

eowa

Submission to the Review of the Equal Opportunity for Women in the Workplace Act and Agency

Executive Summary and Recommendations

October 2009



Australian Government

**Equal Opportunity for
Women in the Workplace Agency**

Executive Summary and Recommendations

The Agency

The Equal Opportunity for Women in the Workplace Agency (EOWA) is a statutory authority located within the portfolio of the Australian Commonwealth Department of Family, Housing, Community Services and Indigenous Affairs (FaHCSIA).

The Agency's role is to administer the Equal Opportunity for Women in the Workplace Act (EOWW Act) 1999 (Commonwealth) and, through education, assist organisations to provide equal opportunity for women. EOWA collects and analyses this information and provides reporting organisations with feedback and advice on how to further develop their equal opportunity programs for women. As of July 2009, the Agency undertook this work on behalf of 2,803 reporting organisations covering a total of approximately 8,500 parent organisations, their subsidiaries and standalone employers. The Agency thus received, entered and evaluated reports from organisations employing around 23 per cent of Australian employees.

Its resources support 13 ongoing staff and six non-ongoing staff. In addition to this, seven contractors are employed for 18 weeks; one receptor is contracted for five months and an additional three receptors are contracted for six weeks each year at the time when reports are due to be received.

The total appropriations for EOWA in 2008-09 were \$2,938,000. The Agency received additional external revenue from the sale of goods, rendering of services and business partnerships to the sum of \$682,000. These funds were used to finance research projects, produce publications and provide additional resources to assist to business address equal opportunity issues.

Rationale for the Review and EOWA's Recommendations

The Government's review of the EOWW Act and Agency takes place 10 years after the last review of the Act and 23 years after the passage of the *Affirmative Action Act* 1986. The review is necessary to ensure that both the EOWW Act and the Agency itself continue to respond to changing external circumstances and to our evolving understanding of how equal opportunity law interacts with workplace practices and organisational cultures.

The high level outcomes of the Act and its operation since 1986 are very positive.

- The introduction of pro-active legislation aimed at preventing discrimination and removing barriers to equal employment opportunity was groundbreaking at the time and remains in advance of most international developments.
- Client surveys show that employers are increasingly positive about the role of the legislation and the services provided by the Agency.

- There is data demonstrating a significant increase in equal employment policies and practices among relevant employers. This data is supported by case studies, attitudinal surveys and public commentary from employers.

However, the Agency is still reliant on organisations self-identifying before they become part of the reporting cycle and many organisations that should report currently do not. The Agency estimates that only around 65-70 per cent of all relevant employers are actually meeting their legislated responsibilities under the EOWW Act. This situation is wholly unacceptable and addressing it is one of the Agency's main priorities in this review.

In addition, the Agency's own experience with receiving reports and giving feedback indicates that the implementation of equal opportunity for women in the workplace is beginning to stall:

- The strategic approach to analysing, implementing and evaluating equal opportunity measures introduced following the 1998 review is not driving further progress in a significant number of workplaces. Nearly all employers comply with the legislation but more reports are indicative of marginal than of high level compliance (15.7 per cent and 11.1 per cent respectively), and most are only moderately compliant (73.2 per cent).
- The flexible reporting format—introduced following the 1998 review in order to enable employers to tailor their reports to individual workplace requirements—has not, as was intended, supported outcomes-based reporting. Instead, it has created uncertainty about the standards to be applied to equal opportunity programs and reports.
- Most organisational cultures continue to reflect the assumption of a male norm and as female deviations from that norm.
- Employers have tended to prioritise measures to increase organisational flexibility, while there has been little or no progress in the more difficult areas of pay equity and the promotion and advancement of women, especially into positions of leadership.

Changes are required to the legislation to: ensure that all relevant employers meet their obligations under the Act; improve equal employment opportunity and pay equity outcomes in the workplace; increase the likelihood of cultural change in organisations; and support a more effective use of Agency resources. These changes involve moving to a broader gender equality focus for Agency activities and:

- substantially increasing the number of covered organisations actually reporting to the Agency ;
- replacing the current Public Report Form, which has proved difficult to evaluate and enforce, with a requirement to undertake a self-audit against a set of required

industry gender equality standards. There would be scope to provide for upward revision of these industry standards over time to reflect improved industry conditions and/or changing community expectations regarding employment arrangements. There would be a requirement to show progress in implementing further gender equality measures over time;

- making pay equity a separate employment matter; making the reporting of salaries and other pay data a mandatory part of the workplace profile (but confidential unless aggregated with other pay data); and introducing a requirement for a pay equity review and implementation program;
- introducing a requirement for organisations seeking to enter into a contract for Government procurement or industry assistance to provide a record of compliance with the Act issued by the Agency as part of their tender or application (a reverse onus approach), and to declare their willingness to be audited to confirm the content of their reports to the Agency;
- introducing a requirement to publish records of compliance with the amended EOWW Act together with a copy of the organisation's most recent report in all reporting workplaces; and
- once other changes have been bedded down, introducing the use of targeted workplace audits in organisations that are covered but currently do not submit a report and where the Agency has reason to believe there may be some misrepresentation on reports, and random audits elsewhere.

These changes—and particularly the strengthened emphasis on ensuring that organisations meet their legislated responsibility to report to the Agency—will entail changes to EOWA operating procedures as well as the current reporting form. For this reason the Agency is proposing a phased approach to implementation of its recommendations over a number of years with the introduction of workplace audits after other new arrangements are well established.

The proposals in this submission would not fundamentally change the focus of the Agency on receiving reports and providing support and feedback to reporting organisations. They would, however, extend the EOWW Act's reach to relevant organisations that are covered by the Act but are not currently reporting; support a more effective use of Agency resources; give the Agency better information on which to act; enable it to provide better information and support to reporting organisations; strengthen its bargaining position with respect to organisations that are inclined to disregard the legislation; and increase its capacity to contribute to the evidence base for Government decision-making and education activities.

These measures are also aimed at supporting cultural change by increasing the awareness and involvement of employees and relevant unions in the implementation of gender equality standards, and by increasing the seriousness with which these standards are taken at the

executive level of organisations. In addition the Agency wants to ensure that measures to support increased workplace flexibility do not close doors to women's organisational advancement at the same time that they open doors to managing work and family responsibilities. This, too, is a cultural change issue. Until more men access workplace flexibility arrangements, such arrangements are likely to be seen as 'solutions' to the 'problem' of women's employment, rather than as the means of supporting employees in managing the full range of their responsibilities.

Recognising that the workplace situation of women is bound to have implications for the workplace situation of men, and vice versa, the Agency is recommending that the Objects and possibly name of the Act and Agency acknowledge a focus on gender equality. In doing this, the Agency also recognises that the barriers to equality are not the same for women and men; that the strategies for responding to them are not likely to be symmetrical; and that its own strategies must continue to focus on women while at the same time encouraging broader access to and use by men of measures to support caring responsibilities.

While the removal of systemic barriers to workplace equality is the longstanding focus of the work of the Agency, reconceptualising this role in terms of the intersection of gender equality is an important development and draws out the particular role of the Agency in addressing Australia's responsibilities under the Convention on the Elimination of All Forms of Discrimination (CEDAW). Article 5 of CEDAW calls upon signatories to the Convention to take all appropriate measures to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. The Agency's interest in gender equality is underpinned by its conviction that, understood as a driver of cultural change, the concept can increase the receptiveness of employers, employees and Australians generally to eliminating the stereotyping of women's and men's roles in the workplace.

The Agency also regards the concept of gender equality as necessarily embracing difference within gender, that is, recognising the scope for age, disability and ethnicity compounded with gender to create multiple barriers to advancement. Accordingly, it is recommending that the Objects of the EOWW Act be amended to recognise the importance of workplace policies and practices to address these intersections.

A full set of the Agency's recommendations follows. In making these recommendations the Agency has tried to strike a balance between serving the ends of the legislation and minimising its regulatory impact for reporting organisations. In some cases it has given its preferred approach to addressing a particular issue and then noted a less preferred approach. In doing this the Agency does not want to be understood to be endorsing the less preferred approach but rather to be arguing that some directed action is preferable to none.

Recommendations

Objects and Name of the Act

1. The Objects of the Act should be amended to recognise that the removal of sex-based barriers to equal opportunity affects both women and men, and that a concept of gender equality is necessary to foster the removal of gender stereotyped roles from Australian workplaces.
2. The Objects of the Act should also be amended to recognise the importance of workplace policies and practices to address the ways in which age, disability and ethnicity compounded with gender can create multiple barriers to women's advancement.
3. The EOWW Act and EOWA should be renamed the Workplace Equality Act and Agency, or the Women in the Workplace Act and Agency.

Section 1: Programs and Reporting

4. The current practice of providing feedback to each reporting organisation should be amended to enable the Agency to provide an in depth review and feedback to all marginally compliant organisations (in 2009, 15.7 per cent of all reporting organisations), and to a random selection of the remaining moderately compliant and highly compliant organisations (73.2 per cent and 11.1 per cent of all reports respectively).
5. Consultation arrangements for the design and implementation of gender equality measures should be consistent with those proposed for modern awards.
6. The reporting requirements of the Act should be amended to include a strengthened requirement for workplace consultation; to modify the workplace profile to use an ANZSIC/ANZSCO framework and to take in the additional data recommended in Section 4 on coverage and Section 5 on pay equity; and to make the use of the common industry profile mandatory for each organisation.
7. A changed Public Report Form should be mandated, requiring employers to complete a self-audit against a specified set of gender equality standards and measures on the basis of a yes/no/not reasonably practicable format. An initial set of gender equality standards set in discussion with industry advisory committees (see Section 9) should be made mandatory. There should be scope to provide for upward revision of equality standards over time to reflect improved industry conditions and/or changing community expectations regarding employment arrangements. There should be a requirement to show progress in implementing the further equality measures over time.
8. The proposed amendments to the Public Report Form should be accompanied by a facility for on-line reporting, and supported by a one-off injection of funds to provide the on-line facility and an underpinning data analysis facility, and to support updating the Agency's website.

9. Once it has completed reviewing an organisation's Gender Equality Self Audit, the Agency should issue a compliance record stating the organisation's compliance status and position against an industry gender equality benchmark, together with a copy of the self-audit.
10. Once an employer's Gender Equality Self-Audit has been submitted and the Agency has issued a record of compliance or non-compliance, copies of both the record of compliance and self-audit should be required to be made directly available to staff and relevant unions.
11. The mechanism for making Gender Equality Self-Audits directly available to employees should be modelled on the existing arrangements for providing employees with a prescribed 'notice of employee representational rights' under the Fair Work Act.
12. EOWA's on-line searchable database of annual reports should be retained.

Section 2: Compliance, Enforcement and Waiving

13. Routine compliance audits conducted by the OFWO involving organisations whose corporate structure employs 100 or more people should include, among other matters of interest to the OFWO, verification that compliance records and reports have been made directly available to employees and accessible to workplace unions. Where this is found not to have been done, it should be the subject of the usual compliance processes employed by the OFWO in its routine audits, including where necessary a compliance notice. Affected organisations should be able to contact the Agency for any support and assistance they might require in complying with the EOWW Act.
14. ***Organisations that refuse to submit an annual Equality Self-Audit:*** If, after receiving notice from the Agency that it will be non-compliant for failing to report within 28 days, an organisation does not report within the specified time period, it will be non-compliant with the Act. In addition, the Fair Work Act or the EOWW Act should be amended to confer appropriate powers on the Fair Work Ombudsman, enabling workplace inspectors to visit such organisations and issue compliance notices to enforce compliance. Affected organisations would be able to contact the Agency for any support and assistance they might require.
15. ***Organisations where there are reasonable grounds to suspect that there has been some misrepresentation:*** If such an organisation fails to respond to questions from the Agency or to substantiate its self-audit, the EOWW Act should be amended to enable the Agency, on its own discretion, to refer the relevant self-audit to the OFWO, which would use its powers to verify the accuracy of the self-audit. If an employer is found in the course of this audit to have made wilful misrepresentations, the Agency may determine that that employer is non-compliant with the Act.

16. The OFWO would have to be appropriately resourced to take on this additional workplace audit function.
17. **Organisations that submit Equality Self-Audits, but do not meet required industry standards:** These organisations should be given 28 days to comply with the Act, and should be able to contact the Agency for any support and assistance they may require. If after 28 days the organisation's self-audit still does not meet the required industry standard, the organisation should be made non-compliant with the Act.
18. Organisations that submit Equality Self-Audits and meet the required industry standards, but show no further progress over time: Where, following discussions with the Agency about its lack of progress, an employer does not take any action to progress gender equality within the timeframe specified by the Agency (likely to be 28 days), including demonstrating to the Agency's satisfaction that the practicability of introducing a particular measure has been exhaustively examined, that employer should be deemed non-compliant with the Act.
19. Over time, as the requirement to conduct pay equity reviews and develop pay equity implementation plans becomes part of the reporting requirement for many organisations, random audits should be introduced. Initially, these could be confined to those organisations that signalled their acceptance of the audit mechanism as part of the contract compliance mechanism, but eventually all reporting organisations should be able to be audited.
20. Non-compliant organisations should receive compliance records that include the ground for non-compliance applying to the particular organisation and refer to the relevant section of the amended EOWW Act. These grounds are
 - Failure to register with the agency
 - Failure to provide an annual report within the specified timeframe
 - Failure to meet required industry standards
 - Failure to demonstrate progress in implementing further equality measures
 - Failure of specified organisations to undertake a pay equity review or develop a pay equity plan, or to take genuine action to implement such a plan (see section 5)
 - Failure to provide additional information sought (Sections 18 and 19 of the current EOWW Act)
 - Making wilful misrepresentations on the Gender Equality self-audit.
21. Non-compliant organisations should be required to make their record of non-compliance and any applicable self-audit directly available to employees and accessible by workplace unions so long as they continue to remain non-compliant.

22. Waiving should no longer occur, although the Director should retain the discretion not to name an organisation as non-compliant.

Section 3: Sanctions

23. The principal sanction for non compliance—naming in the Parliament—should be retained. It should be supplemented initially through inclusion of the record of compliance and any relevant self-audit in routine OFWO workplace inspections. Later, workplace audits could be used to ascertain and enforce compliance with the Act as a further deterrent. If the amended EOWW Act were made a workplace law for the purposes of the Fair Work Act, or if the proposed audit function were conferred on the OFWO as part of amendments to the EOWW Act, then the usual sanctions associated with OFWO compliance notices would come into play. If the amended EOWW Act were made a workplace law for the purposes of the Fair Work Act, then misrepresentations on annual self-audits would also be part of the workplace relations legislative sanctions regime.
24. Contract compliance restrictions for Government procurement and industry assistance should be amended to introduce a reverse onus approach, whereby organisations seeking to enter into a contract for Government procurement or industry assistance are required to provide, as part of their tender or application, the record of compliance with the EOWW Act issued by the Agency following its review of an organisation’s self-audit.
25. Organisations should be required as part of the tender/application process to declare their willingness to be audited to confirm the content of their reports to the Agency.
26. Governments of States not already supporting Commonwealth contract compliance for the EOWW Act should be encouraged to join those governments that have already joined themselves to the arrangements.

Section 4: Coverage

27. Rather than rationalising reporting units or extending coverage of the Act, the Agency believes that priority should be given to ensuring that those organisations that are already covered meet their legislated responsibilities to implement and report on equal opportunity measures and practices. The Agency recommends that the Government amend the *Income Tax Assessment Act 1936* to enable it to receive an annual list of organisations whose corporate structure employs 100 or more people. Pending the introduction of such an amendment, the Agency would conduct a high profile campaign reminding all employers in this category of their responsibilities under the Act.
28. While there should be no mandated change to existing flexibility with respect to reporting units, the Agency should actively encourage employers with a large number of subsidiaries to report separately for functionally distinct operations employing more

than 100 people. The process could be initiated by making this compulsory for organisations that put in an application for the EOWA Employer of Choice for Women citation.

29. While resource constraints also apply to any proposed extension of coverage to smaller employers, the Agency recommends that smaller businesses should be supported by its on-line facilities, and be able to join any Communities of Practice should they be established (see Section 7). Smaller businesses could also be encouraged or required to engage in gender equity initiatives through one or a combination of:

- reporting to the Agency, but in a shorter form confined to the workforce profile and associated pay equity diagnostic questions; and/or
- dropping the size of reporting organisations from those with 100 or more employees to those with 80 or more employees.

The Agency could not pursue either of these proposals without additional resources.

30. Following consultation with the Public Service Commissioner, further consideration should be given to including Commonwealth agencies employing 100 or more staff among the organisations required to report under the EOWW Act.

31. Workplace profiles in the Public Report Form should be disaggregated to specify the numbers and average salaries of men and women who are Executive Managers, in line executive management position and in support executive management positions. This data would be of considerable use to the Agency in considering future EOWA Employer of Choice for Women (EOCFW) criteria.

32. The increase in report handling and feedback likely to be associated with new reporting organisations will require additional resources. The Agency would require additional funding of \$470,00 if it pursued the option of engaging all organisations over 100 employees since, based on information provided by the ABS, it would be looking at assessing an additional 1400 reports. If the EOWW Act were changed to incorporate organisations with over 80 employees, the Agency would require additional funds of \$560,000 to meet its legislative responsibilities.

Section 5: Pay Equity

33. Pay equity should be specified in the legislation as a separate employment matter.

34. The use of the EOWA Pay Equity Tool or equivalent should be a necessary part of organisations' Gender Equality Self-Audits.

- A pared-back and less preferred option is to add to the proposed EOWA reporting instrument a small set of questions found in the New Zealand reviews to be critical

indicators of gender pay inequity. Data on average salary, performance pay and starting salary at each classification would be a mandatory part of the workplace profile. It would also be useful to have the average median duration of employment by classification by sex. The checklist would include a question on whether the organisation has undertaken a formal pay equity audit; a question on whether the organisation has undertaken a formal job evaluation study and what type of evaluation was used; and a question on whether the organisation has a pay equity implementation plan in place.

35. Where the responses to the Pay Equity Tool or diagnostic questions indicate a problem (e.g. fall below a simple benchmark), more substantive equal pay reviews (including work value studies) and pay equity plans would need to be made part of an organisation's subsequent annual Gender Equality Self-Audit requirement.
36. Detailed pay equity reviews and any associated plans would not be required to be submitted to the Agency but should be available for an inspector from the OFWO, which would be enabled to conduct random audits of those organisations required to proceed with formal pay equity reviews and implementation plans, as well as audits of those organisations that declared their willingness to be audited to confirm the content of their reports to the Agency as part of the contract compliance process. Where these audits show a failure to undertake a pay equity review or to develop an implementation plan, or to take genuine action to implement such a plan, the organisation could be made non-compliant with the Act, and the OFWO would be able to issue a compliance notice.
37. Pay equity reviews and plans could be provided to Fair Work Australia or the Fair Work Division of the Federal Court by an employer as part of a defence in an equal pay case.
38. Aggregated data from organisations' Gender Equality Self-Audits should form a part of the Agency's annual report and be made available to the Equal Remuneration Commissioner (should the position be established), the Sex Discrimination Commissioner, and bona fide researchers.
39. The Agency recommends implementation of related structural changes in Section 8 on structural arrangements.
40. The Agency is aware that its proposals for integrating pay equity reporting with its annual reporting arrangements would have to be deferred to the later stages of implementation of its broader package of reforms. For what could be achieved in the interval, the Agency refers the Review to its recent recommendation to the Parliamentary Pay Equity Inquiry that EOWA be funded to run a three year targeted industry campaign conducting voluntary gender pay equity audits. The recommendation suggested that such a campaign might focus on specific industries each year, identifying a group of organisations that have a pay gap greater than the industry average (and any organisations wishing to participate) and assisting employers to develop pay equity plans to lower the gap.

41. The Agency also reiterates its recommendations to the Parliamentary Pay Equity Inquiry for a community education program addressing the nature of the gender pay gap and the means and value of addressing it:
- A nation-wide community education program on pay inequity should be developed and implemented to increase awareness of the gender pay gap, further heighten debate and promote positive change throughout Australian workplaces, across all states and industries. Men, women, employees and employers should have access to such a program.
 - Targeted education of young people in schools about the gender pay gap should be considered.
 - The community education program should include addressing the belief that women risk being further discriminated against in a workplace environment that seeks to ensure that women are paid equally to men for equivalent work. This belief should neither manifest in reality, nor be used as a reason for arguing against steps being taken to address gender pay inequity.

Section 6: Data collection and management

Data coverage

42. The coverage of the requirement to report to the Agency should be extended consistent with the recommendations in Section 4.

Data collection

43. The data reported to the Agency should be enhanced consistent with the recommendations of Section 1 on reporting, and Section 5 on pay equity.

Section 7: Education and Promotion

44. The Agency believes that its education function would be greatly enhanced by the capacity to support a Community of Practice (CoP) for human resource practitioners with a focus on identifying and implementing gender equality measures and practices. Its direct involvement in the CoP would be limited to the provision and maintenance of the necessary IT networking site, securing a threshold level of involvement from practitioners, and ensuring that the contents of the site continue to comply with the Australian Public Service Commission's Circular 2008/8: 'Interim protocols for on-line media participation'. The Agency regards the CoP as a resource for practitioners, and not a promotional tool. Once established, a working CoP would emphasise member autonomy, direct exchange, practitioner-orientation, and informality. It would cost free

to members and accessible to all practitioners. Establishing a CoP would involve a one off cost.

45. On-line training should be made available to HR practitioners who are intending to make use of the Agency's on-line tools. While this assistance would not replace the Agency's workshops, self-paced IT learning modules would support a more effective application of sexual harassment and pay equity tools and findings, particularly for practitioners in regional areas.
46. Medium and small businesses should be able to access any Community of Practice and on-line tools made available by the Agency, as well as benefiting from its broad-based employer campaigns.
47. Gender Equality Self-Audits and compliance records should be required to be made directly available to staff, consistent with the recommendation in Section 1.
48. The data set associated with the proposed new reporting arrangements should be made available to the Minister for the Status of Women, the Office for Women (OfW), the Sex Discrimination Commissioner (SDC), and Fair Work Australia (FWA) for presentations and publications on a broadened range of gender equality matters. It should also be a resource for the academic community.
49. Equal Pay Day should continue to be used as a means of encouraging community discussion of and involvement in gender equality issues. Agency data on flexible work provisions might be used to underpin a similar event reflecting men's access to particular flexible working arrangements.

Section 8: Structural arrangements

50. On balance, the Agency's structural position should depend on any new functions the Government may give to it following the present inquiries.
51. If any enhanced enforcement function is confined to OFWO verification of the distribution of EOWA compliance records and reports, the Agency would continue to benefit from its current status as a stand-alone statutory agency, while at the same time building stronger operational links with FWA and the OFWO in particular. For this reason it should be in the DEEWR portfolio.
52. If, however, the Agency were to get strengthened enforcement (i.e. audit) arrangements, including a role in mandated action on pay equity, then it would have to develop its own audit capacity or rely on the OFWO. In the latter case the privacy and other legal considerations involved would be most easily addressed by moving the Agency at that later stage into FWA. The model proposed by the Agency is the same as that currently in

place for the OFWO, with day-to-day operations practically integrated with FWA, and separate governance arrangements.

Section 9: Advisory Committees

53. It is recommended that, as part of its conduct of the review, the Office for Women use the proposed consultative roundtables to establish the views of employers and employer organisations regarding the proposal the Agency be resourced to re-institute advisory committees, and to do so on an industry basis.

For information about the review and to access the Agency's submission go to
www.eowa.gov.au