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SUBMISSION TO THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

14 October 2005

Striking the Balance: Women, Men, Work and Family
Discussion Paper 2005

Submission to

Paid Work and Family Responsibilities Submission
Sex Discrimination Unit
Human Rights and Equal Opportunity Commission
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THE WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES

The Women Lawyers' Association of New South Wales (WLA NSW) is the peak representative body of women lawyers in New South Wales. Our membership is diverse and includes members of the judiciary, barristers, solicitors, government bodies, corporations, large and small city and country firms, legal centres, law reform agencies, academics and law students.

Since our establishment in 1952, WLA NSW has been dedicated to improving the status and working conditions of women lawyers in New South Wales. We have been active in advocating for and promoting law reform, frequently making submissions on anti-discrimination law, industrial equity, criminal law, women's health, legal aid, child care and gender bias in the legal profession.

Our dedication to equal opportunities for women in the legal profession is demonstrated through the various networking and mentoring programs we have implemented and/or supported, and through our support for and promotion of equal opportunity policies for women in the profession, such as the National Equality of Opportunity Briefing Policy adopted by the Board of Australian Women Lawyers on 20 September 2003.

The weight of our experience informs our submission.

STRIKING THE BALANCE: WOMEN, MEN, WORK AND FAMILY

As a professional body of working women lawyers, WLA NSW appreciates, and the personal experiences of our diverse membership supports, the importance of enabling men and women to access flexible and family friendly work arrangements. The business case for flexible and family friendly policies in the workplace is no secret.[1] Identified benefits of introducing flexible work measures include:

- competitive edge in recruiting and enhanced corporate image;
- improved ability to retain skilled staff and increase return on training investments;
- reduced absenteeism and staff turnover;
- improved productivity;
- reduced stress levels and improved moral and commitment; and
- potential for improved occupational health and safety records.[2]

The head of the Human Resources Department at law firm Blake Dawson Waldron has conservatively estimated that replacing a lawyer with five or more years' experience costs the company at least $75 000.[3] Other estimates argue that it costs

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[1] Australian Workplace, "Why Family Friendly Policies are Good for Business," [Internet – http://www.workplace.gov.au. (Accessed 28 March 2005.)]; Equal Opportunity for Women in the Workplace Agency, "Why EO Makes Business Sense," [Internet – http://www.eeeo.gov.au/About_Equal_Opportunity/Why_EO_Makes_Business_Sense. (Accessed 28 March 2005.)].

[2] Australian Workplace, above.

[3] Equal Opportunity for Women in the Workplace Agency, "Attract and Retain the Best Talent," [Internet – http://www.eeeo.gov.au/About_Equal_Opportunity/Why_EO_Makes_Business_Sense. (Accessed 28 March 2005.)].

about $120 000 to replace a lawyer with four years' experience.[4] The legal workplace is a diverse one, but independent of their size or financial capacity, law firms, legal centres, legal organisations and legal bodies all rely heavily on the talent of their staff. The legal workplace is certainly one in which access to flexible and family friendly arrangements for men and women makes good business sense.

WLA NSW agrees with what the Human Rights and Equal Opportunity Commission (HREOC) has said about the tendency of averages and statistics to conceal diversity and appear to suggest that all men and women are the same.[5] Unfortunately, WLA NSW has been unable to include any case studies in this submission to illustrate the circumstances and needs of men and women as individuals, and to negate the view that all men and women are the same. However, we have discussed the importance of obtaining qualitative data demonstrating the individual circumstances and needs of women in the legal profession with Victorian Women Lawyers (VWL). VWL is also making a submission to this project, and we support the views of VWL on this issue.

Equal opportunity in the workplace between the sexes will not be achieved for all Australians until the diversity of contemporary family compositions and characteristics is recognised by measures that allow men and women, regardless of the industry or sector in which they are employed, to address their individual needs when it comes to sharing unpaid work and caring responsibilities in their homes.

WLA NSW recognises that progress towards achieving a balance between paid and unpaid work in one area may be positively or adversely affected by other areas.[6] Legal, workplace and social policy frameworks all significantly shape behaviour and attitudes toward men's and women's paid and unpaid work. [7] For these reasons attempts at reform must be multifaceted and target legislative change, social policy change, cultural change in the workplace and attitudinal change, in combination.

In April this year, WLA NSW made a submission to Inquiry into Work and Family Balance presently being conducted by the House of Representatives Standing Committee on Family and Human Services. The submission highlighted the need for:

- social policy change through the provision of support for families from federal government;
- cultural change, particularly within the legal workplace; and
- attitudinal change, particularly within the legal profession.

We continue to maintain the views expressed in our submission to the Standing Committee, and the submission we made to the Standing Committee's Inquiry into Work and Family Balance is annexed to this current submission as Appendix 1,[8] for consideration by HREOC.

In the current submission WLA NSW seeks to focus on the issues of:

- caring for people with disabilities, elder care and grandparents as carers;

[4] Australian Workplace, above, n 1.
[5] Human Rights and Equal Opportunity Commission, "Striking the Balance: Women, Men. Work and Family", Discussion Paper 2005, Sydney: Human Rights and Equal Opportunity Commission, 2005, at 19.
[6] Human Rights and Equal Opportunity Commission, above, at 126.
[7] Human Rights and Equal Opportunity Commission, above, n 5, at 111.
[8] Below, at 18.

- anti-discrimination legislation and family responsibilities; and
- workplace relations, policies and practices and the business case for change.

While law reform may be criticised as a blunt tool for change,[9] there is much that law reform, in combination with other changes, can do in setting minimum standards of entitlements for men and women seeking to balance paid work and family responsibilities. Reforms to anti-discrimination and industrial relations legislation are required to allow federal laws to better address the current needs of working men and women.[10]

1. CARING FOR PEOPLE WITH DISABILITIES, ELDER CARE AND GRANDPARENTS AS CARERS

Lyn Francis, Promotions and Fundraising Officer, WLA NSW

Response to Question 8: Are there particular difficulties in balancing paid work with caring for grandchildren, frail aged parents or family members with disabilities?

The cost of formal childcare is costly for families who do not have high incomes[11]. Grandparents are increasingly fulfilling the role as informal babysitters for their grandchildren[12]. While this situation allows increased participation in the workforce by the children's mother the grandparents may decrease their participation in the workforce.[13] The financial cost to grandparents due to providing care to their grandchildren is one that is not often considered[14].

Increasing numbers of grandparents have full time care of their grandchildren with Family Court orders in place or a care and protection order though the Children's Court.[15] The cost of going through the court system while maintaining employment and providing care for their grandchildren is one issue that needs to be addressed.

It is older people who are caring for people with disabilities rather than younger people.[16] Older women in particular do not have adequate superannuation or financial resources due to the time taken off from the workplace in order to provide care for other family members.[17]

The "Striking the Balance: Women, Men, Work and Family" Discussion Paper (the Discussion Paper) suggests that changes in gender expectations may result in

[9] Human Rights and Equal Opportunity Commission, above, n 5, at 129.
[10] B Gaze, "Twenty Years of the Sex Discrimination Act: Assessing its Achievements," (2005) 30(1) *Alternative Law Journal* 3, at 8.
[11] The Law and Justice Foundation of NSW, *Access to Justice and Legal Needs – The Legal Needs of Older People in NSW,* Volume 1, December 2004, at 342
[12] The Law and Justice Foundation of NSW, above, at 341, citing Australian Bureau of Statistics 2001 'child care arrangements' *Australian Social Trends* 2001.
[13] Human Rights and Equal Opportunity Commission, above, n 5, at 45.
[14] The Law and Justice Foundation of NSW, above, n 11, at 353.
[15] The Law and Justice Foundation of NSW, above, n 11, at xxxv.
[16] The Law and Justice Foundation of NSW, above, n 11, at 11.
[17] Human Rights and Equal Opportunity Commission, above, n 5, at 43.

decreased availability of carers for older people.[18]

I would like to make the point that the need for elder care may not be as onerous as the government is painting it – as a community nurse and as someone involved in the DVA Preventive Care Trial[19] I would suggest that the term 'elder' cannot be applied across the board – my 84 year old great aunt is very well and healthy and cooked me dinner and insisted on walking me to the bus stop late last Tuesday evening. More longitudinal studies may paint a different picture of a population who will live longer and healthier with only a minority of older people, albeit who take up a proportionate amount of health care services, being unhealthy.

As a community nurse I also observed many elderly people aged in their 70s and 80s caring for disabled sons and daughters. I would suggest this will increase with lack of residential facilities for people with disabilities. If increased support is provided, such as increased community services and residential care particularly on a temporary or day to day basis to assist those older people who still choose to work, then carers may be able to balance their work and caring roles and improve their quality of life.

2. ANTI-DISCRIMINATION LEGISLATION AND FAMILY RESPONSIBILITIES

Lee-May Saw, Media Officer, WLA NSW

Question 23: Can ant-discrimination systems assist men and women better balance their paid work and family responsibilities? Why or Why not?

WLA NSW believes that anti-discrimination legislation can assist men and women better balance their paid work and family responsibilities. Anti-discrimination systems provide men and women with the capacity to seek individual redress where they encounter barriers to balancing their paid and unpaid work. Legislation that creates the framework for anti-discrimination systems also has significant capacity to establish social policy objectives within the work place, and to set minimum entitlements across all employment sectors for men and women with responsibilities outside of paid work.

Question 24: Why do men with family responsibilities not make more use of the family responsibilities provisions of the *Sex Discrimination Act*?

While the *Sex Discrimination Act* 1984 (Cth) (SDA) may adopt gender neutral language referring to discrimination against "persons" and "people" rather than "women", the majority of the objects of the SDA stated in section 3, and the overall tenor of the SDA, create the impression that its is primarily an Act about affirmative action for women, and that family responsibilities are a "women's issue".

When the social and cultural barriers to men playing a more active role in the sharing of household responsibilities are taken into account alongside the language of the

[18] Human Rights and Equal Opportunity Commission, above, n 5, at 42.
[19] Byles et al, 'Randomised controlled trial of health assessments for older Australian veterans and war widows' (2004) 181 (4) *Medical Journal of Australia* 186 – see References at back of this article for further research in this field.

SDA, there appears to be have been very little systemic and legislative motivation behind the few claims made by men under the SDA.

In 1994 the Australian Law Reform Commission (ALRC) published ALRC 69 "Equality before the Law: Women's Equality" (ALRC 69).[20] In ALRC 69, the ALRC suggested the passage of a federal *Equality Act* which would overcome the limitations of the SDA, and benefit both men and women consistent with Australia's obligations under human rights conventions that declare the equality of all people, both men and women.[21]

Adopting the provisions of the SDA into a federal *Equality Act*, and broadening the protections encompassed by the scope of the SDA, in addition to adopting the recommendations for reform WLA NSW has made in response to Question 25 of the Discussion Paper,[22] will contribute significantly to making the current family responsibilities provisions of the SDA more accessible for men.

WLA NSW recommends that the provisions of the *Sex Discrimination Act* 1984 (Cth) be adopted into a federal *Equality Act*, and that an *Equality Act* be drafted and passed by federal government.

Question 25: Should the *Sex Discrimination Act* be amended to give greater assistance to men and women to address any workplace disadvantage they may face on the basis of their family responsibilities? If so, what particular amendments are necessary? If not, why not.

WLA NSW agrees with the opinion of Beth Gaze when she observed:

> my assessment of the SDA is that I wouldn't be without it. But after 20 years, it has aged. It has fundamentally changed our legal and social environment, but other changes have also occurred which have undermined some of its gains. It needs revitalising to continue to move the case for women's equality along in the modern context. Its limitations must be acknowledged, and efforts put into remedying them as well as developing other measures to end women's disadvantage.[23]

As the ALRC has noted, the SDA, remains only a partial response to women's legal inequality.[24] The limitations of the SDA include that:

- it only addresses individual acts of discrimination within specified fields of activity for which a person may make a complaint;
- it fosters and is based on a limited understanding of equality;
- it is unable to address the issue of violence against women as discrimination other than in the framework of sexual harassment;
- it is unable to challenge directly gender bias or systemic discrimination in the context of the law;
- it concentrates on the treatment of individuals rather than the effect of law;
- it cannot strike down rules or laws;

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[20] Australian Law Reform Commission, "Equality before the Law: Women's Equality", Part II, ALRC69 [Internet – http://www.austlii.edu.au/other/alrc/publications/reports/69/vol2/ALRC69.html. (Accessed 8 April 2005.)].
[21] Australian Law Reform Commission, above, at Chapter 4.
[22] Below, at 6-14.
[23] B Gaze, above, n 10, at 8.
[24] Australian Law Reform Commission, above, n 20, at [4.5].

- it exempts areas from its operation; and
- its protection is only activated by making a complaint.[25]

Amendment of the SDA is required not only so that it can better promote the case for women's equality in the modern context but also so that it can better promote the case for men's equality, particularly in accessing flexible and family friendly work arrangements. WLA NSW has expressed its views that the declining birth rate and its relation to the issue of caring for children is not only a "women's issue".[26] We have maintained that it is not necessarily women who are reluctant to have children – their partner has to be willing as well.[27]

The modern context is very much one in which promoting equality of opportunity for women in the workplace is about promoting equality for men in accessing flexible and family friendly work arrangements: contemporary equality for women is dependent on equality for men. The evidence that fathers want to spend more time with their families,[28] and that men as well as women believe that housework and child care should be shared,[29] is encouraging. However, the current language and structure of the SDA fails to promote family and caring responsibilities as an issue for both men and women, and the SDA has proved to be of little assistance to men who might seek redress in response to barriers to accessing flexible and family friendly work arrangements. This indicates that the object of promoting equality for men and women within the community, captured by section 3(d) of the SDA is not being met.

WLA NSW recommends that the *Sex Discrimination Act* 1984 (Cth) be amended to give greater assistance to men and women to address any workplace disadvantage they may face on the basis of their family responsibilities.

(i) Comprehensive review of the *Sex Discrimination Act* 1984 (Cth)

Beth Gaze has suggested that after 20 years of the SDA, it is time for a review of its effectiveness and the need for change, perhaps along the lines of the Productivity Commission's review of the *Disability Discrimination Act* 1992 (Cth).[30] WLA NSW supports this suggestion: **WLA NSW recommends** that in addition to considering our recommendations for particular amendments to the *Sex Discrimination Act* 1984 (Cth), that a review of the Act similar to the Productivity Commission's review of the *Disability Discrimination Act* 1992 (Cth) take place.

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[25] Australian Law Reform Commission, above, n 20, at [4.5].
[26] Women Lawyers Association of New South Wales, Submission to the House of Representatives Standing Committee on Family and Human Services Inquiry into Work and Family Balance, April 2005, below, at 25.
[27] Women Lawyers Association of New South Wales, "Flexible Working Arrangements not for the Unambitious, Slack or Soft," Press Release, 16 March 2005 [Internet – http://www.womenlawyersnsw.org.au/pdf/birth%20rate%20child%20care%20press%20mar05.pdf.]; Women Lawyers Association of New South Wale, Submission to the House of Representatives Standing Committee on Family and Human Services Inquiry into Work and Family Balance, April 2005, below, at 25.
[28] Human Rights and Equal Opportunity Commission, above, n 5, at 54.
[29] Human Rights and Equal Opportunity Commission, above, n 5, at 53.
[30] B Gaze, above, n 10, at 8.

(ii) Objects of the *Sex Discrimination Act* 1984 (Cth)

The objects of the SDA are stated in section 3, they are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and
(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and
(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

It can be seen that:

- the only human rights convention that the SDA seeks to give effect to is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a convention for the benefit of women but not men;
- the only object which expressly targets equality for both men and women is that in section 3(d), which aims to promote equality of men and women within the community rather than the workplace in particular; and
- section 3(ba) deals with family responsibilities but it only ensures that the Act aims to eliminate, as far as possible, discrimination involving **dismissal** of employees on the ground of family responsibilities.

To ensure that the SDA adopts language and a systemic framework that targets equality for men and women, and to ensure that the scope of the SDA is not limited to eliminating discrimination on the ground of family responsibilities only where employees are dismissed, **WLA NSW recommends** that the following objects be added to section 3 of the *Sex Discrimination Act* 1984 (Cth):

- to give effect to certain provisions of the Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities;
- to eliminate, so far as possible, discrimination between employees on the ground of responsibilities as a carer.

If this recommendation is adopted, **WLA NSW further recommends** that section 3(ba) be removed from section 3 as a consequential amendment.

Family responsibilities are not always necessarily caring responsibilities and vice versa. Growing needs for aged and disabled care, mean that bringing the SDA in line with the modern context and ensuring that it will continue to be effective in a future context requires that the objects of the SDA recognise the responsibilities of employees as carers rather than family members only. For these reasons WLA NSW has recommended that elimination, as far as possible, of discrimination between employees on the ground of responsibilities as a carer be incorporated into the objects of the SDA.

WLA NSW emphasises the importance of having Australia's international obligations fulfilled by giving effect to relevant provisions of all human rights conventions of

which Australia is a party, and which promote equality between men and women in the workplace. Therefore, **WLA NSW further recommends** that any other human rights conventions, apart from Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, that aim to eliminate discrimination against men and women in the workplace be considered for adoption within the objects of the *Sex Discrimination Act* 1984 (Cth).

(iii) Preference for the term "responsibilities as a carer" over the term "family responsibilities"

The term "family responsibilities" is currently defined under section 4A of the SDA. The *Anti-discrimination Act* 1977 (NSW) (ADA) utilises the term "responsibilities as a carer" rather than the term "family responsibilities". Section 49S of the ADA defines a person's responsibilities as a carer. The main difference between the definition of "family responsibilities" under the SDA and "responsibilities as a carer" under the ADA is that the definition of responsibilities as a carer includes responsibilities for caring for an adult step-child, step-parent, step-grandparent, step-grandchild or step-sibling of the employee.

WLA NSW is concerned that the term "family responsibilities" does not adequately take into account the growing imposition of responsibilities involving elder and disabled care on employees. In our submission, bringing the SDA up to date with the modern context and ensuring that it will continue to be effective in a future context requires that the SDA adopt the term "responsibilities as a carer" in place of the term "family responsibilities". To achieve this, and to allow the SDA to better reflect the diversity of family compositions in the modern context, **WLA NSW recommends** that section 4A of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

> **Meaning of ~~family~~ responsibilities as a carer**
>
> (1) In this Act, ~~family~~ responsibilities as a carer, in relation to an employee, means responsibilities of the employee to care for or support:
> (a) a dependent child of the employee; or
> (b) any other immediate family member who is in need of care and support.
>
> (2) In this section:
>
> "child" includes an adopted child, a step-child or an ex-nuptial child.
>
> "dependent child" means a child who is wholly or substantially dependent on the employee.
>
> "immediate family member" includes:
> (a) a spouse of the employee; ~~and~~
> (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee; and
> (c) an adult step-child, step-parent, step-grandparent, step-grandchild or step-sibling of the employee or of a spouse of the employee.
>
> "spouse" includes a former spouse, a de facto spouse and a former de facto spouse.

If this recommendation be adopted, **WLA NSW additionally recommends** that the

following consequential amendments be made (suggested amendment marked up where appropriate):

- that the term "family responsibilities" be removed from the section 4 definition section of the *Sex Discrimination Act* 1984 (Cth), and replaced with the term "responsibilities as a carer".
- that section 7A of the *Sex Discrimination Act* 1984 (Cth) be amended to read:

  Discrimination on the ground of ~~family~~ responsibilities as a carer

  For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's ~~family~~ responsibilities as a carer if:

  (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and

  (b) the less favourable treatment is by reason of:

  (i) the family responsibilities of the employee; or

  (ii) a characteristic that appertains generally to persons with family responsibilities; or

  (iii) a characteristic that is generally imputed to persons with family responsibilities.

- that section 14(3A) of the Sex Discrimination Act 1984 (Cth) be amended to read:

  Discrimination in employment or in superannuation

  …

  (3A) It is unlawful for an employer to discriminate against an employee on the ground of the employee's ~~family~~ responsibilities as a carer by dismissing the employee.

  …

Some employers have gone beyond the list of relationships recognised under the ADA definition of "responsibilities as a carer".[31] They have been willing to take into account an employee's responsibilities to care for:

- a niece or nephew;
- aunt or uncle;
- cousin; or
- a friend who is not related to them who they don't have a legal guardianship arrangement for but who, for example, needs their care or support because they are old and frail with no-one else to care for them, or because they have a disability and have no-one else to care for them.[32]

WLA NSW submits that updating the SDA so that it is responsive to modern circumstances, requires that consideration be given to expanding the definition of "family responsibilities" or "responsibilities as a carer". For this reason, **WLA NSW recommends** that consideration be given to expanding the definition of "family responsibilities" or "responsibilities as a carer", and that the above list of relationships of care be considered in doing so.

[31] Ant-discrimination Board of New South Wales, "Carer's Responsibilities and Flexible Work Practices," [Internet – http://www.lawlink.nsw.gov.au/adb.nsf/pages/carersflex. (Accessed 28 March 2005.)].

[32] Anti-discrimination Board of New South Wales, above.

(iv) Indirect discrimination: the reasonableness test

Beth Gaze has noted that:

> [the] test for the scope of indirect discrimination is vague and sets a standard significantly lower than the tests in the United Kingdom or the United States that seriously blunts the SDA's challenge to systemic discrimination … [and that] because of its open texture as a test, "reasonableness" can be a vehicle for transmission of traditional views of social practices and rejection of any requirement for change.[33]

The test of indirect discrimination has been a factor preventing men from accessing the provisions of the SDA in seeking redress for systemic barriers to flexible and family friendly work arrangements.[34] It has also been a factor limiting family responsibilities provisions under the SDA to direct discrimination generally.[35]

WLA NSW is concerned about the serious restrictions that the reasonableness test for indirect discrimination is placing on access to family responsibilities provisions under the SDA. Accordingly, **WLA NSW recommends** that this test be reviewed and reformed as appropriate.

(v) Special measures intended to achieve equality

Section 7D of the SDA provides a person with the capacity to introduce special measures for the purposes of achieving substantive equality between men and women, amongst other things. However, this does not include the introduction of special measures for the purpose of achieving substantive equality between employees with responsibilities as a carer and employees without such responsibilities. The use of the word "may" instead of "must" in section 7D provides a person in a position to introduce special measures with a discretion to do so. In an employer/employee relationship, this places the power to introduce flexible and family friendly work arrangements within the hands of the employer.

As Beth Gaze has stated, "actually eliminating discrimination entails transferring resources or power away from some people towards others".[36] Improving access to flexible and family friendly work arrangements for men and women requires the introduction of special measures, and requires that resources and power be transferred from employers to employees. In order to achieve this, **WLA NSW recommends** that section 7D(1) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

> **Special measures intended to achieve equality**
>
> (1) A person ~~may~~ must take special measures for the purpose of achieving substantive equality between:
> (a) men and women; or
> (b) people of different marital status; or
> (c) women who are pregnant and people who are not pregnant; or
> (d) women who are potentially pregnant and people who are not potentially pregnant; or

[33] B Gaze, above, n 10, at 5-6.
[34] Human Rights and Equal Opportunity Commission, above, n 5, at 86.
[35] Human Rights and Equal Opportunity Commission, above, n 5, at 83.
[36] B Gaze, above, n 10, at 3-4.

(e) people with responsibilities as a carer and people without responsibilities as a carer.

Alternatively, if our recommendations to amend the SDA to replace the term "family responsibilities" with the term "responsibilities as a carer" are not adopted, **WLA NSW recommends** that section 7D(1) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

Special measures intended to achieve equality

(1) A person ~~may~~ must take special measures for the purpose of achieving substantive equality between:
- (a) men and women; or
- (b) people of different marital status; or
- (c) women who are pregnant and people who are not pregnant; or
- (d) women who are potentially pregnant and people who are not potentially pregnant; or
- (e) people with family responsibilities and people without family responsibilities.

(vi) Discrimination in employment or in superannuation

For reasons similar to those for amending section 7D(1),[37] WLA NSW recommends that sections 14(1) and (2) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

Discrimination in employment or in superannuation

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, responsibilities as a carer, pregnancy or potential pregnancy:
- (a) in the arrangements made for the purpose of determining who should be offered employment;
- (b) in determining who should be offered employment; or
- (c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, responsibilities as a carer, pregnancy or potential pregnancy:
- (a) in the terms or conditions of employment that the employer affords the employee;
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
- (c) by dismissing the employee; or
- (d) by subjecting the employee to any other detriment.

Alternatively, if our recommendations to amend the SDA to replace the term "family responsibilities" with the term "responsibilities as a carer" are not adopted, **WLA NSW recommends** that sections 14(1) and (2) of the *Sex Discrimination Act* 1984 (Cth) be amended to read (suggested amendments marked up):

Discrimination in employment or in superannuation

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, family responsibilities, pregnancy or potential pregnancy:

[37] Above, at 11.

(a) in the arrangements made for the purpose of determining who should be offered employment;
(b) in determining who should be offered employment; or
(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, family responsibilities, pregnancy or potential pregnancy:
(a) in the terms or conditions of employment that the employer affords the employee;
(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
(c) by dismissing the employee; or
(d) by subjecting the employee to any other detriment.

(vii) Equal employment opportunity plans

Part 9A of the ADA requires all public sector organisations in New South Wales (including government department and authorities, New South Wales health authorities and hospitals and New South Wales universities), and all New South Wales local councils to prepare equal employment opportunity management plans. In order to ensure that measures are in place to monitor the standards of equal employment opportunity arrangements within similar organisations across the Commonwealth, **WLA NSW recommends** that such requirements to prepare equal employment opportunity management plans be introduced into the provisions of the *Sex Discrimination Act* 1984 (Cth).

WLA NSW further recommends that consideration be given to expanding requirements to prepare equal employment opportunity management plans to organisations apart from public sector organisations and local councils.

(viii) Equal opportunity workplace programs and reporting requirements

In discussions that WLA NSW has held with the New South Wales Equal Employment Opportunity Practitioners' Association (NEEOPA), the adoption of a model of external reporting similar to that required by section 13 of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth) (EOWWA) has been raised.

WLA NSW supports the reasons given by NEEOPA in its submission to this project for adopting such external reporting requirements. Section 6 of the EOWWA requires employers with 100 employees, or employers who had 100 employees but continue to have 80 and above employees, to develop and implement workplace programs. WLA NSW believes that consideration should be given to dropping the threshold of 100 employees in section 6 to less than 100 employees. Given that the EOWWA was derived from the more controversial affirmative action provisions of the Sex Discrimination Bill,[38] WLA NSW observes that the provisions of the EOWWA may assist in strengthening the provisions of the SDA if they are incorporated into the one act. This act might be an improved SDA or an *Equality Act*.

[38] B Gaze, above, n 10, at 7.

Accordingly, **WLA NSW recommends** that:

- the provisions of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth) be incorporated into a federal *Equality Act* along with the provisions of the *Sex Discrimination Act* 1984 (Cth); **or alternatively**
- that the provisions of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth) be incorporated into the *Sex Discrimination Act* 1984 (Cth) along with other amendments to this act; **and**
- that consideration be given to requiring employers with less than 100 employees to comply with the provisions of the *Equal Opportunity for Women in the Workplace Agency Act* 1999 (Cth).

(ix) Conclusion

The number of particular amendments to the SDA that WLA NSW has recommended and the number of issues raised for further investigation lends additional strength to our recommendation for a comprehensive review of the SDA.[39]

Question 26: Can an individual complaints mechanism adequately deal with discrimination on the basis of family responsibilities? If not, what other changes may be necessary?

WLA NSW submits that an individual complaints systems can go a significant way to dealing with the discrimination on the basis of family responsibilities, especially by allowing individual men and women to initiate complaints aimed at providing them with redress for difficulties they have encountered in accessing flexible and family friendly work arrangements.

However, an individual complaints system alone cannot adequately deal with discrimination on the basis of family responsibilities due to the complex nature of the relationship between legal, workplace and social policy frameworks in shaping behaviour and attitudes towards paid and unpaid work for men and women: changes to workplace culture, and social policy changes are necessary.

The limitations of the current individual complaints mechanism under the SDA, prevents it from adequately dealing, as far as possible, with discrimination on the basis of family responsibilities: legislative change in the form of amendments to the SDA, such as those we have recommended in this submission[40] are necessary.

Legal aid

Beth Gaze has maintained that the enforcement mechanism in the SDA has structural problems because it relies on complaints and legal action taken by individuals affected, or by groups.[41] She has observed that:

> complainants are given very little assistance in doing this: discrimination cases at federal level have virtually no access to legal aid for representation at hearing. They are left to their own efforts to obtain advice and representation, which many feel is essential in such a technical

[39] Above, at 7.
[40] Above, at 7-14.
[41] B Gaze, above, n 10, at 6.

area of law.[42]

This problem is further exacerbated by the fact that:

> complainants often face large and well-resourced respondents who may be repeat players in the sex discrimination field … Litigation has operated in favour of these respondents who are able to afford teams of the best lawyers. In response to their arguments, courts have developed stringent requirements for proof of discrimination, and technical readings of the legislation. These advantage respondents, and have made the law complex and difficult for complainants to use.[43]

To address this inadequacy of the individual complaints system under the SDA, **WLA NSW recommends** that federal government expand funding for representation by legal aid for complainants who are would otherwise be unable to afford appropriate representation.

3. WORKPLACE RELATIONS, POLICIES AND PRACTICES AND THE BUSINESS CASE FOR CHANGE

Mary Underwood, Research Officer, WLA NSW

In Respect of Chapter 8 of the Discussion Paper

Women Lawyers NSW observes that whilst the "change" basis towards more family-friendly workplaces is laudable and the support for an extended EEO awareness and practices is also fully supported, the current Government's foreshadowed charges to the IR system may undermine rights for all, particularly women in the workplace and, if that is to be the case, then there would be a severe deterioration in "striking the balance" for all workers in Australia.

Already Women Lawyers NSW have publicly noted its concern that there is no Parliamentary timetable for any of the IR changes, initially public discussion was limited to a the May Press Statement to the nation and more recently the detailed discussion of issues but still no Draft Bill for comment.

Women lawyers NSW have taken the position that without these usual mechanisms for examining supposedly wide ranging proposals, the public and experts in IR are at a disadvantage in their response to the foreshadowed stark policy shift.

Past major changes to the law or policy have always been executed by the government of the day tabling Draft Legislation for comment; e.g. the law of evidence or the Corporations Law, both of which had several drafts and many months of comment and consultation prior to being introduced into Parliament before being enacted. Moreover, it is the usual practice of the rule of law to allow such legislative and policy comment.

Women Lawyers NSW note that the information released to date on the IR changes appears to assume the proposed stark legislative and policy shift will assist a

[42] B Gaze, above, n 10, at 6.
[43] B Gaze, above, n 10, at 6.

"modernisation" approach and we will all benefit. The Government is saying that the changes will improve the economy, but where is the debate in detail of pragmatic economic benefits that will flow if sweeping IR changes are made? We say, without knowing the details of any proposed legislative charge one cannot assume anything.

That change is needed to IR may well be the case. In commenting on what has been revealed in the Press Release of last May and the more recent material released by the Government, Women Lawyers NSW make the following observations:-

The Australian Constitution ("the Constitution") divided into powers for federal, State and Territory governments reflects a division of powers essential in understanding the operation of the federal and State labour laws. In the list of subjects in the Constitution the federal government is given its subjects for enacting laws; any outside the list are exclusively for State parliaments. There is a balance of powers between the federal and States; s. 51 of the Constitution's list of federal powers are not exclusive powers, but are concurrent with State power, but by virtue of s. 109 of the Constitution, the federal law will override the State law.

Until mid 20th century federal IR laws were made by reference to the Conciliation ad Arbitration power; s.51 (xxxv). The federal government was limited to hearing disputes in IR matters that extended beyond the limits of any one State. In short, the States retained the bulk of IR. In 1983 the High Court of Australia overturned the restrictive or narrow interpretation of the labour power in the Constitution in the Australian Social Welfare case. Prior to this case for nearly 100 years, both federal and State labour regimes were almost the same; both mostly dealt with disputes between employers and employees and regulation of industries was mostly done by way of industry driven wages and rates.

After 1990, the IR system became more complex and the federal arena needed an "industrial dispute" or a situation that would give rise to one. In the 1956 and 1957 Boiler Makers case the law was settled that under federal labour law arbitral and judicial functions had to be undertaken by separate institutions. Put simply Federal Courts were prohibited from exercising judicial powers if they were arbitrating a dispute.

While the Trade and Commerce power has been used for some decades for laws regulating merchant seamen, waterside workers and airline crews; the constitutional framework was supported because it was regarded that the terms and conditions of employers and employees contained many aspects of interstate and overseas trade and commerce. However, with this shift the essential element of resolution of competing group interests through established conciliation and arbitration with mostly resultant award regulation was maintained.

The current proposal outlined by the Government to rely on the Corporations power to enact one national labour system, if it come to fruition, would be a most stark legal and policy change indeed. Whilst there are arguments for developing a more unified and simpler IR model, this does not necessarily have to mean a stand alone federally based model. Where is there evidence that the current system of federal and State models is a major obstacle to diminishing labour productivity? Many incorporated employers choose to operate under State labour laws. It would seem that there is ample room to simplify IR in the existing labour power of the Constitution to develop

a co operative national labour system.

Reliance on a unified IR system under the Corporations power would then see the development of labour law in the words of that power; which does not include terms relating to people or disputes over work or conditions. The Corporations power is not by its nature purposive, it is an object power. This gives rise to the basic premise of Women Lawyers NSW concern of enacting (if that is what will happen) labour laws based on that power; there is no reference to workers, people or individuals, including women. Conceivably if such an IR regime were enacted then all workers rights could be governed in part by the individual policies of international companies; organisations that have limited responsibility to Australian law. Women Lawyers NSW would be most concerned at such a development as Australian laws, rights and values in IR to date adequately reflect basic rights and values the community expects.

The Government has made comment in recent months that Australia needs to compete fiscally with China and India and that the overhaul of IR is linked to that process. Whilst remaining robust fiscally is a proper course of action, it should be noted that there would have to be limits to competition with a still totalitarian Communist State such as China. Furthermore, India, whilst a common law country, does not have the rights and conditions of employment enjoyed by Australians, who, Women Lawyers NSW believe would be reluctant to give up.

From a consistent ideological framework it can be argued that to achieve a better balance between family and work responsibilities, more "matters" should be included in awards, not a reduction. That this approach, which would foster greater flexibility in the ever more divergent society, would better enhance a "striking the balance" for workers and the economy.

There are also cogent arguments against most facets of the May press release, particularly in respect of women in the workplace, who are predominately in disproportionate numbers of the lower echelons of paid workers.

To date, but for the advertising campaign which is very sketchy Women Lawyers NSW, nor anyone else it seems have been given detailed and sustained financial argument as the basis for accepting even at an ideological level, the proposed IR changes.

In conclusion it appears that at face value the Discussion Paper on "Striking the Balance" has many laudable ideas and policy directions to assist women and families and to work out a formula for making the community and the country more economically savvy. However, it would seem that the whole notion of the community, family and especially women's work and hence earning rights may be undone if draconian IR laws are enacted.

SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON FAMILY AND HUMAN SERVICES

14 April 2005

Inquiry into Work and Family Balance

Submission to

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THE WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES

The Women Lawyers' Association of New South Wales (WLA NSW) is the peak representative body of women lawyers in New South Wales. Our membership is diverse and includes members of the judiciary, barristers, solicitors, government bodies, corporations, large and small city and country firms, legal centres, law reform agencies, academics and law students.

Since our establishment in 1952, WLA NSW has been dedicated to improving the status and working conditions of women lawyers in New South Wales. We have been active in advocating for and promoting law reform, frequently making submissions on anti-discrimination law, industrial equity, criminal law, women's health, legal aid, child care and gender bias in the legal profession.

Our dedication to equal opportunities for women in the legal profession is demonstrated through the various networking and mentoring programs we have implemented and/or supported, and through our support for and promotion of equal opportunity policies for women in the profession, such as the National Equality of Opportunity Briefing Policy adopted by the Board of Australian Women Lawyers on 20 September 2003.

The weight of our experience informs our submission. We thank Blake Dawson Waldron and Minter Ellison Lawyers for their support in preparing this submission. While we have focused on the position of women in the legal profession, many of the principles in this submission hold for the wider Australian community and the arguments we have put forward for reform are just as applicable.

THE ISSUES – FINANCIAL, CAREER AND SOCIAL DISINCENTIVES TO STARTING A FAMILY

Financial Disincentives

The financial disincentives to starting a family are the same for women lawyers as for members of other professions. They include the:

- Greater impact on the employment and earnings of mothers than on fathers that child rearing has.[44] This is captured by a comment made by one of our members:

[44] Australian Department of Family and Community Services and Department of Employment and Workplace Relations, *OECD Review of Family Friendly Policies: The Reconciliation of Work and Family Life*, August 2002, at 14.

"My career has plateaued since having my children. However I was aware that this would occur as I chose to I return to work in a part time capacity. I purposely chose to have my children close together in age so that I could minimise the interruption my clients. However I expected my career advancement to improve once I had returned to the workforce after my second child. That has not happened. I suspect it may not happen unless I return to work 4 days per week (in which case I will most likely be doing a 5 day job in 4 days). This is not something that I would contemplate at this stage unless my husband was able to reduce his hours to spend a day with the children".

- *WLA NSW member, Senior Associate in a major law firm working 3 days per week with 2 children under 5 years.*

- Lessening in value of labour market skills that is associated with taking time out to have a family.[45] As this woman lawyer puts it:

"Return to work after my first child was born was … necessary to continue practising, without significant time off, to ensure my future employability".

- *WLA NSW member, in practice for 7 years with 2 children, aged 4 and 2.*

- Availability of paid maternity and paternity leave. Most law firms reflect the Australian business culture of generally not paying staff on maternity leave.[46] 28% of respondents to the Law Society of New South Wales 2002 inaugural Remuneration and Work Conditions Survey reported that paid maternity leave was available to them, with 41% of respondents being unsure if their organisation offered paid maternity leave, and 9% of women participating in the survey reporting that they had accessed paid maternity leave.[47]

  On average female solicitors take nine weeks of paid maternity leave.[48] Anecdotal evidence suggests that women lawyers take less maternity leave than non-legal employees in legal organisations. Such decisions are influenced by systemic pressures within the profession such as the fact that promotion is based in part, on fee-earning capacity,[49] and the value placed on continuity of client contact.

- Cost of child care. Many members of the legal profession are resorting to private nannies for childcare as it can often be more than a year's wait before a position in a childcare centre becomes available. The opening and closing hours of childcare centres are often inflexible and do not coincide with the sometimes long hours that lawyers work. Late fees are imposed for every hour that a lawyer is, for example, caught up with a client or in city traffic and

[45] Australian Department of Family and Community Services and Department of Employment and Workplace Relations, above, at 15.
[46] The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 25.
[47] The Law Society of New South Wales, above, at 25.
[48] "Law Society Report: Remuneration and Work Conditions", *Law Society Journal* (NSW Australia), March 2002, [Internet – http://www.lawsociety.com.au. (Accessed 31 March 2005).].
[49] Australian Law Reform Commission, ALRC 69 Part II Equality Before the Law: Womens Equality, 1 October 1994, [Internet – http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol2/ALRC69.html. (Accessed 8 April 2005).], at [9.23].

delayed from picking up their children.

In 2002 the Taxation Committee of the Law Society of New South Wales Business Law Committee considered what tax relief was available in relation to childcare arrangements for women in the legal profession. It concluded that the tax system provides limited benefits to employees who incur childcare expenses while they are at work.[50] Childcare expenses are not deductible as a general tax deduction, and income support for childcare from the government is based on Australian social security arrangements which, unlike the position in many other OECD countries, are flat rate, means-tested[51] and not accessible to most members of the legal profession. Any non-means tested support does not provide enough support for most members of the legal profession to be meaningful:

"I appreciate that the government does give some non-means tested assistance to child care. Currently that is approximately $3 per day. When the centre charges $80 per day, the $3 is laughable. With current petrol prices that probably covers the petrol to drive them to child care".

- *WLA NSW member, Senior Associate in a major law firm working 3 days per week with 2 children under 5 years.*

- Gender gap in pay. The number of bright young women graduating from law schools is greater than ever, yet the gender gap in pay remains. In many instances this serves as a disincentive to women having children earlier in their career life while they build an income base for the years when they expect to have a family. In the income year 2001-2002 male and female solicitors reported significantly different income levels irrespective of type of practitioner, location of practice and years in practice.[52] The average income for female solicitors was $75 700 compared to $92 000 for male solicitors in that financial year.

  In 2004, 18% of practicing barristers across Australia were women, but they received only 6% of fees from government panel briefs.[53] The number of promotions which secure larger pay dollars continue to serve as a statistic disproportionately against women: in 2001 7.2% of female solicitors were partners while 27% of male solicitors were partners.[54] Generally across the profession, there is a fall in the percentage of solicitors practicing as partners, with the percentage of men practicing as partners steadily declining.[55]

  Female solicitors do not share the same career aspirations as their male colleagues when it comes to partnerships. 50% of female respondents to the Law Society of New South Wales 2002 Remuneration and Work Conditions Survey identified commitment to family/personal responsibilities, compared to

[50] The Law Society of New South Wales, above, n 47, at 26.
[51] Australian Department of Family and Community Services and Department of Employment and Workplace Relations, above, n 44, at 26.
[52] The Law Society of New South Wales, above, n 47, at 8.
[53] Statistic published by Victorian Attorney-General Rob Hulls, referred to in "How to Rip Through the 'Silk Ceiling'", *Lawyers Weekly*, 15 October 2004, at 18.
[54] The Law Society of New South Wales, above, n 47, at 35.
[55] The Law Society of New South Wales, above, n 47, at 35.

23% of men, as a reason why they thought it was unlikely or very unlikely that they would become partners.[56]

- Segregation by area of law and practice type. Many women lawyers are segregated in areas of law traditionally seen as "female", such as constitutional/administrative law and family law.[57] The experience of women lawyers reflects the experience of women in the workforce generally, with the areas of employment dominated by women characterised by lower status and pay.[58]

  On 1 August 2002, 66% of practicing women solicitors were in private practice, 14% practiced in the Government sector and 17% in the corporate sector.[59] For the taxable income year ending 20 June 2001, the mean income for each sector was: $67 000 in the private sector, $70 000 in the Government sector and $ 102 000 in the corporate sector.[60]

  The effects of segregation are more pronounced when the later entry of women into the profession and their consequent accumulation in the lower ranks of the profession are taken into account.

Carer & Social Disincentives

Carer disincentives to starting a family for women lawyers are also "social" disincentives because most carer disincentives are a result of the culture of the legal profession and the attitudes instilled within this culture. These barriers and disincentives include that:

- Historically the legal profession is dominated by Anglo Celtic men. The progression of women through the upper levels of the legal profession has been slow, and the higher ranks of the legal profession continue to be considered as an "exclusive" territory which is largely the domain of men. The pressures of taking time out to have a family followed by the challenges of balancing work and family are seen to jeopardise the chances of a woman lawyer's promotion through the profession, particularly because women continue to perform 70% of all unpaid household work in Australian households.[61] What this woman lawyer has said illustrates some of these points:

[56] The Law Society of New South Wales, above, n 45, at 15-16.
[57] Australian Law Reform Commission, above, n 50, at [9.23].
[58] Australian Law Reform Commission, above, n 50, at [9.23].
[59] The Law Society of New South Wales, above, n 50, at7.
[60] "Law Society Report: Remuneration and Work Conditions", above, n 49.
[61] "After the Barbeque: Women, Men, Work and Family", Speech by Pru Goward, Federal Sex Discrimination Commissioner at the "Families Matter" Australian Institute of Family Studies Conference, Melbourne, 10 February 2005, [Internet – http://www.hreoc.gov.au/speeches/sex_discrim/aifs/html. (Accessed 13 March 2005).].

"It is very difficult to maintain any career, let alone a legal one, with 2 children.

If I were to have a third child I do not think I could continue to practise. As it is I feel guilty that I'm not giving 100% to either my family or my work. I just don't think I could keep all the "balls in the air" with another child in the equation".

- *WLA NSW member, in practice for 7 years with 2 children, aged 4 and 2.*

- Within the culture of the legal workplace, as with other workplaces, attitudes that flexible work options belong on the "mummy track"[62] or " never-to-be-promoted daddy track"[63] persist, as do the attitudes that balancing work and family is a woman's concern,[64] the field of the less ambitious, slack or soft. More men may be expressing the desire to seek a better balance between paid work and family commitments,[65] but the low uptake of family friendly practices by men continues.

  In a survey of 1000 fathers, more than half believed that the major barrier to being the kind of father they wanted to be was the commitment to paid work.[66] Until the differences in provisions for paid maternal and paternal leave are addressed, and sufficient education and training targeted at changing existing attitudes is introduced, it will be difficult to change the unwillingness and inability of men to forgo income. Workplace and managerial cultures impede men's use of unpaid parental leave provisions. Income maintenance will assist in encouraging fathers to take time out of the workforce to care for children.[67]

  Many women as well as men in the legal workplace feel pressured by their perception of how others in their workplace will perceive them. While various firms and organisations have come a long way in introducing flexible arrangements and programs to the legal workplace, the toughest barriers to overcome are attitudes based around the individual. Firms and organisations can introduce part time, job share, work from home or other arrangements, but until individual-based attitudes are overcome, men and women will not be encouraged to take advantage of the options that are available.

- There is a lack of role models and mentors for women and a lack of formal networking groups. Allowing both men and women to share stories of how they managed to have a family on their journey to partnership or the bar will

[62] The Law Society of New South Wales, above, n 47, at 9.
[63] "Coming of Age: the Sex Discrimination Act, women, Men, Work and Family", Address to the National Press Club in Canberra by Pru Goward, Federal Sex Discrimination Commissioner and the Commissioner Responsible for Age Discrimination, 9 February 2005, [Internet – http://www.hreoc.gov.au/speeches/sex_discrim/press_club.html. (Accessed 13 March 2005).].
[64] "Striking the Balance with Work and Family", Media Release by Pru Goward, Federal Sex Discrimination Commissioner, 4 February 2005, [Internet – http://www.hreoc.gov.au/media_release/2005/04_05.html. (Accessed 13 March 2005).].
[65] "Striking the Balance: Women, Men, Work and Family, A Snapshot of Some of the Facts Informing the Project", [Internet – http://www.hreoc.gov.au/sex_dicrimination/strikingbalance/snapshot.html. (Accessed 13 March 2005).].
[66] "Striking the Balance: Women, Men, Work and Family, A Snapshot of Some of the Facts Informing the Project", above.
[67] "Striking the Balance: Women, Men, Work and Family, A Snapshot of Some of the Facts Informing the Project", above, n 66.

go a long way in changing attitudes within the legal profession as to what a "mainstream" career path is.

- Difficulties in balancing carer and family can be multiplied for those who are female, indigenous Australian, have a disability and/or come from a non-English speaking background.

WHAT CAN BE DONE – MAKING IT EASIER FOR PARENTS WHO SO WISH TO RETURN TO THE PAID WORKFORCE

Government Funded Paid Parental Leave

In December 2002 Australian Women Lawyers (AWL) made a submission in response to the Options for Paid Maternity Leave Interim Paper 2002 of the Human Rights and Equal Opportunity Commission. WLA NSW continues to support the view submitted by AWL that paid maternity leave should be paid parental leave so that it is available to both men and women who are in the paid workplace and who are self-employed. Paid parental leave should be government funded, it should not be subject to means-testing, and it should be available for 14 weeks in accordance with the International Labour Organisation (ILO) standard, which has been internationally recognised as the appropriate period under Articles 4 and 6 of the ILO 183 Maternity Protection Convention 2000.

Australia has not ratified ILO 183, but all OECD countries apart from Australia and the USA provide paid maternity leave.[68] In Denmark employees are entitled to 30 weeks maternity leave at full pay; in Norway, 42 weeks at full pay; in Finland, 52 weeks at 70% pay; and in Sweden, 64 weeks at 63% pay.[69] Since 1 July 2002 paid parental leave has been introduced in New Zealand providing for 12 weeks paid leave.[70]

The 14 weeks ILO standard should be set as the universal minimum standard for parental leave in appropriate federal, state and territory legislation, such as Division 5 and Schedule 14 of the *Workplace Relations Act* 1996 (Cth), and Part 4 of the *Industrial Relations Act* 1996 (NSW). We recommend that paid parental leave be paid at the rate of the minimum wage level to all parents who are the primary carers of their child, and who have spent the previous 12 months in the labour force. This should be paid pro rata for those earning less than the minimum wage. Employers should be free to "top-up" the payment if they wish.

Government Funding and Subsidies for Education and Training Programs

Funding, education and co-ordination of agencies and services are the key to changing the attitudes which serve as barriers to men and women taking up flexible work options. WLA NSW recommends that the federal government provides subsidies to firms and organisations providing employees with education and training

[68] The Law Society of New South Wales, above, n 47, at 25.
[69] The Law Society of New South Wales, above, n 47, at 25.
[70] The Law Society of New South Wales, above, n 47, at 25.

programs. Programs and resources targeted at addressing attitudinal barriers should be developed and funded. WLA NSW further recommends that awards given by government departments for work and family balance initiatives, such as the Equal Opportunity for Women in the Workplace Agency Awards, and the Australian Chamber if Commerce and Industry/Business Council of Australia National Work and Family Awards, should place a greater emphasis on recognising the value of educating and training male employees on flexible work arrangements. Increases in the rate at which such arrangements are taken up by male members of staff should also be acknowledged as an achievement on the part of organisations applying for such awards.

We additionally recommend that funding by federal and state governments be provided for the introduction of mentoring and networking programs for men and women employees, but particularly for women lawyers who seek to have a family while continuing on their career path.

Tax Deductions for Care Costs & The Impact of Taxation on the Choices that Families Make in Balancing Work and Family

"I am lucky to be in an occupation that is well paid. Despite this child care still consumes one third of my after tax salary. If we were to consider having a larger family serious thought needs to be given to whether we could afford another child in child care (ie an increase of our current child care costs by 50%)".

- *Comment from WLA NSW member: Senior Associate in a major law firm working 3 days per week with 2 children under 5 years.*

WLA NSW is an active and supportive member of the Taskforce on Care Costs (TOCC). We endorse the findings, submissions and recommendations of the TOCC which support the introduction of a scheme for the tax deductibility of care costs. We accordingly recommend that the federal government:

- Immediately draft legislation (for consultation) to implement its promised 30% rebate for care costs;
- Extend the child-care rebate to cover elder and disability care costs;
- Extend the 30% rebate to a more meaningful level (i.e. closer to dollar for dollar rebate) and remove the proposed $4 000 cap;
- Introduce reforms to assist the cost of care in combination with a strategy to improve the accessibility and quality of care;
- By June 2006 release a public report identifying the steps it has taken to implement the Taskforce's recommendations.

CONCLUSION

WLA NSW maintains that the declining birth rate is not only a "women's issue". It is not necessarily women who are reluctant to have children – their partner has to be willing as well.

Many firms and organisations are introducing flexible work options so that they are available to both men and women, but the existence of such options alone is not

enough. Much can be achieved in encouraging both sexes to access flexible work options by government funding and support, education, co-ordination on the part of state and federal governments in setting uniform minimum entitlements, co-ordination of state and federal agencies and services, and co-operation between employers, employees and members of both sexes.

Making flexible work options more accessible for our male colleagues within and outside of the legal profession will have a significant impact on the choices that women of child-bearing age are making to delay, or in some cases give up on, having children. It will also enhance the opportunities for professionals to continue in their chosen career while having a family. Lawyers, both men and women, who seek to balance work and family while rising through the profession do not lack ambition. What they need is support. Support from government will go a long way in changing the social attitudes and gender stereotypes that undermine the accessibility of family friendly work arrangements.