

ANTI DISCRIMINATION COMMISSION QUEENSLAND

Submission to Queensland Industrial Relations Commission for consideration in its Pay Equity Inquiry June 2007

1. Introduction - Queensland's International obligations

1. The Anti Discrimination Commission (the ADCQ) is established under the *Anti-Discrimination Act 1991*. One of the functions of the ADCQ is to promote an understanding and acceptance, and the public discussion of human rights in Queensland.

2. A major purpose of the *Anti-Discrimination Act (the ADA)* is to promote equality of opportunity for women by protecting them from unfair discrimination in the area of work.

3. The Queensland Parliament in passing the *ADA*, cited its support of the Commonwealth in ratifying a number of international instruments. Those instruments include the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Labour Organisation (ILO) Convention concerning Discrimination in respect of Employment and Occupation (ILO 111) and the International Labour Organisation Convention on Workers with Family Responsibilities (ILO 156).

4. CEDAW requires parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women:

- the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the rights to receive vocational training and retraining;
- the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.¹

5. ILO 111 requires parties to eliminate discrimination in employment on a range of grounds including sex. Discrimination is defined as:

any distinction, exclusion or preference made (on the basis of any ground) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.²

¹ Article 11 of CEDAW

² Article 1.3 of ILO 111

6. ILO 156 states that with a view to creating effective equality of opportunity and treatment for men and women workers, parties shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination, and to the extent possible, without conflict between their work and family responsibilities.³

7. ILO 156 further states that all measures compatible with national conditions and possibilities shall be taken:

- to enable workers with family responsibilities to exercise their right to free choice of employment; and
- to take into account their needs in terms and conditions of employment and in social security.⁴

8. Australia is also obliged under the ILO Equal Remuneration Convention (ILO 100) to 'ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.'⁵

9. The important human rights issues raised in these conventions means that equality in employment, and particularly pay equity for women, is a critical element to achieving substantive equality between men and women.

2. The Present Scope of the *Anti Discrimination Act* to deal with Pay Equity issues

2.1 Complaint Process

10. One of the primary functions of the ADCQ and the Anti Discrimination Tribunal (the ADT) under the *ADA* is to deal with complaints of discrimination. This includes complaints of discrimination on the basis of sex in the pre-work and work area.

11. Discrimination can be either direct or indirect discrimination.⁶

12. Direct discrimination on the basis of sex happens if a person treats, or proposes to treat, a person of a particular sex less favourably than a person of the opposite sex is or would be treated **in circumstances that are the same or not materially different.**

13. Indirect discrimination on the basis of sex happens if a person imposes a term, with which a person of a particular sex is not able to comply, and with which a higher proportion of people of the opposite sex are able to comply, that is not reasonable.

14. The comparator methodology required to prove direct discrimination works well in cases of discrimination where men and women are performing the same or similar work in the same workplace. The complaint process under the *ADA* can be an

³ Article 3 of ILO 156

⁴ Article 4 of ILO 156

⁵ Article 2 (1) of ILO 100

⁶ Section 10 and 11 of the *ADA*

effective remedial solution to pay inequity in its most extreme and obvious forms. However, 'anti discrimination legislation by and large does not sufficiently address systemic discrimination, or undervaluation, deriving from the operation of a broad range of factors including occupational segregation.'⁷

15. The meaning of 'circumstances that are the same or not materially different' as elucidated through discrimination cases does not readily permit comparisons of the payment of male and female workers within workplaces if they are performing different types of work, between workplaces even when they are performing similar work or between different sectors in the workplace. The recent High Court decision in the *Purvis case*⁸ shows the recent narrow approach being adopted by the courts when determining the relevant comparator in order to be able to establish discrimination.⁹

16. While the *ADA* does permit complaints to be made on a representative basis, again the legislation and the case law establish that the representative complainants must have questions of law and fact common to all members of the class, and the allegations of discrimination made by the representative complaint, need to be similar or related to the alleged discrimination in relation to the other members of the class.¹⁰ This can be problematic in cases where a representative complainant or group of complainants are complaining of direct and indirect discrimination that they allege affects a larger group; see *Harris and Pyne v Transit Australia Pty Ltd and Queensland Transport*¹¹

17. Remedies available under the complaint process of the *ADA* compensate for past harms caused by discrimination, and generally have an individualised focus. They cannot address large scale structural inequalities and attack problems that are not largely based on an individual situation or the situation of a limited class of representative complainants. For this reason the present complaints based process of the *ADA* is not well suited to dealing with pay equity issues, particularly on a broad systemic basis involving either work of 'equal' or 'comparable' value.

2.2 Other ADCQ and ADT Functions

18. The ADCQ in addition to its complaint handling function also has a number of other functions conferred on it under the *ADA*. These functions include:

- to undertake research and educational programs to promote the purposes of the *ADA*, and to coordinate programs undertaken by other people or authorities on behalf of the State;
- to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the *ADA*;
- to promote an understanding and acceptance, and the public discussion, of human rights in Queensland;

⁷ Quoting Her Honour Glynn J in the NSW Pay Equity Inquiry, p122

⁸ *Purvis v State of New South Wales*(2003) 217 CLR 92

⁹ See also *Edwards v Hillier & Educang Ltd* (2006) QADT 34 and *Hickie v Hunt & Hunt* (1998) HREOCA 8.

¹⁰ Sections 146-151 and 194-200 *ADA*

¹¹ (1999)QADT 1 (25 February 1999).

- if the ADCQ considers it appropriate to do so- to intervene in a proceeding that involves human rights issues with leave of the court hearing the proceeding and subject to any conditions imposed by the court;
- other such functions as the Minister (the Attorney General) determines.¹²

19. While the ADT's main function is hearing and determining complaints of discrimination, other functions can be conferred on it under another Act.¹³

20. While the above functions permit the ADCQ to consider and identify systemic discrimination in certain circumstances, the functions and associated powers do not provide for any remedies for changing systemic issues that have been identified.

21. For this reason the present non complaint based functions of the ADCQ under the *ADA* can only have a very limited role in addressing pay equity issues on any sustained basis.

3. Can the Anti Discrimination Act be amended to deal with Pay Equity Issues?

3.1 Constitutional Issues arising under Workplace Relations Act 1996 (WRA)

22. As identified by the QIRC in its discussion paper, section 16 of the amended *WRA* has a number of very specific as well as some very broad exclusions of State powers. The issue is whether the *WRA* covers the field with respect to measures to address pay equity for employees of constitutional corporations? Section 16(1)(c) of *WRA* specifically excludes any law providing for a court or tribunal constituted by a State to make an order in relation to equal remuneration for work of **equal** value. The definition of 'equal remuneration for work of equal value' is a reference to equal remuneration for men and women workers for work of equal value, which has the same meaning as in the *Equal Remuneration Convention 1951*. Article 1 of the Convention provides the term refers to **rates of remuneration established without discrimination based on sex**.¹⁴ The ADCQ notes that the breadth of the meaning of the term 'equal remuneration for work of equal value' provided by article 1 the *Equal Remuneration Convention 1951* could be argued to cover both work of equal or comparable value.

23. The QIRC poses the question whether amendments could be made to the *Anti Discrimination Act* to permit the Anti Discrimination Commission or Tribunal to make equal remuneration orders based on **comparable** value. The QIRC also reflects 'with the loss of collective remedies through industrial regulation, perhaps Queensland should also explore human rights remedies that go beyond individual complaints of past discrimination.'¹⁵

24. The ADCQ while not having a definitive view on either of these questions, believes there is very limited scope for amending the *ADA* to permit either the Anti Discrimination Commission or Tribunal to make equal remuneration orders based on either work of equal or comparable worth, other than in the framework permitted by

¹² Section 235 *ADA*

¹³ Section 248 *ADA*

¹⁴ Section 623 of *WRA*

¹⁵ Pay Equity Inquiry Discussion Paper, QIRC April 2007 p24

section 16(2) (a) of the *WRA*. That section permits State laws that deal with the prevention of discrimination, the promotion of EEO or both, and is neither a State industrial law nor contained in such a law. A 'State industrial law' includes an Act of a State that applies to employment generally and has one of its main purposes regulating workplace relations or providing for the determination of terms and conditions of employment.¹⁶ A State law 'applies to employment generally' if it applies to all employers and employees in the State, or all employers and employees in the State except those identified (by reference to a class or otherwise) by a law of the State. The *Tristar case*¹⁷ appears to affirm the *WRA* covers the field other than those limited exclusions listed in ss 16(2) and (3).

3.2 Options for Amending the ADA

3.2.1 Amending the Definition of Discrimination based on sex

25. There may be scope for amending the definition of discrimination under the *ADA* so as to make it clear that discrimination on the basis of sex in the area of remuneration for work can include an examination of rates of remuneration of both an equal or comparable value. The phrase 'circumstances that are the same or not materially different' could, in the context of discrimination on the basis of sex in the area of work remuneration, be amended in such a manner to include circumstances where the duties, skills, working conditions and responsibilities of employment are of equal or comparable value or worth. The effect would be that an individual or representative female complainant could seek to prove direct sex discrimination in the area of work remuneration, by reference to an individual male comparator or group of male comparators who perform work of equal or **comparable** value.

26. Adding a 'comparable value' comparator would be a significant change to the present approach of the courts and tribunals in determining direct discrimination.¹⁸ The drafting and the subsequent legal interpretation of such an extended definition of direct discrimination is likely to present challenges to the effectiveness of the legislative intent. While such a change may benefit a small group of individuals or a group of representative complainants who can successfully prove a sex discrimination case in their particular situation of remuneration for their work, the remedies they could achieve would only apply in their particular case. The court or tribunal has no power to order a collective or sector wide remedy. The logistics of gathering the relevant evidence and proving direct discrimination would still be very problematic for a complainant running such a case, even within the same workplace.¹⁹ The ADCQ suggests there would be formidable problems in gathering the relevant evidence and proving a case of discrimination where the male comparator is not within the same workplace.

27. For the reasons discussed above, even with such a change to the definition of direct discrimination, it is highly unlikely to result in any large scale or systemic changes for women in achieving pay equity.

3.2.2 Expanding the orders the Commission or Tribunal may make.

¹⁶Section 4 *WRA*

¹⁷ *Tristar Steering and Suspension v Industrial Relations Commission of New South Wales* (2007) FCAFC 50

¹⁸ See paragraphs 13 and 14 above

¹⁹ See *McCrostie v Boral Resources(Qld) Pty Ltd* (1999) QADT 4 (22 March 1999)

28. The QIRC discussion paper discusses possible amendments to the ADA to permit the Commission or Tribunal to make equal remuneration orders based on comparable worth.²⁰ The discussion paper speculates whether it may be possible for an equal remuneration order based on comparable worth to direct that the specified employee or class of employees be reclassified.

29. Under the ADA as it stands, ADC has no power to make any substantive orders which bind parties to complaints. It does have power to make certain procedural orders.²¹

30. The ADT has both procedural and substantive powers. Its power to make substantive orders if a complaint is proven includes orders requiring the respondent:

- not to commit further contraventions of the ADA;
- to pay compensation for loss or damage;
- to make a public or private apology or retraction;
- to do specified things to redress loss or damage suffered by the complainant or another person because of the contravention;
- to implement programs to eliminate unlawful discrimination.²²

The remedies can only apply to the respondent to the particular complaint before the Tribunal. The Tribunal has no power to make substantive orders binding on non parties to the complaint. Therefore its orders can have no direct impact on any other employer.

31. Under the existing remedies available to it, it is highly unlikely that the Tribunal would make orders for reclassification if a complaint of sex discrimination on the basis of remuneration was proved. However the Tribunal may be prepared to make an order that a particular complainant or representative group of complainants be paid at a rate equivalent to a relevant comparator employee, who may be either an individual employee or a group of employees.

32. To expand the powers of the Tribunal to cover a group of people broader than the parties to a particular complaint (or the employees of those parties), would appear to be constrained by the limitations imposed by section 16 of the WRA discussed in 3.1 above

3.2.3 Amending sections 235 or 248 of the ADA to add further functions to the Commission or Tribunal

33. The QIRC in its discussion paper notes that the Victorian Working party in its 2005 report recommended non complaint based investigations and other proactive measures be made available under the *Equal Opportunity Act 1996(Vic)*.²³

²⁰ p 23 IRC discussion paper.

²¹ For instance see ss156, 157,159 and 160 of the ADA.

²² Section 209 of the ADA

²³ Victorian Pay Equity Working Party, *Advancing Pay Equity-Their Future Depends on It*, 2005, Recommendation 12.

34. It may be possible for non complaint based investigations and other proactive measures to be inserted into the *ADA* to provide additional functions to either the ADC or the ADT. However, the constitutional limitations proscribed by section 16 of the *WRA* may constrain the scope and impact of any such additional functions.

35. Queensland could decide to adopt one of the overseas models discussed in the QIRC discussion paper, and either the *ADC* or the *ADT* could be given the function of administering the legislation. The critical issue would be whether such a function 'applies to employment generally' and has as one of its main purposes 'regulating workplace relations' or 'providing for the terms and conditions of employment.' Many of the overseas models have mandatory legislative provisions requiring certain groups of employer organisations to undertake activities such as formulating or implementing pay equity plans or audits. If a similar model with mandatory requirements being imposed on employers were adopted in Queensland, could the law be argued to be a 'State industrial law', even though the function has been conferred under anti discrimination legislation? The ADC does not claim any particular expertise in either constitutional or industrial law and would defer to the advice of those with expertise in this regard.

36. The ADC could be given a general investigative function to examine pay equity in Queensland. This would seem however, to be a duplication of the role already being successfully undertaken by the QIRC.

37. The ADC could be given a function to raise public awareness of pay equity through education and training. Other such functions as are outlined in the QIRC discussion paper at page 37 that are currently performed by the New Zealand Pay and Employment Equity Unit or the Western Australian Pay Equity Unit, could be legislatively conferred on the ADC.

3.2.4 Other possible amendments to ADA

38. While not strictly confined to the issue of pay equity, the ADA could be amended in a similar manner to that recently proposed for the *Equal Opportunity Act* by the Victorian Government to include 'employment activity' as a ground for discrimination. This will mean that termination on the basis of 'employment activity', such as checking pay rates or information regarding working conditions, will be unlawful and open for all employees to challenge.

4 The ADC's Preferred Options to be adopted in Queensland

4.1 Legislative Models

39. If there are no legislative constraints imposed by the *WRA* and Queensland does have power to adopt and implement legislative models similar to those implemented in Sweden or Quebec, United Kingdom and the Netherlands, France or Switzerland, the ADCQ submits that a strong mandatory model binding all employers should be passed in Queensland. Such a legislative model is likely to be one of the most effective means to have systemic outcomes, if combined with other measures to address the underlying causes of the gender pay gap.²⁴ This type of measure becomes even more necessary, given that the individualisation and

²⁴ Other measures include the implementation of the recommendations in the 2007 HREOC Report '*Its About Time.*'

decentralisation of wage bargaining, and the removal of state based equal remuneration principles under *WorkChoices* eliminates some of the former means of reducing the gender pay gap.

40. The ADCQ suggests the Quebec *Pay Equity Act* has a number of elements, which with the addition of provisions requiring organisations to methodically report on their compliance and a bolstering of monetary sanctions for non compliance, could be an effective means of systematically advancing pay equity in Queensland. The reported results of 80% of employers employing more than 200 staff completing pay equity plans, and pay increases of 5.6% in predominately female occupations, and 8.4% for female occupations found in businesses employing between 10 and 49 employees, indicates the model is having some impact on redressing the gender pay gap in Quebec.

41. The Quebec *Pay Equity Act* also confers on an individual employee a right to file a complaint with the Commission de l'équité salariale for one of the following reasons:

- if their employer did not go through the pay equity process, or did not post the results of the process so the staff could read them;
- the employee has reason to believe that the employer's acts or attitude do not comply with the *Pay Equity Act*;
- the employer has noted gender bias or gender discrimination in the pay equity process;
- reprisals are being taken against the employee for having exercised a right provided under the Act.

If the Commission finds the complaint is founded, it determines the measures to be taken by the employer to comply with the Act, and sets a deadline for the implementation of those measures. If the measures are not implemented the Commission can take steps to have its decision executed. If this complaint process is utilised, it may add an extra oversight to the implementation of the steps required by the model.

4.2 Non legislative models

4.2.1 Pay Equity in the Queensland Public Service

42. If legislative constraints are imposed by the *WRA* such that Queensland does not have the power to pass legislation mandating employers to take actions to assist in addressing gender pay equity, the ADC submits that a model similar to that implemented in New Zealand ought to be implemented in Queensland.

43. Like New Zealand, Queensland should show its commitment to gender pay equity by implementing specific pay equity initiatives for its own employees. The ADCQ suggest the measures should include:

- establishing a pay equity unit or agency that has the function of overseeing pay equity initiatives;
- developing a pay equity plan of action including the requirement that all government agencies including government corporations conduct pay

equity audits and implement a strategy to address any pay inequities that may be identified;

- mandatory systematic reporting on audits and implementation strategies, and the development of reporting and data collection mechanisms should be a component of the plan;
- ensuring the job evaluation tool used in the public sector is gender neutral and appropriately recognises and values undervaluation identifiers; including soft skills;
- developing capacity within government to ensure the expertise exists within agencies to undertake the pay equity audits and the implementation of strategies to address inequities;
- ensuring additional funds are allocated to agencies to remedy any pay inequities that are identified;
- establishing a contestable fund that is available to public service, public education and public health employers and unions to undertake specific projects to support pay and employment equity, to undertake pay equity audits and provide ongoing training and support.

4.2.2 Queensland Government as Information Provider

44. The Queensland Government pay equity unit or agency should be given the function of providing the private sector with pay equity information similar in content and method to that provided by the Victorian and Western Australian governments. Links should be provided to the EOWA and the New Zealand pay equity tools. The government should encourage voluntary compliance by the private sector, and consider appropriate incentives for employers who can demonstrate that they have undertaken pay equity audits and have taken action to achieve pay equity at all levels of their organisation.

45. The unit or agency should also have the responsibility to gather and report Queensland statistics in relation to gender pay equity, to design and co-ordinate education campaigns to increase awareness of gender pay equity in the business and wider community.

4.2.3 State Purchasing Policy

46. Preferred tenderer status should be conferred by the Government on those organisations that have undertaken an approved gender pay equity audit and have taken action to achieve pay equity at all levels of their organisation. The QIRC discussion paper notes that this measure has been introduced in Switzerland. Public procurement policies are increasingly being used internationally to further social goals including equality in employment. Procurement policies can attain these objectives by requesting contractors to modify the gender, racial or ability/disability make up of their workforce, or by encouraging contractors who are female or belong to racial or ethnic minorities to partake in public tenders. The USA, South Africa and Europe are all using procurement policies to promote equality in the workplace.²⁵

²⁵ See *Equality at Work: Tackling the Challenges* Report I(B) International Labour conference 2007 at pp 64-67.

4.2.4 Other Measures

47. There are a number of recommendations in the 2007 HREOC report *It's About Time: Women, men, work and family* that could be implemented by the Queensland government, particularly for Queensland government employees. The QIRC Report notes that HREOC found that pay inequity is a major factor in determining the choices men and women make about who undertakes care within couple families. One of the key themes of the report was a call for support for a society which values shared work and shared care. In order to create real choice for men and women (in relation to paid and unpaid work), a greater effort is required to progress pay equity and fostering a culture where men and women both take responsibility for the care of family members.

48. The ADC urges Queensland, where ever it has jurisdiction or power to do so, to implement the recommendations of the HREOC report in Queensland, and in particular the following:

- That workers with family and carer responsibilities have a right to request flexible work arrangements with a corresponding duty on employers to reasonably consider those requests. Refusal to reasonably consider a request for flexible work arrangements could be the subject of a complaint to the ADCQ (recommendation 6).
- With State training authorities fund the development of innovative projects to increase the number of girls and women in non traditional occupations in areas of skill shortages (recommendation 12).
- Introduce a 14 week paid maternity leave scheme (recommendation 13).
- Phase in a more comprehensive scheme consisting of:
 - a) At a minimum, two weeks paid paternity leave to be taken at the birth of the child; and
 - b) A further 38 weeks of paid paternal leave that is available to either parent (recommendation 14).
- That State and Territory governments (who have not already done so) examine the introduction of a Carer Card, similar to existing Seniors Cards, to provide for additional benefits for carers with the aim of increasing participation of carers in the community, providing some financial benefits for carers and improving the recognition of carers across the community, government and health and disability sectors (recommendation 29).
- That the Australian, State and Territory governments finalise the National Agenda for Early Childhood as a matter of urgency to identify priorities for reform in early childhood education and care services, and the responsibilities of all stakeholders in delivering these priorities (recommendation 33).
- That the Australian Government in cooperation with the States and Territories address concerns about quality in early childhood education and care services by initiating a review of the current quality assurance framework administered by the National Childcare Accreditation Council and establishing more transparent systems for quality assurance compliance. Such a review should consider standardising regulatory

frameworks for service quality including the National Standards for child care, State and Territory frameworks and Quality Assurance frameworks (recommendation 34).

- That the State and Territory governments introduce a scheme of financial incentives for primary and secondary schools to introduce outside school hours activities with the aim of enabling all schools to be able to offer education and care to school aged children under the age of 16 during the hours of 8 am – 6 pm (recommendation 36).
- That Australian, State and Territory governments offer coordinated grant based funding for community based organisations, schools and children's services to establish innovative projects which provide age appropriate activities for high school aged children and young people before and after school and during school holidays (recommendation 37).
- That the Australian Government with the cooperation of the States and Territories develop a framework for a national preschool year of education for all four year old children in Australia as a matter of urgency (recommendation 39).
- That the Australian Government with the cooperation of the States and Territories institute a comprehensive national review of early childhood education and care (ECEC) services, grounded in a commitment to children's wellbeing, with the aim of:
 - ensuring that all children can access quality programs regardless of their socio-economic circumstances, geographic location or abilities;
 - establishing the extent of demand for ECEC services so as to provide a better planning framework for the establishment and accreditation of children's services;
 - providing greater options for families for non-standard hours child care services;
 - ensuring that the funding formula and mode of payment most effectively reflect the needs of children; and
 - improving affordability for working parents (recommendation 40).
- That the State and Territory governments, with cooperation with the Australian Government, develop state specific internet based resources (modelled on the NSW government's Working Carers Support Gateway) in addition to an advisory service linked to existing infrastructure to inform working carers about their rights and provide greater information about support services and entitlements (recommendation 41).
- That the State and Territory governments develop additional specialist information resources for working carers with specific needs, in particular men, people with disability, grandparents, young carers, Indigenous carers and carers from culturally and linguistically diverse backgrounds (recommendation 43).

- That in recognition of the workforce issues facing the formal aged care and disability service sectors and the expected increases in level of demand for these services, that the Australian and State and Territory governments prioritise strategies to improve recruitment, retention, training, working conditions and remuneration of employees in these sectors (recommendation 44).
- That the Australian Government in cooperation with the States and Territories undertake a review of specialist disability services to identify where gaps in service provision and delivery could be addressed so as to improve the balance between paid work and caring responsibilities for men and women workers with disability (recommendation 45).