with pay equity claims. There are three main reasons for this.

First, the Act focuses on redressing discrimination through individual complaints, rather than dealing with systemic issues. Because of the reliance on individual acts or practices, complaints tend to be restricted to looking at single employers, and do not involve comparisons between pay across enterprises or industries.[29] In its individualised focus, the SDA does not attempt to provide a broad response to the inequality of women as a disadvantaged group. Although representative complaints are possible, they cannot adequately deal with complaints of discrimination on behalf of a large group of women or on behalf of women in general in the main because they focus on individualised notions of harm.

Second, the definitions of discrimination that the Act utilises are limited. They reflect the individualised focus of the legislation and look to formal equality. Thus, although concepts of direct discrimination can deal with different rates of remuneration (including over-award payments) paid to men and women within the one organisation in circumstances that are the same or not materially different, it is often the case that men and women perform quite different jobs which may be, but are unlikely to be, said to be the 'same or not materially different' circumstances. It

28 'Terms and conditions' includes all components of remuneration including superannuation, leave, bonuses, discretionary payments, allowances, performance bonuses, commissions etc.

29 There are some provisions in the SDA for changes to discriminatory awards. If the Sex Discrimination Commissioner considers that the provision may be discriminatory according to the Act, she can refer the award to the Australian Industrial Relations Commission. If that Commission finds the provision discriminatory, it must remove the discrimination. These provisions will be discussed further below.

is also difficult to see how an individual respondent can be held to be responsible under the SDA for an inequity that exists between his or her firm and another company entirely. This means that the scope of comparators will be limited. In a small organisation (where most women are employed) there may be no comparators at all and Australia continues to have an extremely sex segregated workforce. Thus, the human rights remedy falls short of the requirements of Australia's international obligations.[30]

Although an indirect discrimination claim could alleviate some of these difficulties, it is not easy to construct an indirect discrimination argument in relation to pay inequities. This is because these inequities do not fall easily into the legislative formulation of a 'requirement or condition' which has a differential impact on women. Also, arguments in relation to 'reasonableness' will assume great importance, in particular in relation to the economic capacity of an employer to pay for pay equity adjustments.

Third, the human rights statutes prescribe a variety of remedies which are directed at compensating the complainant for harm caused as a result of the discrimination suffered. These remedies are akin to those available in tort. They look backwards and aim to place the complainant in the position that she would have been in had the discriminatory conduct not occurred.[31] Crucially, when dealing with systemic inequities such as those arising with respect to remuneration, these remedies do not adequately deal with the future. These remedies cannot:

- provide a remedy for large groups of women who are not party to the proceedings;

---

30 ILO 100 has been interpreted to require cross industry comparisons. The ILO Committee of Experts has stated that 'the principle of equal remuneration for work of equal value extends beyond cases where work is performed in the same establishment and beyond jobs performed by both sexes', see International Labour Organisation, *Equal Remuneration: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (1986) para 22. Note, also, that cross industry comparisons have long been recognised in Australia. In the 1969 Equal Pay decision (127 CAR 1159), the AIRC held that consideration should not be restricted to the situation in one establishment.

31 For example, s 81 of the SDA allows the Commission to make a declaration that there has been unlawful conduct and that this shall cease, a declaration that the respondent should perform any reasonable course of action to redress the loss suffered; a declaration that the respondent employ or re-employ the complainant, a declaration that the respondent pay damages by way of compensation, a declaration that the respondent promote the complainant and a declaration that the termination of a contract be varied.

- directly amend discriminatory arbitral awards for the future; or

- require a systemic audit of all inequitable remuneration systems.

Much evidence has demonstrated that centralised systems of wage fixation which allow the gains won by one group to be spread across the system have been beneficial in delivering pay equity outcomes to women. Ad hoc anti-discrimination complaint based systems cannot deliver such across-the-board results.

Integrating the human rights and industrial systems

The limitations of current discrimination law means that it cannot adequately address the structural and systemic aspects of pay inequity. However, discrimination law can be extremely useful to achieving pay equity because of the principles underlying anti-discrimination legislation — the international conventions that provide the broad framework for dealing with inequality.

There is no theoretical gulf between the operation of the human rights system and the workings of the industrial system and there is no theoretical barrier to the conceptualisation of both systems in terms of fundamental underlying international human rights norms.

This is not to say that the human rights complaints system and the industrial system are the same, that they perform the same functions or that they should be amalgamated. Each system clearly has its respective strengths and weaknesses in relation to particular types of cases. So, for example, the human rights system is particularly suited to the claim of an individual that she has been paid less than her immediate male predecessor was paid. This claim involves a direct comparison between individuals and is well captured by the individualised comparative model of discrimination which human rights statutes in Australia utilise. It allows for the tailoring of individualised remedies to compensate that person for the loss she has suffered.

On the other hand, the industrial system works extremely well when the claim is that all women within a particular class (such as an award classification or an occupational group) are inequitably remunerated with respect to another, male dominated, class. Such a claim looks to the future, to an arbitrated outcome which sets future standards for the remuneration of that class of women as a whole.

Each system has a particular role to play. Each is important. Neither should be diminished. Nevertheless, based on their common underpinnings, it is important to

be explicit about the role that each play in the other. Communication, dialogue and exchange between the systems will be important in achieving the substantive equality required by international law.

'Crossover' points: background

Since 1992, there has been an explicit role for the Sex Discrimination Commissioner in federal industrial relations. These provisions which were introduced into the *Industrial Relations Act 1988* (Cth) (IRA 1988) are substantially reproduced in the WRA with some exceptions.

The main exception is the process whereby, under s 150A of the IRA 1988,[32] the Australian Industrial Relations Commission (AIRC) was required to review all awards and remedy certain deficiencies. These deficiencies include whether the award contains provisions which discriminated on a number of specified grounds. Where deficiencies were found, the AIRC was required to take steps to remedy the deficiency. Before making such a decision, the AIRC had to give the parties and, where the deficiency involved discrimination, the Commissioner, an opportunity to be heard.[33]

The AIRC established a clear process for review of awards in the September 1994 Review Decision[34] and required a pilot review of awards prior to the establishment of principles for review. As part of this process[35] working parties were established to consider a range of central issues and 14 awards were selected to be reviewed. The working parties developed a model discrimination clause and adopted a standardised approach to the form and structure of awards. Pursuant to submissions made to the October 1995 Review Decision,[36] the resource book *Making Federal Awards Simpler* was produced for the assistance of the parties.

---

32 Section 150A commenced operation on 22 June 1994 and provided for a review of all awards by 22 June 1997. The section was repealed by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). The new legislation provides for a new regime of simplified or stripped back awards and a greater focus on individualised bargaining, either at the workplace or employee level.

33 Regulation 26A.

34 Print L5300.

35 This process is described in *Australian Industrial Relations Commission Making Federal Awards Simpler: A Guide to Reviewing Federal Awards in Accordance with s 150A of the Industrial Relations Act 1988* (Australian Industrial Relations Commission, 1995).

36 Print M5600.

In conjunction with this process, s 50A of the SDA provided for the Sex Discrimination Commissioner to refer discriminatory awards and agreements to the AIRC. Section 111A of the IRA 1988[37] required the AIRC to convene a hearing to review awards so referred. The Commissioner is automatically a party to these hearings. Sue Walpole, the former Commissioner, gave evidence to the NSW Pay Equity Inquiry that these provisions had never been utilised.[38] In part, this was due to the currency of the s 150A award review process and the systemic 'audit' of awards that would happen as a consequence.

Under the IRA 1988 and the WRA, the Sex Discrimination Commissioner has the ability to intervene in AIRC proceedings. Section 43 of the WRA allows the AIRC to grant an organisation, person or body who 'should be heard' in a matter leave to intervene in that matter. However, under the current s 43(2), the AIRC must not grant leave to intervene in certification of agreement proceedings except in certain defined circumstances. The intervention powers in s 43 of the IRA 1988 were broader, with no exceptions for the certification of agreements.[39]

The NSW IRA has very similar 'crossover' provisions and establishes a like dialogue between the NSW Industrial Relations Commission and the Anti Discrimination Board of NSW (ADB). These provisions also require the review of awards, contain specific provisions in relation to pay equity in awards and require the scrutiny of enterprise agreements for compliance with the *Anti-Discrimination Act 1977* (NSW). They provide a role for the President of the ADB in relation to discrimination in industrial instruments and processes.

Although it is still early days, there are clear benefits to these 'crossover' mechanisms. For example, the industrial commissions themselves are responsible for the identification of discrimination in awards and do not have to rely on the industrial parties or individuals making complaints to identify discrimination. The industrial commissions are obligated in the exercise of their powers to take into account discrimination and human rights principles. In addition to this, however, there is a clear role for the human rights tribunals and commissioners in the

37 Note that s 111A remains in the WRA with some small changes. Section 50A likewise is retained in the SDA.

38 Transcript p 1604.

39 It is noted that, under the approval process for Australian Workplace Agreements in Part VID of the WRA, there is no ability for the intervention of the Sex Discrimination Commissioner or for any outside scrutiny of agreements. Note, also, that under the 'private', individualised arrangements for Australian Workplace Agreements, it is much more difficult to address pay equity issues that are structural in nature and require broad comparisons between groups of people.

industrial processes, including in relation to interventions in processes before the industrial commissions. In effect, the systems are 'talking' to each other.

This dialogue is empowering for women because it allows them to have their voices and concerns heard from *within* the mainstream industrial system. This prevents women's marginalisation and relegation to an 'add on' system of anti-discrimination which fixes up aberrant 'pockets' of discrimination. It places them instead in the centre of industrial regulation. This dialogue will assist in ensuring that, when wages are set and hours are determined, women's experiences and perspectives on the nature of work are taken into account. In being responsive to the multiple perspectives of all workers, the industrial system itself will change and it will become infused with the foundational principle of international human rights — the principle of equality.

It is important to remember, however, that this 'crossover' is in its infancy and that, in relation to difficult matters, such as indirect discrimination and pay equity, the process can be problematic. The 'model clause' approach adopted federally in relation to discrimination in awards may have been extremely useful in relation to direct discrimination but it may have a more a limited effect on structural inequities. Pay equity is an extremely complex phenomenon. It requires widespread comparisons *between awards,* a fundamental revaluation of women's skills and a genuine commitment to undertake radical comparisons. This is not to say that change of this nature cannot occur in this way, only that it is vital to ensure that the dialogue continues and that the 'difficult' cases are not forgotten.

'Crossover' points: current and future

If Australian human rights statutes are to play an optimal role in achieving pay equity, the crossover points between the industrial and discrimination jurisdictions must be utilised to their fullest capacity. This means a number of things. First, it means that women and their unions must continue to use the complaint mechanisms in the SDA and State statutes to the full extent of their capabilities. Many players in the industrial relations system do not see the SDA as an alternate forum for resolving industrial matters even though complaints may be made about any industrial matter if it is discriminatory.

Second, the powers of the Sex Discrimination Commissioner[40] and the President of the ADB to intervene in matters before the relevant industrial commissions and to

40 Note that under the Human Rights Legislation Amendment Bill (No 2) (Cth) certain functions will become functions of the President of the Commission (for example, referral of discriminatory awards) and there are proposed restrictions on the power of the Commission to intervene in court proceedings.

interact within the industrial system should be used whenever possible. This is potentially a very influential role, and provides a unique opportunity to bring a human rights perspective directly into an industrial forum.

Third, it will be important in infusing the industrial system with human rights principles to look to foundational principles and eschew the limited statutory definitions in the individualised anti-discrimination statutes. Thus, at every opportunity, a substantive, structural notion of equality should be argued for.

Fourth, the industrial parties must utilise all means available to them for representing all of their members, including their women members. They must be responsive to the needs and specificities of women's employment and they must use all avenues — dispute notifications, the award review process, test case proceedings, individual complaints — to ensure that these needs are met.

Finally, the role of the Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission as well as the State bodies in educating employers and employees on their rights and responsibilities in relation to industrial discrimination and equal opportunity can provide a link or conduit between human rights or discrimination models and industrial models of dealing with workplace relations.

There is no one cause of pay inequity and there is no one solution. The recent dialogue between two systems which are joined in their fundamentals but which, over the years, have developed separately, is a crucial step in effecting a transition to a more equitable system of remuneration. ●