10 February 2014

Ms Elizabeth Broderick
Sex Discrimination Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

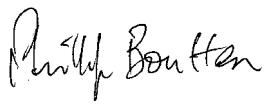
Dear Commissioner

***Supporting working parents: national pregnancy and return to work review***

Thank you for the opportunity to contribute to the pregnancy and return to work review.

Please find enclosed a submission on behalf of the New South Wales Bar Association. If you or your officers have any questions, please do not hesitate to contact the Association's Executive Director, Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



Phillip Boulten SC
President

## Supporting Working Parents: Pregnancy and Return to Work Review

### Introduction

1. The Australian Human Rights Commission (the **Commission**) has asked for submissions from community organisations that work with women who have experienced discrimination while pregnant, and women and men who have experienced discrimination while on parental leave and/or upon their return to work following parental leave on:

    a. the types of challenges faced by women and men in the workplace while pregnant, on parental leave, or upon returning to work;
    b. relevant data, case studies and trends;
    c. any gaps and practical challenges in implementing relevant legislative and policy framework;
    d. examples of leading practices and strategies in the workplace that may have assisted women and men in addressing challenges.

2. This submission will addresses each of the following 'guiding questions' provided by the Commission:

    a. Question One: Data on the prevalence, nature and consequences of discrimination experienced by women when they became pregnant at work and/or men and women who have returned to work after taking parental leave
    b. Question Two: Case studies of women and men's experiences of discrimination
    c. Question Three: Trends in relation to discrimination experienced by women when they become pregnant at work and/or men and women who have returned to work after taking parental leave
    d. Question Four: Limitations or gaps in the legislative and policy framework in relation to pregnancy discrimination and return to work.
    e. Question Five: Case studies of leading practices and strategies for addressing discrimination in the workplace in relation to pregnancy, parental leave or return to work.
    f. Question Six: Outcomes or recommendations you like to see from this National Review.

3. The Association has addressed each of the above questions One, Two, Three and Five specifically in relation to the unique situation faced by its members, being local practising barristers in New South Wales. However, in line with its object (below), the Association's submissions in respect of questions Four and Six relating to legislative limitations and recommendations in respect of legislative change, have been approached on behalf of more vulnerable members of the community at large and in particular those engaged in precarious forms of work as opposed to standard employment relationships. These two responses are dealt with together.

   For the purposes of this submission, the Association has treated as those engaged in precarious forms of work the following categories of worker:[1]

   a. Casuals, particularly in female dominated industries.
   b. Part time or other predominantly flexible workers.
   c. Irregular workers.
   d. Self-employed workers and other non-traditional workers.

***The New South Wales Bar Association***

4. The Association is a voluntary association of practising barristers and the peak representative body of New South Wales barristers. As at 2013 there are 2210 barristers holding New South Wales practising certificates, of whom 2192 are members of the Association.

5. The objects of the Association are relevantly to:

   a. promote the administration of justice;
   b. promote, maintain and improve the interests and standards of Local Practising Barristers;
   c. make recommendations with respect to legislation and law reform; and
   d. seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community.

6. The Association regularly provides both the judicial and executive branches of government with advice in respect of bills and legislative amendment. A considerable number of barristers are appointed as members of court liaison committees, government working parties and statutory authorities, providing their skills and expertise for the public benefit.

[1] Fudge, Judy; Owens, Rosemary *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*. Onati International Series in Law and Society. Oxford: Hart (2006), pp. 3–28.

*The work model of New South Wales barristers*

7. Barristers at the private Bar in New South Wales are compelled by legislative and other requirements to work in a particular and unique way. Barristers at the private Bar in New South Wales are not permitted to be employees[2] and nor are they permitted to employ another legal practitioner,[3] although they are permitted to employ non-legal support staff such as secretaries, research assistants and the like. By reason of this, New South Wales barristers at the private Bar are self-employed and operate as sole practitioners running their own business. They are not permitted to form any business association or partnership[4] and each barrister is solely responsible for his or her own work.

8. Most New South Wales barristers at the private Bar work from chambers for the purpose of sharing knowledge and resources and minimising financial overheads. Most barristers' chambers consist of one or more 'floors', with each floor comprising a discrete group of barristers and engaging its own support staff, usually between 2 and 4 in number servicing a floor of about 20 to 30 barristers. Most floors operate by way of a registered business name, which engages support staff, pays their wages and receives payment of fees from member barristers for the purpose of operating the floor and paying the support staff.

9. Significantly, the support staff of each floor or chambers ordinarily includes and is headed up by a floor clerk, who provides services to all floor members, is the first point of contact for clients and instructing solicitors, sometimes provides work directly to barristers and is considered integral to a barrister's ability to manage his or her practice.

10. The nature of the Bar has a significant impact on women barristers when pregnant and both women and men while taking parental leave and upon attempting to return to the Bar after a period of parental leave.

11. There are significant pressures related to taking parental leave and balancing work and family. Increasingly, barristers are the primary carers for aging parents, children, and people with a disability. Long working hours, which are dependent on court time-tables, can make it challenging to meet these care obligations. The legal services market is also currently in a state of flux, which can have a disproportionate impact on those members on the Bar who are pregnant, on parental leave, or who have recently returned to work.

12. Having said this, practise at the Bar can be a flexible option where appropriately managed and where the barrister has the support of their floor, colleagues and the Association.

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[2] Rule 16(c) of the New South Wales Barristers Rules, 8 August 2011.
[3] Rule 16(b), ibid.
[4] Rule 16(a), (d) and (e), ibid.

*Glossary of international conventions to which this submission refers*

Convention No 156 Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981 (**ILO Convention 156**)

Convention No 111 Convention concerning Discrimination in Respect of Employment and Occupation 1958 (**ILO Convention 111**)

UN Convention on the Elimination of All Forms of Discrimination against Women 1979 (**CEDAW**).

*Summary of the recommended legislative changes and areas for policy review*

13. The *Sex Discrimination Act 1984* (NSW) (the **SD Act**) has historically been criticised for its limited scope and effect for the following reasons:[5]

    a. It defines discrimination in terms of direct and indirect discrimination rather than in terms of equality, which would more closely reflect the text and purpose of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) on which it is based.
    b. The current mechanism by which discrimination is defined, in terms of direct and indirect discrimination, necessarily limits the scope and coverage of the SD Act by confining it to only limited, specified areas of public life rather than all fields of activity.
    c. The definitions of direct and indirect discrimination are complex and extremely difficult in particular for lay people to work with, with many complaints of sex discrimination failing for technical reasons.
    d. It is not able to appropriately address systemic discrimination.
    e. Its operation and effect are not properly understood.

14. These submissions, and the legislative amendments suggested herein, attempt to address each of these matters by way of the following recommendations:

    a. Recommendation One: The definition of both 'direct discrimination' and 'indirect discrimination' under the SD Act ought to be repealed and replaced with the definition of 'discrimination' contained in Article 1 of CEDAW. This and the following two recommendations would assist in covering the self-employed and sole practitioners, such as barristers, and would also assist precarious workers generally.

[5] See for instance *Equality Before the Law, Justice for Women* ALRC Report 69, 1994 ('*Equality Before the Law* Parts I and II')

b. Recommendation Two: In line with Recommendation One, a general prohibition against all forms of discrimination ought to be incorporated, in accordance with Article 2(b) of CEDAW, as opposed to the prohibition of discrimination in limited areas of public life as currently exists.

c. Recommendation Three: In the event that Recommendation One above is not adopted, in the alternative:

    i. Include a definition of unlawful direct discrimination based on unfavourable or unequal treatment rather than less favourable treatment, as in the *Discrimination Act 1991* (ACT); and
    ii. Substitute the use of the term 'employment' in sections 4 and 14 with the term 'work and occupation', based on the definition of 'work and occupation' to reflect the breadth of work covered by ILO Convention 111. The definition of 'work and occupation' in section 4 should include all work arrangements, whether paid or unpaid and whether under a common law contract of employment or under a contract for services, whether casual, self-employed, part time, as a trainee, volunteer, apprentice, piece worker, commission agent, as a partnership or any other form of work. Repeal sections 15-17 to the extent that they are then redundant.

d. Recommendation Four: While maintaining the current proscription of family responsibilities discrimination contained in section 7A of the SD Act, which accords with ILO Convention 156, replace the current definition of family responsibilities under section 4A(1) of the SD Act with a broader definition of carers' responsibilities which reflects that contained in section 49S of the *Anti-Discrimination Act 1977* (NSW) and amend section 7A of the SD Act to include a proscription expressly against indirect discrimination reflecting that contained in section 49T(1)(b) of the *Anti-Discrimination Act 1977* (NSW).

e. Recommendation Five: The Sex Discrimination Commissioner should be empowered to investigate systemic and/or pervasive discriminatory practices at her own initiative and without needing to rely upon a formal individual complaint and without requiring the consent of AHRC.

f. Recommendation Six: The Sex Discrimination Commissioner should be empowered to report to the Attorney-General on any organisation that fails to implement the recommendations of the Sex Discrimination Commissioner made pursuant to an investigation of that organisation.

g. Recommendation Seven: The Sex Discrimination Commissioner ought to be empowered to develop partnerships with key industry bodies to develop guidelines

and protocols to identify barriers to equality and develop industry specific guidelines to address those barriers.

h. Recommendation Eight: The SD Act ought to be amended to make provision for a special need on the basis of an attribute to be accommodated in a similar manner to section 24 of the *Anti-Discrimination Act 1992* (NT) and include a provision for the making of temporary special measures in line with article 4(1) of CEDAW.

i. Recommendation Nine: Professional associations, such as the Law Council and State and Territory bar associations and law societies, could be assisted to institute a range of measures (such as model anti-discrimination policies) including assuming an educative role on the obligations of all legal practitioners under the SD Act, to assist in removing the barriers to the sustained participation of women in the legal industry.

j. Recommendation Ten: Industry standards ought to be developed, in consultation with the Law Council and State and Territory professional associations, in relation to the education of the profession on gender bias and discrimination.

k. Recommendation Eleven: Section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) could be amended to include legislative guidance to the Court to the effect that common law principles relevant to determining awards of compensation in termination of employment cases (such as wrongful dismissal cases) are to be applied in cases in which the unlawful discrimination result in termination of employment.

l. Recommendation Twelve: A review of the government funded scheme of paid parental leave particularly as it applies to the self-employed be conducted.

m. Recommendation Thirteen: A review addressing the ongoing non-tax deductible status of child care costs be conducted. The Association notes the public inquiry into Childcare and Early Childhood Learning currently being carried out by the Productivity Commission.

**Question One: Data on the prevalence, nature and consequences of workplace pregnancy and family responsibilities discrimination**

***Prevalence and nature of workplace pregnancy and family responsibilities discrimination at the Bar***

15. The data available to the Association on the prevalence, nature and consequences of workplace pregnancy and family responsibilities discrimination is largely anecdotal. The Association is aware that some member barristers make complaints and enquiries in relation to matters of discrimination on the grounds of sex, pregnancy, potential pregnancy, family responsibilities and the need to work flexibly, including because of family responsibilities. There is unfortunately no record kept of these complaints, although the general nature and content of the complaints is set out below in response to Question Two.

16. The Association, in addition, periodically conducts surveys of its members in respect of their experiences, levels of income, work and life practices and reasons for attrition. One such survey conducted in December 2005, asked members about their experiences and perceptions of discrimination at the Bar.

17. The survey conducted in December 2005 was directed at 607 barristers, being all men and women barristers holding practising certificates in New South Wales at that time. Of these, 224 barristers, or 37%, responded to the survey. Of the 224 barristers who responded, 160 were men and 64 were women.

18. In response to the question "have you personally been the object of discrimination [at the Bar] by reference to gender", 15% of all respondents said yes. In response to the question "do you perceive that there exists [at the Bar] discrimination by reference to gender", 49% said yes. Broken down into male and female respondents to these questions:

    a. 42% of women respondents; and
    b. 4% of men respondents,

    said that they had experienced gender discrimination at the Bar, and

    c. 72% of women respondents; and
    d. 41% of men respondents,

    said that they perceived discrimination on the grounds of gender to exist at the Bar.

19. The two questions above were not broken down into further grounds of discrimination so there is no way of knowing whether the perception or experience of discrimination related to discrimination on the grounds of pregnancy, family responsibilities or the need to work flexibly.

20. The consequences for women in particular at the New South Wales Bar of discrimination on the grounds of pregnancy and/or family responsibilities, including being discriminated against upon return from periods of parental leave, are extreme. As discussed, barristers are self-employed. Upon taking any form of leave from the Bar (short or long term), they necessarily are in receipt of no income and very often must continue to sustain high ongoing costs of running their practice. Combined with this, where taking parental leave, can be the ordinary personal vulnerabilities associated with childbirth as well as feelings of being isolated from the legal community for a short or long period of time due to the practicalities of caring for a new born and/or older children. Re-entering the workforce and re-establishing a legal practice and necessary contacts, even if only after a relatively short absence of several months, can be daunting and challenging. If a person is subject to detriment and/or additional unnecessary hurdles at this vulnerable time, the resulting burden is often can be overwhelming.

21. The consequences for women at the Bar in particular can be devastating, depending on their personal circumstances, and can include:

    a. decisions to leave the Bar permanently or temporarily;
    b. decisions to leave the legal profession permanently or temporarily;
    c. decisions to work from home and/or work part time for longer or shorter periods than they would otherwise have;
    d. decisions not to have any more children; and/or
    e. decisions to attempt to hide from fellow barristers, instructing solicitors and/or clients that they are pregnant, have children, have carers' responsibilities, ever work from home and/or ever work part time.

22. The attrition rates of women at the Bar support the anecdotal evidence that the consequences of pregnancy and/or family responsibilities discrimination at the Bar include women leaving the Bar in greater numbers than men.

23. Statistics compiled in 2013 demonstrate that the attrition rates for women barristers who came to the NSW Bar through the Bar Practice Course each year is significantly higher than it is for men, as shown in the following table:

| **Year** | **Percentage of the total number of males who undertook the BPC who have since left the NSW Bar (as at Aug 2013)** | **Percentage of the total number of females who undertook the BPC who have since left the NSW Bar (as at Aug 2013)** |
|---|---|---|
| 1998 | 37.5% (24 out of 64) | 33.3% (9 out of 27) |
| 1999 | 35% (25 out of 71) | 62.5% (15 out of 24) |
| 2000 | 24% (17 out of 71) | 50% (9 out of 18) |
| 2001 | 16% (7 out of 44) | 25% (6 out of 24) |
| 2002 | 17.6% (9 out of 51) | 31.25% (5 out of 16) |
| 2003 | 24.6% (14 out of 57) | 27.8% (5 out of 18) |
| 2004 | 25% (22 out of 88) | 33.3% (7 out of 21) |
| 2005 | 17% (10 out of 58) | 28% (9 out of 32) |
| 2006 | 14.8% (9 out of 61) | 27.3% (9 out of 33) |
| 2007 | 3.9% (2 out of 51) | 16% (5 out of 31) |
| 2008 | 5.6% (2 out of 36) | 29% (7 out of 24) |
| 2009 | 5.8% (3 out of 52) | 5.3% (1 out of 19) |
| 2010 | 5.5% (3 out of 55) | 14.3% (4 out of 28) |
| 2011 | 7.4% (4 out of 54) | 18% (6 out of 33) |
| 2012 | 0% (0 out of 47) | 0% (0 out of 23) |

24. This is reflected in the fact that only 20% of the New South Wales Bar currently consists of women, which is a leap up from 14.27% over the past ten years, as shown in the following table:

| Year (as at Oct each year) | Percentage of holders of practising certificates in NSW who are male barristers | Percentage of holders of practising certificates in NSW who are female barristers |
|---|---|---|
| 2004 | 85.73% (1833) | 14.27% (305) |
| 2005 | 84.6% (1764) | 15.4% (321) |
| 2006 | 83.8% (1728) | 16.2% (334) |
| 2007 | 83.08% (1728) | 16.92% (352) |
| 2008 | 82.37% (1710) | 17.63% (366) |
| 2009 | 81.71% (1720) | 18.29% (385) |
| 2010 | 81.39% (1732) | 18.61% (396) |
| 2011 | 80.7% (1735) | 19.30% (415) |
| 2012 | 80.43% (1747) | 19.57% (425) |
| 2013 | 79.93% (1768) | 20.07% (444) |

25. The high attrition rate of women, particularly in the junior years, is then reflected in the low numbers of women silks at the New South Wales Bar. Women senior counsel currently make up 10.9% of all senior counsel, which again is significantly higher than in recent years, as shown in the following table:

| Year (as at Oct each year) | NSW Senior Counsel who are men | NSW Senior Counsel who are women |
|---|---|---|
| 2004 | 96% (314) | 4% (13) |
| 2005 | 95.4% (310) | 4.6% (15) |
| 2006 | 94.5% (308) | 5.5% (18) |
| 2007 | 94.6% (315) | 5.4% (18) |
| 2008 | 94.4% (318) | 5.6% (19) |
| 2009 | 93.3% (318) | 6.7% (23) |
| 2010 | 92.7% (318) | 7.3% (25) |
| 2011 | 93.5% (332) | 6.5% (23) |
| 2012 | 90.6% (328) | 9.4% (34) |
| 2013 | 89.1% (327) | 10.9% (40) |

26. The above figures demonstrate the disproportionately low representation of women barristers and thereafter women barristers later being appointed to the ranks of Senior Counsel. This is alarming when considered in light of the comparatively high numbers of women coming to the Bar, a figure that is increasing each year. The following table demonstrates that the numbers of women coming to the New South Wales Bar through the Bar Practice Course over the past ten years has consistently been between 20% and 40% (33% on average over the last 9 years), while during this same period the representation of women at the Bar has remained at between 14% and 20% (17.6% on average):

| **Year** | **Intake of men to the NSW Bar** | **Intake of women to the NSW Bar** |
|---|---|---|
| 2004 | 80.7% (88) | 19.3% (21) |
| 2005 | 64.4% (58) | 35.6% (32) |
| 2006 | 64.9% (61) | 35.1% (33) |
| 2007 | 62.2% (51) | 37.8% (31) |
| 2008 | 60% (36) | 40% (24) |
| 2009 | 73.2% (52) | 26.8% (19) |
| 2010 | 66.3% (55) | 33.7% (28) |
| 2011 | 62% (54) | 38% (33) |
| 2012 | 67% (47) | 33% (23) |

**Question Two: case studies of women and men's experiences of discrimination**

27. Anecdotally the Association is aware of discrimination experienced by women barristers upon becoming pregnant, and by women and men barristers upon returning to the Bar after taking parental leave.

28. The experiences of discrimination include:[6]

    a. Barristers being prevented from sharing workplace accommodation, or rooms, on floors during pregnancy, following childbirth, while taking parental leave and/or while attempting to work part time to accommodate parental responsibilities and/or care for children;
    b. Barristers being prevented from sublicensing workplace accommodation, or rooms, on floors during pregnancy, following childbirth, while taking parental leave and/or while attempting to work part time to accommodate parental responsibilities and/or care for children;
    c. Barristers being asked to vacate their rooms or leave the floor altogether upon becoming pregnant, following childbirth, while taking parental leave and/or while attempting to work part time to accommodate parental responsibilities and/or care for children;
    d. Barristers no longer receiving briefs or referrals of work from the solicitors who have historically instructed them and/or from other barristers and/or their floor generally;
    e. Barristers who are pregnant or about to take parental leave and/or attempting to return from parental leave receiving derogatory, unhelpful and/or demeaning comments from other barristers; and/or
    f. Barristers' clerks being unhelpful to barristers who are pregnant and/or while a barrister takes parental leave or attempts to return to the Bar after a period of parental leave, as well as being unhelpful to the barrister's clients. This includes clerks refusing to give assistance to barristers on parental leave, and/or telling instructing solicitors and/or potential instructing solicitors that the barrister has left the Bar or is generally not available and/or no longer practising.

29. Anecdotally, the rate of discrimination on the basis of pregnancy and/or family responsibilities experienced by women or men barristers (in other words, the likelihood that a woman in particular will experience conduct of the kind described above) is not insignificant.

[6] Taken from interviews conducted during 2008 by barrister Rhonda Bell on behalf of the Bar Association Equal Opportunity Committee as well as anecdotal information received directly by the Equal Opportunity Committee and Women Barristers Forum.

**Question Three: Trends in relation to pregnancy and/or family responsibilities discrimination**

30. Unfortunately the Association does not keep data on trends relating to pregnancy and/or family responsibilities discrimination.

31. The Association will be conducting a survey of members during 2014 that will seek information in relation to parental leave and the extent of discrimination experienced by members on the basis of family responsibilities.

**Question Five: Leading practices and strategies for addressing workplace pregnancy and family responsibilities discrimination.**

**A. NSW Bar Association**

32. The Association has implemented a number of strategies to assist in minimising and/or eliminating pregnancy and/or family responsibilities discrimination experienced by barristers, including:

a. Commending the adoption and implementation, by individual chambers, of the Model Sexual Harassment and Anti-Discrimination Policy.
b. Commending the adoption and implementation of the Equitable Briefing Policy by individual chambers, firms of solicitors, in house counsel and government authorities.
c. Hosting regular continuing professional development seminars in compliance with Regulation 176 of the Legal Profession Regulation 2005, which educates legal practitioners on the management of legal practice in compliance with the principles of equal employment opportunity, discrimination, workplace safety and employment law.
d. Implementing mentoring programs in which junior women and men barristers are matched up with more senior members of the Bar for the purpose of giving guidance and sharing experience and knowledge.
e. Researching the child care needs of barristers and making arrangements with various childcare providers for the provision of emergency in home care and long day care. The Association has entered into an arrangement with Jigsaw Corporate Childcare to reserve places at childcare centres in the Sydney CBD for its members.
f. Providing on-going support for the work of the Women Barristers Forum and Equal Opportunity Committee of the Association.
g. Hosting events that allow barristers to share experiences and strategies for balancing work and family responsibilities.
h. Ensuring that heads of chambers and clerks on each floor are fully conversant with the sexual harassment policy approved by Bar Council and the Equitable Briefing Policy, through meetings with heads of chambers and the annual clerks conference.

i. Educating members of the bar as to the need for flexibility in the workplace, including unusual hours in chambers, barristers undertaking more work from home than may be usual and other arrangements to facilitate the on-going participation of barristers who are on parental leave.

**B. Chambers**

33. Actions by individual chambers that have addressed workplace discrimination and family responsibility discrimination include the following:

a. Having heads of chambers and other senior barristers lead the way in ensuring that women are not disadvantaged on their floors when pregnant or returning to work.
b. Chambers making decisions to permit barristers to notionally remain associated with the floor whilst away from work by ensuring that the name of the barrister remains on the floor register, providing a contact point for solicitors to reach the barrister and in some cases, offering a reduced floor fee or licensing rate while the barrister is not earning his/her usual income.
c. Ensuring that barristers on maternity or parental leave continue to be invited to floor functions, ensuring the maintenance of networks and the provision of information and encouragement.
d. Arranging for calls for a barrister on maternity or parental leave to be directly forwarded through the floor switchboard to a private number (to enable the barrister to remain contactable by solicitors in relation to work).
e. Ensuring that the clerk of the floor continues to direct work to a barrister on parental leave, where requested by the barrister.
f. Upon a barrister's return to work, the clerk of the floor ensures that solicitors who briefed the barrister prior to parental leave are encouraged to continue to brief him/her.
g. The clerk maintains good communication with the barrister on parental leave.
h. Educating floor members regarding the Equitable Briefing Policy and Model Sexual Harassment Policy.

34. So far as the Association is aware, Chambers do not keep records of their efforts to address workplace discrimination/family responsibilities discrimination.

**C. Barristers**

35. Individual barristers have implemented their own strategies to overcome potential discrimination or adverse changes to their work upon becoming pregnant or being on parental leave. These include the following:

a. Negotiating with their floors with respect to issues such as continued affiliation with the floor, floor fees, work load.
b. Sharing briefs with another barrister during the period of leave, to be returned to the barrister once the period of leave has concluded.

c. Advising professional contacts of the date of return to work.
d. Maintaining and renewing contacts with instructing solicitors.
e. Ensuring that reliable methods of communication are available whilst away from chambers (eg e-mail, text, telephone, skype, advising hours that the barrister may be contacted, which calls should be forwarded etc).
f. Putting appropriate child care arrangements in place to ensure reliable delivery of any work agreed to be undertaken by the barrister.

36. Solicitors can assist in ensuring that barristers who take parental leave are not disadvantaged by:

a. Offering briefs to counsel, regardless of whether they are pregnant or on parental leave.
b. Ensuring that barristers sharing a brief during a period of parental leave understand the nature of the arrangement, and that the brief is returned to the original barrister upon his/her return to work.
c. Making an effort to brief barristers upon their return from parental leave, where appropriate.

**Questions Four and Six: Legislative and policy framework limitations in relation to pregnancy discrimination and return to work.**

37. This section deals with the limitations inherent in the SD Act and related policy, and the affect that these limitations potentially have in relation to pregnancy discrimination and return to work on all sections of the community, and in particular on vulnerable workers and workers who are self-employed.

38. The sex discrimination provisions under the SD Act, which relevantly prohibit direct and indirect discrimination on the grounds of sex, pregnancy, potential pregnancy and family responsibilities,[7] are limited to discrimination in certain areas of public life.[8] Unlike under the *Racial Discrimination Act 1975* (Cth), it is not all fields of activity in which discrimination is proscribed.

39. In respect of the prohibition of discrimination in the area of work under the SD Act, section 14 of the SD Act is phrased so that discrimination is only proscribed by an 'employer', thereby prima facie necessarily limiting the scope of the proscription to the area of employment. At common law, the term 'employment' excludes the notion of other forms of work, such as casual work and the work of independent contractors carried out for principals. The SD Act overcomes this shortcoming to some extent by way of the definition of employment in section 4 being extended relevantly to include part time and temporary work and work under a contract for services (in other words, the work performed by an independent contractor).

[7] Sections 4A, 4B, 5, 7, 7A of the SD Act.
[8] Part II, Divisions 1 and 2 of the SD Act.

40. Courts and tribunals have in turn also interpreted the term 'employment' as it is used in anti-discrimination legislation expansively so that it is not limited to the common law concept of that term but is extended to any work relationship where there is 'also an element of direction and control of work'.[9]

41. The SD Act in addition prohibits discrimination on the grounds of sex, pregnancy, potential pregnancy and family responsibilities by members of a partnership,[10] as well as by qualifying bodies against people seeking qualification in a particular trade or profession.[11]

42. However, notwithstanding these provisions and the expansive interpretation of them by the courts, self-employed workers and certain other atypical workers falling outside the notion of work relationships in which one person performs paid work for another, will not be covered by the provisions of the SD Act. In certain circumstances, such persons may be covered where they are providing a good or a service,[12] but this will not be the case in respect of every aspect of the work of a self-employed person.

43. The Association seeks to address this anomaly, as well as the complex and otherwise limited scope and effect of the SD Act, by way of the mechanisms below.

***Scope of the SD Act***

44. The SD Act gives effect to Australia's obligations under CEDAW.[13] Accordingly where expressions and terms used in the SD Act come from CEDAW, those terms must be construed consistently with the way in which the terms are construed in CEDAW. [14]

45. Central to the operation of CEDAW is the concept of equality. The idea of equality is notoriously difficult.[15] The expression 'equality' takes into account the ideas of formal equality, where people are treated the same regardless of the relevant characteristic. It also takes into account substantive equality, which recognises that sometimes

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[9] *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232 at 88-94, per Spigelman CJ with Stein JA and Davies A-JA agreeing; Rees, Lindsay and Rice *Australian anti-discrimination law: Text, Cases and Materials,* The Federation Press, 2008, [6.1.2.7]-[6.1.2.8].

[10] Section 17 of the SD Act (although excludes firms below 6 persons in size).

[11] Section 18 of the SD Act.

[12] Section 22 of the SD Act.

[13] See Schedule to the *Sex Discrimination Act.* CEDAW opened for signature on 18 December 1979. Entry into force generally: 3 September 1981. Entry into force for Australia: 27 August 1983. Note that Australia has a reservation entered in July 1983 to article 11(2)(b). The reservation relevantly provides '[t]he Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' ATS 1983 No. 9

[14] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-31 (Brennan CJ)

[15] See *Equality Before the Law.*

differential treatment is necessary to ensure an equal outcome and thereby differential treatment is not necessarily unfair or unfavourable discrimination.

46. In CEDAW article 1 describes 'discrimination against women' in the following terms:

*Article 1*

*For the purpose of the present Convention, the term 'discrimination against Women' shall mean any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economical, social, cultural, civil or other fields.*

47. The SD Act does not incorporate this definition of discrimination. Rather the SD Act describes discrimination in terms of 'direct discrimination' and 'indirect discrimination'. The descriptions of direct and indirect discrimination do not come to terms with the central obligation in CEDAW, namely the promotion of equality of opportunity. Because the operation of the SD Act is premised on the notion of formal equality in specified areas of public life, this means that at times the Act is inadequate in actually achieving equality for women in all areas of activity, particularly where there may be a need for different treatment to achieve equal outcomes in relation to opportunities as between men and women.[16]

48. The definition of sex discrimination under section 5 of the SD Act could be amended so that it accords with the definition of 'discrimination' in Article 1 of CEDAW.[17]

49. Broadening the definition of 'sex discrimination' under the SD Act so that it is in accordance with the term 'discrimination' in Article 1 of CEDAW will enable the removal of the current definition of 'direct discrimination', defined in section 5(1) in terms of less favourable treatment, and the simplification of the concept in section 5(2) of the SD Act of 'indirect discrimination', thus more readily allowing for systemic discrimination to be addressed.[18] This would also remove the need to limit the scope of the SD Act to specific areas of public life and would enable it to cover all fields of activity, as with the *Racial Discrimination Act 1975* (Cth), and more particularly would enable coverage of all categories of worker, including the self-employed.

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[16] The Hon. Justice Mary Gaudron, The Mitchell Oration 1990, *"In The Eye Of The Law: The Jurisprudence of Equality"* , 24 August 1990.

[17] Compare section 9 (1) of the *Racial Discrimination Act* 1975 (Cth).

[18] See for instance Recommendation 3.2 of *Equality Before the Law*, Part I.

***Definition of discrimination and areas of discrimination***

50. In line with the Recommendations of the Law Council of Australia and New South Wales Bar Association in 2008,[19] the Recommendations of the Australian Law Reform Commission in 1994[20] and the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1992,[21] the definition of direct sex discrimination in section 5(1) of the SD Act ought to be replaced with the definition of 'discrimination' in CEDAW as described above.

51. While the current definition of direct sex discrimination in section 5(1) of the SD Act ought to be replaced with the general prohibition against discrimination contained in Article 1 of CEDAW, the definition of indirect sex discrimination in section 5(2) should be simplified with the simpler notion of indirect discrimination being based for instance on the notion in subsections 8(1)(b), (2) and (3) of the *Discrimination Act 1991* (ACT).

52. Section 8(1)(b) and (2) of the *Discrimination Act 1991* (ACT) provides:

*(1) For this Act, a person discriminates against another person if:*
*…*
*(b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.*
*(2) Subsection (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.*
*(3) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—*
*(a) the nature and extent of the resultant disadvantage; and*
*(b) the feasibility of overcoming or mitigating the disadvantage; and*
*(c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.*

53. Amending the definition of direct and indirect discrimination under the SD Act to reflect the definition in Article 1 of CEDAW will more appropriately establish the substantive and positive right of women to equality and the enjoyment of human rights and fundamental freedoms, in line with the objectives of CEDAW.[22] It is suggested

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[19] Law Council of Australia and New South Wales Bar Association submission to the Standing Committee on Legal and Constitutional Affairs' 2008 *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality.*
[20] *Equality Before the Law*, Part I, op cit.
[21] House of Representatives Standing Committee on Legal and Constitutional Affairs *Halfway to Equal, Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* 1992, AGPS.
[22] See for instance *Equality Before the Law*, Part I, op cit, pp41-42.

that such an outcomes-focused approach to the prohibition of discrimination will assist in addressing systemic discrimination.[23]

54. It is further submitted that the definition of 'discrimination' in Article 1 of CEDAW captures all forms of discrimination and will enable the removal of the limitation currently in the SD Act of prohibition of discrimination only in the proscribed areas of public life in Divisions 1 and 2 of Part II. This is in line with the obligation under Article 2(b) of CEDAW to adopt appropriate legislative and other measures prohibiting discrimination.

55. Similarly to section 9(1) of the *Racial Discrimination Act 1975* (Cth), the SD Act will on this basis be structured to apply to discrimination in all fields of activity, rather than only limited areas of public life. This will also broaden the types of conduct captured by the SD Act.

56. In this respect the observations of then Justice French in the Federal Court decision of *Victorian Women Lawyers Association Inc v Commissioner of Taxation*[24] highlight that the aim of the SD Act, in accordance with the objects of CEDAW, is to eradicate discrimination in all fields of human endeavour:

> *121 The Convention, which is scheduled to the Act and to which Australia is a party, includes, in Art 11, a commitment by States Parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women the same rights and, in particular:*
> *…*
> *(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*
>
> *122 Similar legislation exists in the various States. The legislation and the Convention to which Australia is a party can be taken as indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life.*

[23] See for instance, Evatt, op cit, at [9]-[14].
[24] [2008] FCA 983 at [122].

***Definition of direct discrimination***

57. In the event that the first recommendation herein is not adopted and the definition of direct discrimination within the SD Act is not replaced with a definition in line with Article 1 of CEDAW, it is recommended that:

    a. The definition of direct discrimination be amended to reflect the definition of direct discrimination found within section 8 of the *Discrimination Act 1991* (ACT); and
    b. The term 'employment' in sections 4 and 14 is substituted with the term 'work and occupation', to more closely align with the breadth of coverage of types of work as covered by ILO Convention 111, with the definition of 'work and occupation' in section 4 to include all work arrangements, whether paid or unpaid and whether under a common law contract of employment or under a contract for services, whether casual, self employed, part time, as a trainee, volunteer, apprentice, piece worker, commission agent, as a partnership or any other form of work. Repeal sections 15-17 to the extent that they are then redundant.

58. Section 8 of the *Discrimination Act 1991* (ACT) defines direct discrimination in terms of unfavourable rather than less favourable treatment as follows:

    *(1) For this Act, a person discriminates against another person if—*
    *(a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; …*

59. Incorporating a definition of direct discrimination that relies on unfavourable rather than less favourable treatment removes the need for the identification of a real or hypothetical of a comparator, which is required for the purposes of determining whether a complainant has been treated less favourably under the SD Act.[25]

60. Under the definition of direct discrimination as it is currently formulated under the SD Act, a complainant must prove, in addition to a causal link between the attribute and the conduct, that the conduct constituted less favourable treatment when objectively assessed by comparison with an identified real or hypothetical comparator.

61. Determining the characteristics of a hypothetical comparator have proved troublesome for courts in making this assessment, with the High Court majority in *Purvis v State of New South Wales* (2003) 217 CLR 92 concluding that all manifestations of the complaint are to be attributed to the comparator (at [223]-[225]), thus making it inherently difficult for complainants to demonstrate that they have been treated less favourably when assessed against such a hypothetical comparator in the same or similar circumstances.

[25] See for instance *Purvis v State of New South Wales* (2003) 217 CLR 92 at [223]-[225].

62. In tandem with changing the definition of direct discrimination, the term 'employment' in section 14 could be substituted with the term 'work', which in turn could be defined to include all forms of paid and unpaid work. This would extend coverage under the SD Act to all workers, including those most vulnerable, whether they are engaged by another entity/person or working in an atypical work relationship. Such a legislative amendment would remove the need for further judicial scrutiny of the term 'employment' to determine whether the term covers the type of arrangement argued for. To the extent that CEDAW did not provide constitutional support for such an amendment, reliance could be placed on ILO Convention 156 (discussed below).

***Powers of the Sex Discrimination Commissioner to inquire into, report on and monitor systemic discrimination***

63. The Association notes that recommendations to assist the Sex Discrimination Commissioner to initiate inquiries particularly to address systemic change were made by the Law Council of Australia in its submission in 2008[26] and by the ALRC in *Equality Before the Law Part I*.[27]

64. The pervasive nature of systemic discrimination is such that redressing individual complaints, while perhaps providing a remedy of some utility to the complainant, does little or nothing to address the widespread underlying problem, particularly when that problem exists outside the one organisation, or across whole industries, occupations or area of the community.[28]

65. In addition, the financial and emotional burden is borne singularly by each complainant in making an individual complaint, whereas the community at large ought to bear the responsibility for addressing systemic discrimination, which is very often the product of out-dated, yet once commonly accepted, social and cultural practices.

66. An appropriate approach to addressing systemic sex discrimination would be to enact legislative changes that would:

    a. empower the Sex Discrimination Commissioner to investigate systemic and/or pervasive discriminatory practices at his/her own initiative and without needing to rely upon a formal individual complaint and without requiring the consent of the AHRC;
    b. enable the Sex Discrimination Commissioner to report to the Attorney-General on any organisation that fail to implement the recommendations of the Sex Discrimination Commissioner made pursuant to an investigation of that organisation.

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[26] Law Council of Australia and New South Wales Bar Association submission to the Standing Committee on Legal and Constitutional Affairs' 2008 *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality.*

[27] *Equality Before the Law* Part I, op cit, p50-57.

[28] *Equality Before the Law* Part I, ibid, p50.

67. Any legislative measures should facilitate the Sex Discrimination Commissioner developing partnerships with key industry bodies to develop guidelines and protocols to identify barriers to equality and develop industry specific guidelines to address those barriers.[29] In this respect, we think it is important that there is not a 'one size fits all' approach to addressing systemic discriminatory practices. We think that the partnership will enable a top down approach to addressing biases which may work with the current bottom up approach, which is constituted by complaints being made by individual complainants about specific type of treatment.

68. The Association adopts the Recommendations made by the Law Council of Australia and New South Wales Bar Association in the submission to the Standing Committee on Legal and Constitutional Affairs' 2008 Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in *Eliminating Discrimination* and *Promoting Gender Equality* and Recommendations 3.3 to 3.5 made by the ALRC in *Equality Before the Law Part I.*

***Special needs and special measures provisions***

69. The SD Act should make it unlawful for a person to refuse or fail to accommodate persons with a special need that a person has because of an attribute, with the attribute being defined to include the sex, marital status, pregnancy or potential pregnancy of a person.

70. Such a provision would assist in overcoming the historical disadvantage and discrimination suffered by women and would properly assist in addressing systemic discrimination.[30]

71. The SD Act could incorporate a provision which makes it unlawful for a person to fail or refuse to accommodate such a special need, in terms similar to section 24 of the *Anti-Discrimination Act 1992* (NT), which provides:

*(1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.*
*(2) For the purposes of subsection (1) –*
*(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and*

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[29] See for instance Canadian Bar Association Taskforce on Gender Equality in the Legal System, *Touchstones for Change: Equality, Diversity and Accountability*, Ottowa, Canadian Bar Association 1993 and Judicial Council of California Advisory Committee on Gender Bias in the Courts, *"Achieving Equal Justice for Women and Men in the California Courts"* (July 1996)

[30] See CEDAW Committee, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures Thirtieth session, 2004.

*(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.*

72. Further, a new provision reflecting the wording of Article 4(1) of CEDAW could be incorporated into the SD Act, with such a provision co-existing with the current section 7D of the SD Act. The provision could read:

*Temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined by Division 1 or 2, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*

*The Sex Discrimination Commissioner should have power to make a declaration that a measure is a special measure for the purposes of the SD Act. Where such a declaration has been made, a person challenging the declaration shall bear the onus of proving the measure is not a special measure.*

73. A special measures provision in this form would accord with the objects of CEDAW and the obligations of State Parties to take measures aimed at accelerating de facto equality. In addition it avoids the problems associated with defining 'special measures' as constituting 'discrimination' while making that discrimination lawful, an approach not supported by CEDAW.[31]

74. It is noted that a provision (in former section 33 of the SD Act) providing that special measures aimed at assisting women to achieve de facto equality did not constitute unlawful discrimination was repealed and replaced with section 7D[32] partly on the basis that it did not accord with Article 4 of CEDAW.

75. The current section 32 in addition ought to be amended to provide that the provision of services the nature of which is such that they can only be provided to members of one sex shall not be considered discrimination, in line with Article 4(2) of CEDAW. It is contrary to Article 4(2) to define services that can only be provided to women (such as services directed at pregnancy or breast cancer) as constituting discrimination but exempting that discrimination from the provisions of the legislation making it unlawful.

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[31] See Article 4(1).

[32] By way of the *Sex Discrimination Amendment Act 1995*, No 165.

***Addressing discrimination on the ground of family responsibilities***

76. The meaning of discrimination on the basis of family responsibilities is dealt with in the SD Act under section 7A, which provides:

> *For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities 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.*

77. Neither section 7A nor section 14 of the SD Act makes reference to indirect discrimination, and these provisions do not on their face extend the operation of section 7A to indirect discrimination as the term is contemplated for instance in section 5(2) of the SD Act.[33]

78. The limited operation of the family responsibilities ground of discrimination in the SD Act is one of the most significant deficiencies of the legislation. One of the immediate problems which results from the fact that indirect family responsibilities discrimination is not a ground of discrimination under the SD Act, is that applicants making such claims are forced to formulate them as a species of indirect sex discrimination under section 5(2) of the SD Act.[34] This is problematic for a number of legal and policy reasons.

79. Primarily, as a matter of policy it is particularly problematic because claims of indirect sex discrimination by reason of family responsibilities discrimination made under section 5(2) of the SD Act necessarily require the court to make a finding, or accept on the basis of 'judicial notice', that women are the primary carers of infants and children.[35]

80. While this may historically have been accurate, and may remain the case for a large number of women, it perpetuates the stereotype that only or primarily women have or ought to have the care and responsibility for infants and children.

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[33] Australian Human Rights Commission, *Federal Discrimination Law*, October 2011, [4.2.6].
[34] See for instance the discussion in *Federal Discrimination Law*, ibid, [4.2.6], [4.3].
[35] See for instance *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122 at [37]; *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1 at [106].

81. As a result, the courts are prepared to find that it is a characteristic that appertains to women that women are the carers of children.[36] This interpretation reinforces a stereotype which we do not think is appropriate or fair for women. Moreover, this interpretation may result in the SD Act being a vehicle for perpetuating adverse discrimination by allowing a view that it is only women who have the responsibility of children and it is only women who require part time work. As a matter of policy, such an interpretation of the SD Act or other human rights legislation ought to be avoided by appropriate use of legislative amendment.

82. At present if a male employee complains under the SD Act that he is being denied access to part time work, his claim will automatically be defeated because his claim is not a species of discrimination on the grounds of sex because it is not a characteristic appertaining to men that men are the primary carers of infants or children.

83. Both men and women are capable of being subject to discrimination on the grounds of responsibility to care for infants or dependent children, given the modern role of caring (for not only infants and dependent children but other dependent members of the community) arises as the equal responsibility of both men and women. This is appropriately becoming the reality and ought to be recognised and encouraged by the operation of the SD Act. However, because the SD Act does not make indirect discrimination on the grounds of family responsibility unlawful, such claims are currently run as species of indirect sex discrimination claims which inherently means that a view has to be formed that only women have the care and responsibility for infant children.

84. It is critical that women are not viewed as being the only parent with responsibility for infants and children and that parents, both men and women, are seen to have equal responsibility and hence equal rights in relation to being free from discrimination on those grounds. It is more over important that the caring responsibilities of both men and women for all dependents, not only infants and children, are recognised under human rights legislation. Accordingly the definition and title of 'family responsibilities' ought to be amended to reflect the definition of carers' responsibilities under section 49S of the *Anti-Discrimination Act 1977* (NSW). In these respects the SD Act is sadly deficient compared to relevant state and territory legislation; legislation which defines carers responsibility or family responsibility in a much more inclusive and appropriate manner.

85. While maintaining the current proscription of family responsibilities discrimination contained in section 7A of the SD Act, which accords with ILO Convention 156, consideration ought to be given to amending the SD Act to extend the meaning of family responsibilities discrimination under section 7A of the SD Act to include indirect carers' responsibilities discrimination in a formulation similar to section

[36] See for instance the findings of Driver FM in *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1.

49T(1)(b) of the *Anti-Discrimination Act 1977* (NSW). In addition, the definition of carers' responsibilities under section 4A(1) ought to be reformulated in terms similar to section 49S of the *Anti-Discrimination Act 1977* (NSW).

86. It is noted that the limitations on the operation of the family responsibilities discrimination provisions currently in the SD Act are reflected in the limitations of Article 8 of the ILO Convention 156 (discussed below). To overcome these limitations it is submitted that alternative articles of ILO Convention 156 ought to be relied upon under the external affairs power (further discussed below).

***Family responsibilities discrimination and indirect discrimination: the current position***

87. The mixed interpretations of section 5(2) of the SD Act that have arisen in the course of judicial examination as to whether this provision is capable of sustaining claims of indirect family responsibilities discrimination is in addition problematic as a matter of law, for the reasons discussed below.

88. In a number of decisions the Federal Magistrates Court of Australia in particular has considered, with mixed results, whether the SD Act operates to make indirect family responsibilities discrimination unlawful by use of the prohibition against indirect sex discrimination under section 5(2): see for instance *Escobar v Rainbow Printing Pty Ltd* (No.2) [2002] FMCA 122 at [37]; *Kelly v TPG Internet* [2003] FMCA 584 at [71]-[72]; *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1 at [106].

89. This has resulted in differing lines of interpretation of section 5(2) of the SD Act. Moreover, an interpretation of the SD Act which allows for indirect discrimination on the basis of family responsibilities is not supported by the explanatory memoranda or second reading speeches relating to the Sex Discrimination Amendment Bill 1995 or the Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992, and nor is it supported by relevant international instruments, including ILO Convention 156.

90. For example, the House of Representatives Explanatory Memorandum to the Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 provides, in relation to section 7A, as follows:

*This provision defines what is meant by direct discrimination against an employee on the grounds of the employee's family responsibilities. Direct discrimination occurs when an employee is treated less favourably on the basis of his or her family responsibilities in circumstances that are the same or not materially different, than an employee without family responsibilities.*

91. The second reading speech in relation to the *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* in the House (3 November 1992), read by the Honourable MJ Duffy (Holt, A-G) was relevantly as follows:

*I turn now to a more detailed description of the amendments. This amendment is intended to be narrow in its scope in that it provides protection only against discrimination on the grounds of family responsibilities which takes the form of dismissal. `…*
*… `Discrimination' is defined to include less favourable treatment—that is, direct discrimination. …. It is not intended to cover, for example, the dismissal of an employee because the employee is unwilling to change a shift, or has a period of unauthorised leave, even though both may be due to family responsibilities.*

92. To resolve the uncertainty and inconsistency currently surrounding section 5(2) of the SD Act, it is submitted that legislative amendment of section 7A which extends to indirect discrimination and reflects the indirect discrimination provisions contained in section 49T(1)(b) of the *Anti-Discrimination Act 1977* (NSW) is appropriate, while the definition of family responsibilities under section 4A of the SD Act ought to be broadened to reflect that contained in section 49S of the *Anti-Discrimination Act 1977* (NSW). Each of these changes can be supported using ILO Convention 156 in addition to Article 8 of that convention.

***Preventing discrimination, including by educative means***

93. The Association supports education as a tool to eliminate discrimination. Of particular concern to the Association is the effectiveness of the SD Act in achieving labour market reform through educative means in the Australian legal profession to assist in removing barriers to women's sustained participation in the profession.

94. Labour market reforms in Australia and overseas have to some extent enabled women's greater participation in the legal profession. However, women remain under-represented in senior roles within the legal profession and judiciary and in addition tend to be paid less than their male counterparts.

95. These indicia suggest that despite moves to strengthen the SD Act, labour market discrimination continues to perpetuate the unequal treatment of equally productive female legal practitioners.

96. While the SD Act has been effective to some extent in addressing sex discrimination within the legal industry, because of the nature of the industry and the stigma which attaches to individual complainants, legislation providing only for individual complaints cannot adequately address systemic discrimination within the legal industry.

97. Combating such barriers to the participation of women in the legal industry ought to go beyond addressing undesirable conduct and compensating complainants. It is submitted that eradicating barriers to women's sustained participation in the legal

industry and making lawyers more responsive to women's needs requires the legal profession and judiciary to be trained and educated in gender issues.

98. Legal education could play a pivotal role in developing lawyers that are sensitive to and intolerant of gender bias particularly indirect bias embedded in statutes and common law, thereby assisting in removing the barriers to women's sustained participation in the legal industry.

***Industry Standards to combat barriers to women's participation in the legal industry***

99. It has been said that it is merely a question of time and the presence of women in sufficient numbers that will remedy the inequitable status of women within the legal profession. However, comparative research demonstrates that, without more, this is not the case.[37]

100. In 1995 it was observed that women lawyers were like 'fringe dwellers of the jurisprudential community' and that 'neither an increase in the number of women nor the passing of time'[38] would automatically remedy this situation.

101. The ongoing and historical 'disadvantage of women in the legal industry' was recognised by then Justice French in the 2008 Federal Court decision in *Victorian Women Lawyers Association Inc v Commissioner of Taxation*.[39] In that case, the Federal Court was invited to take judicial notice of the 'disadvantage' of women practitioners in the legal profession. In accepting this as a matter of 'common knowledge…generally' and taking it on judicial notice, Justice French (as he then was) observed (at [116]):

*… VWL, in its written submissions, identified the social fact for which it contended. … The social fact propounded was the historical and persisting disadvantage of women in relation to their participation and career advancement within the legal profession. At that level of generality there was no dispute. I am prepared to take judicial notice of it.*

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[37] See for instance Keys Young Consultants, *Research on Gender Bias and Women Working in the Legal Profession* (1995), Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996), Hunter and McKelvie, *Equality of Opportunity for Women at the Victoria Bar: A Report to the Victorian Bar Council* (1998).

[38] M Thornton 'Women as fringe dwellers of the jurisprudential community' (Chapter 12 in D Kirby (ed) Sex Power and Justice: Historical Perspectives of Law In Australia Melbourne OUP 1995 p 291.

[39] [2008] FCA 983 (27 June 2008). This decision involved an application by the Victorian Women Lawyers Association Inc (VWL) to the Commissioner of Taxation for a private ruling that VWL was exempt from any obligation to pay income tax on the basis that it is a charitable institution or an association established for community service purposes. The Commissioner of Taxation refused to make such a ruling and the VWL successfully appealed to the Federal Court.

102. His Honour further observed that the SD Act and CEDAW can be taken as:

> *…indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life.*[40]

103. In 2011, women made up 61.4% of Australian law graduates.[41] A 2013 survey of partnership appointments found that women made up 20.8% of partners overall including a decrease in new appointments to 25.8% from 30.3% in 2012.[42] Women are far more likely to be salaried rather than equity partners than men; women make up 16.7% of equity partners, a slide of 0.3% on the previous year.[43] When one considers female participation at the bar, women account for 21.44% of barristers, 13.52% of non-senior counsel (or 'juniors') and just 7.92% of senior counsel.[44]

104. From the beginning of their careers within the legal profession, men are paid more than women. For example, the starting salary of female graduates is $4300 less than their male counterparts, almost double the disparity recorded in 2011.[45]

105. Pay inequity within the legal profession can be partly explained by the fact that men continue to hold a greater proportion of the more senior roles and are accordingly better remunerated. In 2012-2013 in New South Wales the estimated mean income of women lawyers was $113,700 compared to the whole profession $127,300.[46]

106. However, comparing the salaries of male and female solicitors is complicated by the fact that men and women are not equally distributed across the main employment sectors. Female practitioners tend to be younger and more recently admitted to practice than male practitioners. Further, relatively more female practitioners than male practitioners work part time or under a flexible workplace arrangement.

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[40] At [122].

[41] Graduate Careers Australia, 'Grads Jobs and Dollars', *Australian Graduate Survey*, 2011 statistics downloaded 31 January 2014 from http://www.graduatecareers.com.au/Research/GradJobsDollars/index.htm

[42] Chris Merritt 'Survey prompts call for 'real equality', *The Australian*, 23 December 2013, downloaded 31 January 2014 from http://www.australianwomenlawyers.com.au/uploads/publications/AWL_-Survey_Prompts_Real_Equality_-The_Australian_-_20_December_2013.pdf

[43] At [43]

[44] Australian Women Lawyers, Media Release 4 September 2012 downloaded 31 January 2014 http://www.australianwomenlawyers.com.au/uploads/publications/AWL_Media_Release_4_September_2012.pdf ; Ainslie Van Onselen, 'Gender gap in the judiciary is still too wide', *The Australian,* 8 July 2011 downloaded 31 January 2014 http://www.theaustralian.com.au/business/legal-affairs/gender-gap-in-the-legal-system-is-still-way-too-wide/story-e6frg97x-1226090158942

[45] 'It pays to be a male law grad', *Lawyers Weekly*, 29 January 2013 downloaded 21 January 2014 http://www.lawyersweekly.com.au/news/it-pays-to-be-a-male-law-grad

[46] The Law Society of New South Wales 2007 Profile of the Solicitors of New South Wales December 2007 page 17.

107. Men on the other hand continue to hold a greater proportion of the more senior roles for which they are accordingly better remunerated. A more meaningful way of gauging income parity between the genders is to compare incomes of full time private practitioners by reference to years since admission. For example in NSW 2012-13 the estimated mean income of male solicitors admitted between two and five years was $97,100 and for female practitioners $86,700.[47]

108. The role played by discrimination, sexual harassment and other barriers of a structural and cultural nature to women's involvement in the legal industry must be addressed at a systemic level. Anti-discrimination legislation alone is unlikely to address the deep seated causes of women leaving the legal industry at far higher rates than their male colleagues.

109. It is recommended that industry standards ought to be developed in consultation with the Law Council and State and Territory professional associations requiring feminist legal theory to be incorporated into both pre-admission requirements for law graduates as well as continuing professional development and specialist accreditation coursework materials.

110. Under these industry standards the Law Council and State and Territory professional associations can assume an educative role on the obligations for legal firms and practitioners under the federal SD Act.

111. Such training could be run in tandem with the compulsory equal employment opportunity and anti-discrimination training required under the *Legal Profession Act 2004* (NSW) and associated regulations, and the counterpart legislation of other States and Territories.

***Providing effective remedies***

112. All of the relevant human rights instruments stress the right to an effective remedy. An effective remedy is one which redresses the loss and damage suffered by the particular complainant but also addresses the reasons for the discriminatory conduct to prevent continuing or future breaches.

113. For the most part, remedies have focused on compensation. The historically low levels of compensation generally awarded under the SD Act have been criticised as being reflective of a view that discrimination, and sexual harassment in particular, is unimportant.[48] It has been observed that low levels of monetary compensation trivialise

[47] The Law Society of New South Wales 2007 Profile of the Solicitors of New South Wales December 2007 page 35.

[48] See for instance the submissions recorded in *Equality Before the Law* Part I, p86, fn 357-358.

the serious nature of the conduct involved in complaints of sex discrimination and the often devastating impact on the complainant.[49]

114. One of the difficulties with compensation in the discrimination area is that claims for compensation might arise in a number of different circumstances. In the area of employment the question of compensation needs to take into account the relevant contract between the employee and the employer and much closer regard should be had to relevant contract principles in relation to the assessment of damage arising for breach of contract by way of discrimination. In that regard where the claim is concerned with the termination of employment it would be appropriate that the Court had regard to relevant principles concerning compensation for termination of employment.

115. Section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) could be amended to include legislative guidance to the Court to this effect, that is, that common law principles relevant to determining awards of compensation in termination of employment cases (such as wrongful dismissal) are to be applied in cases in which the unlawful discrimination results in termination of employment.

116. We do not support a general approach to assessing damages in discrimination law along the lines of a personal injuries type claim for all cases, particularly in the employment area. As the Federal Court noted in *Hall v Sheiban*, the measure of damages has to be appropriate to discrimination claims.

***Further policy measures***

117. The Association supports policy review focusing on:
    a. A review of the government funded scheme of paid parental leave particularly as it applies to the self-employed (including barristers); and
    b. The ongoing non-tax deductible status of child care costs.

***Availability of Paid Maternity, Paternity and Parental Leave***

118. Government funded paid parental leave is currently available to sole proprietor barristers who have an individual adjusted taxable income of $150,000 or less in the financial year which is completed either before the date of birth or adoption, or the date you claim (whichever is earlier).

119. The role that a scheme of paid parental leave plays in maintaining women and men at the Bar following the birth of a child is particularly important, given that it is traditionally practitioners at the Bar who are considered for appointments as judges or magistrates. It contributes to retaining talent at the Bar during what might be the key years of a barrister's practising life.

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[49] Id.

120. However, as the government scheme is only available to barristers with an income of under $150,000, a barrister earning over $150,000 will not have access to any scheme of paid parental leave and is highly likely to be providing specialist legal services of an equivalent or greater level of value, skill and complexity to for example a solicitor in a large firm or in house environment on similar levels of income, with greater levels of workplace support, and access to an employer funded scheme of paid parental leave which is likely to be more generous than the government funded 18 week scheme.

121. The government scheme fails to take into account the significantly fluctuating income inherent to barrister's practices, which is also a feature of the self-employed sole trader. By focusing only on the completed financial year prior to the birth, adoption or claim, it ignores the fact that a barrister's individual adjusted taxable income could average far less than the $150,000 threshold in the two or three years prior to the claim, because of cashflow issues. A barrister's income is often paid substantially late by clients, and many barristers work 'on spec' in certain practice areas, which can delay income being paid for months or years. This excludes many barristers from being eligible for the government scheme, despite having low incomes in the financial year prior to and post the financial year on which the $150,000 threshold is applied.

122. The government scheme also ignores the fact that the purchasing of barrister's chambers (which is generally necessary and inevitable to secure longevity at the Bar) is not included in a Barrister's individual adjusted taxable income. Where the purchase of chambers can range from $10,000 to $450,000, depending on the floor on which the barrister practices, this is significant in that a barrister may have an adjusted taxable income of over $150,000 but be in significant debt or without disposable income from their practice because of the purchase of chambers.

123. A review of the government funded scheme in such instances would go a significant way to ensuring fairness and equality of its application between the employed and the self-employed, including barristers. The self-employed should not be penalised by being rendered ineligible for the government scheme because of the timing of payments by clients or customers, which is out of their control, or because of tax rulings regarding the deductibility of business expenses. A review would assist in ensuring that only the best quality for value legal services are supported, only the best quality for value access to justice is provided, and quality individual legal service providers are retained in the workforce, through public policy. Further this would be consistent with a recognition of the importance of an educated and highly skilled Australian workforce.

*Cost of Child Care*

124. The private child care crisis has led many members of the Bar to resort to private nannies for childcare, or to abandon their practices on a full time or part time basis. It is not unusual for there to be over a year's wait for a position in a childcare centre. The opening hours of childcare centres are often inflexible and do not always coincide with

the sometimes long hours that barristers are required to work. Costs associated with private nannies or other private childcare arrangements can be prohibitive for more junior members of the Bar especially.

125. The ongoing non-tax deductible status of child care costs, late fees, and the avoidance of late fees, are multiple added sources of pressure related to using childcare centres and private nannies which significantly affect retention of women with family and carer's responsibilities at the Bar.

126. The Association recommends that a review addressing the ongoing non-tax deductible status of child care costs be conducted. Such a review could be conducted in conjunction with, or as a part of, the public inquiry into Childcare and Early Childhood Learning currently being carried out by the Productivity Commission.

**Conclusion**

127. In summary, the Association welcomes any review of the SD Act. The SD Act has been an important legislative initiative to eliminate sex discrimination and has shifted perceptions about the role of women in the workplace and public life.[50] The focus of the SD Act is providing a remedy to individual complainants. The SD Act has had little impact on addressing systemic sex discrimination, especially outside the specific areas of public life currently dealt with under the SD Act, and this review provides an opportunity to examine how the SD Act may better achieve equality between women and men in all areas of activity in Australian life.

128. Legislative measures operate best when supported and complemented by adequate and appropriate policy measures. The Association encourages a review of relevant policy measures, especially those relating to paid parental leave and the continued non-tax deductible status of child care, hand in hand with a review of the SD Act.

[50] See University of New South Wales Law Journal, Forum Volume 10 No 2 – 'The *Sex Discrimination Act*: A Twenty Year Review', 2004.