



pilch

promoting law in the public interest

Eliminating Barriers to Workplace Equality:

Submission to the Office for Women on the Review of the
Equal Opportunity for Women in the Workplace Act 1999

October 2009

Eliminating Barriers to Workplace Equality:

Submission to the Office for Women on the Review of the *Equal Opportunity for Women in the Workplace Act 1999*

PILCH acknowledges the contribution of the Federation of Community Legal Centres in the preparation and drafting of this submission.

This submission is endorsed by the following organisations in whole or part:

Federation of Community Legal Centres (Vic) Inc.

Victorian Women Lawyers Association Inc.

Victorian Women's Trust

Women's Legal Services Australia

Women's Legal Services New South Wales

Simone Cusack

Public Interest Law Clearing House (PILCH) Inc
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: (03) 8636 4415

F: (03) 8636 4455

E: simone.cusack@pilch.org.au

TABLE OF CONTENTS

1.	Executive Summary	1
2.	About PILCH	4
3.	Scope and Structure of Submission	5
4.	Value and Impact of Equal Employment for Women	5
4.1	Obstacles Impeding Further Progress Toward Equality in the Workforce	6
4.2	Transforming the Division of Family and Work Responsibilities	16
5.	Objects and Coverage of the EOWW Act	18
5.1	Appropriateness and Relevance of EOWW Act's Objectives	18
5.2	Recognition of Role of Men as Fathers and Carers	19

1. Executive Summary

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to make a submission to the Office for Women in relation to its review of the effectiveness and efficiency of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (**EOWW Act**). The right to work is a fundamental human right.¹ Its exercise and enjoyment are also essential to the realisation of other human rights and fundamental freedoms.² The right to work cannot be fully realised unless there is equality of employment opportunities for men and women; that is to say, *substantive* equality in the employment sector.
2. States are obligated, under international human rights law, to ensure that men and women exercise and enjoy an equal right to work.³ In recognition of the specific obstacles that women often face in realising the right to work, additional protections have been enshrined in international human rights law to ensure that substantive equality is achieved. For example, article 11(1)(a) of the UN *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**) provides that

States Parties shall 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, in particular: The right to work as an inalienable right of all human beings.
3. In Australia, organisations that employ 100 or more employees are explicitly obligated, under the EOWW Act, to promote equal opportunity for women in employment. The objectives of the Act include the promotion, amongst employers, of ‘the elimination of discrimination against, and the provision of equal opportunity for, women in relation to employment matters’⁴. Further obligations to ensure equality for women in employment can be found in such laws as the *Sex Discrimination Act 1984* (Cth) (**SDA**)⁵ and the *Fair Work Act 2009* (Cth) (**FWA**).⁶
4. The EOWW Act was last reviewed 10 years ago. As the Issues Paper rightly points out, ‘there have been a number of changes in key policy settings and the economic landscape which make it important to ensure that the EOWW Act and [the Equal Opportunity for Women in the Workplace Agency (**EOWA**)] are continuing to make the best possible contribution to advancing equal opportunity for women in Australian workplaces’. The thirtieth anniversary of the CEDAW in 2009 makes the review of the effectiveness and

¹ See, eg, *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3 (**ICESCR**), art 6; *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (**CEDAW**); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Dec. 18, 1990 entered into force July 1, 2003), 2220 UNTS 93.

² Committee on Economic, Social and Cultural Rights (**CESCR**), *General Comment No. 18: The Right to Work*, UN Doc E/C.12/GC/18 (2006), at para 1.

³ See, eg, ICESCR, arts 2, 3, 6; CESCR, *General Comment No. 18*, *ibid*, at paras 12(b)(i), 13, 19, 23, 25, 31.

⁴ See EOWW Act, s 2A(b).

⁵ See SDA, ss 14-20, 28B, 28E.

⁶ See FWA, s 351(1).

efficiency of the EOWW Act even timelier. PILCH commends the Hon Tanya Plibersek MP and the Office for Women on the initiative to undertake the review.

5. PILCH submits that women's ability to fully exercise and enjoy the right to work is contingent on the elimination of discrimination against women and the realisation of substantive equality. The obligation to eliminate discrimination and ensure substantive equality is both negative and positive in nature.⁷ Australia must ensure that all public authorities and institutions refrain from unlawful discrimination, including in the employment sector. Yet, in order to comply with its human rights obligations, Australia must do more than merely refrain from discriminating against women in relation to their employment. It must also take positive steps to protect and fulfil the rights to non-discrimination and substantive equality and the right to work.⁸ Positive intervention is especially important in sectors, such as the employment sector, where women have traditionally been subjected to systemic discrimination and where discrimination is regularly perpetuated by non-state actors (eg, employers).
6. Whilst some of the major obstacles that impede the realisation of substantive equality in the workplace have been removed (or partially removed), PILCH submits that many barriers, including wrongful gender stereotyping and gender-based violence against women, remain resilient and are socially entrenched. PILCH submits that the Australian Government and EOWA must take positive steps to remove the obstacles that continue to impede equal employment opportunities for women. Particular emphasis should be placed on those measures that will help transform the traditional division of breadwinning and caregiving responsibilities between men and women. PILCH is of the opinion that such a transformation is necessary to ensure that caregiving is viewed as an important and valued responsibility of men and women, as well as the community as a whole. It is also necessary to ensure that women's full participation in society is viewed as beneficial not only for women, but also the entire Australian community.
7. PILCH submits that redefining the traditional roles of men and women and transforming the traditional division of caring and breadwinning responsibilities can be achieved only by placing greater focus on enabling men and women to share paid work and caring responsibilities more equally. Whilst focusing on women's roles and the way in which women's work is valued is important, it is not sufficient. Focusing exclusively on women's roles and the undervaluing of women's work, to the exclusion of men's roles and the valuing of men's work, and how they both impact power relations and gender hierarchies, ignores the complexity of the social and cultural patterns of conduct of men and women.
8. In summary, PILCH makes the following recommendations:

⁷ See, eg, CESCR, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/CN.12/2005/4 (2005), at paras 18-21; Human Rights Committee (HRC), *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), at para 6-8; HRC, *General Comment No. 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994), at para 5.

⁸ See, eg, *Yilmaz-Dogan v. The Netherlands*, CERD, Communication No. 1/1984, UN Doc CERD/C/36/D/1/1984 (1988) (CERD); *Nachova v. Bulgaria*, Appl. Nos. 45377/98 and 43579/98, (European Court of Human Rights, Grand Chamber, 2005); *Moldovan v. Romania*, Appl Nos. 41139/98 and 64320/01 (European Court of Human Rights, 2005). See also Bob Hepple, 'Positive Obligations to Ensure Equality' (2006) 15 *INTERIGHTS Bulletin* 114.

Recommendation No. 1:

The Australian Government should make the elimination of wrongful gender stereotyping a priority, in accordance with its obligations under international human rights law to ensure women's equal access to, and equality within, employment. It should ensure that all branches of government – state and federal – refrain from wrongful gender stereotyping. In addition, it should take positive steps, such as educating state agents and officials, employers, trade unions and the broader community, about the harms of wrongful gender stereotyping and the need to eliminate and remedy this wrong to ensure equal opportunity for women in the workplace.

Recommendation No. 2:

The Australian Government should take immediate steps to implement the strategies and actions in *The National Council's Plan for Australia to Reduce Violence against Women and their Children* on enhancing women's economic independence.

Recommendation No. 3:

EOWA should address wrongful gender stereotyping and gender-based violence against women as an obstacle to equal opportunity for women in the workplace in its:

- guidelines for employers;
- research, educational programs and other programs for the purpose of promoting equal opportunity for women in the workplace;
- efforts to promote understanding and acceptance, and public discussion, of equal opportunity for women in the workplace, and,
- other functions,

under article 10 of the EOWW Act.

Recommendation No. 4:

The EOWW Act should be amended to explicitly obligate EOWA to take steps to promote the more equal sharing of paid work and caring responsibilities between men and women.

Recommendation No. 5:

In fulfilling its mandate under the EOWW Act, EOWA should promote the more equal sharing of paid work and caring responsibilities between men and women.

Recommendation No. 6:

Section 2A of the EOWW Act should be amended to make explicit that one of the principal objects of the Act is the elimination of all forms of discrimination against women in the employment sector, with a view to ensuring *substantive equality* of men and women.

Recommendation No. 7:

The EOWW Act should be amended to explicitly recognise the role of men and women as parents and carers.

2. About PILCH

9. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono referral schemes (Public Interest Law Scheme, Victorian Bar Legal Assistance Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).
10. PILCH's objectives are to:
- improve access to justice and the legal system for those who are disadvantaged or marginalised;
 - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
 - refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
 - support community organisations to pursue the interests of the communities they seek to represent; and,
 - encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

11. In 2008-2009, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.
12. PILCH has a particular interest in the elimination of all forms of discrimination against women and the realisation of substantive equality. To this end, it has facilitated numerous pro bono referrals and made countless policy and law reform submissions that aim to realise these important goals. For example, in 2009, PILCH made a joint submission (with the Human Rights Law Resource Centre (**HRLRC**)) and gave evidence to the Scrutiny of Acts and Regulations Committee on its inquiry into the exceptions and exemptions to the

Equal Opportunity Act 1995 (Vic).⁹ In 2008, PILCH made a submission to the Senate Standing Committee on Legal and Constitutional Affairs on the effectiveness of the *Sex Discrimination Act 1984* (Cth).¹⁰ The present submission is made in the context of PILCH's efforts to address systemic discrimination and inequality against marginalised and disadvantaged groups, including women.

3. Scope and Structure of Submission

13. This submission addresses two of the thematic priorities identified in the Issues Paper, namely: the value and impact of equal employment opportunity for women (theme 1); and, the objects and coverage of the EOWW Act (theme 2). It is not the intention of this submission to provide a comprehensive analysis of each of these thematic priorities. Rather, this submission focuses on those aspects of the identified priorities in which PILCH has expertise.
14. This submission begins in Section 4 by examining the first thematic priority of the Issues Paper: the value and impact of equal employment opportunity for women. It responds specifically to questions 1.2 and 1.3 of the Issues Paper:
- What are the obstacles that may impede further progress towards equal employment opportunity within organisations and in Australia generally?
 - Should there be a greater focus on enabling men and women to share paid work and caring responsibilities more equally? How can men be provided with better opportunities to participate in the care of their children and other dependants?

Section 5 then examines the second thematic priority: objects and coverage of the EOWW Act. It addresses questions 2.1 and 2.4:

- Are the objects of the EOWW Act appropriate and relevant to today's workplaces?
- Should the role of men as fathers and carers be acknowledged in the EOWW Act?

4. Value and Impact of Equal Employment for Women

15. Section 4 examines theme 1 of the Issues Paper on the value and impact of equal employment for women. Section 4.1 considers some of the major obstacles that impede the realisation of substantive equality in the workplace. It examines how wrongful gender stereotyping and gender-based violence against women impede women's equal access to, and equal treatment in, employment, and outlines Australia's obligations, under human rights law, to eliminate those obstacles. Section 4.2 considers whether or not there should be a greater focus on enabling men and women to share paid work and caring

⁹ See Simone Cusack and Rachel Ball, *Eliminating Discrimination and Ensuring Substantive Equality*, Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the *Equal Opportunity Act 1995* (Vic) (PILCH and HRLRC, 2009), available at: http://www.pilch.org.au/2009_submissions/.

¹⁰ See Michelle Panayi, Mat Tinkler and Dahni Houseman, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (PILCH, 2008), available at: http://www.pilch.org.au/2008_submissions/.

responsibilities more equally. It concludes that steps need to be taken to transform the traditional division of breadwinning and caregiving responsibilities between men and women. It asserts that such a transformation is necessary to ensure that caregiving is viewed as an important and valued responsibility of both men and women, as well as the community as a whole. It is also necessary to ensure that women's full participation in society is viewed as beneficial not only for women, but also the entire Australian community.

4.1 Obstacles Impeding Further Progress Toward Equality in the Workforce

16. There can be little doubt that, over the past 50 years, there have been significant strides toward the equality of men and women in the Australian workforce. For example, as the Issues Paper points out, women's participation in the Australian workforce (one of the indicators of workplace equality) has increased significantly during this period.¹¹ These important developments are due, in large part, to the removal or partial removal of a number of barriers that have impeded women's equal access to, and equality within, the workforce. For instance, protections against sexual harassment have been introduced¹² and, in 2009, the Australian Government agreed to introduce a paid maternity leave scheme.¹³
17. Despite the removal of a number of barriers, equality of men and women in the workforce has not yet been achieved. For example, research shows that: women are still underrepresented in leadership and decision-making positions;¹⁴ there is a growing pay equity gap between men and women;¹⁵ and, women are significantly more likely than men to be impoverished in retirement, since superannuation balances and payouts for women are approximately half of those of men.¹⁶ What this research tells us is that many of the barriers to women's workplace equality remain resilient and are socially entrenched.
18. Question 1.2 of the issues paper asks: What are the obstacles that may impede further progress toward equal employment opportunity within organisations and in Australia generally? This section examines two of the major obstacles that PILCH submits continue to impede the elimination of discrimination against women and the realisation of substantive equality in the workplace, namely, wrongful gender stereotyping and gender-based violence against women. It also outlines the obligations incumbent on the Australian Government to eliminate those barriers. PILCH submits that if women are to achieve

¹¹ Office for Women, *Review of the Equal Opportunity for Women in the Workplace Act 1999: Issues Paper* (2009), 3.

¹² See SDA, ss 28A-28L.

¹³ See Honourable Tanya Plibersek, Minister for Housing and Minister for the Status of Women, 'Launch of the EOWA Survey on paid maternity leave, sex-based harassment initiatives and the gender pay gap,' (Speech delivered at Parliament House, Canberra, 20 August 2009).

¹⁴ See generally EOWA, *EOWA 2008 Australian Census of Women in Leadership* (2008), available at: http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/2008_Australian_Women_In_Leadership_Census/Media_Kit/EOWA_Census_2008_Publication.pdf.

¹⁵ See Office for Women, 'Pay Equity', available at: <http://www.fahcsia.gov.au/sa/women/progserv/economic/Pages/payequity.aspx>.

¹⁶ See Australian Human Rights Commission (AHRC), *Accumulating Poverty: Women's Experiences of Inequality over the Lifecycle*; An Issues Paper Examining the Gender Gap in Retirement Savings (2009).

equality with men in employment and if Australia is to fully comply with its international human rights obligations, these barriers must be removed.

(a) Wrongful Gender Stereotyping

Nature and Extent of Wrongful Gender Stereotyping in the Employment Sector

19. Wrongful gender stereotyping¹⁷ is one of the major obstacles that impede further progress toward equal employment opportunity in Australia.¹⁸ Common stereotypes include the:
- *stereotype of women as primarily carers*, which implies that women should prioritise childbearing, childrearing and other forms of caring over all other roles they might perform or choose. According to this stereotypical thinking, women cannot be model or valuable employees since they will (and should) put their caring responsibilities before the responsibilities of their employment.¹⁹
 - *stereotype of men as primary breadwinners*, which implies that men ought to assume the burden of sustaining and protecting their families and meeting their financial needs and responsibilities.²⁰
 - *stereotype of men as decision-makers*, which implies that men possess the attributes and characteristics (eg, drive, competitiveness, aggressiveness) that it is suggested are required in (well-paid) leadership and decision-making positions.²¹
 - *stereotype of women as nurturers*, which implies that women possess the attributes and characteristics (eg, compassion, warmth) that it is suggested are required in (low-paid) occupations.²²
20. Although wrongful gender stereotyping affects both men and women, its repercussions are often particularly egregious for women.²³ One does not need to look far to find evidence of the multifarious ways in which gender stereotyping

¹⁷ The term 'stereotype' is used in this submission to refer to 'a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group ...'. Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (forthcoming, 2009), 9.

¹⁸ For a discussion of the role and effect of wrongful gender stereotyping in the workplace, see generally: Joan C. Williams and Stephanie Bornstein, 'The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias' (2008) 59 *Hastings Law Journal* 1311; Joan C. Williams and Elizabeth S. Westfall, 'Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" in the Workplace' (2006) 13 *Duke Journal of Gender Law & Policy* 31; Joan C. Williams, 'Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case' (2004-2005) 73 *University of Cincinnati Law Review* 365; Joan C. Williams and Nancy Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job', (2003) 26 *Harvard Women's Law Journal* 77.

¹⁹ See Simone Cusack, 'If I Were Attorney-General ... Ensuring Substantive Equality Through the Elimination of Gender Stereotypes' (2008) 32 *Human Rights Law Resource Centre Bulletin* 23, at 23 (arguing that '[t]his was recently evident during the national debate concerning paid maternity leave. Largely invisible from this debate was the role that men play in caregiving. While the provision of paid maternity leave is essential to enable women to recover from the physical act of childbearing, gender stereotypes prevented a more robust debate about the role of both parents and the broader community in the provision of childcare. Stereotypes also limited debate about the provision of childcare in same-sex relationships'.).

²⁰ For an example of this stereotype in practice, see the workplace safety advertisements of WorkSafe Victoria, which overwhelmingly cast men as primary breadwinners: WorkSafe Victoria, *Campaigns: Valuing Safety* (2009), available at: <http://www.workcover.vic.gov.au/wps/wcm/connect/WorkSafe/SiteTools/About+WorkSafe/Campaigns/>.

²¹ Evidence of the effect of this stereotype can be seen in the decreasing numbers of women in leadership and decision-making positions: see generally note 14.

²² Evidence of the effect of this stereotype can be seen in the segregation of women into occupations such as teaching, and nursing.

²³ See Cook and Cusack, above note 17, at 1; Sandra Fredman, *Women and the Law* (1997), 3.

operates to impair or nullify women's equal exercise and enjoyment of the right to work in Australia. For example, in 2008, EOWA named wrongful gender stereotyping as an underlying cause of the pay equity gap in this country. In a submission to the House Standing Committee on Employment and Workplace Relations, EOWA noted that the gender pay gap reflects

the low value placed on the work women do, the unequal distribution of ... opportunities, the impact of caring responsibilities, the continued reluctance to invest in women ..., old fashioned beliefs about women's abilities and roles and the failure to understand the difference between hours worked and outcomes achieved.

Unequal pay is a problem that affects all women at all levels of the Australian workforce and its solution lies in overcoming stereotypes and achieving genuine cultural change, both within the workplace, and in society generally.²⁴

21. The Australian Human Rights Commission (**AHRC**) also recently highlighted how wrongful gender stereotyping can impair women's equal right to work. In *Accumulating Poverty: Women's Experiences of Inequality over the Lifecycle*, the AHRC identified how wrongful gender stereotyping impacts women at different points over their lifecycle. It noted, for instance, that

[w]omen's decisions to take time out of paid work, to trade salary for flexibility or to work in a low paid job are often viewed as a matter of individual choice and responsibility. Yet, these choices are very often constrained by a range of external factors such as ... gendered stereotypes. Rather than leave individuals to struggle with the consequences of constrained choices, ... removing workplace and other barriers to women's financial security is an important component of narrowing the gender gap in retirement savings.²⁵

Experiences of sex discrimination and sexual harassment, fuelled by discriminatory stereotypes about gender roles, continue to pervade women's experiences of paid work. These can occur at any point in the lifecycle. These experiences subsequently affect women's lifetime earnings. They also present a barrier to women fully benefiting from the retirement income system.²⁶

The onset of caring responsibilities, or potential onset of caring responsibilities, is another critical point at which women's advancement in the paid workforce is affected. This is often due to negative assumptions and stereotypes about women and their commitment to their career.²⁷

Analysing the specific effect that stereotyping can have on the employment experiences of older women, the AHRC further noted that '[t]he consequences of discriminatory stereotyping for older women are far-reaching and serious. These stereotypes ... can prevent older women from being selected for jobs or, when

²⁴ EOWA, *Submission to the House Standing Committee on Employment and Workplace Relations: Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce* (2008), at paras 32-33.

²⁵ AHRC, *Accumulating Poverty*, above note 16, at 2.

²⁶ *Ibid.*, at 14.

²⁷ *Ibid.*

employed, from being considered for training and promotion opportunities²⁸. 'What is also troubling,' it said 'is that in the face of entrenched discrimination, older women themselves may start to believe and internalise the stereotypes and select out of better work opportunities. This would further compromise both their ability to accumulate retirement savings and their long term financial security'²⁹.

22. Further evidence of the effects of wrongful gender stereotyping on women's equal right to work can be found in such documents as the 2009 CEDAW Shadow Report³⁰ and the 2008 report of the Standing Committee on Legal and Constitutional Affairs on the effectiveness of the SDA.³¹ For example, in calling for the removal of the permanent exception in section 43 of the SDA, which makes it lawful to discriminate against women in respect of combat duties, one submission to the Senate Committee drew attention to the fact that the gender stereotypes that underpin this provision permit discrimination against women in the armed forces and deny women their equal right to employment. The submission noted that:

[i]t is a myth that all women are not suitable for combat, just as it is a myth that all men are suitable for combat. Arguments about men and women's suitability for frontline military service are grounded in stereotypical assumptions about the psychological and physiological makeup of women and men. It is naïve and ignorant to believe all women possess petite bodies and pacifist mindsets. It is equally absurd to believe all men are athletic warriors³²

23. Wrongful gender stereotyping in the employment sector is not always 'hostile' in the sense that gender stereotypes are applied, enforced or perpetuated in a way that it is deliberately intended to impair or nullify women's equal right to work. A person who relies on a gender stereotype (whether consciously or subconsciously) may be acting benevolently; they may see themselves as being considerate of others and may be 'outraged, devastated, or bewildered by any suggestion that he or she is sexist'³³. Yet, benevolent stereotyping can harm women just as hostile stereotyping can, for instance, by reducing expectations of individuals in a particular social group (eg, women), without considering an individual's need, interests or circumstances. In the context of the employment sector, one commentator has explained:

²⁸ Ibid, at 21. See also AHRC, *Australia's Future Tax System (Retirement Income System)*: Australian Human Rights Commission Submission to the Review Panel (2009), at para 125.

²⁹ AHRC, *Accumulating Poverty*, *ibid*.

³⁰ YWCA Australia and Women's Legal Services Australia, *NGO Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Australia* (2009), at paras xi-xii, 7.1, 7.2, 9.2, 11.1-15.2, 44.1, 89.1, available at: <http://www.ywca.org.au/pdfs/FINAL-CEDAW-NGO-Report-Australia-July09.pdf>.

³¹ Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008), at paras. 4.26, 5.83, 7.6, 7.23, 7.25, 7.50, available at: http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/report/report.pdf.

³² Jyonah Jericho, *Women, Combat and War: Debunking the Myths*, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008), at 3, available at: http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sub02.pdf. See also at 5, 8, 9, 10, 12.

³³ Williams and Segal, above note 18, at 95. See generally Peter Glick and Susan T. Fiske, 'An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications of Gender Inequality' (2001) 56 *American Psychologist* 109.

Regardless of whether stereotyping is hostile or benevolent, it strips the decision-making power about how to interpret the responsibilities of motherhood away from the mother herself, in favour of an assumption that she will (or should) follow traditional patterns. In one instance, after a husband and wife who worked for the same employer had a baby, the wife was sent home at 5.30 P.M., with the solicitous sentiment that she should be at home with the child. In sharp contrast, the husband was given extra work and was expected to stay late. The additional work was meant to be helpful, for the husband now had a family to support. The employer effectively created workplace pressures that pushed the family into traditionalist gender roles; the decision about how to distribute family caretaking responsibilities was taken out of the family itself.³⁴

24. On the occasion of the ratification of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, the Hon Robert McClelland MP (Attorney-General) and the Hon Tanya Plibersek MP (Minister for the Status of Women) formally acknowledged the harms of wrongful gender stereotyping. In a joint news release marking this significant occasion, the Attorney-General stated that '[t]he Rudd Government is committed to overcoming the stereotypes and prejudices that can stifle women's rights and weaken equality'³⁵. Whilst the Attorney-General is to be lauded for this statement, as at the time of writing, the Australian Government has failed to adequately address the deleterious effects of wrongful gender stereotyping, including the various ways in which it impairs and nullifies women's equal exercise and enjoyment of the right to work. The Government's failure to take steps to address wrongful gender stereotyping is all the more incongruous considering the obligations incumbent on the Government, under CEDAW and other international human rights instruments, to eliminate wrongful gender stereotyping.

Obligations to Eliminate Wrongful Gender Stereotyping

25. Article 5(a) of CEDAW requires the Australian Government 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.

In addition, article 2(f) of CEDAW obligates the Government 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. The obligation to eliminate wrongful gender stereotyping is further entrenched in article 10(c) of CEDAW on the right to equality in education.

³⁴ Williams and Segal, *ibid*, at 95-96. See also Cook and Cusack, *above note 17*, at 18.

³⁵ Attorney-General, the Hon Robert McClelland MP, and Minister for Housing, Minister for the Status of Women, 'Australia Comes in From the Cold on Women's Rights', News Release (Nov. 24, 2008), available at: http://www.tanyaplibersek.fahcsia.gov.au/Internet/tanyaplibersek.nsf/content/womens_rights_25nov08.htm.

26. Articles 2(f) and 5(a) of CEDAW are cross-cutting obligations that must be read together with other human rights, including the right to work.³⁶ Article 11 of CEDAW requires States Parties to eliminate all forms of discrimination against women in the context of employment. Although article 11 does not explicitly require States Parties to eliminate wrongful gender stereotyping in the employment sector, when read together with articles 2(f) and 5(a), it necessarily follows that eliminating such stereotyping is a key element of complying with that provision.
27. It is significant that the UN Committee on the Elimination of Discrimination against Women (**CEDAW Committee**) has explained that the requirement to eliminate wrongful gender stereotyping is not only an obligation in its own right, but is also essential to States Parties' full compliance with CEDAW. According to the CEDAW Committee, 'States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions'³⁷. It is also significant that the obligation to eliminate wrongful gender stereotyping finds support in other international human rights instruments.³⁸
28. PILCH submits that eliminating wrongful gender stereotyping in the employment sector will help to transform the way in which society perceives and values women and the work that they undertake. PILCH is of the view that eliminating this harmful phenomenon will help, for example, to: reduce the pay equity gap; address the segregation of women into low-paid and less influential jobs; and, change the division of family and caring responsibilities so that they are more equally shared between men and women.
29. PILCH further submits that, in fulfilling its functions under article 10 of the EOWW Act, EOWA should address wrongful gender stereotyping as an obstacle to equal opportunity for women in the workplace.

(b) Gender-Based Violence against Women

30. Gender-based violence against women,³⁹ like wrongful gender stereotyping, is a major obstacle to equal employment opportunity in Australia. As the CEDAW Committee has explained, '[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual

³⁶ See Rikki Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5A CEDAW for the Elimination of Structural Gender Discrimination* (2004), 74-75.

³⁷ CEDAW Committee, *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004), at para 7.

³⁸ See, eg, CESCR, arts 2, 3; CESCR Committee, *General Comment No. 16*, above note 7, at paras 11, 19; CESCR Committee, *General Comment No. 20: Non-Discrimination*, UN Doc E/C.12/GC/20 (2009), at paras 20, 35.

³⁹ The term 'gender-based violence against women' refers to 'violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.' CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), at para 6.

harassment in the workplace⁴⁰ This section examines two forms of gender-based violence against women – sexual harassment and domestic violence – that continue to impede women’s equal enjoyment and exercise of the right to work in Australia.

Sexual Harassment

31. Sexual harassment, meaning unwelcome sexually determined behaviour,⁴¹ is socially pervasive in the Australian workplace, impeding women’s equal exercise and enjoyment of the right to work. Sex Discrimination Commissioner, Elizabeth Broderick, has noted, for instance, that

it is clear that sexual harassment is alive and well and occurring far too frequently. There is no question that work-related sexual harassment is unlawful [and] this has been the case under the Sex Discrimination Act for more than 20 years. And yet, as has been documented extensively by HREOC and many others, and I have now heard for myself, sexual harassment continues to be a problem in workplaces.⁴²
32. In 2008, a survey commissioned by the AHRC explained that, whilst reported cases of sexual harassment are decreasing in Australia, sexual harassment remains a significant problem, especially for women.⁴³ According to this survey, 20% of people in Australia aged 18-64 have experienced sexual harassment at some point in their lifetime.⁴⁴ The figure is significantly higher for women in this age group, a third of whom have experienced sexual harassment.⁴⁵ The survey also revealed that 22% of women and 5% of men aged 18-64 have experienced sexual harassment in the workplace.⁴⁶
33. Underreporting of sexual harassment by victims/survivors remains a significant problem, suggesting that sexual harassment may be even more pervasive in Australian workplaces than the statistics above suggest. For instance, it is estimated that only 16% of individuals who have experienced sexual harassment in the Australian workplace over the past 5 years have formally reported that harassment.⁴⁷ In addition, of the survey respondents that said they had not experienced sexual harassment, 22% subsequently reported behaviour that may in fact amount to sexual harassment under the SDA. Fears of reprisals, including

⁴⁰ CEDAW Committee, *General Recommendation No. 19*, *ibid*, at para 17.

⁴¹ See SDA, s 28A; CEDAW Committee, *General Recommendation No. 19*, *ibid*, at para 18.

⁴² Elizabeth Broderick, 'Improper Sexual Behaviour Still Rife' *The Canberra Times* (6 February 2008), 13.

⁴³ See AHRC, *Sexual Harassment: Serious Business; Results of the 2008 Sexual Harassment National Telephone Survey* (2008), available at <http://www.humanrights.gov.au/sexualharassment>.

⁴⁴ *Ibid*, at 11.

⁴⁵ *Ibid*, at 1.

⁴⁶ *Ibid*, at 11, 13.

⁴⁷ *Ibid*, at 11, 29.

termination, and fear that employers would not take complaints seriously, have contributed to underreporting of workplace sexual harassment.⁴⁸

34. Notably, 30% of respondents who had experienced sexual harassment sought informal advice and assistance, most commonly from a manager or supervisor. If workplace complaint mechanisms are not being utilised to address sexual harassment incidents, sexual harassment will continue to impact the ability of women to achieve equality in the workplace.
35. The harms of sexual harassment can be severe and multifaceted, with victims/survivors experiencing a range of physiological, psychological and socio-economic harms that impact their equal employment and other opportunities. There are also a broader range of harms being brought to bear on workplaces (e.g., absenteeism and decreased productivity) and society at large (e.g., perpetuation of gender inequality).⁴⁹

Domestic Violence

36. Domestic violence has deleterious consequences for women in Australia. For example, it has been estimated that almost half of female homicide victims in Australia are killed as a result of a domestic dispute.⁵⁰ Significantly, the impact of domestic violence is not confined to the private sphere; it also has implications for women's ability to exercise and enjoy the right to employment (as well as for the employment sector and the community as a whole).⁵¹
37. It has been explained, for instance, that domestic violence perpetrators will often make harassing phone calls to victims/survivors at their workplaces, stalk them and/or have violent outburst at their place of employment.⁵² An example of this can be seen in *Yildirim v. Austria*.⁵³ In that case, domestic violence perpetrated by Irfan Yildirim against his wife, Fatma Yildirim, spilt over from the home into the workplace when Irfan began harassing Fatma repeatedly at her place of employment, including by threatening to kill her.⁵⁴
38. There is limited information on exactly how domestic violence impacts women's employment experiences in Australia. Significantly, *The National Council's Plan for Australia to Reduce Violence against Women and their Children* notes:

⁴⁸ IWRAP Asia Pacific, *Sexual Harassment in the Workplace: Opportunities and Challenges for Legal Redress in Asia and the Pacific* (2005), 4.

⁴⁹ See International Labour Organization, *Action against Sexual Harassment at Work in Asia and the Pacific*, 18-20.

⁵⁰ See Jenny Mouzos, Australian Institute of Criminology, *Homicide in Australia: 2003-2004 National Monitoring Program (NHMP) Annual Report* (2005), cited in YWCA Australia and Women's Legal Services Australia, *NGO Report*, above note 30, at 106.

⁵¹ See generally Maya Costello, Donna Chung and Ed Carson, 'Exploring Alternative Pathways Out of Poverty: Making Connections between Domestic Violence and Employment Practices', (2005) 40(2) *Australian Journal of Social Issues* 253.

⁵² See generally Suzanne Franzway and Donna Chung, *Domestic Violence and Work* (2005).

⁵³ *Yildirim v. Austria*, CEDAW, Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (2007) (CEDAW Committee).

⁵⁴ Austria was found in violation of CEDAW for its failure to exercise due diligence to prevent Irfan from killing Fatma.

[w]hile the incidence of violence is similar across all social, cultural, economic and geographical boundaries Australian research shows a correlation between domestic violence and poorer economic outcomes after the event. For example, domestic violence victims tend to have a history of unemployment and have higher levels of job turnover. They also report less job stability, more interrupted work patterns, and tend to be employed in lower skilled and lower paid jobs with little opportunity for promotion. Longitudinal research suggests that the relationship between being a victim of violence and unemployment often continues for many years after the violence ends, highlighting the long-term impact of violence on women's capacity to be economically independent and secure.⁵⁵

39. These findings are supported in literature from comparable jurisdictions, which suggests that domestic violence can impact women's equal exercise and enjoyment of the right to work in a number of different ways, including the following:

- social isolation, poverty and mental health issues associated with domestic violence can impede victims'/survivors' access to paid work;⁵⁶
- victim/survivors of domestic violence are more likely to have lower personal incomes, a greater number of different jobs and a higher level of part-time and casual work than other women;⁵⁷
- perpetrators of domestic violence can exacerbate victims'/survivors' financial and economic dependencies through controlling behaviour;⁵⁸ and,
- gainful employment by victims/survivors of domestic violence can increase vulnerability to abuse, whereas violence is reduced when those women are not gainfully employed.⁵⁹

Obligations to Eliminate Gender-Based Violence against Women

40. Australia is obligated, under international human rights law, to eliminate gender-based violence against women, including sexual harassment and domestic violence.⁶⁰ Moreover, as explained in section 4.1(a) above, States Parties are required to eliminate discrimination against, and the unequal treatment of, women in the employment sector. The cumulative effect of these obligations is that the Australian Government and EOWA are required to take all appropriate measures to ensure that gender-based violence against women does not obstruct equal

⁵⁵ *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021*, at 46 [citations omitted].

⁵⁶ See generally Suzanne Franzway, Carole Zufferey and Donna Chung, *Domestic Violence and Women's Employment* (2007).

⁵⁷ See generally Franzway and Chung, above note 53.

⁵⁸ *Time for Action*, above note 55, section 12.2.

⁵⁹ Stephanie Riger and Susan Staggs, *The Impact of Intimate Partner Violence on Women's Labour Force Participation* (2004), cited in Franzway, Zufferey and Chung, above note 56, at 5.

⁶⁰ See CEDAW, art 1; CEDAW Committee, *General Recommendation No. 19*, above note 39; *Declaration on the Elimination of Violence against Women*, Nov. 7, 1967, G.A. Res. 2263 (XXII). See also *A.T. v. Hungary*, CEDAW, Communication No. 2/2003, UN Doc CEDAW/C/32/D/2/2003 (2005) (CEDAW Committee); *Opuz v Turkey*, [2009] ECHR 33401/02 (9 June 2009) (European Court of Human Rights).

employment opportunities for women.⁶¹ Because of the nature of gender-based violence and the specific repercussions it has for women, it is important that the Government and EOWA work together with employers, trade unions and employees in implementing these obligations.

41. PILCH submits that eliminating gender-based violence against women will improve women's equal employment opportunities. In addition to enabling women to realise their equal right to work, ensuring equal employment opportunities will help women to realise other human rights and fundamental freedoms and contribute to their overall development and advancement.
42. PILCH submits that immediate steps must be taken to implement the strategies and actions in *The National Council's Plan for Australia to Reduce Violence against Women and their Children* on enhancing women's economic independence. These strategies and actions are as follows:
 - 'Women's Ministers, nationally, make representation to the Gender Pay Equity Inquiry and the Pensions Review, asking that the inter-relationship between violence against women, lack of economic independence and gender inequality be considered as part of their reviews, and addressed within their recommendations.
 - Develop specific formal and informal employment support initiatives with businesses (including affordable childcare) that enable women who have experienced violence to enter or return to the workforce.
 - Encourage employers to provide flexible working arrangements for women who have experienced violence.
 - Explore incentives for employers to recruit and retain women who have experienced violence.
 - Encourage, support and recognise business initiatives which prevent gender-related violence (for example, sexual harassment) in the workplace⁶².
43. PILCH further submits that, in fulfilling its functions under article 10 of the EOWW Act, EOWA should address gender-based violence against women as an obstacle to equal opportunity for women in the workplace.

Recommendation No. 1:

The Australian Government should make the elimination of wrongful gender stereotyping a priority, in accordance with its obligations under international human rights law to ensure women's equal access to, and equality within, employment. It should ensure that all branches of government – state and federal – refrain from wrongful gender stereotyping. In addition, it should take positive steps, such as educating state agents and officials, employers, trade unions and the broader community, about the harms of wrongful gender

⁶¹ See, eg, CESC, arts 2, 3, 6; CEDAW, art 11.

⁶² *Time for Action*, above note 56, at 51.

stereotyping and the need to eliminate and remedy this wrong to ensure equal opportunity for women in the workplace.

Recommendation No. 2:

The Australian Government should take immediate steps to implement the strategies and actions in *The National Council's Plan for Australia to Reduce Violence against Women and their Children* on enhancing women's economic independence.

Recommendation No. 3:

EOWA should address wrongful gender stereotyping and gender-based violence against women as an obstacle to equal opportunity for women in the workplace in its:

- guidelines for employers;
- research, educational programs and other programs for the purpose of promoting equal opportunity for women in the workplace;
- efforts to promote understanding and acceptance, and public discussion, of equal opportunity for women in the workplace, and,
- other functions,

under article 10 of the EOWW Act.

4.2 Transforming the Division of Family and Work Responsibilities

44. Question 1.3 of the issue paper asks: Should there be a greater focus on enabling men and women to share paid work and caring responsibilities more equally? How can men be provided with better opportunities to participate in the care of their children and other dependents?
45. PILCH is of the strong opinion that there needs to be a greater focus on enabling men and women to share paid work and caring responsibilities more equally. As stated in CEDAW, 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'⁶³. In addition, the CEDAW Committee has stated that measures must be adopted 'towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'⁶⁴. These sentiments are echoed in the eloquent words of one commentator who stated:

[t]he future is not simply one of allowing women into a male-defined world. Instead, equality for women entails a re-structuring society so that it is no longer male-defined. Transformation requires a redistribution of power and resources and a change in the institutional structures which perpetuate women's oppression. It requires a dismantling of

⁶³ CEDAW, pmbi.

⁶⁴ CEDAW Committee, *General Recommendation No. 25*, above note 37, at para 10.

the private-public divide, and a reconstruction of the public world so that child-care and parenting are seen as valued common responsibilities of both parents and the community. It aims to facilitate the full expression of women's capabilities and choices, and the full participation of women in society.⁶⁵

46. Changing the traditional roles of men and women and transforming the traditional division of caring and breadwinning responsibilities can only be achieved by placing greater focus on enabling men and women to share paid work and caring responsibilities more equally. Whilst focusing on women's roles and the way in which women's work is valued is important, it is not alone sufficient. Focusing exclusively on women's roles and the undervaluing of women's work, to the exclusion of men's roles and the valuing of men's work, and how they both impact power relations and gender hierarchies, ignores the complexity of the social and cultural patterns of conduct of men and women.
47. Ensuring a greater focus on enabling men and women to share paid work and caring responsibilities more equally is essential for women, men, children and society as a whole; that is to say, it is not just a 'women's issue' but an issue that is critical for the future of all of Australia. Transforming the current division of responsibilities by focusing on men *and* women is important for *women* because, for too long, the current division has deprived them of a fair opportunity to participate in public life. It has also deprived the Australian community of the valuable and diverse contributions that women can make. To borrow the words of Justice Mokgoro of the Constitutional Court of South Africa, '[w]omen have been prevented from gaining economic self-sufficiency, or from forging identities for themselves independent of their role as wives and mothers'⁶⁶.
48. Transforming the current division of responsibilities by focusing on men *and* women is important for *men* because the division has deprived men of opportunities to participate in caregiving, and denied them recognition of their role as fathers and carers. In addition, it has harmed men by failing to recognise their equal worth and dignity as fathers, carers and individuals, and by burdening them with the responsibility of being primary breadwinners.⁶⁷ This has, in turn, harmed women by entrenching traditional sex-roles and the systemic discrimination that flows from those roles.
49. There are many different options for providing men better opportunities to participate in the care of their children and other dependents. Such options include:
 - the introduction of public education campaigns that:
 - promote the idea that caregiving is an important and valued responsibility of *both* men and women and the community as a whole; and,
 - seek to value men's contribution as carers and make it more socially acceptable for men to want and to choose caregiving roles.

⁶⁵ Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in I. Boerefijn *et. al.* (eds.), *Temporary Special Measures* (2003), 111, at 115.

⁶⁶ *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC) (S. Afr., Constitutional Court), at para 93.

⁶⁷ Cusack, above note 19, at 23.

- the introduction of incentives for employers to demonstrably change their workplace cultures around parental leave and childcare. Such incentives should reward those employers that move beyond formal support of 'parental' leave to substantive or de facto support of such leave.
 - the adoption of measures to eliminate wrongful gender stereotypes of men as primarily breadwinners and decision-makers.
 - the adoption of measures to alleviate the pay equity gap between men and women to reduce the likelihood that the only viable financial option for families is for the man to continue working and for the woman to stop working to care for others.
50. PILCH submits that, as the body responsible for promoting equal employment opportunity in Australia, EOWA is well positioned to make these and other options for providing men better opportunities to participate in caregiving a reality. For this reason, PILCH submits that the EOWW Act should be amended to explicitly obligate EOWA to take steps to ensure that men and women share paid work and caring responsibilities more equally.

Recommendation No. 4:

The EOWW Act should be amended to explicitly obligate EOWA to take steps to promote the more equal sharing of paid work and caring responsibilities between men and women.

Recommendation No. 5:

In fulfilling its mandate under the EOWW Act, EOWA should promote the more equal sharing of paid work and caring responsibilities between men and women.

5. Objects and Coverage of the EOWW Act

5.1 Appropriateness and Relevance of EOWW Act's Objectives

51. Question 2.1 of the issues paper asks: Are the objects of the EOWW Act appropriate and relevant to today's workplaces?
52. Section 2A of the EOWW Act currently provides that the principal objects of the Act are to:
- promote the principle that employment for women should be dealt with on the basis of merit;
 - promote, amongst employers, the elimination of discrimination against, and the provision of equal opportunity for, women in relation to employment matters; and,
 - foster workplace consultation between employers and employees on issues concerning equal opportunity for women in relation to employment.

Whilst section 2A of the EOWW Act addresses the need to promote the elimination of discrimination against women, PILCH submits that it does not make explicit the need to promote substantive equality in the employment sector.

53. The obligation to eliminate all forms of discrimination against women and realise substantive equality requires states to:

- eliminate direct and indirect forms of discrimination against women;
- improve women's de facto position in society; and,
- address prevailing gender relations and wrongful gender stereotyping.⁶⁸

Under international human rights law, it is not sufficient for states to adopt a formal approach to equality. In addition to treating men and women identically where their interests are substantially similar, states must accommodate biological and socially and culturally constructed differences between men and women.⁶⁹ In certain circumstances, including in the employment sector, this will require the differential treatment of men and women.

54. PILCH submits that section 2A of the EOWW Act should be amended to make explicit that one of principal objects (and arguably the main object) of the Act should be the elimination of all forms of discrimination against women in the employment sector, with a view to ensuring *substantive equality* of men and women in accordance with Australia's obligations under CEDAW and other international human rights instruments.

Recommendation No. 6:

Section 2A of the EOWW Act should be amended to make explicit that one of the principal objects of the Act is the elimination of all forms of discrimination against women in the employment sector, with a view to ensuring *substantive equality* of men and women.

5.2 Recognition of Role of Men as Fathers and Carers

55. Question 2.4 of the issues paper asks: Should the role of men as fathers and carers be acknowledged in the EOWW Act?
56. In this submission, PILCH has argued that men and women's roles in society are intricately intertwined. When men's roles as fathers and carers are denied or marginalised, this entrenches women's roles as mothers and carers. It also impairs women's ability to participate in public life. Conversely, where men's roles as fathers and carers are acknowledged and celebrated, this helps to facilitate the equal distribution of caring responsibilities between men and women. For this reason, PILCH submits that efforts to ensure equal opportunity for women in the workplace must address the roles ascribed to, and performed by, women *and* men.
57. *Petrovic v. Austria*⁷⁰ provides a clear example of why this is important. In that case, a majority of the European Court of Human Rights upheld Austria's decision to deny parental leave to a father, Mr Petrovic. Austria had determined, on the basis of stereotypes of women as caregivers and men as breadwinners, that only mothers were entitled to parental leave. The majority of the European Court concluded that since there was no common European standard on the provision of parental leave to fathers, Austria's refusal

⁶⁸ CEDAW Committee, *General Recommendation No. 25*, above note 37, at para 7.

⁶⁹ *Ibid*, at para 8.

to grant leave to Mr Petrovic fell within its margin of appreciation.⁷¹ In a dissenting opinion, Judges Bernhardt and Spielmann ruled that, in denying Mr Petrovic access to parental leave, Austria had discriminated against him on the ground of sex.⁷² Although conceding that Austria was under no legal obligation to provide parental leave, the dissenting Judges determined that, in the event that it did so, it could not treat men and women differently on the basis of stereotypes. Significantly, the dissenting Judges recognised that the denial of parental leave to Mr Petrovic not only harmed him insofar as he could not access leave, but also Mrs Petrovic, since the denial entrenched her role as a mother and prevented her from accessing employment. The Judges reasoned that

[t]he discrimination against fathers perpetuates this traditional distribution of roles and can also have negative consequences for the mother; if she continues her professional activity and agrees that the father stay at home, the family loses the parental leave allowance to which it would be entitled if she stayed at home.⁷³

What is significant about the dissenting opinion of Judges Bernhardt and Spielmann is the recognition that in order to ensure substantive equality of men and women in the employment sector (and in the family), it is necessary to consider the roles ascribed to, and performed by, both men and women. The opinion recognises that focusing exclusively on the roles ascribed to one sex, to the exclusion of the roles ascribed to the other sex, and how they both impact power relations and gender hierarchies, ignores the complexity of the social and cultural patterns of conduct of men and women.

58. For the reasons outlined above, PILCH submits the EOWW Act should be amended to acknowledge the role of men *and* women as parents and carers.

Recommendation No. 7:

The EOWW Act should be amended to explicitly recognise the role of men and women as parents and carers.

⁷⁰ *Petrovic v. Austria*, 33 Eur. H.R. Rep. 307 (1998) (European Court of Human Rights).

⁷¹ *Ibid*, at paras 38-40 (majority).

⁷² *Ibid* (Bernhardt and Spielmann JJ., dissenting).

⁷³ *Ibid*.