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The implementation of the CEDAW in Australia: success, trials, tribulations and continuing struggle

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1 Introduction

Australia signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 17 July 1980 at the mid-decade conference of the United Nations Decade for Women (1976–1985) in Copenhagen, and deposited its instrument of ratification on 28 July 1983; the Convention thus entered into force for Australia on 27 August 1983. Australia acceded to the Optional Protocol to the Convention on 4 December 2008,[1] which entered into force for it three months later.

When it ratified the Convention, the Australian government deposited a declaration describing the country's federal system of government and the division of responsibilities between the Commonwealth and the eight State and Territory governments and stating that the Convention would be implemented in accordance with that federal structure. It also entered two reservations to Article 11 – one relating to the obligation to ensure that paid maternity leave was available throughout the workforce, the other excluding the operation of the Convention in relation to the performance by women in the defence forces of combat-related or combat duties.[2] In

[1] See *Multilateral Treaties Deposited with the Secretary-General*, Chapter IV.8. Australia accepted the Amendment to Article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/SP/1995/2, on 4 June 1998, although that Amendment has not yet received a sufficient number of ratifications to enter into force.

[2] The reservations are reproduced at Annex A. The government has stated that its aim in relation to reservations is 'to: limit the extent of any reservations to CEDAW; formulate any such reservations as narrowly and precisely as possible; and if appropriate regularly review reservations with a view to withdrawing them'. *Combined Fourth and Fifth Periodic Reports of Australia*, CEDAW/C/AUL/4–5 (2004), para. 18.

2000 it modified the combat duty reservation (limiting it to combat duty only). Since that time the reservations have not been further modified or removed.[3]

Since it became a party to the treaty, the Australian government has submitted a number of reports to the CEDAW Committee – not always on time and on a number of occasions submitting combined reports (the CEDAW Committee having permitted States to combine overdue and due reports in the one document). The government's most recent report under the Convention (its combined sixth and seventh reports) was submitted in 2009,[4] and the Committee reviewed that report at its 46th session in July 2010.[5]

A number of features stand out over the last thirty or so years in terms of the advancement of the human rights of women in Australia, so far as the Convention is concerned. At least five factors may be identified that have been important to the question of ratification and implementation of the Convention:

- the strong women's movement that (re-)emerged in the 1960s, which has consistently pushed for the improvement of laws and policies relating to or with an impact on women and which on many occasions has pushed for the better implementation of the CEDAW Convention;
- the support within government of key political representatives who have been committed to pursuing sexual equality or who have been put in a position in which it was politically difficult to show anything other than support for this goal;
- the presence of feminist civil servants (femocrats)[6] in the bureaucracy and the development of structures (national machinery) to ensure that the voice of the women's office was heard;

[3] In its July 2010 *Concluding Observations on the Combined Sixth and Seventh Reports of Australia*, the CEDAW Committee noted that 'notwithstanding recent developments with regard to women in the armed forces and the adoption of the Paid Parental Leave Act, the State party has not yet withdrawn its two reservations under the Convention' and recommended that it do so 'as soon as possible': CEDAW/C/AUL/CO/7, paras. 18–19 (2010). Given the adoption of a new maternity leave scheme in early 2011, it seems likely that the maternity leave reservation will be lifted in the near future.

[4] *Combined Sixth and Seventh Periodic Reports of Australia*, CEDAW/C/AUL/7 (2009).

[5] See CEDAW/C/SR.935 and 936 (2010) and *Concluding Observations on Australia*, CEDAW/C/AUL/CO/7 (2010).

[6] See M. Sawer, *Femocrats and Ecorats: Women's Policy Machinery in Australia, Canada and New Zealand*, UNRISD, Occasional Paper 6, March 1996, 4–10; L. Chappell, *Gendering Government: Feminist Engagement With the State in Australia and Canada* (Vancouver: UBC Press, 2003).

- the work of the Australian Human Rights Commission and the federal Sex Discrimination Commissioners (as well as their State and Territory counterparts); and
- the use of international reporting procedures, including reporting to the CEDAW Committee, as part of the process of attracting international attention and pressure to the need for change and of adding momentum to domestic efforts to bring about change.

2 Constitutional structure and the place of international law in Australian law

2.1 The federal system, the powers of the Commonwealth and human rights protection

Australia is a federal State, comprising the Commonwealth, six States, two mainland Territories (the Australian Capital Territory and the Northern Territory), and a number of external Territories. The Commonwealth Constitution establishes the Commonwealth legislature, executive and judiciary, and provides for the distribution of powers among the Commonwealth and States. The legislative power of the Commonwealth extends to those matters that are specifically listed in the Constitution (in particular in section 51), as well as to other matters incidental to the existence of a national government: a Commonwealth law will only be valid if it is referable to a head of power in the Constitution. The States enjoy legislative power to make laws for the peace, order and good government of their territory (subject to a number of express limitations in the Constitution), and thus share a parallel legislative jurisdiction on many matters within Commonwealth legislative power. A valid Commonwealth law will prevail over an inconsistent law of a State (Constitution, section 109) or Territory. Since Federation (the establishment of the Commonwealth and the States in 1901), there has been a steady accretion of legislative, executive and financial power to the central government.[7]

The Commonwealth Constitution does not contain a comprehensive bill of rights. There are a few rights contained in the text of the Constitution (some of which are either spent, or have been interpreted to be almost meaningless), and the High Court has discovered a number of implied rights, including an implied right of freedom of political

[7] All Australian legislation referred to in this chapter can be found at www.austlii.edu.au.

communication. There is no general constitutional guarantee of equality, or of sex or gender equality, in the Constitution. At the federal level, there is no comprehensive legislative bill of rights; the only bills of rights of reasonably broad coverage (though limited to civil and political rights) are the Human Rights Act 2004 of the Australian Capital Territory and the Victorian Charter of Human Rights and Responsibilities 2006, both ordinary statutes of the legislatures of those jurisdictions. Section 128 of the Commonwealth Constitution provides a procedure for amendment of the document that requires any proposed change to be approved both by a majority of States *and* a majority of voters overall. This makes constitutional change difficult to achieve – generally bipartisan political support from the two major political parties, as well as support from the States is required.[8] A number of efforts to amend the Constitution to add rights protections have been unsuccessful.[9]

An extensive national consultation was held in 2009 on improving human rights protection in Australia. The Report of the National Human Rights Consultation Committee recommended the adoption of a legislative bill of rights (among other measures), an issue on which there has been considerable debate in recent years.[10] In its response to that Report, the Australian government proposed the introduction of the *Australian Human Rights Framework*. While it did not accept the Committee's recommendation supporting the introduction of a statutory charter of rights, the government did take up the Committee's recommendations in relation to the need for enhanced Parliamentary scrutiny of human rights issues.[11] It proposed the establishment of a new Joint Parliamentary Committee on Human Rights, the functions of which would include scrutinising all draft legislation for consistency with human rights standards. These standards were to include the principal UN human rights treaties to which Australia is party, including the CEDAW.[12]

[8] See generally G. Williams and D. Hume, *People Power: The History and the Future of the Referendum in Australia* (Sydney: UNSW Press, 2010).

[9] See A. Byrnes, H. Charlesworth and G. McKinnon, *Bills of Rights in Australia – History, Politics and Law* (Sydney: UNSW Press, 2009) Chapter 2.

[10] *Report of the National Human Rights Consultation Committee*, September 2009.

[11] See generally E. Santow, 'The Act that dares not speak its name: the National Human Rights Consultation Report's parallel roads to human rights reform', *University of New South Wales Law Journal* 33:1 (2010) 8–33, and A. Byrnes, 'Second-class rights yet again? Economic, social and cultural rights in the Report of the National Human Rights Consultation', *University of New South Wales Law Journal* 33:1 (2010) 193–238.

[12] Australian Government, *Australia's Human Rights Framework* (2010).

The legislation to establish this new body was introduced into Parliament in 2010,[13] and was referred to a Senate Committee. The report of that Committee, which by majority supported the Bill, endorsed the use of the United Nations (UN) human rights treaties as appropriate standards, but also recommended that the mandate of the proposed Joint Committee be expanded so that it 'would also have the ability to examine issues raised in the findings of UN treaty bodies (such as concluding observations) … if considered appropriate'.[14] At Australia's appearance before the UN Human Rights Council as part of the Universal Periodic Review procedure, the government representative undertook to lay treaty body Concluding Observations before the Parliament as a matter of course.[15] The new Parliamentary Joint Committee on Human Rights was established in March 2012, but as of the time of writing had not addressed this issue.[16]

2.2 Treaty-making and treaty implementation

Under the Australian Constitution, the executive power of the Commonwealth includes the power to enter into treaties at the international level. As a matter of practice, the Commonwealth generally consults with the States and Territories in the process of treaty negotiation or in the lead-up to ratification, especially where the subject matter of the treaty falls within areas historically regulated by the States. Since the mid 1990s there has also been a procedure for having proposed treaty actions considered by the Parliament, in the form of the tabling of most proposed treaty actions before the Commonwealth Parliamentary Joint Standing Committee on Treaties (JSCOT), which reports to the government on its view of whether ratification is appropriate.[17]

[13] Human Rights (Parliamentary Scrutiny) Bill 2010.

[14] Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]*, January 2011, para. 3.116.

[15] Opening and closing remarks at the United Nations Human Rights Council for the Universal Periodic Review – Parliamentary Secretary to the Prime Minister, Senator Hon. Kate Lundy, 28 January 2011, available at: www.geneva.mission.gov.au/gene/Statement158.html (last accessed 13 February 2013).

[16] See www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/ctte_info/index.htm (last accessed 13 February 2013).

[17] See www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/index.htm (last accessed 13 February 2013). On the origins and operation of the JSCOT, see H. Charlesworth, M. Chiam, D. Hovell and G. Williams,

So far as the implementation of treaties is concerned, both the Commonwealth and the States/Territories may have a legislative role, depending on the subject matter of the treaty concerned and the specific obligations assumed under it, and any political agreement (or lack thereof) as to the division of responsibility between the Commonwealth and States/Territories in relation to implementation. In some cases a treaty will be implemented only by Commonwealth legislation and other action; in other cases a combination of Commonwealth and State action will be involved.

These constitutional arrangements are reflected in the *Declaration* Australia made when it ratified the CEDAW:

> Australia has a Federal Constitutional System in which Legislative, Executive and Judicial Powers are shared or distributed between the Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

In enacting Commonwealth legislation to implement a treaty, the Commonwealth Parliament may draw on any of the legislative powers it enjoys, for example its power to legislate with respect to corporations, interstate trade and commerce, or banking and insurance, among others. Of particular importance since the early 1970s has been the power of the Commonwealth Parliament to legislate 'with respect to … external affairs'.[18] This provision empowers the Commonwealth to legislate to implement a treaty, even if there is no other relevant source of legislative power. If a law relies for its validity on the fact that it is a treaty-implementation measure under section 51(xxix), then it 'must be reasonably capable of being considered appropriate and adapted to implementing the treaty'. In other words, it must be consistent with the obligations contained in the treaty, and there is a test of proportionality that leaves the legislature some discretion in how it implements the treaty. At the time of Australia's ratification of the CEDAW in 1983, the extent of this power was still in the process of being resolved by the High Court of Australia (the apex constitutional and appellate court).

As a result of the uncertainty about and limited nature of the Commonwealth's legislative power in relation to some treaties,

No Country is an Island: Australia and International Law (Sydney: UNSW Press, 2006) 40–8.

[18] Constitution, section 51(xxix).

implementing statutes will often draw on a number of legislative heads of power, producing an intricately drafted statute that operates in a complex manner. The major piece of Commonwealth legislation implementing the Convention, the Sex Discrimination Act 1984 (Cth), is an example of this and is discussed below.

2.3 International law in the Australian legal system

Under the Australian legal system the rules governing the reception of international law are similar to those that apply in most countries with a common law heritage. In relation to customary international law, the system has a monist flavour, these rules being said to be a source of the common law (though perhaps not 'part of the common law').[19] However, customary international law has been of little practical relevance in relation to gender equality issues under Australian law.

So far as the reception of treaties is concerned, however, the system is dualist – the provisions of a treaty cannot be directly relied on to found a claim under domestic law, unless there is some implementing Act by the legislature or, in certain cases, by the executive government.[20]

This is not to say that an unincorporated treaty can have no impact under domestic law. It can, for example, create a legitimate expectation that a decision-maker will act in accordance with the provisions of the treaty or amount to a relevant consideration that a decision-maker should take into account – and a failure to do either provides grounds for judicial review of the decision under general administrative law principles. Equally, when it comes to the interpretation of statutes, the general rule is that it should be assumed that the legislature (whether Commonwealth or State/Territory) did not intend to legislate in contravention of obligations binding on Australia, and that ambiguous statutes should be read consistently with international obligations where that is reasonably possible. International law obligations have also been accepted as a relevant source for the determination of public policy, or for the development of the common law where that is unclear.[21]

[19] G. Triggs, *International Law: Contemporary Principles and Practices*, 2nd edition (Sydney: LexisNexis Butterworths, 2011) 189–93. See generally Charlesworth *et al.*, *No Country is an Island*, Chapter 2.

[20] Triggs, *International Law* at 178–9.

[21] See Triggs, *International Law* at 180–1; *Royal Women's Hospital* v. *Medical Practitioners Board of Victoria* [2006] VSCA 85, paras. 74–80 (Maxwell P). The Australian cases referred to in this chapter can be found at www.austlii.edu.au.

The upshot is nonetheless that the most effective way of ensuring that treaty obligations, such as those contained in the CEDAW, give rise to directly invocable rights and obligations under Australian law is to implement the treaty by legislation. It is relatively rare for a common-law jurisdiction such as Australia to directly enact the provisions of a human rights treaty as part of domestic law; the more usual practice is to select a number of provisions and either reproduce the treaty language or translate those provisions into the language of domestic law.[22] As will be seen below, it is this last approach that has been taken in relation to legislative implementation of the CEDAW.

3 The background to the ratification of the Convention and its implementation

The ratification of the Convention by Australia and the enactment of the primary implementing legislation at the Commonwealth level,[23] as well as other implementing measures, were controversial and formed a part of the struggle for women's equality that first (re)gathered momentum in the late 1960s and early 1970s and beyond.[24] As Marian Sawer points out,[25] although Australian women achieved some political rights fairly early – in particular the right to vote in the late nineteenth and early twentieth centuries – other efforts to gain constitutional or other recognition of equality and to be free from discrimination on the basis of sex, marital status or pregnancy were long in coming. For example, the marriage bar for women employed in the Commonwealth public service – which

[22] A statute might also provide that a treaty should be taken into account in the exercise of judicial or administrative powers conferred by it or that it is intended to 'give effect' to a treaty, without making the provisions of the treaty directly justiciable. See, for example, the Fair Work Act 2009 (Cth), section 772, which provides that the object of Division 2 of Part 6–4 of the Act (dealing with unlawful grounds for the termination of employment) is to give (further) effect to a number of Conventions, including ILO Conventions Nos. 111 and 156 (though no mention is made of the CEDAW).

[23] This account draws heavily on M. Sawer, *The Commonwealth Sex Discrimination Act: Aspirations and Apprehensions* Forum to mark the 20th Anniversary of the Sex Discrimination Act, The Darlington Centre, University of Sydney, 3 August 2004, and M. Sawer, 'Women's work is never done: the pursuit of equality and the Commonwealth Sex Discrimination Act' in M. Thornton (ed.), *Sex Discrimination in Uncertain Times* (Canberra: ANU E Press, 2010) 75–92 at 75.

[24] There is of course a long history of women's activism for equality in Australia: see Sawer, 'Women's work is never done' at 75–6.

[25] See Sawer, *The Commonwealth Sex Discrimination Act*.

required women to resign from their jobs upon marriage – was abolished only in 1966.

While the struggle for women's rights continued during the first sixty years of the twentieth century, it gained considerable social and political momentum in Australia in the late 1960s, with the rise of the organised women's movement (though this was confronted by a similarly well-organised opposition at various stages). The women's movement over the forty years since then has pursued the goal of equality in many fora and in many different ways, the choice and effectiveness of means depending at least in part on the receptiveness of the Commonwealth and State governments of the day to arguments for more effective legislative and policy measures to address discrimination.

Although it would oversimplify the political history to suggest that, since the Second World War, conservative governments (comprising coalitions of the Liberal Party and Country/National Party) at the Commonwealth level have been largely resistant to demands for action in relation to women's equality and that Labor governments have always been responsive,[26] many of the significant legislative and other advances have come during periods of Labor government. The federal governments since 1972 have been:

1972–1975	Whitlam Labor government (first Labor government since 1949, ending twenty-three years of continuous conservative government)
1975–1983	Fraser Liberal–Country coalition government
1983–1996	Hawke–Keating Labor government
1996–2007	Howard Liberal–National coalition government
2007–2010	Rudd Labor government
2010–	Gillard Labor government.

The Whitlam Labor government that came to power in 1972 had an ambitious reform agenda that included a range of proposed human rights reforms (in which Lionel Murphy, Attorney-General for two of the three years of the Labor government, was a prime mover).[27] The Whitlam government reopened the federal equal pay case immediately when it came to

[26] See J. Ramsay, 'The making of domestic violence policy by the Australian Commonwealth Government and the Government of the State of New South Wales between 1970 and 1985: an analytical narrative of feminist policy activism', PhD thesis, University of Sydney, 2004, Chapter 4.

[27] See Sawer, *The Commonwealth Sex Discrimination Act*, and M. Thornton and T. Luker, 'The Sex Discrimination Act and its rocky rite of passage' in M. Thornton (ed.), *Sex Discrimination in Uncertain Times* 25–45.

office, and ratified International Labour Organization (ILO) Convention No. 111 in 1974. It also ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1975, and enacted implementing legislation in the form of the Racial Discrimination Act 1975 (Cth), the statute that was to successfully test the boundaries of the Commonwealth's power to implement human rights treaties under the external affairs power.[28] It also drafted a legislative bill of rights that came to naught, though it did not accede to lobbying to include sex discrimination in either of these pieces of legislation. Towards the end of its period of office, urged on by women's groups such as the Women's Electoral Lobby (WEL),[29] it began to focus on the possible enactment of legislation to prohibit discrimination based on sex or marital status, but because of the political turmoil that resulted in the dismissal of the government in November 1975, the proposed legislation was not enacted.[30]

There was some interest in sex discrimination legislation in the Fraser government that came to power at the end of 1975 – in particular on the part of the Minister with Responsibility for Women's Affairs, Robert Ellicott, who was supportive of the adoption of sex discrimination legislation, a goal also supported by leading Liberal women within the Parliamentary party and outside it.[31] However, there was opposition both within the Cabinet and in the broader Liberal constituency, perhaps the most high profile of which was the group called Women Who Want to be Women (WWWW).[32] Notwithstanding the failure by the coalition government to adopt a draft Plan of Action for the UN Decade for Women that contained a commitment to sex discrimination legislation, Australia did sign the Convention at the mid-decade conference in Copenhagen in July 1980. However, ratification did not occur under the Fraser government.

Nonetheless, during this period there were developments on the opposition side of the Parliament that laid the groundwork for the eventual enactment of sex discrimination legislation. In 1981 Labor Senator Susan Ryan, the Shadow Minister for Media, the Arts and Women's Affairs,

[28] *Koowarta* v. *Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 (upholding the Racial Discrimination Act 1975 as a valid exercise of the external affairs power).

[29] See M. Sawer, *Making Women Count: A History of the Women's Electoral Lobby in Australia* (Sydney: UNSW Press, 2008).

[30] Sawer, 'Women's work is never done' at 79.

[31] *Ibid*. and Thornton and Luker, 'The Sex Discrimination Act' at 28.

[32] Developments had been proceeding at State level, with South Australia (1975), New South Wales (1977) and Victoria (1977) all enacting anti-discrimination/equal opportunity legislation that prohibited discrimination on the basis of sex and marital status (among other grounds).

introduced the Sex Discrimination Bill 1981 into the Senate as a private member's bill.[33] This Bill contained not only non-discrimination provisions, but also affirmative action provisions, and was the precursor to the two pieces of legislation that were ultimately enacted after Labor returned to government in 1983: the Sex Discrimination Act 1984 (Cth) and the Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth). However, Ryan's Bill was not passed by the Parliament.

When Labor was elected to government in 1983, Ryan, now a government Minister (Minister assisting the Prime Minister on the Status of Women), introduced the Sex Discrimination Bill 1983, which contained anti-discrimination provisions but which had had its affirmative action provisions removed. A vigorous and at times bizarre debate over the Bill ensued within and outside Parliament, with some critics arguing that the legislation would destroy the traditional family, produce a 'unisex' society and was a stalking-horse for communism, and making other dire predictions about the likely destructive impact of the Bill on Australian society.[34] After vigorous advocacy and lobbying on both sides of the issue (and with support from some members of the Opposition Liberal Party in the Parliament), the Parliament enacted a much-amended Bill as the Sex Discrimination Act 1984. The Act commenced operation on 1 August 1984. Just over two years later, the Parliament passed the Affirmative Action (Equal Opportunities in Employment) Act 1986, which, despite its title, does not embody obligations to undertake positive action ('reverse discrimination'), but rather established a scheme that required corporations with more than 100 employees to prepare programmes and to report on the steps they have taken to advance equal opportunity for women in the workplace. The Act, which was amended and renamed in 1999,[35] has received mixed reviews so far as its contribution to real change in the workplace is concerned,[36] and since 2009 has been the subject of review

[33] Senate Hansard, Thursday, 26 November 1981, at 2714.

[34] See S. Magarey, 'The Sex Discrimination Act 1984', *Australian Feminist Law Journal* 20 (2004) 127–34; S. Ryan, 'The "Ryan Juggernaut" rolls on', *University of New South Wales Law Journal* 27:3 (2004) 828–32; Thornton and Luker, 'The Sex Discrimination Act'; S. Ryan, 'Opening Address II' in Thornton (ed.), *Sex Discrimination in Uncertain Times* at 11; and S. Magarey, '"To demand equality is to lack ambition": sex discrimination legislation – contexts and contradictions' in Thornton (ed.), *Sex Discrimination in Uncertain Times* 93–106 at 94–6.

[35] The 1986 Act was amended and renamed the Equal Opportunity for Women in the Workplace Amendment Act 1999 (Cth).

[36] See S. Charlesworth, 'The Sex Discrimination Act: advancing gender equality and decent work?' in Thornton (ed.), *Sex Discrimination in Uncertain Times* 133–52 at 136–7; G. Strachan and J. Burgess, 'W(h)ither affirmative action legislation in Australia?', *Journal*

with the goal of improving its effectiveness.[37] Amending legislation was introduced into the Parliament in March 2012.[38]

Of course, the Sex Discrimination Act (SDA) 1984 is not the only legislation implementing the provisions of the Convention: other Commonwealth statutes and the State anti-discrimination legislation,[39] as well as industrial relations laws,[40] do so as well. Even so, neither the Act nor other legislation fully gives effect to all the provisions of the Convention, even those that require merely legislative implementation, such as the inclusion of a general guarantee of equality and non-discrimination in the Constitution or other appropriate legislation.[41] The legislation has also been accompanied by an array of policies and programmes at federal and State level over the years that give effect to various provisions of the Convention (whether

of Interdisciplinary Gender Studies 5:2 (2002) 46–63; G. Strachan, J. Burgess and L. Henderson, 'Equal employment opportunity legislation and policies: the Australian experience', *Equal Opportunities International* 26:6 (2007) 525–40; E. French and G. Strachan, 'Equal opportunity outcomes for women in the finance industry in Australia: merit of EEO plans', *Asia Pacific Journal of Human Resources* 45:3 (2007) 314–32; S. Charlesworth, Submission to the Review of the Equal Opportunity for Women in the Workplace Act (EOWWA) and Agency, 30 October 2009, available at: http://web.archive.org/web/20120411060734/http://mams.rmit.edu.au/isc7fenuga7s1.pdf (last accessed 22 February 2013); and R. Graycar and J. Morgan, 'Equality unmodified?' in Thornton (ed.), *Sex Discrimination in Uncertain Times* 175–96 at 183–6.

[37] See KPMG and Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs, *Review of the Equal Opportunity for Women in the Workplace Act 1999, Consultation Report* (2010) 124–8. In January 2011 the government announced that as part of improving the operation of the Act, it was working with KPMG 'to identify meaningful measures of gender equality in the workplace as well as processes which ease the reporting burden on business', but no timetable or further details were provided. 'Taking action to achieve better gender balance at work', Press release by the Minister for the Status of Women, Kate Ellis, 30 January 2011.

[38] Equal Opportunity for Women in the Workplace Amendment Bill 2012. See Senate Education, Employment and Workplace Relations Committee, *Equal Opportunity for Women in the Workplace Amendment Bill 2012 [Provisions] Report*, May 2012.

[39] Of particular importance are the Anti-Discrimination Act 1977 (NSW); the Anti-Discrimination Act 1991 (Qld); the Equal Opportunity Act 1994 (SA); the Anti-Discrimination Act 1998 (Tas); the Equal Opportunity Act 1995 (Vic); the Equal Opportunity Act 1984 (WA); the Human Rights Act 2004 (ACT); the Anti-Discrimination Act 1992 (NT); the Human Rights Act 2004 (ACT); and the Charter of Human Rights and Responsibilities Act 2006 (Vic).

[40] See Charlesworth, 'The Sex Discrimination Act' at 137–9.

[41] See E. Evatt, 'Falling short on women's rights: mis-matches between SDA and the international regime' in M. Smith (ed.), *Human Rights 2004: The Year in Review*, Castan Centre for Human Rights Law, Monash University, 2005, available at: www.law.monash.edu.au/castancentre/events/2004/evatt-paper1.pdf (last accessed 13 February 2013); and H. Charlesworth and S. Charlesworth, 'The Sex Discrimination Act and international law', *University of New South Wales Law Journal* 27:3 (2004) 858–65.

or not the Convention was explicitly in the minds of the planners). Yet in many ways the battles over the enactment of the Sex Discrimination Act 1984 and over subsequent efforts to improve it or undermine it, have typified the struggle and the objections to equality measures that have had to be overcome in many areas. The Act is viewed by many – with perhaps an excessively optimistic view of the power of law – as a central component of the efforts to address sex discrimination and gender inequality. The willingness of governments to strengthen the SDA and its enforcement mechanisms, or conversely, their preparedness to limit or undermine its effectiveness, have been seen as a touchstone of their commitment to gender equality. The next section gives an overview of the SDA and of its limitations, and the most recent review of its operation.

4 The Sex Discrimination Act 1984 (Cth)

The Sex Discrimination Act[42] had a number of purposes.[43] While motivated primarily by a desire to address discrimination against women and to give effect to the provisions of the CEDAW, it goes beyond this and in effect prohibits discrimination on the ground of sex and marital status against both women and men in many of the areas it covers. To the extent that there was clear Commonwealth power to legislate – for example, in relation to the Territories or to Commonwealth employment – the Act made unlawful all forms of sex discrimination (including pregnancy discrimination), as well as discrimination on the grounds of marital status – both women and men are covered (other than in relation to pregnancy). Discrimination on the ground of family responsibilities was added

[42] See Australian Human Rights Commission, *Short Timeline of the Sex Discrimination Act* (2009), available at: http://humanrights.gov.au/sex_discrimination/sda_25/index.html (last accessed 22 February 2013).

[43] Section 3 of the Act sets out its (current) objects.

The objects of this Act are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programmes; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

subsequently in reliance on other treaties, as was the ground of potential pregnancy.[44] While sexual harassment is also covered by the protection against discrimination on the ground of sex, the point was put beyond doubt by the inclusion of new sections that made sexual harassment in a range of areas covered by the Act explicitly unlawful.

The Act reaches beyond those areas clearly within other heads of Commonwealth power by relying on the CEDAW, and provides that, in other areas not clearly within Commonwealth legislative competence, the Act applies only to discrimination against women, as legislation giving effect to the Convention.[45] The critical point is that the Act would not have had as broad an application as it did when first enacted if it had not been possible to rely on the Convention as a basis of legislative power. By the end of 2010 the Act had acquired a rather unwieldy and awkward accretion of technical and substantive changes that are the result of political opportunities that presented themselves to improve or expand the Act. Given that the Act coexists at the federal level with a number of other discrimination statutes (disability, age and race discrimination legislation), there is much to be said in favour of the government proposals to rationalise the existing legislation by enacting an equality Act, though concerns have been expressed that symmetrical gender equality legislation may serve to obscure the particular prevalence of discrimination against women.[46]

The Sex Discrimination Act follows the structure of legislation that was in force in a number of States at the time of its enactment. The Act is not a general sex or gender equality statute that states a general principle of equality applicable to all areas of life. Rather it makes unlawful particular discriminatory acts in certain areas, such as employment, education, the provision of goods and services, and the administration of Commonwealth laws and programmes. An unlawful act is a civil wrong. The Act defines two forms of discrimination, direct and indirect discrimination, which are defined in rather complex terms (especially the latter); the Act does

[44] Sex Discrimination Act 1984, section 10A (referring to the ICCPR, ICESCR, Convention on the Rights of the Child and ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation 1958). Australia has since also ratified ILO Convention No. 156.

[45] Section 9(10) provides: 'If the Convention is in force in relation to Australia, the prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention.'

[46] Graycar and Morgan, 'Equality unmodified?' at 179–87; S. Rice, 'And which "Equality Act" would that be?' in Thornton (ed.), *Sex Discrimination in Uncertain Times* 197–234.

not import the definition of 'discrimination against women' contained in Article 1 of the CEDAW.[47] It provides that special measures to redress disadvantage are not to be considered discriminatory for the purposes of the Act (tracking Article 4 of the CEDAW); it also has many general and specific exemptions.[48]

Under the system of enforcement provided for by the Sex Discrimination Act, a complainant cannot directly take a complaint of discrimination to court, but must first lodge the complaint with the Australian Human Rights Commission.[49] If the Commission is unable to conciliate the complaint, the complainant may then bring the matter before the courts. The system of conciliation of complaints was intended to ensure that remedies were readily accessible to complainants, given the cost, time and trauma involved in pursuing cases through the courts, the rules of procedure and evidence that apply, and the disparity in power that often exists between complainants and respondents when it comes to marshalling resources for court proceedings.

The current system differs from that originally in place. Under the earlier system, if conciliation of a complaint was unsuccessful, then the matter could be the subject of adjudication by the Commission itself, in proceedings that were meant to be more informal than proceedings before the regular courts (though these tended to become highly judicialised as well). However, in 1995 the High Court held that these arrangements involved an unconstitutional conferral of the judicial power of the Commonwealth on a tribunal that was not a constitutionally recognised court.[50] As a result, the jurisdiction of the Commission to adjudicate complaints no longer exists, though an equivalent jurisdiction exists in some States that are not subject to the same constitutional constraints.

[47] Given that many of the provisions apply to discrimination against men as well as discrimination against women, it would have been necessary to modify the Article 1 definition if this form of definition were to be used. However, the Human Rights Committee adopted such an approach in its General Comment No. 18, so it is a possible approach. The original definition of discrimination in section 9(1) of the Racial Discrimination Act 1975 tracked the definition in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). That has now been supplemented by a definition of indirect discrimination, which also uses language drawn from the ICERD.

[48] These include exemptions for religious bodies (s. 37), educational institutions established for religious purposes (s. 38), voluntary bodies (s. 39), sport (s. 42) and combat duties (s. 43). The Australian Human Rights Commission is also given the power under s. 44 of the Act to grant temporary exemptions from the operation of certain provisions of the Act.

[49] Formerly the Human Rights and Equal Opportunity Commission.

[50] *Brandy* v. *Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 24.

A complainant who cannot achieve resolution in conciliation proceedings must now take her complaint to the courts.

The Sex Discrimination Act does not contain a provision providing that it prevails over all other laws (indeed there is a list of laws and general exceptions that it is expressed not to prevail over), though its effect is to make unlawful some acts that might be permitted under State law. This may be contrasted with the Racial Discrimination Act (RDA) 1975 (Cth), which gave effect to provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. By virtue of section 10 of the RDA, where a law discriminatorily denies the enjoyment of a right on the grounds of race, then that law is ineffective in that regard and the person enjoys the right without discrimination.[51]

4.1 Review and reform of the Sex Discrimination Act 1984

The Sex Discrimination Act has been the subject of review on a number of occasions over the past twenty-five years, and improvements made to it as a result.[52] The most recent inquiry was undertaken in 2008 by the Senate Standing Committee on Legal and Constitutional Affairs. In its December 2008 report, the Committee made over forty recommendations for improving the Act and its operation.[53] The government decided to respond to the report in two stages. The first was to amend the Sex Discrimination Act in order to extend protection against discrimination on the ground of family responsibilities, to provide wider protection from sexual harassment for students and workers, and to include breastfeeding

[51] Section 10 provides:

10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

[52] The major reviews prior to 2008 were House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992), and Australian Law Reform Commission, *Equality before the Law – Women's Equality (Parts I and II)*, ALRC 69 (1994).

[53] Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

as a separate ground of discrimination.[54] The second stage is the harmonisation and consolidation of Commonwealth discrimination legislation into a single equality Act,[55] in order 'to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly'.[56] Legislation to carry out the first stage was introduced into the Parliament in 2010,[57] and was enacted and commenced operation in mid 2011.[58] The government commenced a public consultation on the consolidation of anti-discrimination laws in September 2011, committing to introduce new protections against sexual orientation and gender identity discrimination.

An exposure draft of a consolidated anti-discrimination statute was published in late 2012.[59] The draft adopted a general definition of discrimination applicable to all protected attributes. Defining discrimination as unfavourable treatment that is not justifiable,[60] the draft moved away from using definitions drawing directly on treaty definitions (as was the case under existing federal sex and racial discrimination legislation), although the implementation of Australia's international obligations relating to equality and non-discrimination is explicitly stated to be an object of the legislation.[61] The exposure draft attracted considerable public discussion, especially in relation to its proposals to expand protection against offensive or insulting conduct and to introduce a shared burden of proof in discrimination cases. The draft was the subject of a major inquiry by a Parliamentary committee,[62] and it was not clear whether the legislation would be passed by the Parliament before the federal election due in 2013.

[54] *Sex and Age Discrimination Legislation Amendment Bill 2010, Explanatory Memorandum* (2010) 1.

[55] *Ibid*.

[56] *Australia's Human Rights Framework*, April 2010, 3.

[57] See *Report of the Senate Committee on Legal and Constitutional Affairs* (February 2011).

[58] See Sex and Age Discrimination Legislation Amendment Act 2011.

[59] Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation, November 2012, available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/antI_discrimination_2012/index.htm (last accessed 22 February 2013).

[60] *Ibid*., Chapter 2, Part 2–2. The definition of 'special measures' in clause 21 also departs from the standard international formulation.

[61] *Ibid*., clause 3.

[62] Senate Constitutional and Legal Affairs Legislation Committee, *Report on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, 21 February 2013, available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/antI_discrimination_2012/report/index.htm (last accessed 22 February 2013).

5 The Sex Discrimination Act, the Convention and Australian case law

The Convention and the work of the Committee has been considered in a number of cases decided by Australian courts and tribunals,[63] generally in the context of the interpretation of the Sex Discrimination Act or the corresponding State and Territory legislation. While the Australian courts (in particular the High Court) have been criticised for adopting narrow interpretations of anti-discrimination legislation,[64] where the courts have had the opportunity to draw on the Convention and the work of the Committee to interpret the Sex Discrimination Act or equivalent legislation, they have generally done so in a way that advances the implementation of the Convention (as far as that is possible within the wording and structure of the legislation).[65]

Some cases have involved challenges to the constitutionality of particular provisions of the Sex Discrimination Act on the ground that they exceed the legislative power of the Commonwealth Parliament. Although the High Court has not pronounced on the constitutionality of the Act,[66] these challenges in the lower courts have all failed, and it seems clear in light of the case law of the High Court on the scope of the external affairs power that the provisions of the Act that draw on that power are valid. This underlines the importance of the treaty for the constitutionality of the expansive reach of the Act.

For example, in *Aldridge* v. *Booth*[67] the Federal Court of Australia held that sexual harassment was a form of 'discrimination against women' within the meaning of the Convention and that providing women with

[63] There have been many references to the Convention and to the Concluding Comments of the CEDAW Committee in asylum or refugee cases, where the Committee's output may form part of the material on which an assessment of an asylum seeker's claim may be based. These are not considered here.

[64] See, for example M. Thornton, 'Sex discrimination, courts and corporate power', *Federal Law Review* 36:1 (2008) 31–56; B. Gaze, 'The Sex Discrimination Act after twenty years: achievements, disappointments, disillusionment and alternatives', *University of New South Wales Law Journal* 27:3 (2004) 914–21; B. Smith, 'Rethinking the Sex Discrimination Act: does Canada's experience suggest we should give our judges a greater role?' in Thornton (ed.), *Sex Discrimination in Uncertain Times* 235–60 at 250–5.

[65] See, for example, *Ilian* v. *ABC* [2006] FMCA 1500, [43]–[45].

[66] Though see *Victoria* v. *Commonwealth ('Industrial Relations Act Case')* [1996] HCA 56, in which the Court accepted that the CEDAW and other human rights treaties gave rise to legislative competence on the part of the Commonwealth under s. 51(xxix) of the Constitution.

[67] [1988] FCA 170.

legal protection against sexual harassment in employment gave effect to Australia's obligations under Article 11 of the Convention and was therefore constitutional,[68] a conclusion affirmed by the Full Federal Court in *Hall* v. *A & A Sheiban Pty Ltd*.[69] The cases were decided before the CEDAW Committee adopted its General Recommendation No. 19 (1991), which made it clear that sexual harassment was a form of discrimination against women within the meaning of Article 1 of the Convention.[70]

The most substantial discussions of the Convention have occurred in cases involving the legitimacy of special measures, generally those that make available to women opportunities or services as part of efforts to redress prior disadvantage or other special circumstances. Both the Sex Discrimination Act and the corresponding State statutes contain such provisions. There have been two versions of a special measures provision in the Sex Discrimination Act – the original section 33 and the current section 7D.[71]

The case law got off to something of a false start, but has subsequently corrected itself; the cases demonstrate the difference that taking account of the relevant international standards can make to the outcome of a case. In

[68] [1988] FCA 170, [46]–[60].

[69] [1989] FCA 72.

[70] See also *Johanson* v. *Michael Blackledge Meats* [2001] FMCA 6, [93]–[96].

[71] The current provision relating to special measures is s. 7D:

7D Special measures intended to achieve equality

(1) A person may take special measures for the purpose of achieving substantive equality between:
  (a) men and women; or
  (b) people of different marital status; or
  (c) women who are pregnant and people who are not pregnant; or
  (d) women who are potentially pregnant and people who are not potentially pregnant.

(2) A person does not discriminate against another person under sections 5, 6 or 7 by taking special measures authorised by subsection (1).

(3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:
  (a) solely for that purpose; or
  (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

This provision was inserted in 1995 and replaced the original provision on special measures (s. 33), which provided:

> Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who

Re Australian Journalists' Association[72] the Australian Industrial Relations Commission refused to permit a change to the rules of the Australian Journalists' Association that was designed to ensure that there was at least one-third representation of women members on the Association's governing body. Boulton J found that the provision was discriminatory and did not fall within section 33 of the Sex Discrimination Act, which permitted measures to be taken that are intended to ensure equality of opportunity.[73] The judge held that women had the same opportunity formally to stand for election and that therefore the section did not apply.

Had the judge looked to Article 4 of the CEDAW (which section 33 was intended to reflect), it is difficult to see how he could have come to any conclusion other than one holding the measure was a permissible temporary special measure and therefore not unlawful. The union subsequently applied for and was granted an exemption under the legislation. In its decision granting the exemption, the Human Rights and Equal Opportunity Commission stated that it did not necessarily agree with the interpretation of Boulton J.[74]

In a later decision of the Australian Industrial Relations Commission, the Commission considered a similar issue and, after considering Article 4 of the Convention and other international cases dealing with the concept of discrimination, took the view – albeit tentatively – that a union rule providing that each union branch must have at least one female vice-president, was covered by section 33 of the Sex Discrimination Act.[75]

Subsequent cases have been more confident in their conclusions about the appropriate standard. The most important of these is *Jacomb* v. *Australian Municipal Administrative Clerical and Services Union,*[76] in which the Federal Court of Australia discussed in detail, with reference to General Recommendation No. 25 and other sources, the concept of (temporary) special measures under the Convention and implementing

> are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act.

See generally J. O'Brien, 'Affirmative action, special measures and the Sex Discrimination Act', *University of New South Wales Law Journal* 27:3 (2004) 840–8.

[72] (1988) EOC ¶92–224.

[73] See section 33, *supra* note 66.

[74] *Re an application for an exemption by the Australian Journalists' Association* (1988) EOC 92–236 at 77, 209.

[75] *Re Municipal Officers' Association of Australia: Approval of Submission of Amalgamation to Ballot* (1991) EOC 92–344, (1991) 12 *International Labour Law Reports* 57.

[76] [2004] FCA 1250.

Australian legislation in the context of quotas for women in senior positions in the union.[77] The new section 7D, inserted in 1995, had moved the special measures provision from the part of the Act that dealt with exceptions to the part of the Act that defined discrimination. This was to make clear that special measures were not 'discrimination' that was excused or justified, and were not in fact discrimination at all but a means of achieving substantive equality. The Court examined the history and content of section 7D in light of Articles 4 and 7 of the Convention. Noting that the Act should be interpreted in accordance with the provisions of the Convention,[78] the Court found that the quotas were special measures within the meaning of the Act and the Convention and were therefore not unlawful.[79] There have been a number of similar cases in which the provision of women-only services or facilities has been upheld as special measures within the meaning of the Act and the Convention.[80] There have been similar decisions in relation to State anti-discrimination law as well.[81]

In *McBain* v. *State of Victoria*,[82] the Federal Court of Australia considered a claim that section 8(1) of the Fertility Treatment Act 1995 (Vic), which restricted the availability of IVF treatment to a woman who was married and living with her husband on a genuine domestic basis, or was living with a man in a de facto relationship, was discriminatory on the basis of marital status and inconsistent with the Sex Discrimination Act. The Court held that this was unlawful discrimination in the provision of services, contrary to section 22 of the Commonwealth Act. The Court rejected an argument that section 22 should be construed in light of the Convention on the Rights of the Child and other instruments that a child had a right to be born into a family, to be raised by its mother and

[77] [2004] FCA 1250, [37]–[44].

[78] [2004] FCA 1250, [41].

[79] [2004] FCA 1250, [63]–[66].

[80] See, for example, *Walker* v. *Cormack & Anor* [2010] FMCA 9 (women-only gym sessions a special measure). The issue is discussed more generally in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (special measures under the Victorian Charter of Human Rights and Responsibilities).

[81] For example, in one of the many sex discrimination cases that involve disputes over access to sporting facilities or clubs, *Mangan* v. *Melbourne Cricket Club (Anti Discrimination)* [2006] VCAT 73, the Victorian Civil and Administrative Tribunal construed the 'special measures' provision of the Victorian Equal Opportunity Act (s. 82), in the light of Article 4 of the Convention and the CEDAW Committee's General Recommendation No. 25 on temporary special measures, finding that the measure in question did not satisfy the criteria of a special measure.

[82] [2000] FCA 1009.

father and to know its parents. The Court held that primacy should be given to the CEDAW in this case, since that was the treaty that the Sex Discrimination Act was intended to implement, and found that the denial of access to treatment was discriminatory, and that therefore the State Act was invalid to the extent of the inconsistency.[83]

In *AB* v. *Registrar of Births, Deaths and Marriages,*[84] a person who had been born male, was registered as male on her birth certificate, and was married (though living apart from her spouse), underwent sex affirmation (reassignment) surgery, and sought to have her birth certificate amended to reflect this. The Births, Deaths and Marriages Registration Act 1996 (Vic) provided that the Registrar could consider applications for such changes from persons who were unmarried, and so the Registrar refused AB's application on the basis that she was still married. AB challenged this refusal, arguing it violated section 22 of the Sex Discrimination Act in that it denied persons access to a service (rectification of the register) on the ground of marital status.

The issue was whether the Convention (and the Act) applied to discrimination on the ground of marital status where both married women and men were treated differently in comparison with women and men who were not married, or whether the reference to marital status discrimination applied only in cases where married women were subject to unfavourable treatment in comparison with married men or unmarried women. Resolution of this question was important because, for constitutional reasons, the Sex Discrimination Act would only apply in the context of the case to the extent that it gave effect to the Convention.

The judgments of the trial at first instance, Heerey J, and on appeal of the Full Court of the Federal Court (in particular that of Kenny J), are the most extended discussions to date of the Convention, its drafting history and meaning in the Australian cases. Heerey J dismissed the applicant's case, finding that the Convention and the Sex Discrimination Act did not apply to the present case since all married persons, women or men, were treated the same, and the Convention and the Act only applied to marital status discrimination where married women were treated unfavourably with respect to married men[85] (or unmarried women with respect to unmarried men). A majority of the Full Court dismissed the appeal

[83] The matter came before the High Court of Australia in *Re McBain* [2002] HCA 16, but the case there was decided on procedural grounds and did not reach the merits of the issue.
[84] *AB* v. *Registrar of Births, Deaths and Marriages* [2006] FCA 1071.
[85] *Ibid.*

against this decision, after an extended examination of the meaning of the Convention and the Act.[86]

There are other cases in which there has been reference to the Convention, but less extensive discussion. In *Jordan* v. *North Coast Area Health Service (No 3)*,[87] the New South Wales Anti-Discrimination Tribunal considered whether an award of 75 per cent of legal costs should unusually be made in favour of a successful complainant whose legal costs exceeded the maximum amount that could be awarded under the NSW Act. The Tribunal noted that the rights protected by the Anti-Discrimination Act (ADA) 1977 were 'internationally recognised, fundamental human rights' and that the Act 'reflects, in part [the CEDAW] which commits signatories, such as Australia, to pursue by all appropriate means a policy of eliminating discrimination against women'. The Tribunal concluded that if 'in a particular matter, seeking the ADA's protection of a fundamental human right is undermined by the cost of doing so, then it must be so that that single circumstance could, in the circumstances, justify the making of a costs order'.[88]

The Convention has also been drawn on as representing a clear statement of a public values and benefit, in a case in which the issue was whether the Victorian Women Lawyers' (VWL) Association was a charitable organisation for the purpose of income tax laws.[89] The Court noted that 'the legislation and the Convention to which Australia is a party can be taken as indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life,'[90] and that as 'VWL's principal purpose was to remove barriers and increase opportunities for participation by and advancement of women in the legal profession in Victoria' and '[h]aving regard to the social norms reflected in the Sex Discrimination Act, cognate State legislation and Australia's membership of the *Convention for the Elimination of All Forms of Discrimination Against Women*', that objective was a purpose 'beneficial to the community'.[91]

[86] *AB* v. *Registrar of Births, Deaths and Marriages* [2007] FCAFC 140 (Kenny and Gyles JJ; Black CJ dissenting).
[87] [2005] NSWADT 296.
[88] [2005] NSWADT 296, [33]–[34]
[89] *Victorian Women Lawyers' Association Inc.* v. *Commissioner of Taxation* [2008] FCA 983.
[90] [2008] FCA 983, [112].
[91] [2008] FCA 983, [147]–[148].

6 The Convention as a framework of reference for law reform

The Convention has also provided a policy framework and specific equality standards for a number of inquiries into law and policy reform. For example, in 1993 the Australian Law Reform Commission (ALRC) was given a reference under which it was to consider whether changes should be made to Australian federal laws or their administration in the light of the obligations of that State under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) in relation to the equality of men and women, and in relation to the CEDAW. The inquiry was presided over, for most of its duration, by Justice Elizabeth Evatt, a former member and Chairperson of the CEDAW Committee (1985–92) and subsequently a member of the Human Rights Committee (1993–2000).

The concept of equality and non-discrimination contained in the CEDAW were central to the framework of analysis adopted by the ALRC, and the individual provisions of the Convention provided a list of topics that the Commission drew on in its analysis of substantive law and practice. The Commission affirmed that 'equality in law, as required by CEDAW, needs to be understood in a different and more substantial sense than merely equality before the law. Any understanding of equality must take account of the social and historical disadvantages of women and how that has affected the law.'[92] The Commission made a range of recommendations, some of which specifically referred to the Convention, others of which were intended to implement its substantive obligations. These included a recommendation that the existing federal Sex Discrimination Act contain a general prohibition of discrimination in accordance with CEDAW Article 1,[93] and that any inclusion of temporary special measures in the Act should reflect the CEDAW position that such provisions were not discrimination that could be justified, but rather not discriminatory and a means of achieving substantive equality.[94] Even though not all the recommendations of the Commission were implemented, many were, and the CEDAW framework was important to the framing of the issues and the proposed legislative and policy responses.[95] There have been other

[92] ALRC, *Equality before the Law – Women's Equality (Part I)*, ALRC 69, para. 3.1.
[93] ALRC, *Equality before the Law – Women's Equality (Part II)*, ALRC 69, para. 3.1 and Recommendation 3.1.
[94] *Ibid*. Recommendation 3.7.
[95] *Ibid*. at para. 4.39 and n. 101 (referring to CEDAW's General Recommendation No. 19 on violence against women in relation to the importance of eliminating violence as part of the struggle to achieve equality for women).

inquiries in which CEDAW standards have been considered as relevant to the content of proposals for legislative and policy reform.[96]

7 Activism around the reporting procedure

Australian women's groups and other human rights groups have been active in their use of the reporting procedure under the Convention to advocate for improvements in law and practice relating to women's equality; they have also used the occasion of Australia's reports under other human rights treaties to focus public and international attention on these issues.

A number of features characterise the manner in which this engagement has taken place. First of all, the use of the reporting procedure has been closely linked to existing domestic campaigns of the organisation in question – the CEDAW reporting process has become part of a national advocacy strategy that takes advantage of the attention that such an international event attracts and the opportunities it provides to encourage or pressure government to take action.

The second is the way in which the preparation of an NGO report on the implementation of the Convention has been used as a capacity- and network-building exercise.[97] For example, in the lead-up to the review of Australia's 6th and 7th reports to the CEDAW Committee, an extensive consultation process with women from a variety of groups and backgrounds led to the adoption of a report endorsed by a significant number of groups. This process was led by the Young Women's Christian Association Australia and Women's Legal Services Australia, and contained contributions from other Australian NGOs and was 'endorsed, in whole or in part, by 135 non-government organisations across Australia'.[98] This resulted in a coordinated submission to the CEDAW Committee, in addition to other material that it received. At the same time a report was prepared by

[96] See, for example, the House of Representatives Standing Committee on Employment and Workplace Relations, *Making it Fair: Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce*, November 2009, paras. 344–379 (reference to the Convention, CEDAW's Concluding Observations and other relevant treaty obligations as part of the framework for assessing policy reform to achieve pay equity).

[97] See A. Cody and A. Pettitt, 'Our rights, our voices: a methodology for engaging women in human rights discourse', *Just Policy* 43 (April 2007) 86–94.

[98] YWCA Australia and Women's Legal Services Australia (with the endorsement of 135 organisations), *NGO Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Australia* (July 2009). The organisations are listed at vii–viii of the Report.

indigenous women's groups in parallel to this report.[99] A similar process had taken place in relation to the hearing before the CEDAW Committee in 2006, and many of the groups involved in that process actively drew on the CEDAW Committee's Concluding Comments as part of their advocacy at the national level.[100]

Australia's approach to the UN human rights bodies and their recommendations and views has generally been supportive and cooperative, with the Commonwealth government prepared to submit reports (though not always on time) and to engage in dialogue with the treaty committees and other procedures. At the same time, governments of both Labor and Liberal/National persuasions have consistently noted that while the pronouncements of the treaty bodies, including their views on communications, deserve due consideration and should be given considerable weight, they are not binding as a matter of international law. Accordingly, the Australian government considers that it is entitled to take a contrary, reasoned view of the meaning of certain provisions of the treaties, or of the application of the relevant provision in the circumstances of a particular case, and that this is consistent with its obligations under the relevant treaties.[101]

Nevertheless, the relationship between the UN human rights system and the Australian government has varied over the years. In particular, during the years of the Howard government (1996–2007), Australia's generally open and cooperative approach to UN human rights bodies took a turn for the worse.[102] A number of hearings before UN committees and findings by special procedures adopted adverse assessments of Australia's record on issues of political importance and sensitivity – in particular, in relation to racial discrimination and indigenous peoples' rights and to the rights of persons seeking asylum or refuge in Australia.

[99] *Aboriginal and Torres Strait Islander Women's CEDAW NGO Report* (2009).

[100] For descriptions of earlier hearings before the CEDAW Committee, see S. Brennan, 'Having our say: Australian women's organisations and the treaty reporting process', *Australian Journal of Human Rights* 5:2 (1999) 94–100, and A. Byrnes, 'Australia and the Women's Discrimination Convention', *Australian Law Journal* 62 (1988) 478–9.

[101] See, for example, the statement in the *Fifth Periodic Report of Australia under the ICCPR*, CCPR/C/AUS/5 (2008), paras. 9–11.

[102] See generally H. Charlesworth, 'Human rights: Australia versus the UN', Discussion Paper 22/06, Democratic Audit of Australia, Canberra, August 2006, and Charlesworth *et al*., *No Country is an Island* at 82–91. See also D. Kinley and P. Martin, 'International human rights law at home: addressing the politics of denial', *Melbourne University Law Review* 26:2 (2002) 466–77; and S. Zifcak, *The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System* (Canberra: The Australia Institute, 2003) 24–32.

These triggered a hostile response from the government. This took not only the form of jingoistic assertions of sovereignty, but also, following a review in 2000 of its engagement with the treaty body system, the articulation by the government of a more belligerent ('robust') and less cooperative approach to engagement with the treaty body system.[103] This involved, among other things, slow or no responses to Committee Concluding Observations or Views, failure to publicise Committee findings[104] and a rejection of the substantive findings in a number of cases, and a refusal to sign or ratify the CEDAW Optional Protocol. In some cases these responses reflected ongoing disagreements about the meaning of certain provisions of the treaties,[105] but in others it reflected a more hostile approach to the UN human rights system. This less receptive approach to UN human rights bodies was reflective of the government's

[103] Charlesworth *et al*., *No Country is an Island* at 87–91.

[104] A number of decisions of treaty bodies decided adversely to Australia from July 2006 have been published on the Attorney-General's Department website, together with (generally undated) responses from the government that set out its understanding of the scope and application of the relevant provisions of the ICCPR where the government's view is different to that of the treaty body. See www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx (last accessed 22 February 2013). The number of violations/communications under the various treaties as of 7 May 2012 was: ICCPR (20/59), CERD (1/9) and the Convention against Torture (CAT) (1/11): see www.bayefsky.com/docs.php/area/jurisprudence/state/9 (last accessed 13 February 2013). For details of Committees' responses to the replies by the Australian government to Committee views, see www.bayefsky.com/docs.php/area/fu-jurisprudence/state/9 (last accessed 13 February 2013).

[105] For example, whether Article 9(1) of the ICCPR provides a substantive guarantee of non-arbitrariness in relation to detention, or merely a guarantee of lawfulness under domestic law. The Human Rights Committee held in *A* v. *Australia* (560/1993), 30 March 1997, UN Doc. CCPR/C/59/D/560/19, and subsequent cases, that the guarantee was substantive, a legal finding the Australian government rejected (response of 16 December 1997, summarised in A/53/40, para. 491 (1998)). The debate continued, with the HRC objecting to this approach (A/55/40, vol. I, paras. 520–1 (2000)) and a riposte by the Australian government:

> Australia is careful to ensure that all communications concerning Australia are responded to in a considered manner. The fact that Australia may on occasion disagree with the Committee does not undermine our recognition and acceptance of the communications mechanism under the Optional Protocol. (*Fifth Periodic Report of Australia under the ICCPR*, CCPR/C/AUS/5, (2008) para. 11).

See also *Response of the Australian Government to the Views of the Committee in Communication No 1324/2004 Shafiq* v. *Australia*, 25 May 2007, and A/63/40 vol. II, 505 (2008) (rejecting Committee's view of scope of ICCPR Article 9(4)). The narrower view of these provisions has been maintained by the subsequent Labor government.

general political approach on human rights issues, including on issues of equality and non-discrimination.[106]

The election of the Rudd Labor government in late November 2007 led to a renewal of a more constructive rhetoric about and engagement with the human rights system, with accession to the CEDAW Optional Protocol, and the ratification of other instruments or the commencement of the steps needed to ratify them. At the same time, in its responses to the Committees on individual communications, the government maintained its different view of the meaning of certain provisions of the treaties,[107] and also continued to emphasise that the views of the treaty bodies on communications were non-binding recommendations.[108]

8 Major issues – the case of paid maternity leave

When Australia ratified the Convention, it entered the following reservation in relation to the obligation under Article 11(2)(b) of the Convention 'to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances':

> The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.
>
> The Government of Australia advises that it is not at present in a position to take the measures required by article 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

[106] M. Sawer, 'Australia: the fall of the femocrat' in J. Outshoorn and J. Kantola (eds.), *Changing State Feminism* (Basingstoke: Palgrave Macmillan, 2007) 20–40 at 26, 39–40; L. Chappell, 'Winding back Australian women's rights: conventions, contradictions and conflicts', *Australian Journal of Political Science* 37:3 (2002) 475–88.

[107] See, for example, *Response of the Australian Government to the Views of the Committee in Communications 1255/2004 et al*., *Shams et al*. v. *Australia*, 25 June 2008 (rejecting the Committee's view of the scope of ICCPR Article 9(4)); see also A/63/40 vol. II, 508 (2008).

[108] See, for example, the *CEDAW–OP Australian Treaty National Interest Analysis*, tabled before the Parliament's Joint Standing Committee on Treaties, as a prelude to accession to the Optional Protocol: 'The views of the Committee are non-binding, and therefore, while they could guide Australia in its implementation of international law, Australia would not be obliged to conform to the Committee's views if it believes that there is a better way to implement its obligations under CEDAW.' [2008] ATNIA 26, para. 9.

The question of paid maternity leave has been a contentious one in Australia,[109] with the federal Sex Discrimination Commissioners pushing governments of both political complexions to move ahead with a scheme of paid maternity leave for all.[110] There has been a significant measure of public support for this proposal, though support in some sectors such as business (especially among small businesses) has been dependent on the nature of the contributions required from business and likely to be provided by government.

The CEDAW Committee has also pressed Australia on the issue. For example in its 2006 Concluding Comments, the Committee stated:[111]

> 24. [T]he Committee remains concerned about the lack of uniformity in work-related paid maternity leave schemes. It is also concerned that there is no national system of paid maternity leave and that, as a consequence, the State party continues to maintain its reservation to article 11, paragraph 2, of the Convention.
> 25. The Committee urges the State party to take further appropriate measures to introduce maternity leave with pay or with comparable social benefits. It also recommends that the State party evaluate its maternity payment introduced in 2004 in the light of article 11, paragraph 2 (b), of the Convention and to expedite the steps necessary for the withdrawal of its reservation to this article.

In May 2009 the Productivity Commission, to which the government had referred the issue, made public its report.[112] The Commission recommended that the government adopt a taxpayer-funded scheme that would:

[109] See D. Brennan, 'The difficult birth of paid maternity leave: Australia' in S. B. Kamerman, *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Bristol: The Policy Press, 2009) 15–31; Charlesworth and Charlesworth, 'The Sex Discrimination Act and international law' at 860–3.

[110] See *Pregnant and Productive: It's a Right Not a Privilege to Work While Pregnant*, National Pregnancy and Work Inquiry (1999) Commissioner Susan Halliday (proposing modelling and analysis of possible paid maternity leave schemes); *A Time to Value: Proposal for National Maternity Leave Scheme* (2002) (Commissioner Pru Goward) (proposed as a minimum standard, a fully costed scheme of 14 weeks to be paid by the government at the level of the federal minimum wage); *It's About Time: Women, Men, Work and Family* (2007) (acting Sex Discrimination Commissioner John von Doussa QC). See also Sex Discrimination Commissioner Elizabeth Broderick, Oral evidence, Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave, Public Hearing, 20 May 2008.

[111] CEDAW/C/AUL/CO/5, paras. 24–25 (2006).

[112] Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children Inquiry Report* (2009).

- provide paid postnatal leave for a total of eighteen weeks that can be shared by eligible parents, with an additional two weeks of paternity leave reserved for the father (or same sex partner) who shares in the daily primary care of the child;
- provide the adult federal minimum wage (currently $543.78) for each week of leave for those eligible, with benefits subject to normal taxation.

The Commission estimated that the government scheme would cost taxpayers around $310 million annually in net terms (with an additional cost of $70 million if superannuation contributions were to be introduced subsequently). This endorsement by the Productivity Commission of the financial feasibility of a scheme (which followed reports by Sex Discrimination Commissioners and others that a scheme was affordable), provided powerful political impetus to the campaign for universal paid maternity leave.

The Australian government indicated its plans in its response to the lists of issues sent to it by the CEDAW Committee in relation to its combined 6th and 7th reports:[113]

> On 10 May 2009 the Government announced its intention to introduce a paid parental leave scheme (Scheme) in January 2011. The Scheme is closely based on the model proposed by the Productivity Commission. It will provide the primary carer with 18 weeks of paid post-natal leave, paid at the federal minimum wage. Eligibility will depend on the primary carer's period of employment with their employer, and whether the carer has an adjusted taxable income of $150,000 or less in the financial year prior to the birth of the child. The Scheme will cover employees, including casual workers, as well as contractors and the self-employed. The Australian Government is currently considering its position on the reservation to article 11(2) (b) of the Convention, particularly in light of its announced intention to introduce paid parental leave throughout Australia in 2011.

This represented a significant advance, though there was criticism of the limitations of the scheme and its perpetuation of gender stereotypes.[114]

The CEDAW Committee welcomed the introduction of the paid parental leave scheme, but noted that 'it does not include superannuation,

[113] *Responses to the List of Issues and Questions with Regard to the Consideration of the Combined Sixth and Seventh Periodic Reports*, CEDAW/C/AUL/Q/7/Add 1, Question 25 at 57 (2010).

[114] YWCA Australia and Women's Legal Services Australia (with the endorsement of 135 organisations), *NGO Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Australia* (July 2009), paras. 12.3–12.6.

which impacts on the major gender gap in retirement savings and economic security between older women and men, that the leave is of limited duration (18 weeks), and that compensation is limited to an amount equal to the federal minimum wage and subject to other conditions'.[115] It called on Australia to ensure that the proposed review of the legislation would address and remedy these aspects of the scheme.[116] The scheme took effect from 1 January 2011, and it seems likely that this will permit Australia to remove its reservation relating to maternity leave.

9 The role of the Convention in the pursuit of equality

The CEDAW has been much more of a focus for advocacy and law-making around women's equality than other international instruments, such as the ICCPR. This is primarily the result of the fact that the main form of gender discrimination that was broadly identified as needing to be addressed at the time of the enactment of the first federal legislation on sex discrimination and around the time of the adoption of the Convention was discrimination against women. Compared with the brief and general non-discrimination guarantees of the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and other treaties, women's rights advocates found the broad-ranging and detailed stipulations of the CEDAW substantively more useful and a more natural basis for political solidarity, emerging as it did from the women's movement in which the advocates of legislative reform in the 1970s and 1980s in Australia also participated. It also provided a firm constitutional basis on which to erect a wide-ranging federal statute.

That said, in a number of areas these other treaties have proved useful, especially as constitutional hooks on which to base federal legislation more firmly, and as the framework for particular administrative schemes of rights protection (ILO 111).[117] The ICCPR also provided an important avenue for advancing activism and law reform around discrimination on

[115] CEDAW/C/AUL/CO/7, para. 38 (2010).

[116] CEDAW/C/AUL/CO/7, para. 39 (2010).

[117] In the 1970s, as part of implementation of ILO Convention No. 111, national and state committees on discrimination in occupation and employment constituted on a tripartite basis were established, with the function of receiving complaints of discrimination in employment on various grounds (including sex). The committees could only conciliate cases and had no power to issue orders; if conciliation failed, under this system the only remedy was a report by the Minister to the Parliament: United Nations, *United Nations Yearbook on Human Rights for 1975–76* (United Nations, 1981) 8. For an example of a case in which ILO Convention No. 111 is discussed in the context of an appeal

the basis of sexuality. In *Toonen* v. *Australia*,[118] the complainant successfully challenged Tasmanian laws that criminalised homosexual conduct before the Human Rights Committee in a complaint lodged under the First Optional Protocol. The Committee found the Tasmanian laws violated Article 17 of the ICCPR,[119] and also noted that discrimination on the basis of 'other status' in Articles 2 and 26 of the Covenant included discrimination on the basis of sexual orientation, although the Committee did not make a finding of violation on this separate ground.[120]

More recently, the revamping of the Equal Opportunity in the Workplace Act 1986 (Cth) – which involved renaming the legislation as the Workplace Gender Equity Act and extending its provisions to men – cites, as the part of its constitutional basis and international reference points, not just the CEDAW, but also Article 26 of the ICCPR and Article 7 of the ICESCR.[121] The Commonwealth Sex Discrimination Act, when initially enacted in 1984, referred specifically only to the CEDAW in so far as it based itself on international treaty obligations to extend the range of the Commonwealth's legislative reach (it applied to men under other legislative powers of the Commonwealth, but its application to women was broader due to the reliance on the Convention). At the time no reference was made to other treaties – it was only in amendments made to the Act in 2011 that other treaties are referred to as providing a substantive basis for the legislation.[122]

10 Conclusion

The following conclusions can be offered in relation to the relevance of the Convention to Australian law and practice relating to gender equality:

against an adverse disciplinary finding, see *Hart* v. *Jacobs* [1981] FCA 223; (1981) 57 FLR 18 (23 December 1981).

[118] Communication No. 488/1992, views adopted on 31 March 1994, UN Doc. CCPR/C/50/D/488/1992 (1994). See generally S. Joseph, 'Gay rights under the ICCPR', *University of Tasmania Law Review* 13:2 (1994) 392–411, and W. Morgan, 'Sexuality and human rights: the first communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights: Comment' 14 (1992) *Australian Year Book of International Law* 277–92.

[119] Communication No. 488/1992 at para. 8.6.

[120] *Ibid*. at para. 8.7.

[121] 'Statement of compatibility with human rights', *Equal Opportunity for Women in the Workplace Amendment Bill 2012*, *Explanatory Memorandum* at 133–4.

[122] Sex and Age Discrimination Legislation Amendment Act 2011, s. 4(1) refers to the CEDAW, the two Covenants, the CRC, and ILO Conventions Nos. 100, 111, 156 and 158 – though not the Convention on the Rights of Persons with Disabilities.

- The ratification and continuing efforts to implement the CEDAW have been part of a broader political and social campaign to address discrimination against women and to pursue the goals of gender equality.
- The ratification and implementation of the CEDAW has been both a result of that campaigning and has contributed additional impetus to it – by providing a framework for advocacy and scrutiny of policy and law, and by the reporting procedure providing a stimulus to and opportunities for women's groups to collaborate and coordinate their critiques and to put public pressure on the government nationally and internationally, and by providing material that can be brought back to the domestic debate that has a different form of legitimacy.
- The Convention's requirement to ensure that there are appropriate legislative guarantees and protection of equality and non-discrimination on the ground of sex, although not initially the basis of calls for legislation, subsequently was important to the form and constitutionality of the Sex Discrimination Act 1984 (and other legislation).
- The Sex Discrimination Act has provided some form of remedy for many women who have brought their cases to the Commission, but it suffers from the inherent limitations of individual complaint-based procedures and is not a particularly good vehicle for addressing systemic discrimination, or generating proactive responses.
- Courts have drawn on the Convention and CEDAW Committee output to give CEDAW-consistent interpretations of the Sex Discrimination Act in a number of cases and to produce CEDAW-consistent readings/considerations in other contexts, but given the nature of the Sex Discrimination Act, these cases have not been a major driver of legislative or policy reform.
- The Convention and CEDAW Concluding Observations/Comments and other output have provided a useful substantive framework for policy critique and reform in a number of cases, and have become part of the standard repertoire of argumentation and substantive consideration in policy reform, and appear to carry some, though by no means decisive, weight with legislators and policy-makers.
- Australia's reservations to the CEDAW have admittedly prevented Australian law and policy in the areas they cover from violating Australia's international legal obligations; on the other hand, they have provided a focal point for the exertion of political pressure on the government to review and amend the substantive policies that the reservations seek to immunise, and have led to the modification and removal of some of the reservations.

- The sources of and grounds for resistance to the implementation of the Convention have varied, sometimes depending on the issue. They have included many conservative politicians, socially conservative groups, States rights advocates, some religious groups, the defence establishment (which was able to secure a reservation for its policies but which has engaged in a review and amendment of those policies) and some business groups (depending on the issue – the business community is not monolithic).

There are other areas in which the CEDAW has been important in adding to momentum for legislative and policy change – violence against women and moves towards pay equity are two such areas, but there are many areas in which much remains to be done. The reluctance of the government and others to adopt a more extensive range of temporary special measures (for example, in ensuring the representation of a fixed percentage of women on corporate boards) is something that the CEDAW Committee has consistently urged the government to do.[123]

Notwithstanding the many advances, it has also become clear that one cannot take changes advancing the cause of equality for granted – they are always subject to challenge by countervailing political and social forces, and the forms of discrimination are constantly evolving.[124] Thus, the struggle will continue, and the CEDAW will continue to provide an important frame of reference and resources for that continuing struggle.

Annex A

Australia's declaration and reservations to the Convention on the Elimination of All Forms of Discrimination against Women

Declaration:
Australia has a Federal Constitutional System in which Legislative, Executive and Judicial Powers are shared or distributed between the

[123] Most recently in its 2010 Concluding Observations on Australia: CEDAW/C/AUL/CO/7, paras. 26–27 (2010).

[124] See M. Thornton, 'Auditing the Sex Discrimination Act' in M. Smith (ed.), *Human Rights 2004: The Year in Review* (2005) 21–56 ('the references in the objects clause of the SDA to the *elimination* of discrimination and sexual harassment, which are taken directly from the Convention for the Elimination of Discrimination against Women (CEDAW), are based on a flawed premise. It is naïve to think that we might *eliminate* activity that is ongoing.').

Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

Reservations:

The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.

The Government of Australia advises that it is not at present in a position to take the measures required by article 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

Reservation [original version July 1983]:

The Government of Australia advises that it does not accept the application of the Convention is so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'.

Reservation [modified in August 2000]:[125]

The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties.

[125] The combat-related duties aspect of the reservation was removed in 2000 after review by the Defence Forces, *Combined 4th and 5th Periodic Reports of Australia*, CEDAW/C/AUL/4–5 (2004), paras. 281–2. In its 2009 report the government indicated that, while the range of jobs open to women in the Defence Forces was expanding and it was continuing to review women's roles, it was maintaining the reservation so far as it related to women's direct participation in combat duties: *Combined 6th and 7th Reports of Australia*, CEDAW/C/AUL/6–7 (2009), paras. 9.63–9.65.