

## **The Intersections of Gender Equality and Decent Work: Progress and Prospects in Australia**

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Gender equality is a contested term. In its fullest sense it can be understood as the freedom for all human beings ‘to develop their personal abilities and make choices without limitations set by strict gender roles; and that the different behaviours, aspirations and needs of women and men are considered, valued and favoured equally’ (Olgiati and Shapiro 2002). The ILO’s framing of gender equality in the context of decent work, ‘embraces equality of opportunity and treatment, equality of remuneration and access to safe and healthy working environments, equality in association and collective bargaining, equality in obtaining meaningful career development, maternity protection, and a balance between work and home life that is fair to both men and women’ (ILO 2007).

In Australia there have been three main regulatory approaches to advancing gender equality in employment: the use of specific anti-discrimination (AD) legislation, the prohibition of sex and other forms of discrimination in industrial relations (IR) regulation and the use of a human resource management (HRM) approach in the implementation of affirmative action (AA) regulation.

### ***The AD approach***

While prompted by Australia’s ratification of CEDAW, the *Sex Discrimination Act 1984* (SDA) drew on a more formal conception of gender equality that emphasises equal opportunity for women measured in terms of ‘less favourable’ treatment where women and men are similarly situated. This comparator conception takes the male pattern of life as the norm and does not tackle deep-rooted causes of inequality, including the gender division of labour (Thornton 1990). Close analysis of case law has highlighted the narrowness and complexity of the SDA’s direct and indirect discrimination provisions, which together with its individual complaints-based model and ineffectual enforcement processes have emerged as major structural problems (Hunter 2002; Gaze 2004; Thornton 2004). All these problems are exacerbated by the increasingly narrow judicial interpretation of AD statutes and of the international law on which they draw (Gaze 2002; Smith 2007). Empirical studies on the operation of the SDA suggest its implementation is also flawed, highlighted by growing formalism and a ‘creeping legalism’, with a concentration on procedural fairness that ignores the power disparity between complainants and respondents, as well as a more time-consuming and less transparent conciliation process than in the IR jurisdiction (Hunter and Leonard 1995; Chapman 2000; Charlesworth 2003; Thornton 2004). Problems with legislative awareness and enforcement have also emerged in specific areas such as sexual harassment and pregnancy discrimination (HREOC 1998; 2002, 2004, 2006, 2008; McDonald et al. 2008; Charlesworth and Macdonald 2008).

### ***The IR approach***

Much analysis of the operation of IR regulation in Australia has arguably been gender-blind and imbued with traditional male breadwinner assumptions (Hunter 1991; Baird 2003; Pocock 2000, Baird and Williamson 2009). However, there is a rich vein of empirical studies of the gendered impact of IR regulation on pay inequity and the failure of federal IR regulation to address it (Whitehouse 2001; Preston and Whitehouse 2004; Preston and Jefferson 2007; Whitehouse 2007; Smith and Lyons 2007), on the concentration of women in precarious work (Owens 1993; Fudge and Owens 2006; Campbell et al. 2009) on the regulatory exclusion of groups of women such as outworkers (Owens 1995), and on

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Australia's gendered and polarised working time regime (Pocock 2003; Campbell 2008). One focus of research has been on the more limited access many women have to 'family-friendly' arrangements through IR mechanisms such as awards and enterprise agreements because of their location in poor quality jobs (Buchanan and Thornthwaite 2002; Chalmers et al. 2005). Changes in IR regulation have prompted the analysis of the gendered impact of enterprise bargaining (Bennet 2004; Hall and Fruin 1994; Burgess et al. 1996; Charlesworth 1996; Smith and Ewer 1995), of individualised workplace agreements (Burgess et al. 2004) and of the far-reaching changes introduced through the 'WorkChoices' amendments (Pocock et al. 2008; Peetz 2007). While the lack of fit between the reality of many women's lives and IR regulation and policy modelled around the 'ideal worker' has been highlighted in these studies, less attention has been paid to the roles of classification structures and enforcement in the persistence of gender inequality.

### ***The HRM approach***

An HRM approach to improve equal opportunity for women through voluntary action by employers has been vigorously promoted by government. Over the last decade in particular this approach has substituted for any IR regulatory action to improve EEO through minimum labour standards. For employers with more than 100 employees there is a legislative framework designed to encourage action at the enterprise level. The implementation of the *Affirmative Action Act 1996* (AAA) (followed by the *Equal Opportunity for Women in the Workplace Act 1999* (EOWWA)) has relied on the individualised HRM discourse of 'diversity' that implicitly undermines the regulation's mandate to address structural discrimination (Bacchi 2000). The few existing studies of the impact of the AAA/EOWWA on organisational practice suggest there is little relationship between mandatory reporting by organisations on basic indicators and the achievement of positive organisational outcomes for women (Sheridan 1995; Braithwaite 1993; Strachan and Burgess 2000). Studies drawing on data from organisational reports paint a mixed picture of the impact of AAA/EOWWA regulation, suggesting some correlation between gender-specific HR strategies and EEO structures and increases of women in management positions yet little organisational action in the areas of recruitment and the promotion of women (French 2001; Strachan and French 2007). Industry-specific and organisational studies reveal little connection made between conditions of employment and EEO/diversity action with a striking lack of interaction between EOWWA regulation and enterprise bargaining in most large workplaces (Strachan and Burgess 1997, 2000; French and Strahan 2007; Charlesworth et al. 2007).

In Australia, manifestations of gender inequality in employment continue and indeed are growing (Preston et al. 2006; Maddison & Partridge 2007). This is frequently attributed to the failure of AD regulation. However it is not only the flaws in AD regulation, but also the effective separation of the AD, IR and HRM regulatory approaches from each other, the progressive weakening of the regulatory underpinnings of the IR and AA mechanisms, and the disappearance of any broader gender equality policy agenda that have contributed to Australia's failure to advance gender equality in employment and decent work. In particular, the practical and symbolic divide between the AD and IR regulatory domains means that sex discrimination, such as sexual harassment and pregnancy discrimination, has not been seen as a mainstream IR issue. Further, the gender equality impact of IR regulation, such as the regulation of classification structures, bargaining provisions and working time arrangements, remains invisible as does the importance of taking positive action to achieve decent work for all workers, men and women.

### ***Future research directions***

The regulatory and institutional bases of the AD, IR and HRM frameworks are currently in a state of flux. The Senate Inquiry into the SDA reported late in 2008, the House of Representatives Inquiry into Pay Equity will report shortly and the EOWWA is currently under review. There may well be some pressure on the federal government to renovate the basic architecture of the SDA and the EOWWA and to rethink some of the links between IR and AD including positive action. Arguably the *Fair Work Act 2009* represents a continuation of many aspects of IR regulation to date (Forsyth and Stewart 2009) and a failure to think outside the traditional standard employment relationship and male breadwinner model. Many of the proposed national employment standards still exclude precarious workers, such as casual employees and those without 12 months service with the same employer. In the lengthy debates around the Fair Work Bill and indeed around the current award modernisation process, there has been little reference to gender equality, decent work or to related international standards. However the framing of discrimination as 'adverse action' and the establishment of a discrimination compliance unit within the Office of the Fair Work Ombudsman (OFWO) suggest a welcome mainstreaming of the proscription of sex discrimination within the IR jurisdiction, if not the advancement of gender equality.

The new regulatory environment provides the basis for future research that integrates IR, AD and HRM perspectives in an assessment of the prospects of gender equality through decent work. Adequately gender-disaggregated data and cross-national comparison will be crucial for studies including:

- monitoring the implementation of the FWA inc the NES, award modernisation and enterprise bargaining through both gender equality and decent work lenses at the labour market, industry and workplace levels
- monitoring the take up and the effectiveness of enforcement through in IR and AD jurisdictions and the links between them
- case studies of gender inequality at work in the new regulatory environment
- identifying the central elements of an Australian regulatory framework that could underpin progress to greater gender equality in paid work, including recognition of life outside paid work

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