THE ILLUSIONS OF COMPARABLE WORTH

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Gabriël Moens
&
Suri Ratnapala

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Foreword

Comparable-worth proposals would require equal pay for different jobs (usually with the same employer) which are predominantly held by males or females and which are determined by a political authority to be comparable in value or worth. Yet the claims that a gender gap in wages results from discrimination and that comparable worth would provide an effective remedy are hardly demonstrable. They are so contrary to common experience that their acceptance by advocates of comparable worth is more readily attributable to ideology than to rational analysis.

The first claim — that discrimination causes a gender gap in wages — has been demolished by studies showing that virtually the entire difference in the average wages of men and women can be explained by the fact that most women take time out of the labour market in order to care for their children. They therefore invest less of their human capital, and, since any wage is in part a return on human capital, they tend to gravitate to lower-paid work. As Gabriël Moens and Suri Ratnapala argue in this carefully crafted and easily readable monograph, we can sensibly compare only the earnings of people who are comparable; and it has been established that women who have never married earn as much as men who have never married. There can be no sound comparison between married men and married women since marriage has different effects on the two groups. The authors conclude that discrimination is not a major factor affecting occupational segregation. Instead, choice plays a more important part in female job selection. If the comparable-worth method restricted such choices, its moral case would be seriously weakened.

The second claim — that comparable worth would effectively close the gender gap in wages — pretends that the laws of supply and demand can be repealed by government agencies and courts engaged in the impossible task of ascertaining the worth of comparable work. Comparable worth may be a symptom of the tendency of our post-Enlightenment era to rely so heavily on the scientific method as to try to quantify the unquantifiable, to the exclusion of common sense and experience. It involves declaring that, for example, a secretary's two years of college are equal in worth (not half or double) to a truck-driver's risk of getting killed on the highways.

Perhaps the main virtue of this important book is that the authors make the technical and statistical distinctions without allowing those

unavoidable details to obscure principles and practicalities. They carefully distinguish the concepts of equal treatment, equal pay, equal worth, equal pay for work of equal value, and comparable worth. And they clearly perceive that, beyond the serio-comic arbitrariness of wage determination by Olympian bureaucrats, comparable worth threatens both the free economy and the welfare of most women employees. The book is also strong in its comparative analysis of comparable worth in the law of the United States, Canada, Australia and the European Community.

With their precise and cautious style, the authors have so effectively demolished the case for comparable worth that a fair reader could easily agree with Robert Rector, another authority on the subject, that comparable worth is 'phrenology for modern times'.

Charles E. Rice
Notre Dame Law School
University of Notre Dame

Preface

The quest for the 'just wage' is perennial, but the concept has eluded satisfactory definition. Despite its imprecision the notion has played a key role in the determination of wages in Australia. The continuous adjustments of employees' wages indicate that, in matters of remuneration, there is little agreement on the 'value' of a person's work. This disagreement alerts us to the many difficulties involved in the setting of 'just' wages. This monograph deals with a relatively recent development in this aspect of industrial relations, namely, the introduction of the comparable-worth method of wage-setting.

In this monograph, we discuss whether, and if so to what extent, this method is compatible with a market economy on the one hand, and Australia's centralised wage-fixing system on the other. In particular, we argue that the concept of comparable worth has not yet been accepted by Australia's industrial relations tribunals because of its perceived or presumed incompatibility with the centralised wage-fixing system currently in force. But we also anticipate that the method will be promoted from time to time by the trade unions and elements of the feminist movement. We evaluate the likely impact the implementation of the method has on the market economy in general and on the choices and opportunities available to different groups of female employees in particular.

The issues discussed in this monograph are, from conceptual points of view, difficult. This difficulty is exacerbated by the fact that, in the relevant literature, terms such as 'equal pay for equal work', 'equal pay for work of equal value', 'pay equity' and 'comparable worth' are often used interchangeably, resulting in intellectual confusion. Unfortunately, the tendency to attribute the same meaning to distinct terms (or, conversely, to lump different ideas under one term) is commonplace in a world where the language of politics usually triumphs over the methodologies of scholarship. We believe that this tendency endangers democracy by confusing important issues, thus impeding rational choice. Such confusions abound in the debate concerning comparable worth. Hence we devote Chapter 3 to the task of clarifying some of these terms and their relevance in the industrial relations field.

Issues concerning comparable worth are discussed throughout the world at both the academic and the industrial levels. There is a voluminous literature, especially in the OECD countries, on the concept of comparable worth. It is not the purpose of this monograph to discuss comprehensively the legal status of comparable worth in

different countries. The comparable-worth method proposed for New Zealand in 1990 is the subject of an admirable CIS monograph written by Penelope J. Brook and entitled *The Inequity of 'Pay Equity': Comparable Worth Policy in New Zealand.* The comparable-worth debate in Canada that we discuss briefly in Chapter 5 has been penetratingly examined by Professor Thomas Flanagan of the University of Calgary. We refer to his writings in the course of our arguments.

It is, however, necessary to review at some length the relevant state of the law in the United States. US judicial decisions are especially helpful to the issues considered in this study as they examine the comparable-worth method in relation to the ideal of equality guaranteed by the constitution and landmark civil-rights statutes. Some of these decisions are cited, often misleadingly, by comparable-worth activists in Australia and elsewhere in support of their cause. Therefore, it is important to examine these decisions to determine the state of the law in the United States and to gain valuable insights into the nature of the egalitarian arguments advanced in support of comparable worth. We undertake this task in Chapter 4. The rich and provocative jurisprudence of the European Court of Justice is discussed in Chapter 5. This jurisprudence indicates that, in the European Economic Community, comparable-worth claims are asserted in the name of 'equal pay for work of equal value'.

In our research, we were struck by the fact that many commentators, especially in Australia, have tended to neglect the moral issues raised by the implementation of the comparable-worth method. We hope this monograph will initiate the much-needed debate on these issues.

We hope that our monograph contributes to a more informed discussion of an important emerging issue in the industrial relations field. If this work enhances the quality of the discussion, we would consider our project a success. The monograph is the product of close cooperation between the authors. The research was begun in 1987 by Gabriël Moens when he was working as a Jean Monnet Fellow in Law at the European University Institute, Florence. We would like to thank our respective families, whose patience, tolerance and encouragement sustained us in this effort. Our thanks are also due to our friends, too many to name, who over the years have stimulated our interest in this topic and have unflinchingly supported our intellectual endeavours.

Gabriël Moens
Suri Ratnapala
1 December 1991

About the Authors

Gabriël Moens was born in Belgium. He is an Associate Professor of Law in the University of Queensland. He is also a member of the Faculty of the University of Notre Dame London Law Centre, where he teaches International Trade Law and Comparative Constitutional Law in the Summer Programme. He obtained law and philosophy degrees from the University of Leuven (Belgium) and a postgraduate degree in law from Northwestern University (Chicago). He holds a Ph.D. from the University of Sydney. His research and teaching interests cover many areas, and include constitutional law, banking law, human rights, jurisprudence, European law and comparative law. He is the author of the CIS Policy Monograph *Affirmative Action: The New Discrimination* (1985) and the coauthor of *The Decline of the University*, Law Press, Sydney, 1990.

Suri Ratnapala is a Lecturer in the Department of Law of the University of Queensland, where he teaches jurisprudence, constitutional law and comparative law. Previously he taught law at the University of Colombo, Sri Lanka, and the Macquarie University in Sydney. Before migrating to Australia, he served as a Senior State Counsel in the Attorney-General's Department of Sri Lanka, specialising in constitutional litigation and drafting. He obtained a Master's degree in law from Macquarie University. He is the author of the CIS Policy Monograph *Welfare State or Constitutional State?*, which won second place in the 1991 Sir Anthony Fisher International Memorial Awards. He has published articles on constitutional law, legal philosophy and public law theory. He is co-editor of the *University of Queensland Law Journal.*

Executive Summary

1.

The comparable-worth method of wage setting requires that workers, regardless of their sex, be paid an equal salary for work of comparable worth or value to their common employer. It is advocated as a means of breaking down occupational segregation and of closing the concomitant gender gap in wages. The method was rejected by the Australian Conciliation and Arbitration Commission in 1986 because it could undermine Australia's centralised wage-fixing system.

2.

'Comparable worth' must be carefully distinguished from a range of similar concepts. 'Equal treatment' prohibits federal and State governments from discriminating between persons who are similarly situated. 'Equal pay for equal work' has been interpreted as meaning that employees doing jobs that have the same job description should, as a general principle, be paid the same salary. 'Equal pay for work of equal value' is due where jobs, although differently described, are substantially similar, and hence of equal value. 'Equal pay for work of comparable worth' means that workers, regardless of their sex, should earn equal pay for dissimilar jobs of equal value to their common employer.

3.

Although a number of international documents refer to 'equal pay for work of equal value', this principle was until recently indistinguishable from the principle of 'equal pay for equal work'. Various affirmative-action laws, adopted since the early 1960s, aim at increasing the number of female employees in typically male occupations but are unsuited to narrowing the wages disparity between men and women. The comparable-worth method allegedly closes the wages gap.

4.

Proponents of comparable worth often rely on the judgment of the US Supreme Court in *County of Washington* v. *Gunther*, in which a majority of the members of the Supreme Court expressed the view that an allegation of discriminatory compensation practice is sustainable even where the relevant jobs are not equal or substantially equal. But this, in itself, does not support comparable-worth claims because compensation claims can only succeed where a discriminatory intent is proved. Claims that the market does not work for women and is inherently discriminatory have been consistently rejected by the American Courts. But although, in the United States, comparable worth has failed to make any inroads at the federal level, some state legislatures and local-government authorities have implemented comparable-worth legislation or have undertaken comparable-worth studies as preliminary steps toward the preparation of suitable state legislation.

5.

In the European Economic Community and Canada, the principle of 'equal pay for work of equal value' has been interpreted as accommodating the comparable-worth method. This is based on an interpretation of Article 119 of the Treaty of Rome of 1957 and the Equal Pay Directive of 1975. In Canada, where comparable worth is known as 'pay equity', the law requires or permits the comparison of dissimilar jobs. Ontario's Pay Equity Act of 1987 imposes on certain employers an obligation to develop pay-equity plans.

6.

Australia's anti-discrimination legislation cannot be interpreted as requiring the comparable-worth method of wage setting, since it prohibits unequal pay only where jobs are the same or are not materially different. But Australia's industrial-relations law and practice do provide opportuni-

ties for the pursuit of comparable-worth claims, since the Industrial Relations Commission can decree what the law ought to be and is not limited to a determination according to what the law is. Although proponents of comparable worth claim that the Commission's 1972 'equal pay for work of equal value' principle allowed comparable-worth claims, the Commission decided in 1986 that such 'an approach would strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of the present Wage Fixing Principles'. The Commission may implement the method if it deems itself unrestrained by economic considerations.

7.

Comparable-worth advocates assume that the gender gap in wages is caused by discrimination. In contrast, life-choice theories discount discrimination as the sole or dominant determinant of occupational segregation. Discrimination theories fail to account for many factors that affect the wage disparity between men and women. If the wage gap is not substantially due to discrimination, the moral argument in favour of the comparable-worth method is seriously undermined.

8.

The comparable-worth method may not result in the integration of the workforce. It interferes with women's' choices and has other unacceptable social and economic costs. There is evidence that typically female occupations draw less pay because they are more overcrowded than most typically male occupations with which they are sought to be compared. The comparable-worth method can offset market-induced depression of female wages only by disregarding the marginal value of labour. The method could reduce the expected growth of female employment. Comparable-worth theory assumes uncritically that the equalising of wages will automatically lead to cross-migration of

male and female workers sufficient to achieve occupational integration and hence aggregate wage parity. The method is implemented by job-evaluation procedures to establish the relative values of dissimilar jobs. These procedures involve highly subjective judgments, and their results can easily be distorted by selecting those factors that are likely to lead to desired results.

9.

The comparable-worth method redistributes income, since its benefits will accrue selectively to groups of female workers who work in industries where comparable-worth claims are successfully pursued. Housewives and women who already work in a typically male job occupation are unable to gain from it. Jobs of blue-collar workers are systematically downgraded because the method usually involves the overestimation of paper credentials. This conflicts with the affirmative-action movement, which de-emphasises the importance of paper qualifications. Comparable worth facilitates the achievement by special-interest groups of advantages at the expense of others and it undermines the fabric of a free society.

Chapter 1

The Comparable-Worth Method of Wage Setting

Over the last decade the Commonwealth parliament has adopted a number of 'social justice' laws that aim to reduce the high level of occupational segregation of the Australian workforce. This legislation includes the Commonwealth Sex Discrimination Act of 1984 and the various affirmative action laws. Whereas the Sex Discrimination Act of 1984 prohibits employment discrimination on the ground of sex, the affirmative action laws purport to facilitate access by women to the job market. These laws, in general, are based on the idea that an improvement in the career opportunities and life choices of women will lead to a more integrated workforce.

Another method of breaking down occupational segregation is at present being fervently discussed in some academic, feminist and union circles. This method, known as the comparable-worth method, is the subject of this monograph.

Occupational Segregation and the Earning Gap

In Australia (as in most Western countries) occupations tend to be segregated by sex. Recent statistics reveal that the majority of female workers are employed in only four occupational groups: clerical workers; professional and technical workers (particularly teachers and nurses); service, sport and recreation employees; and sales representatives. There is also evidence not only that women are concentrated in typically female occupations but that even in the service sector, where women are predominant, jobs are segregated by sex within occupations, with men occupying the senior executive positions and women occupying the lower-paid positions. Such occupational segregation results in the 'overcrowding' of some occupations. An important consequence of occupational segregation is pay differentiation by sex. An oversupply of female labour often depresses wages in such occupations because employers are able to attract female applicants who are willing to work for lower wages. The concentration of female workers in typically female jobs may be largely responsible for the 'earnings gap', i.e. the difference between the average wage

paid to all women workers and the average wage paid to all men (Treiman & Hartmann, 1981:42; Johansen, 1984:12). Thus, any legislative attempt to narrow the 'earnings gap' must seek to promote a more integrated labour force.

In this context, it is often argued that occupational segregation (and the concomitant earnings gap) is sufficient proof that the market does not work for women and that this market failure calls for extensive government intervention. Those who entertain these views usually advocate the introduction of the comparable-worth method of wage setting, which requires wage parity between typically female jobs (where women predominate) and typically male jobs (where men are predominant) if their 'worth' or value is comparable to their common employer. Underlying these views is the assumption that, if men were in the majority in an occupation, wages would rise. The expectation is that any narrowing of the wage differential between men and women achieved through the implementation of the comparable-worth method would make it unprofitable for the industrial-relations system to retain rules and practices that adversely affect a disproportionate number of female employees. The removal of these discriminatory rules and practices, it is argued, would sanitise the demand-side conditions of the market; this, in turn, would improve the distribution of women across occupations and within occupations.

Alternatively, comparable-worth advocacy appeals directly to notions of wage justice or pay equity derived from the ideal of equalising outcomes. The most direct method of achieving this objective is to raise the wages paid in occupations where female participation is predominant. Comparable-worth theory is thought to offer a rational method of meeting this demand. This strand of comparable-worth advocacy is not too concerned about the need to desegregate occupations. Rather, it treats the concentration of women in particular (lower-paid) occupations as a fact that in and of itself justifies wage enhancement in these sectors. We examine this argument from the moral and economic standpoints.

Comparable Worth: How it Works

The comparable-worth method requires that workers, regardless of their sex, be paid an equal salary for work of comparable worth or value to their common employer. The basic premise of comparable worth is the substantiation by women of 'a claim for equal wages by showing that their jobs and those of male workers are of equal value to their common employer' (Brown, Baumann & Melnick, 1986:129).

This raises the question of how it is possible to compare the worth of jobs that are different in content. Usually, the comparable-worth method of wage setting is implemented by means of a specific job-evaluation system whereby jobs that are 'dissimilar in concrete content could be compared by an abstract point system of measurement and addition' (Flanagan, 1987a:16). A point-system analysis involves, in a simplified form, the following steps:

- Analysis of jobs into a number of factors related to (a) skills and knowledge, (b) responsibility, (c) effort and (d) working conditions. There can be many subfactors, for example, physical exertion, mental effort and accountability.
- A determination of minimum and maximum points that can be earned for each factor, and a selection of the criteria that will be used when points are assigned, within the allowable spread, to the specific factors.
- An addition of the point totals of each job and ranking of jobs against one other.
- A determination of monetary compensation.

The comparable-worth method is thus implemented by means of a job-evaluation system that assigns numerical values to a number of previously selected factors. This job evaluation is followed by the demand that 'wages should be linearly proportional to points totals even if market data indicated otherwise' (Flanagan, 1987a:16). Thus the comparable-worth method allows for a comparison of jobs which are different but which require comparable skills, effort and responsibility.

The push for the comparable-worth method constitutes one of the most radical developments in the movement towards equalising the distribution of jobs and incomes between the sexes. In the ultimate analysis, the comparable-worth method aims to establish wage parity among certain **dissimilar** types of employment on the claim that the jobs are of comparable value to the employer.

The comparable-worth method has serious economic, political and social implications. In its economic dimension, it has been viewed as a 'quantum departure from presently organized economic production', leading 'inevitably to administratively-determined concepts of value that have no relationship to market forces' (Hum, 1987:217). It has been said with regard to its socio-political dimensions that it provides 'the basis for an attack on the sexual division of labor and gender hierarchy' and that 'it lays the foundation for a

reordering of gender relations throughout social life' (Feldberg, 1984:313). In Australia, the Full Bench of the Conciliation and Arbitration Commission has considered that the comparable-worth method strikes 'at the heart of long accepted methods of wage fixation in this country' and is 'particularly destructive of the present Wage Fixing Principles' (1986 A.I.L.R. 99, 101). However, we contend that despite the formal rejection of the comparable-worth method by the Conciliation and Arbitration Commission, the goals associated with the method have made significant inroads into Australian industrial relations law.

The Aims of This Study

The comparable-worth method has been the subject of fervent debate in the United States, Canada and the European Economic Community for the better part of the last decade. Consequently, there is a wealth of literature on the subject originating from these countries. It is therefore useful to spell out at the outset the contribution that we intend to make to this debate.

This monograph has two major aims. First, we consider the current status of the comparable-worth method in Australia's unique system of wage setting. Second, we aim to substantiate our view that the method should not be implemented in Australia. In pursuing these aims, we shall necessarily have to consider the global state of the comparable-worth debate.

Comparable worth and wage-fixing systems. The concept of comparable worth has made progress in countries where wages are determined by voluntary agreement rather than by the state. In these countries, wage fixing is not entirely unregulated, particularly with respect to minimum rates of pay. But the actual wage levels are established by direct agreement between employers and workers. Hence, the system remains highly responsive to market forces. The comparable-worth method is one of the more radical reactions to the perceived failure of the market to wipe out wage disparities between male and female sections of the workforce. Advocates of comparable worth provide widely differing explanations of the market's failure to produce wage parity. These range from the suggestion that male employers are incapable of responding to market signals because of their gender prejudice, to the assertion that the market itself is intrinsically biased against women. According to its advocates, the comparable-worth method overcomes labour-market inefficiency and/or bias by compelling employers to reward workers according to the

true value of their jobs. Thus, the concept of comparable worth has been proposed and discussed mainly in relation to market-dictated systems of wage fixing.

In contrast, Australia has a highly centralised and bureaucratised mechanism of wage setting. In this regard the country is almost unique among the Western industrialised nations. This means that many of the market-related arguments that figure in comparable-worth literature have only modified application to the Australian situation. On the other hand, the Australian system has attributes that make it a fertile context for the reception of the comparable-worth method. Australia has a nationwide network of tribunals carrying out arbitral functions relating to wage determination. These tribunals operate at Commonwealth and State levels. The Industrial Relations Commission (formerly the Australian Conciliation and Arbitration Commission) has power to determine wage disputes that extend beyond State limits. Hence it has *de jure* power to directly control the wages of 35 per cent of the Australian workforce. It also wields enormous *de facto* power to indirectly determine wage trends on a national scale. This is demonstrated by the fact that Commission's 'National Wage case' decisions are routinely duplicated by State tribunals (Hancock, Polites & Fitzgibbon, 1985:99). The Commonwealth body and the State counterparts have wide powers to determine wages and other conditions of employment in disregard of market signals. Australia thus possesses a bureaucratic apparatus that readily lends itself to the implementation of a comparable-worth policy. The Australian industrial relations tribunals have traditionally performed functions similar to those involved in comparable-worth determinations. In its widely understood sense, a comparable-worth determination involves, as seen above, the evaluation of a job's worth to an employer and the comparison, in the same establishment, of such jobs with other jobs that carry higher wages. Australian industrial tribunals have long been in the business of comparing jobs in order to correlate wage levels according to job value. This aim is expressed in the concept of 'comparative wage justice', which historically has shaped the wages policies of key arbitral tribunals. The ideas of 'comparable worth' and 'wage justice' differ in important respects. But in our view the two ideas also have much in common. In Chapter 6, we undertake a comparison of these two concepts as part of our inquiry into the extent to which the comparable-worth method is compatible with the Australian industrial relations system.

An inquiry into the present status of the comparable-worth

method in Australia and its prospects for future advancement calls for an examination of some of the recent developments in wages policy in this country. In December 1972 the Australian Conciliation and Arbitration Commission brought down a decision in which it sought to establish the principle of equal pay for work of equal value. In 1985, the Royal Australian Nursing Federation and the Hospital Employees Federation of Australia initiated a test case before the Commission in order to establish the comparable-worth method as a requirement or implication of the guidelines set out in the 1972 equal-pay decision. The comparable-worth method was explicitly rejected by the Commission, which distinguished the 'comparable-worth' method from the 'equal pay for work of equal value' principle set out in the 1972 decision on certain technical grounds. But it is clear that the substantial reason for rejecting the concept was its potential for undermining the centralised wage-fixing system that had been established by the Commission in the 1983 National Wage case, pursuant to the 'Accord' reached by the Australian Council of Trade Unions (ACTU) and the Hawke Labor Government. It is therefore arguable that the comparable-worth method has not been finally rejected but only set aside for the time being because of the exigencies of current economic policy. We investigate, in Chapter 6, the future prospects of comparable worth in Australia in the light of this decision and subsequent developments in wages policy dictated by the Labor government's economic strategies.

Keeping Australia free of comparable worth. Our second major objective is to defend our view that the comparable-worth method should not be implemented in Australia. In doing so, we question, *inter alia,* the egalitarian character attributed to the comparable-worth method. The method will be questioned on 'due process' grounds and on the grounds that it diminishes rather than enhances the opportunities of its intended beneficiaries. In his seminal trilogy *Law, Legislation and Liberty,* Friedrich Hayek argues that the adoption and implementation of redistributive or 'social justice' policies are the result of complex and unrelenting efforts by policy makers to transform social values and roles. This fact is freely admitted by many intellectuals seeking redistributional goals. But Hayek further contends that the appeal to social justice to legitimise such measures 'is little more than a pretext for making the interest of the particular groups prevail over the general interest of all' (Hayek, 1976:96). Whether or not we agree with this statement as a general proposition, it alerts us to the need to critically examine the nature

and worth of social policies without making judgments solely on characterisations offered by the proponents or opponents of such policies. We argue that for structural and other reasons, it is unavoidable that the comparable-worth method will become the vehicle of special interests. Initially, the beneficiaries are likely to be particular sections of the female workforce. However, we contend that the method, if pursued to its logical end, may also be exploited by predominantly male sections of the workforce. The comparable-worth method is seen by many of its advocates as a means of ending occupational segregation. We put this claim to critical test by questioning some of its underlying assumptions. We advance the hypothesis that the campaign to establish comparable worth as the touchstone of wage setting, despite its appeal to egalitarian ideals, is working itself out as a distributional struggle among interest groups. It might be mentioned that some proponents of the comparable-worth method have already acknowledged its potential to divide the female section of the workforce into competing interests (Feldberg, 1984:325).

Chapter 2

The Historical Background

Two persistent statistical facts lie at the heart of the concerns that led to the emergence of the comparable-worth method. One is that occupations tend to be segregated by sex; that is to say, many occupations tend to be dominated by members of one sex although they may also have significant minorities of the opposite sex. The second fact is that the aggregate earnings of the male members of the workforce are much higher than the total earnings of the female members. The oft-cited official statistic for Australia is that women earn approximately 67 per cent of male earnings (Thornton, 1981:466). Edna Ryan points out that this figure is misleading, unless it is noted that a large number of women are part-time workers (Ryan, 1988:8). Yet it is true that in Australia, despite its bureaucratic system of wage setting, there remains a significant disparity between male and female full-time earnings. In countries where wages are not centrally determined, the wage disparity tends to be higher. For example, in the United States, the corresponding figure is thought to be around 60 per cent (Hartmann, 1984:13).

The Aims of Early Legislation

In recent feminist literature, occupational segregation and wage disparity are regarded as two faces of the same problem, each sustaining the other. On the one hand, it has been suggested that current job segregation provides no incentive for men to extend their advocacy of equal pay for women to segmented areas of the workforce and that unions join male employees in actually devaluing 'female' jobs by 'defining new classifications for women employees which will place them in a permanently inferior position and intensify the segmented nature of the occupational structure' (Thornton,1981:468). On the other hand, it is argued that the lower wage levels of female workers help to segregate the workforce by discouraging men from seeking entry into female-dominated occupations (Holzhauer, 1986:931). Initially, however, the concern of legislatures and governments was not with occupational segregation but with the protection of women from hazardous employment. These 'protective' labour laws, by excluding women from certain types of work or by imposing special conditions

for their employment in such work, served to accentuate rather than reduce occupational segregation (Griffiths, 1976:28).

The Birth of the Equal-Pay Principle

In fact, it appears that the first equal-pay policies were formulated on the basis that occupational segregation and the protection of women were accepted norms. This is evident from one of the earliest equal-pay initiatives in the West, undertaken by the United States National War Labor Board during World War I. The Board was created by executive order of the President to give labour and management a mechanism to settle their disputes without disrupting the war effort. The Board was faced with equal-pay issues when, owing to depletion of the workforce, women were called upon to do work traditionally done by men. The Board's response was to lay down the principle that if 'it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength' (National War Labor Board, 1920:69).

Whereas occupational segregation remained a non-issue, the principle of equal pay for equal work gained widespread recognition at national and international levels. The prosecution of World War I required a vast industrial effort and hence an unprecedented mobilisation of labour of both sexes. Labour's contribution to the war effort earned it new international recognition. The great powers were also apprehensive of possible revolution caused by disaffection amongst labour. Thus, there was consensus at the Paris Peace Conference that the industrialised nations should cooperate in improving conditions for workers (Flanagan, 1987a:7). The major consequence of this consensus was the establishment, by the Treaty of Versailles, of the International Labour Organisation (ILO). The Treaty also introduced the phrase 'equal remuneration for work of equal value' into industrial-relations language, which had hitherto been accustomed only to the phrase 'equal pay for equal work'. However, Thomas Flanagan disputes the suggestion that the Treaty, in recognising 'the principle that men and women should receive equal remuneration for work of equal value', intended to do more than restate the 'equal pay for equal work' concept. He refers to the fact that the new terminology was introduced in the redrafting process without exciting any comment or sense of innovation. It is also evident from ILO policy documents that until recently the organisation did not distinguish the principle of equal pay for work of equal value from the principle of equal pay for equal work (Flanagan,1987a:9).

The Rise of the Equal-Value Principle

The origin of 'equal pay for work of equal value' **as a distinct principle** is traceable to the work of the United States National War Labor Board established during World War II. This Board had a task similar to the Board of World War I, namely, the resolution of industrial disputes that threatened the war effort. Among the principles enunciated by this Board was one requiring that women should be paid equally with men when they performed jobs 'which differ only inconsequently, and not in measurable job content, from jobs performed by men' (National War Labor Board, 1945:296). The Board also stated that even where male and female jobs were measurably different, there could be a case for equal pay, if 'intraplant inequity' was proved from 'a comparison of the content of the jobs in question with the content of the jobs performed by men' (p.296). In practice, the Board worked on the presumption that where jobs differed measurably, the male-female wage differential was correct (Bellace, 1984:660). It is evident that the Board sought to extend the equal-pay principle to situations where, in the same establishment, men and women were engaged in **similar** as opposed to the **same** work.

Despite the initiatives of the War Labor Board, the ideal of equal pay for work of equal value failed to gain international currency as a distinct concept. The phrase was frequently treated interchangeably with the phrase 'equal pay for equal work'. The Universal Declaration of Human Rights adopted in December 1949 declared in Article 23(2) that 'Everyone, without any discrimination, has the right to equal pay for equal work'. In 1951, in a Convention devoted to the promotion of 'equal remuneration for men and women workers for work of equal value', the ILO defined the concept as referring to 'rates of remuneration established without discrimination based on sex' (Article 1(b) of Convention 100). The terminological confusion regarding 'equal pay for equal work' and 'equal pay for work of equal value' is nowhere more apparent than in the International Covenant on Economic, Social and Cultural Rights (1966). Article 7 (a)(1) of the Covenant calls for the payment of 'Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work'.

The idea of equal pay for work of equal value found its first concrete legislative expression in the Equal Pay Act passed by the US Congress in 1963. Section 3 of the Act provided that no employer shall pay women less than men in any establishment 'for equal work on jobs

the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions'. The section was clearly a deviation from the equal pay for equal work principle. It compelled the payment of equal wages to men and women engaged in similar work provided that the jobs made similar physical and intellectual demands.

In Europe, the corresponding development occurred only in 1975. The Treaty of Rome, which established the European Economic Community, provided in Article 119 that member states shall 'ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'. This provision was known as the 'European Translation' of the ILO Convention (Landau, 1985:17). However, it was only in the Equal Pay Directive of 1975 that the term 'equal work' was extended to include 'work to which equal value is attributed' (Council Directive 75/117/EEC).

Affirmative Action

By this time a further important development had taken place in the United States. This was the emergence of affirmative-action programs aimed at increasing the representation in employment of previously under-represented groups. This objective was secured by bureaucratically determined quotas and targets for preferential hiring. Affirmative action in the United States was initiated by Presidential Orders. In September 1965, President Lyndon B. Johnson issued Executive Order 11246 requiring the adoption of affirmative-action programs by all federal contractors and subcontractors. Federal contractors were to take 'affirmative action' to ensure that job applicants were treated without regard to their race, colour, religion, sex, or national origin. The contractor was also required to comply with all the rules, regulations, and relevant orders of the Secretary of Labor. The Department of Labor oversaw affirmative action through the Office of Federal Contract Compliance (OFCC) and, in relation to higher-educational institutions and some other non-profit organisations, through the Office of Civil Rights (OCR). The requirements of affirmative action were extended by the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964. The Act set up the Equal Employment Opportunities Commission (EEOC) to police affirmative action in the private sector (Moens, 1985:23-4).

Although affirmative action was conceived as a means of increasing black representation in employment and education, the feminist

movement quickly capitalised upon it as an ideal vehicle for its objectives of equalising the distribution of jobs and incomes between gender groups. Affirmative action is usually described by its proponents as the means of compensating for past social discrimination, as a way to remove present barriers to enter occupations, and as a redistributive mechanism. Thus, according to its proponents, affirmative action is capable of ending both occupational segregation and wage disparity.

Affirmative-action legislation is based on the idea that occupational segregation and the concomitant low wages are the result of 'indirect' discrimination. This concept usually refers to employment rules or practices which have not been introduced with the **intention** to discriminate against women but which have, nevertheless, an adverse **effect** on a greater number of women than men. This definition implies that 'indirect' discrimination can be identified by 'looking at the effects that the adoption of facially-neutral factors produces on the number of the different groups affected (men versus women)' (Treu, 1986:20). It is argued by proponents of affirmative action that apparently neutral but actually discriminatory factors are built into the evaluation guidelines that employers develop in order to assess the qualifications of potential employees or employees who apply for reclassification or promotion. Tiziano Treu provides a non-exhaustive list of examples of 'indirect' discrimination:

> Among the most common examples . . . are the following: 'unreasonable' emphasis on physical effort in comparison to visual effort; failure to include manual dexterity in the definition of physical efforts; unreasonably greater credit given to responsibility for property than to responsibility for people; extra points for the strength required in occasionally lifting heavy weights, in comparison with that required in repeatedly lifting light weights; disregarding skills learned by women in non-paid work at home in defining required education and training; disregarding negative work conditions found in women's jobs (confinement to small places, restricted body movement, use of magnifying equipment and noise from typewriters or telephones). (Treu, 1986:19)

According to advocates of affirmative action, these employment rules or practices, even though they apply equally to men and women, often result in the exclusion of women or in the limitation of their access to typically male positions.

After coming to power in 1983, the Hawke Government pursued a policy of incrementally introducing affirmative action to Australia. The program began with a Green Paper on *Affirmative Action for Women,* leading to the 'voluntary' adoption of the proposed scheme by 28 large corporations and higher-education institutions in an affirmative-action pilot program. The project was extended and made compulsory by the Affirmative Action (Equal Employment Opportunity for Women) Act of 1986, which itself is required to be incrementally enforced. The government may well contemplate greater coercive measures if the objectives of the present legislation are not met to its satisfaction. However, even before affirmative action was embraced in Australia, it was running into trouble in the United States. The concept faced constitutional challenges on account of its positive discrimination against blameless individuals. The program was also stultified by the philosophically opposed Reagan Administration. Above all, statistical evidence was failing to vindicate expectations of rapid elimination of occupational segregation and diminution of wage disparities.

The concept of comparable worth emerged against this backdrop of unyielding statistics. It was seen by its advocates as a means of improving the economic condition of women not only by directly enhancing their wages but also by ending occupational segregation. However, before we can test this and other claims made by comparable-worth advocates, we need to clearly understand the meaning of the concept and to examine its legal-logical foundation. This task will be attempted in Chapter 3.

Chapter 3

Equal Work, Equal Value, and Comparable Worth

Arguments that introduce new political concepts commonly proceed from explicit criticism of established ideas. However, reformers often do not directly reject a concept but seek to accommodate within it some new project that may be substantially inconsistent with the conventional understanding of the concept. The latter mode of argument is facilitated by the decay or corruption of language. Hayek states:

> . . . in the course of the last hundred years the very sense in which many of the key words describing political ideals are used has so changed meaning that one must today hesitate to use even words like 'liberty', 'justice', 'democracy' or 'law', because they no longer convey the meaning they once did . . . It was, unfortunately, not only ignorant propagandists but often grave social philosophers who contributed to this decay of language by twisting well established words to seduce people to serve what they imagined to be good purposes. (Hayek, 1979:135-6).

A variation of this reformist approach is found in the modern stratagem of fabricating what James H. Billington calls 'talismanic words' (Billington, 1980:244-6). These words, by virtue of their calculated imprecision, are capable of encompassing a wide range of meanings or implications. This lumping together of different ideas under one slogan diminishes the capacity of individuals to resist unacceptable meanings of the term. A very good Australian example of this phenomenon is the term 'multiculturalism'. Multiculturalism is a catchword that embraces a diverse range of social aims. It is said to imply a non-discriminatory immigration policy and the equal legal status of all Australians. But the term is also used to justify programs that employ taxpayers' money to encourage and to assist the maintenance of the separate cultural identities of migrant communities. Many Australians support non-racial immigration policies and the abstract legal equality of all persons living in Australia, but oppose public expenditure to support sectional interests of any kind. But those who

oppose this type of multiculturalism are often denigrated on the false supposition that they also oppose the classical-liberal principles that are grouped under the multicultural label. This situation results from the deliberate or careless confusion of disparate ideas under one political slogan.

The evolution of the concept of comparable worth has been facilitated by similar reformist-engineered corruption or decay of political language and the mutation of ideas brought about by the confusion of language. Specifically, it shows how premises based on **abstract** equality have been transformed to serve the goals of **material** equality. In order to understand fully the nature of the comparable-worth method we must unravel some of the terminological, and therefore conceptual, confusion that surrounds the idea. We may do this by examining in turn the concepts of equal **treatment**; equal pay for **equal work**; equal pay for **work of equal value**; and equal pay for **work of comparable worth.**

Equal Treatment

Most claims for 'wage justice' are explicitly or implicitly founded on the ideal of equal treatment. But the popular conception of the ideal has been significantly altered by the uses to which it has been put by those seeking distributional goals. The evolution of the concept of comparable worth is ultimately traceable to the ideal of equal treatment. For this reason we should first examine the original meaning of this ideal.

The ideal of equal treatment was first embodied in an enforceable form in the equal protection clause of the Fourteenth Amendment of the US Constitution read with the due process clause of the Fifth Amendment. These clauses, as interpreted by the US Supreme Court, prohibited the federal and state governments from discriminating between persons who are similarly situated. In other words, these constitutional guarantees required that persons who are situated similarly be treated alike (Tussman & tenBroek, 1949:344). However, this abstract principle, standing alone, cannot resolve difficult issues that can arise concerning equal treatment. Questions often arise as regards the propriety of the criteria employed to determine whether or not persons or things are similarly situated. Additional principles are therefore required to resolve these issues. For example, criteria such as gender, race, and religion are generally regarded as improper for the purpose of classifying persons for differential treatment. However, it is generally conceded that criteria such as age, financial means and

intelligence may in appropriate cases be regarded as proper bases for differentiation. Thus, persons within a high-income group will not be considered to be similarly situated to those within a low-income group for the purpose of imposing differential rates of income tax.

The principle of equal treatment has been interpreted by the American courts to mean that government should not make arbitrary classifications in its legislative and executive actions. Non-arbitrary classifications, since they were based on a relevant characteristic justifying unequal treatment, had some rational connection with a legitimate policy objective. Thus a law that prohibits children from purchasing alcoholic drinks may be regarded as making a valid classification rationally connected to the legitimate object of promoting the welfare of children. On the other hand, a law that prevented coloured children from attending a particular school would be struck down on the ground that the classification is not rationally related to a non-discriminatory object (Nowak, Rotunda & Young, 1978:517–22).

So far as this discussion is concerned, the importance of the American jurisprudence lies in the fact that a state could, under such interpretation of the principle of equal treatment, validly establish pay differentials among employees provided they followed classifications based on intelligible and rational criteria. Furthermore, the criteria would not have to be needs-based. This being the case, the equal-protection clause was clearly not concerned with material equality or social welfare. The latter view has been reinforced by the Supreme Court in a series of decisions that rejected arguments that welfare rights can be founded on the equal protection and due process clauses (Nowak, Rotunda & Young, 1978:680-7).

Another important point to be noted with regard to the equal protection and due process clauses is that they were directed at governmental and legislative authority. This accorded with classical-liberal theory, which holds that an individual has wide-ranging freedom to act according to his or her personal preferences even if they are arbitrary. However, the clauses did not prevent legislatures from extending equality principles to the sphere of private conduct. In the absence of such laws, disincentives to arbitrary preferences are created by market forces that punish arbitrary judgment and reward non-arbitrary and economically rational choices.

The equal-protection principle does not require wealth-equalising measures by government. But neither does it prohibit legislatures and governments from implementing redistributional schemes provided they do not, themselves, infringe equal protection and due process

rights. This left the way open for Congress and state legislatures to enact equal-pay legislation that compels **private employers** to eliminate wage differentials. Whether such legislation had redistributive objectives is a question that will be examined in Chapter 4.

Equal Pay for Equal Work

'Equal pay for equal work' is a key phrase in the wages debate. Yet it is one of the most misunderstood. For a start, it does not mean what it says. If it did, it would hardly ever be applicable, since ordinarily no two persons' work is equal in qualitative or quantitative terms. Thus, the practical understanding of the concept is that employees doing jobs that have the same job description should, as a general principle, be paid the same salary. Accordingly, all firemen should be paid the same salary and so should all nurses. But firemen and nurses need not be paid equal amounts as the two groups are not engaged in work of the same description.

However, paying the same salary to all members of a job category is problematic, since not all members are equal in competence, productivity, experience and other requisite qualities. Hence, the unmitigated application of the general principle of equal pay is not only inequitable but also deprives individual members of any incentive to improve performance. Principally for this reason, the equal pay for equal work concept admits certain salary variations within job categories.

First of all, for the purpose of wage differentiation, there could be sub-classifications within the job category. Accordingly, there could be different grades or ranks of firemen and of nurses. Among university teachers these sub-classifications are given names such as lecturer, senior lecturer, associate professor and professor. The equal pay for equal work principle would not be interpreted as prohibiting wage differences between such sub-classes. Second, it is generally conceded that individual members within a sub-class may be placed at different salary points on a common scale. Most Australian workers are familiar with this type of differential treatment.

And yet, despite these concessions to productivity, the equal pay for equal work concept, as implemented, is a derogation from the ideal it was supposed to achieve. This is because there can be no absolutely correct determination of equal work. Approximations are all that is possible. We believe that such approximations are more likely to be achieved by permitting the full impact of market forces on the economic decisions concerning recruitment and remuneration.

But market forces have only a remote impact on the decision-making processes of governmental instrumentalities, particularly monopolistic ones. This is because of the lack of profit accountability on the part of those who manage these organisations. In this context, there appears to be no realistic alternative to legislatively decreed norms requiring equal wages for employees in the same job category. These norms will not always produce equitable results. But they will generally inhibit intentional discrimination.

Take the case of university teachers. Those who are acquainted with academic life will have no difficulty with the proposition that rank does not always reflect a corresponding level of productivity. Even according to formal work allocations, the work of a senior lecturer and a professor is substantially equal. Both of them will have equivalent teaching, research and administrative duties. In reality, it sometimes happens that the productivity of the lower-ranked academic is greater than that of the higher-ranked one. In such instances, the equal-pay ideal would demand that the lower-ranked teacher be paid more. But this is never the case in Australian universities which, apart from the emerging private tertiary academies, are governmental institutions. At first sight, this disregard of actual productivity seems inequitable. But practical considerations make this practice unavoidable. There is the obvious difficulty of gaining consensus on any productivity-evaluation scheme. The implementation of such a scheme would be costly and inconvenient. Above all, it would unavoidably leave many questions to the subjective judgment of persons who have no political, legal or economic accountability. In this context, class-based assessment will arguably proceed on the rebuttable assumption that professors, owing to their greater qualifications and experience, are likely to be more productive than senior lecturers. Such a system is not patently unjust, since the individual abilities of professors are usually determined by very lengthy and detailed investigations during the selection process.

It is important to realise that, under this type of wage setting, value is attached to a particular job classification rather than to the work of an individual. As argued above, this method may be justified in the public-service context. But in our view, this idea has been uncritically and inappropriately applied to private industrial relations in many jurisdictions. One consequence of this development was the confusion created in the relevant literature between the concepts of 'individual worth' and 'job worth'.

Later developments in the equal-pay debate should not be allowed to cloud the fact that, initially, 'equal pay for equal work' was

recognised as permitting wage differentials according to **individual** productivity. Thus the American Equal Pay Act of 1963 (29 USC s.206(d)) prohibited employers from discriminating on the ground of sex with respect to wages 'except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity and quality of productivity; or (iv) a differential based on any other factor other than sex'. According to this law, the substance of the equal pay for equal work principle was that persons should not be discriminated against with regard to pay on the basis of sex.

A number of studies in the United Kingdom and in Australia have established a direct link between on the one hand the introduction and the implementation of the equal pay for equal work principle and on the other hand increased pay. For example, Zabalza and Tzannatos have argued that in the United Kingdom 'there exists a very clear coincidence between the increase in relative pay and the application' of equal pay legislation (Zabalza & Tzannatos, 1985:3). The Australian Council of Trade Unions (ACTU) has claimed that the equal pay for equal work principle has contributed 'significantly to narrowing the differences between male and female employees' earnings' (ACTU, 1985:19). In the United States, however, the gap between male and female average total earnings has widened despite and after the passage of the Equal Pay Act of 1963 (Williams, 1984:94).

One plausible explanation of this mixed result is that, as Walter Williams argues, the equal pay for equal work principle operates as a minimum-wage law that tends to discriminate against the employment of women. He argues that minimum-wage laws inevitably compel employers to adjust worker productivity to the new mandated minimum wage. Employers, in so doing, will hire only those workers who are able to meet the adjusted worker productivity level. According to this argument, an 'employer will have no economic inducement to hire a worker who is so unfortunate as to have skills that would enable the worker to produce' less than the adjusted worker productivity (Williams, 1984:98). The payment of the new minimum wage, arguably, would have no effect upon the number of women hired by an employer **if** there are no productivity differences by sex. But Williams believes that these differences will inevitably appear because he assumes that men and women are not perfectly substitutable actors in the workforce.

The non-substitutability of men and women for one another is also the major point of the 'human capital' theory, according to which

'women's productivity is low because women have relatively low stocks of accumulated human capital' (Blau & Jusenius, 1976:183). Thus, subject to the validity of Williams's argument, it could be expected that fewer women would be hired if the equal pay for equal work principle operates as a minimum-wage law. He concludes that 'women who are employed . . . will receive the same wage as men, but that less skilled women will not be hired at all' (Williams, 1984:98). Williams's argument is based on the assumption that, where productivity differences can be established, they are the cause, rather than the consequence, of pay differentials between men and women. His argument may explain why, following the introduction of minimum-wage laws, fewer women than men might be hired in some occupations, particularly those in which physical strength is a prerequisite for employment. In the context of our discussion, Williams's point is relevant because it alerts us to the possibility that existing job segregation levels would be perpetuated rather than dismantled if, as he argues, the principle of equal pay for equal work were to decrease the chances of women gaining entry to typically male (or non-traditional) occupations.

Equal Pay for Work of Equal Value

The phrase 'equal pay for work of equal value' suggests two possible meanings. One meaning modifies the equal pay for equal work principle and the other extends it. The first meaning implies that not all jobs of the same description are of equal value since workers possess different skills, abilities, aptitudes and commitments. Thus, pay differentials among workers would be allowed if their work, even though 'equal', is not of 'equal value'. According to this meaning, equal pay is due where workers do jobs of the same description **and** the actual work done by them is also of equal value. Again, two persons doing the same job may achieve different productivity levels, and hence may not be doing work of equal value. This interpretation modifies the equal pay for equal work principle as literally understood.

The second meaning that this phrase suggests is that equal pay is due not only where jobs carry the same description but also where jobs, **although differently described**, are substantially similar, and hence of equal value. The important question here is whether there are limits to the sorts of jobs that can be compared in order to establish the equal value of the work. If there are no limits, it would arguably accommodate the comparable-worth method of wage setting. But we argue that there are inherent and insurmountable problems in the way

of comparing dissimilar jobs.

These two meanings of the equal pay for work of equal value principle are synthesised into a composite rule in the US Equal Pay Act of 1963. Section 206(d) of this Act provides in its relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The words 'jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions' disclose the intention of Congress to widen the scope of the term 'equal work' to include work which, although not the same, is substantially equal. On the other hand, the provision recognises a number of exceptions that enable employers to establish productivity-related pay differentials within job categories.

The widening of the equal-pay principle to permit comparisons of substantially equal jobs does not appear at first sight to be a significant change in principle. But it had one extremely important practical consequence. Under the equal pay for equal work principle, only those who did the same job were entitled to equal pay. This meant that the principle did not apply to jobs that were completely segregated according to sex. In contrast, the Equal Pay Act of 1963 made comparisons between segregated job categories possible on the basis of substantial equality of work. It is this feature that made the idea of equal pay for work of equal value the precursor of the comparable-worth method. Consider the case where an establishment employs only male clerks and only female receptionists. In this case there could be no equal-pay claim as the groups are doing different jobs. A claim could arise if one or more females were employed as clerks at a lower rate of pay or if one or more males were employed as receptionists with

less pay. The Equal Pay Act, on the other hand, makes equal-pay claims sustainable even if there is complete segregation between clerks and receptionists, provided that the work done by the two groups is substantially the same.

The other important point to be noted is that so far as the United States, Canada and the European Economic Community are concerned, the equal pay for work of equal value principle applies only in relation to employees working for the same establishment. In other words, equal-pay claims cannot be made by employees of one firm on the basis that employees of another firm doing similar work are paid more. Thus, female workers in company A may have an equal-pay claim if male workers doing similar work in company A are paid more. But they will not have an equal-pay claim because male workers doing similar work in company B are paid a higher wage. Such a claim can be made only by female workers in company B, if they do similar work for less pay. This limitation of the equal-pay principle is a crucial concession to the market. It recognises the reality that not all employers may be in a position to pay the same levels of wages and that in any event the freedom to negotiate wages is a requisite of an effective labour market. However, where governments prescribe minimum wages industry-wide, the equal-pay principle will be seen to apply across establishments. In Australia, arbitration tribunals fix the ordinary (as opposed to minimum) wages of a majority of workers. In this context, the Australian Conciliation and Arbitration Commission has held that the principle of equal pay for work of equal value is to be applied to all awards made by the Commission. According to the Commission, the 'eventual outcome should be a single rate for an occupational group or classification which rate is payable to the employee performing the work whether the employee be male or female' (National Wage and Equal Pay Cases [1972] 147 C.A.R. 172, p.179). The implications of such across-the-board application of the equal pay principle will be discussed in Chapter 6.

As foreshadowed above, the most critical question with regard to the principle of equal pay for work of equal value is whether it is applicable to jobs that are dissimilar. This question is critical because an affirmative answer to it will enable the comparable-worth method to be accepted on legal grounds. If the answer is negative, the case for comparable-worth testing can be based only on moral and economic arguments. The concrete answer to this question, however, will depend on the particular legislative definition or expression that the principle has received in the relevant jurisdiction. As regards the

United States, the answer was supplied by the Supreme Court in the case of *Corning Glass Works* v. *Brennan* [1974] 417 US 188, 203 n.24. In that case, the equal-pay principle in section 206(d) of the Equal Pay Act of 1963 was construed as applying to jobs that are 'substantially equal'. In Canada, provincial laws on equal pay have received similar judicial interpretation (Abella, 1987:187). The Canadian Human Rights Act appears to permit comparisons of dissimilar jobs for purposes of equal pay (s.11), but this Act applies only to 11 per cent of the Canadian workforce (Abella, 1987:191). However, several provinces (including populous Ontario and Quebec) have enacted laws expressly mandating the comparison of dissimilar jobs. In Europe, the relevant EEC legislation (consisting of Article 119 of the Treaty of Rome, supplemented by the Equal Pay Directive of 1975) has been interpreted as permitting comparisons of dissimilar jobs (Landau, 1985:125).

Equal Pay for Work of Comparable Worth

'Comparable worth' has been defined to mean that workers, regardless of their sex, should earn equal pay for dissimilar work of comparable value to their common employer. The concept is said to allow comparison of different jobs that do not come within the US Equal Pay Act of 1963 requirement of equal pay for jobs that are 'substantially equal' (Brown, Baumann & Melnick, 1986:129). Although these authors regard comparable-worth testing as going beyond the requirements of the Equal Pay Act, they conclude that this Act and Title VII of the Civil Rights Act of 1964 together supply the analytical framework needed for the consideration of comparable-worth claims (Brown, Baumann & Melnick, 1986:170).

The comparable-worth method goes well beyond the objective of ensuring that men and women receive the same pay for doing the same or similar jobs. The method is largely directed at eliminating pay disparities between occupations that are predominantly populated by men and those that are predominantly populated by women. Such disparities are seen as the result of sex discrimination (Buzolic, 1985:40).

In the United States, comparable-worth claims have been launched on the basis of Title VII of the Civil Rights Act of 1964, which makes it an unlawful employment practice for an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex'. The extent to which these claims have been successful is discussed in Chapter 4. In Canada (at the Federal level)

and in the European Economic Community the comparable-worth method has emerged from new understandings of what is meant by the 'equal value' of work. In brief, the rationale of the method is said to be the fact that jobs that are dissimilar in content can yet be of equal economic value to the employer. Thus, a fitter and a cook may be doing different work for a common employer, but their respective work may be of equal value to the employer. The proponents of comparable worth consider the concept to be a logical consequence of the principle of equal pay for work of equal value. But as Thomas Flanagan's penetrating historical account demonstrates, the traditional understanding of the equal pay for work of equal value principle did not warrant this inference (Flanagan, 1987a:16).

However, proponents of comparable worth in Canada and Europe have advanced their claims under the slogan of equal pay for work of equal value. Consequently, statutes implementing the method in these countries use the words 'equal value' rather than 'comparable worth'. Hence it must be born in mind that in these jurisdictions, the term 'equal pay for work of equal value' is used in a sense wide enough to encompass the notion of comparable worth.

Chapter 4

The State of the Law: The United States

In Chapter 3 we noted the claim made by Brown, Baumann and Melnick (1986:145) that Title VII of the Civil Rights Act of 1964 read with the Equal Pay Act of 1963 provides the analytical framework that can sustain comparable-worth claims in the United States. This claim patently is based on the US Supreme Court's decision in the case of *County of Washington* v. *Gunther* [1981] 452 U.S. 161. *Gunther* generated a stream of litigation on comparable worth, but lower courts with one exception (*AFSCME* v. *Washington* [1983] 578 F.Supp. 846, W.D. Wash.) have rejected the comparable-worth method. Even this exceptional case was overruled by the Circuit Court (*AFSCME* v. *Washington* [1985] 770 F.2d 1401, 9th Circuit).

What Gunther Decided

Gunther was enthusiastically received by the comparable-worth lobby. But the legal reality is that the decision had little to do with the comparable-worth method of wage setting. The Court explicitly declined to endorse the method. As argued in this chapter, the reasoning of the Court does not provide any analytical assistance for future comparable-worth claims. It is important to appreciate the real issues in *Gunther*, for the decision continues to be cited erroneously in support of comparable-worth claims.

The County of Washington, Oregon, employed four female prison guards in the female section of the county jail in addition to a greater number of male guards in the male section of the jail. In January 1974, the County closed down the female section of the jail, transferred the few female prisoners to the jail of a nearby county, and discharged the four female guards. The four female guards filed suit under Title VII of the Civil Rights Act for back pay on the following two alternative grounds: (i) that they were paid unequal wages for work substantially equal to that performed by male guards; or (ii) that part of the pay differential was attributable to intentional sex discrimination. The second allegation was based on the County's own survey of the market worth of these prison jobs. The survey had indicated that the female

guards should be paid 95 per cent of the male guard's salary. However, the County paid them only 70 per cent of the male guards' salary while it paid the full recommended amount to male guards. The female guards alleged that this differential treatment was evidence of intentional discrimination by the County.

The first ground, namely, that male and female guards did substantially equal work, was rejected in the Federal District Court. The Court found that male guards supervised more than ten times as many prisoners per guard as did female guards and that female guards for the most part were engaged in less valuable clerical duties. This finding was affirmed by the Court of Appeals. In the Supreme Court, the female guards did not challenge this point.

The second ground was based neither on substantial equality of the work **nor on the comparable worth of the work.** On the contrary, the argument proceeded on the admission that the work done by the two categories of workers was different. The gravamen of this complaint was that the County failed to implement the results of the market survey that it had commissioned. Although it paid the male guards the wages recommended by the surveyor, it failed to increase female wages so as to maintain the recommended relativity between male and female wages. The female guards alleged that this failure, being intentional, amounted to an act of discrimination of the type prohibited by Title VII.

The County argued that as a matter of law this claim was precluded by the last sentence of section 703(h) of Title VII, known as the 'Bennett Amendment'. This amendment provides:

> It shall not be an unlawful employment practice under this sub-chapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29. (42 USC ss 2000e-2(h))

Section 206(d) of Title 29 is, of course, the provision of the Equal Pay Act of 1963 (discussed in Chapter 2) which 'authorizes' wage differentiation 'made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex'.

The County contended that the Bennett Amendment precluded a pay-discrimination claim under Title VII, if it could not also be brought

under the Equal Pay Act. Obviously, the female guards' claim could not be sustained under the Equal Pay Act as this Act applied only to equal or substantially equal work *(Corning Glass Works* v. *Brennan* [1974] 417 U.S. 188). The County's argument was based on the legislative history of the Bennett Amendment and a highly technical legal submission.

The County's technical submission rested 'on the proposition that any wage differentials not prohibited by the Equal Pay Act are authorized by it' (p.179). Hence what is not actionable under that Act is also not actionable under Title VII. The implication is that Title VII incorporates both the 'prohibition' (which is limited to equal or substantially equal work) and the 'affirmative defences' of the Equal Pay Act. This argument was rejected by the Supreme Court on the basis that the 'language of the Bennett Amendment suggests an intention to incorporate only the affirmative defenses of the Equal Pay Act into Title VII' (pp.168-9). The County, through its legal representatives, had argued that the four affirmative defences in the Equal Pay Act were already included in Title VII when the Bennett Amendment was proposed. In particular, they argued that the first three defences concerning seniority, merit and quantity or quality of production were explicitly set out in section 703(a) of Title VII. They also contended that the fourth defence — 'any other factor other than sex' — is implicit in Title VII's general prohibition of sex-based discrimination (pp.169-70). Under these circumstances, so the argument goes, it would be meaningless to provide for the incorporation of the Bennett Amendment in Title VII. Thus, if the Amendment is to be meaningful rather than redundant, it must be interpreted as incorporating both the 'prohibition' and the 'affirmative defences' of the Equal Pay Act. The County's argument, albeit extremely technical, is reasonable. Indeed, the affirmative defences in the Equal Pay Act are formulated in relation to a specific type of illegal conduct and hence are inextricably bound up with the prohibitory clause. In other words, according to their legislative definitions, the affirmative defences have no meaning except when considered in the light of what is prohibited by the Act. For this reason, it could be argued that the Bennett Amendment did preclude actions that were not possible under the Equal Pay Act.

The Supreme Court by a majority of five to four rejected the County's submission. The majority gave two reasons for disagreeing with the County's argument that the Bennett Amendment would be

redundant if only the affirmative defences were to be incorporated. The majority said that with respect to the first three defences, the Bennett Amendment has the effect of guaranteeing that courts and administrative agencies adopt a consistent interpretation of like provisions in both statutes. The second reason has a crucial bearing on the state of the law. The majority stated:

> More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation' . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . Under the Equal Pay Act, the courts and administrative agencies are not permitted 'to substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system,' so long as it does not discriminate on the basis of sex. (pp.170-1)

The majority's view could be paraphrased in the form of the following two propositions:

- The general prohibition of discrimination in employment practices found in Title VII covers not only intentional discrimination but also facially neutral practices that nevertheless have a discriminatory impact. Thus the prohibition follows what is known in case law as the 'disparate impact' mode of discrimination.
- However, with regard to compensation for work, the general prohibition is modified by the fourth affirmative defence stated in the Equal Pay Act, by virtue of which discrimination with regard to pay is actionable only if it is intentional or is tainted with bad faith. Hence the application of Title VII to equal-pay questions follows what is known as the 'disparate treatment' model.

The result of the majority's opinion is that the disparate-impact theory (according to which practices may be discriminatory even in the absence of an intent to discriminate) will apply mainly in relation to access to jobs or barriers to entry. In relation to pay, the test of discrimination will be that of disparate treatment or intentional discrimination.

Why Gunther Does Not Support Comparable Worth

It must at once be clear that the comparable-worth method cannot be sustained on the basis of the disparate-treatment model of discrimination. The comparable-worth concept means, essentially, that jobs that are regarded by the relevant authority as being of comparable worth to the employer should be rewarded equally, even though the employer may genuinely believe that the jobs are not of comparable worth to him. But under the disparate-treatment model (as adopted in *Gunther*) the material factor is the employers' own *bona fide* judgment of the value of jobs. In other words, so long as a job classification has been formulated in good faith, it cannot be struck down for the reason that it has been found to be erroneous by an administrative or judicial body. This is clearly the view expressed by the majority (p.171). Thus, from the analytical point of view, the fact that *Gunther* encouraged so much comparable-worth litigation is quite mystifying.

What appears to have excited the minds of comparable-worth advocates is the view of the majority that an allegation of discriminatory compensation practice is sustainable even where the relevant jobs are not equal or substantially equal (p.181). But this statement does not in itself support comparable-worth claims because the majority also decided that discrimination under Title VII with regard to compensation can succeed only where a discriminatory intent is proved (p.170). The latter statement cannot be disregarded, as it was an essential part of the reasoning that enabled the majority to reject the County's argument and to uphold Gunther's appeal. In short, it formed a part of the *ratio decidendi* of the case, which in Anglo-Australian jurisprudence is the binding part of the decision. The majority's apparently conflicting views are in fact easily reconciled, and for that reason offer no support for comparable-worth claims under Title VII. The majority opinion simply recognised the fact that the lack of substantial equality between job categories did not preclude the possibility of intentional discrimination against one or the other job category. But a 'comparable-worth' claim cannot succeed under Title VII on the basis that the jobs under consideration are of comparable value. A wage claim will succeed under Title VII only if there is some independent evidence that the wage differential is attributable to an intent to discriminate. Such an intent is not established by the comparability of the jobs alone, for differential treatment of comparable jobs can be consistent with a *bona fide* job evaluation. With regard to job evaluation, the majority opinion explicitly stated that owing to the applicability of the fourth affirmative defence in the Equal Pay Act, the court is not permitted to

substitute its own judgment for that of the employer (pp.170-1). *Gunther* was decided on the basis that according to the employer's own judgment, the complainants should have been paid more.

Janice Bellace (1984:669) argues that the majority opinion does not exclude the possibility that a comparable-worth claim 'could succeed by arguing disparate-impact discrimination', although she concedes that the opinion implies an extreme reluctance of the Court to venture into the field of unintended discrimination. For reasons explained above, we disagree that the majority opinion leaves any room for the recognition of disparate-impact discrimination in relation to wage claims under Title VII. As explained below, we are also of the view that the disparate-impact model, even if applicable, is highly unlikely to sustain comparable-worth claims.

'Disparate-Impact' Discrimination

The meaning of disparate-impact discrimination was already well established when *Gunther* was decided. The Supreme Court has defined this form of discrimination as involving 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity' *(International Brotherhood of Teamsters* v. *United States* [1977] 431 U.S. 324, p.336). Justification by business necessity has long been recognised as a defence to the complaint of disparate-impact discrimination. The scope of this defence was considered by the Supreme Court in *New York Transit Authority* v. *Beazer* [1979] 440 U.S. 568. The Court explained that the employer need not prove that the practice is absolutely necessary to the survival of the business. All that was required was the demonstration that the challenged employment practice was job-related and that the legitimate goals of the business were significantly served by the practice (p.587). In particular, a number of American courts have repeatedly affirmed that wage determinations may be based on market factors.

In *Christensen* v. *State of Iowa* [1977] 563 F.2d 353 the plaintiffs who belonged to the female-dominated clerical category of the University of Northern Iowa staff complained that they were paid less than predominantly male physical plant workers despite the fact that a university job evaluation placed both categories in the same labour grade. The university differentiated between the two groups because 'the local job market paid higher wages for physical plant jobs' than the starting pay under the university system, and consequently 'some

physical plant employees, mostly male, continued to be paid more than clerical employees, all female, despite equivalent seniority and jobs in the same labor grade' (p. 354). In rejecting the plaintiff's claim the Eighth Circuit stated:

> (A)ppellants seek a construction of Title VII that may establish a *prima facie* violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market. Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

We noted in Chapter 2 that the rationale of comparable-worth advocacy takes one of two alternative forms. Sometimes it takes the shape of an argument that purports to support the market. This rationale contains the assertion that the comparable-worth method helps employers to be more responsive to the actual conditions in the labour market. Alternatively, the rationale becomes a denunciation of the market as something that is discriminatory in itself. The latter reasoning constituted the principal argument in the case of *Lemons* v. *City and County of Denver* [1980] 620 F.2d 228. In this case the plaintiff-nurses claimed that they were not paid in accordance with their worth to the city. Although they conceded that they were paid as much as nurses working in the general hospital of Denver, they felt that their pay was discriminatory compared to the pay for predominantly male jobs. In particular, they compared themselves to tree-trimmers and civil engineers. They contended that their wages were depressed because the County adopted existing local labour-market standards, which themselves were discriminatory owing to historical factors. In other words, the plaintiffs invited the Court to determine for itself what the nursing jobs **ought** to be worth in the market as opposed to what in fact they

were worth in the market. The Court of Appeals, Tenth Circuit, affirming the judgment of the District Court, responded with the comment that this 'would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it' (p.229). The nurses' appeal to the Supreme Court was denied ([1980] 449 US 888).

Post-Gunther Wage Claims

Certiorari was denied in the *Lemons* appeal shortly before the *Gunther* appeal was granted by the Supreme Court. But post-*Gunther* cases also militate against the adoption of a disparate-impact model of discrimination in relation to wage claims under Title VII. In *Spaulding* v. *University of Washington* [1984] 740 F.2d 686, the nursing faculty of the University of Washington complained that its members were being discriminated against with regard to wages in comparison with the members of other faculties. The nursing faculty complained of both disparate-treatment and disparate-impact discrimination. The faculty failed on both grounds. In rejecting their argument on the disparate-impact model, the Ninth Circuit followed *Lemons* and *Christensen* but further elucidated the scope of the model. The Court said that the 'model was developed as a form of pretext analysis to handle specific employment practices not obviously job-related' (p.707). The Court explained that under the disparate-impact model it is not possible to complain of the cumulative effect of a company's practices. In relation to comparable-worth claims, the Court stated:

> We cannot manageably apply the impact model when the kernel of the plaintiff's theory is comparable worth . . . The nursing faculty claims to have pinpointed a facially neutral policy at the University having the discriminatory impact they assert. That policy is the University's relying on the market to set their wages. We find that they have failed to do so, and emphasize that such a practice is not the sort of 'policy' at which disparate impact analysis is aimed. Relying on competitive market prices does not qualify as a facially neutral policy or practice for the purposes of the disparate impact analysis that was first articulated . . . For Title VII purposes, simply labelling an employer's action a 'policy or practice' is not sufficient. What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an invidious judgment. (p.708).

This view of the disparate-impact model was re-affirmed by the Ninth Circuit in *AFSCME* v. *State of Washington* [1985] 770 F.2d 1401. The Court stated that disparate-impact analysis 'is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process' (p.1405). In this case the complainant union also attempted to found a comparable-worth case on the disparate-treatment model. The union argued that a state-commissioned study revealed a historical pattern of lower wages for employees in positions staffed predominantly by women and that the State, in relying on the market, intentionally perpetuates this disparity.

This argument had been successful at the District Court level ([1983] 578 F.Supp.846). The District Court had held that 'the State discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 . . . by compensating employees in jobs where females predominate at lower rates than employees in jobs where males predominate, if these jobs, though dissimilar, were identified by certain studies to be of comparable worth' ([1985] 770 F.2d 1401, p.1403). The District Court Judge, Judge Tanner, was aware that his decision would severely disrupt existing employment practices in the state, but he said that the state's 'preoccupation with its budget constraints pales when compared with the invidiousness of the impact ongoing discrimination has upon the Plaintiffs' (p.868). However, the Court of Appeals rejected the union's argument that the state, in relying on market forces, intentionally discriminated against the complainants. This contention was rejected on the ground that the discriminatory motive necessary in the disparate-treatment model cannot be inferred from the state's participation in the market system as the state did not create the market disparity (p.1406). The Court stated:

> The requirement of intent is linked at least in part to culpability . . . That concept would be undermined if we were to hold that payment of wages according to prevailing rates in the public and private sectors is an act that, in itself, supports the inference of a purpose to discriminate. Neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job . . . We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic

> principles such as the laws of supply and demand or to prevent employers from competing in the labor market. (p.1407)

The Courts' reluctance to 'abrogate fundamental economic principles' is encapsulated in Justice Rehnquist's statement in his dissenting opinion in *Gunther* where he said that 'the adoption of the comparable-worth doctrine would ignore the economic realities of supply and demand and would involve both governmental agencies and courts in the impossible task of ascertaining the worth of comparable work' (p.184). The same sentiment is reflected in *American Nurses Association* v. *State of Illinois* [1986] 40 FEP Cases 245. The nurses and typists who initiated these legal proceedings contended that sex-based wage discrimination exists if workers in job classifications dominated by women are paid less than employees in predominantly male classifications, if these jobs are of equal worth to the employer. They also argued that the state had failed to implement the results of a comparable-worth survey. Although the case was decided on technical points, it is still interesting because of Judge Posner's reflections on the concept of comparable worth. He wrote:

> . . . economists point out that the ratio of wages in different jobs is determined by the market rather than by any a priori conception of relative merit, in just the same way that the ratio of the price of caviar to the price of cabbage is determined by relative scarcity rather than relative importance to human welfare. (p.246)

It is evident from the foregoing survey that the US courts have shown no willingness to entertain comparable-worth cases under either the 'disparate-impact' or 'disparate-treatment' model of anti-discrimination litigation. The courts could not have engaged in more wide-ranging examinations of social and economic policy without departing from their constitutional role. However, the public debate about comparable worth is not confined to the present state of the law. Felix Cohen, an eminent American scholar and lawyer, once remarked that the traditional legal 'language of argument and opinion neither explains nor justifies court decisions' (Cohen, 1935:812). His statement is apposite in this context because the reasoning of the courts and their insistence on couching decisions in legal terms, even though the decisions may be based on non-legal but unarticulated grounds, deprives us of a discussion of the broader economic, social and moral issues. From

the intellectual standpoint the comparable-worth method cannot be evaluated without consideration of these issues. We address these issues in later chapters of this monograph.

State Legislation Implementing Comparable Worth

The foregoing review of the state of the law in the United States indicates that at the federal level the comparable-worth doctrine has failed to make inroads to the extent that judges refused to accommodate comparable-worth claims under Title VII of the Civil Rights Act of 1964. However, at state level there has been a considerable number of legislative initiatives to implement the method. The fact that the method is not mandated by federal law does not preclude a state from implementing it by its own legislation. The important proviso is that such legislation should not, itself, violate the equal-protection principle of the US constitution. Given what we think is the inherent arbitrariness of much comparable-worth analyses, it is conceivable that a challenge to such legislation may materialise in the future.

Chi, in a recent paper on comparable worth at state level, observes that although 'a majority of the state governments have given varying degrees of consideration to the issue . . . only a handful of states have begun implementing it' (Chi, 1988:122). However, more than 20 states (including Minnesota, Washington, Iowa, Maryland, New Mexico, Connecticut, Hawaii and Alaska) now have some form of comparable-worth legislation. The method is supported by the Democratic Party, which incorporated the doctrine in its 1984 party platform. Many unions have made the implementation of the method a priority issue (Kessler-Harris, 1990:116). Proponents of the method urge that public and non-profit employers should undertake comparable-worth studies as preliminary steps toward the preparation of suitable state legislation. Wage adjustments based on job-evaluation studies have also been implemented by local-government authorities, for example, the City of San Jose (Aaron & Lougy, 1986:37). Thus, although the doctrine has not found favour in the federal courts, it remains a prominent issue in the political agenda in the United States.

Chapter 5

The State of the Law: The European Economic Community and Canada

As noted previously, in the European Economic Community countries and Canada the comparable-worth method has been advanced in the name of the principle of equal pay for work of equal value. Hence the jurisprudence engendered in these countries relating to this issue differs considerably from that developed in the United States.

Comparable Worth in the European Economic Community

A review of the concept of comparable worth and its place in the law of the European Economic Community (EEC) must begin with a consideration of article 119 of the Treaty of Rome of 1957. The article reads as follows:

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.
>
> Equal pay without discrimination based on sex means:
>
> a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
>
> b) that pay for work at time rates shall be the same for the same job.

The reference in article 119 to 'the first stage' is a reference to the first four-year period of the existence of the EEC. Thus, the principle of 'equal pay for equal work', enshrined in article 119, is part of EEC law since 1 January 1962. Article 119 is, in the words of Advocate-General Alberto Trabucchi who advised the European Court of Justice (ECJ) in the leading case of *Defrenne 2* v. *Sabena* [1976] 2 C.M.L.R. 98, 'the

extension, the European translation' of Convention 100 of the International Labour Organisation, which is discussed in Chapter 2 of this monograph. The Convention provides for equal remuneration for men and women workers for work of equal value. Advocate-General Trabucchi also pointed out that article 119 'is not a complete innovation: it must be viewed both in the light of internationally recognised principles and in the light of the EEC Treaty' (p.110). Trabucchi's statements imply that the principle of 'equal pay for work of equal value' is merely a restatement of the principle of 'equal pay for equal work'. As will be seen shortly, the validity of Trabucchi's understanding of these principles has since been confirmed by the European Court of Justice.

The law of the EEC regarding equal pay also comprises a number of Council Directives, which require member states to achieve a specific result but leaves to them the choice of implementing measures. Three Council Directives warrant special mention:

- Council Directive of 10 February 1975 (Equal Pay Directive) on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women (75/117/EEC).
- Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (76/207/EEC).
- Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC).

Article 1 of the Equal Pay Directive stipulates that the 'principle of equal pay for men and women outlined in Art. 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or **for work to which equal value is attributed,** the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration' (emphasis added). The ECJ has held in *Jenkins* v. *Kingsgate (Clothing Productions) Ltd* [1981] 2 C.M.L.R. 24 that article 1 of this Directive is merely confined to restating the principle of equal pay for equal work and in no way alters the content and scope of article 119 (pp.41-2). Consequently, a claim for equal pay for work of equal value may be brought under article 119 as well as under the Directive. Steiner (1983:418) correctly remarks that, in the usual case, 'a directive may not of itself impose obligations on an individual', and therefore

cannot be relied upon as against such a person. Nevertheless, the ECJ has treated article 1 of the Directive as an extension of article 119 itself, thus imposing obligations on individuals.

Equal Pay for Equal Work: Article 119

The principle of equal pay for equal work, which is enshrined in article 119, has a social and an economic aim. The principle is described in the relevant jurisprudence of the ECJ as socially desirable. In addition, using the words of Advocate-General Dutheillet de Lamothe, the principle is economically useful because its implementation thwarts 'any attempt at "social dumping" through the employment of female labour paid at lower rates than male labour', thereby 'ensuring that competition is not distorted' (*Defrenne 1* v. *Belgium* [1974] 1 C.M.L.R. 494, at 498). This point was restated as follows in *Defrenne 2* v. *Sabena:*

> Article 119 pursues a double aim. First, in the light of the different stages of the development of social legislation in the various member-States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples. (p.122)

In *Defrenne 2*, decided in 1976, the ECJ considered the scope and the extent of the principle of equal pay for equal work. Ms Gabriëlle Defrenne, who had been engaged as an air hostess by the Belgian airline SABENA, had brought an action before the *Tribunal du Travail* of Brussels on 13 March 1968 for compensation for the loss she had suffered in terms of salary and allowances, on termination of service, as a result of the fact that air hostesses and male members of the air crew performing identical duties did not receive equal pay. Ms Defrenne claimed that article 119 of the Treaty of Rome was enforceable in Belgian courts. The Belgian Tribunal referred the matter to the ECJ. In particular, the Tribunal wanted to know whether article

119 was directly effective in the sense that it could be relied upon by individuals in national courts even though member states may not have taken steps to implement the principle of equal pay for equal work. Advocate-General Trabucchi argued in his advisory opinion that article 119 only applied to instances of **direct** discrimination the existence of which could easily be established by an examination of relevant legislative provisions and collective labour agreements. Therefore, article 119 'does not provide for . . . all possible implications of the principle of equal pay for men and women in its fullest sense'. He went on to say that the 'application of the principle to situations other than those referred to in the aforesaid Article (cases where the "same work", namely identical work, is performed) . . . falls within the field of social policy the definition and application of which primarily depend on the initiative and co-ordinating action of the Community executive and of the member-States' (p.113). He also reiterated the well-known point of EEC law that article 119, being a Treaty provision, applies to public as well as private undertakings. In his opinion, the attainment of the fundamental objectives of the Treaty would be compromised if private undertakings were left outside the scope of article 119 (p. 116).

The ECJ, agreeing with the Advocate-General, held that article 119 is directly effective and therefore can be relied upon in national courts in cases of direct (as opposed to indirect) discrimination:

> For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the Article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character. (p.123)

The Court, in adopting the distinction between direct and indirect discrimination, effectively defeats the argument that article 119 does not clearly define the concept of 'equal work'. By limiting article 119 to instances of direct discrimination, the Court could focus on a purely legal analysis of the situation, thereby avoiding the more complex issues of social and economic policy. The Court, agreeing with the opinion of the Advocate-General, also held that article 119 is 'mandatory' in nature and therefore the prohibition on discrimination 'between men and women applies not only to the action of public

authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals' (*Defrenne 2*, 1976:125).

Thus, article 119 (and its restatement in article 1 of the Equal Pay Directive of 1975) are both vertically and horizontally directly effective: a vertical direct effect imposes obligations on member states, while a horizontal direct effect imposes obligations on individuals (Steiner, 1983:417-18). The Court's decision was stated succinctly:

> (T)he principle of equal pay contained in Article 119 may be relied upon before the national courts and . . . these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public. (p.125).

The above quotation reveals that the Court in *Defrenne 2* fixed, as the basis of comparison, equal work carried out in the same establishment or service, thereby making the principle of equal pay for equal work inapplicable to whole industries. S. L. Willborn has argued that 'equal pay is not required for similar jobs in different companies and industries and, hence, need not be implemented throughout the economy' (Willborn, 1986:426). The rationale for limiting the scope of the principle to work in the same establishment or service appear to be threefold. It includes the argument that the principle, if limited to the same establishment or service, increases the manageability of the claims; it minimises the potential shock to the economy; and it protects employers from liability for pay disparities which are outside their control (Willborn, 1986:426-7).

The scope of this implied limitation was further clarified in *Macarthys Ltd* v. *Smith* [1980] 2 C.M.L.R 205. In this case, the applicant sought to establish a right to equal pay by means of a comparison with a former male employee who some four months previously had held the same position, and had been paid at a higher level of remuneration. The ECJ ruled on the admissibility, for the purposes of a claim to equal pay under EEC law, of a comparison with a former employee of the opposite sex. The Court held that the scope of the principle of equal pay for equal work was not restricted to situations of contemporaneous employment of men and women. The Court stated that the concept of

equal work is 'entirely qualitative in character in that it is exclusively concerned with the nature of the services in question' (p.215). However, it also decided that a difference in pay between two workers who occupied the same post at a different period may be due to the operation of factors unrelated to sex discrimination (for example, inflation). This is a question of fact to be decided by the national courts.

The Court was also requested to decide whether article 119 applied in a situation of alleged unequal pay where the work in question had not previously been performed by a man, given the fact that contemporaneity is not a necessary element of 'equal work'. The Court, however, was unwilling to apply the principle of equal pay for equal work to segregated professions. Occupational segregation, so the Court opined, involves 'indirect and disguised discrimination, the identification of which . . . implies comparative studies of entire branches of industry and therefore requires, as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment'. For the purposes of a claim based on article 119 'comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service' (p.215).

The Demise of the 'Direct-Indirect' Distinction

The distinction between direct and indirect discrimination introduced by the Court in *Defrenne 2* did not long survive. In 1981, the ECJ stressed in *Worringham and Humphreys* v. *Lloyds Bank Ltd* [1981] 2 C.M.L.R. 1 that article 119 applied to all forms of discrimination 'which may be identified solely with the aid of the criteria of equal work and equal pay . . . without national or Community measures being required to define them with greater precision in order to permit of their application' (p.21). A few weeks later, the Court confirmed the demise of the direct-indirect distinction in *Jenkins* v. *Kingsgate* referred to above. In *Jenkins* the ECJ was asked by the British Employment Appeal Tribunal whether article 119 applied to a situation involving different hourly wage rates for part-time and full-time employees where the majority of the part-time workers were women. The Court decided that 'the fact that part-time work is paid at an hourly rate lower than pay for full-time work does not amount *per se* to discrimination prohibited by Article 119 provided that the hourly rates are applied to workers belonging to either category without distinction based on sex'. A

violation of article 119 occurred when 'the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex' (p.40). Thus, if the pay policy can be explained by factors other than discrimination based on sex, a violation of article 119 would not arise 'unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women' (pp.40-1). The importance of the *Jenkins* judgment lies in the Court's assertion that a difference in remuneration between part-time and full-time work is contrary to article 119 if the category of part-time employees is predominantly or exclusively composed of females and there are no objectively justifiable factors for the differences in pay. The Court's assumption that statistical disparities proved the existence of indirect discrimination, which comes within article 119, can also be found in *Bilka-Kaufhaus GmbH* v. *Von Hartz* [1986] 2 C.M.L.R. 701 where the Court stated that 'Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme where that exclusion affects a much greater number of women than men, unless the enterprise shows that the exclusion is based on objectively justified factors which are unrelated to any discrimination based on sex' (p.720). If the factors chosen by the company 'meet a genuine need of the enterprise', are appropriate to achieving the objectives pursued and are necessary to that end, the fact that more women are affected is not sufficient to constitute an infringement of article 119 (p.721). The words 'appropriate' and 'necessary' indicate a requirement of proportionality. The employer must show that the same result could not have been achieved by a less discriminatory method and that the means employed are necessary to achieve the desired purpose.

'Equal Pay for Equal Work': the Gateway to Comparable Worth?

In Chapter 3, we pointed out that the principle of equal pay for work of equal value has been construed to accommodate the comparable worth concept. This has been done by interpreting the principle in such a way as to require or permit the comparison of dissimilar jobs. There are indications that the adoption by national courts of such an extended meaning has been facilitated by recent jurisprudential developments in the ECJ. The Court ruled in *Commission* v. *United Kingdom (Re Equal Pay for Equal Work)* [1982] 3 C.M.L.R. 284 that the United Kingdom had failed, in breach of the Equal Pay Directive of

1975, 'to provide a means whereby claims of equal value might be assessed in the absence of a job evaluation scheme having been implemented by the employer' (Steiner, 1990:234). This case had its origin in the fact that the Equal Pay Act of 1970 (UK) did not provide for a woman to claim equal pay for work of equal value if a job evaluation scheme had not been carried out. In addition, the Act did not impose an obligation on the employer to carry out job evaluations. Even if an evaluation had been carried out, it was not binding unless accepted by both parties (Landau, 1985:38). The EEC Commission argued that the absence of such provisions in the UK legislation constitutes an infringement of article 119 of the Treaty of Rome and of article 1 of the Equal Pay Directive. The United Kingdom Equal Pay (Amendment) Regulations of 1983, which came into force in January 1984, brought the Equal Pay Act in line with the ECJ judgment (O'Donovan & Szyszczak, 1988:135-9). The Regulations now provide extensive machinery for the implementation of the principle of equal pay for work of equal value. In particular, equal pay is statutorily required

- where the woman is employed on like work with a man in the same employment; or
- where the woman is employed on work rated as equivalent with that of a man in the same employment, under a job evaluation study; or
- where the job is otherwise rated to be of equal value 'in terms of the demands made on her (for instance, under such headings as effort, skill and decision) to that of a man in the same employment' (Landau, 1985:90; Bourn & Whitmore, 1989:149).

If the conciliation processes before an industrial tribunal fail, a job-evaluation expert is to determine whether the applicant's and comparator's jobs are of equal value. In the United Kingdom, the applicant does not have to limit her choice to only one comparator, with the resulting risk that she may have picked the wrong one. As was decided by the House of Lords in *Hayward* v. *Cammell Laird Shipbuilders Ltd* [1988] 2 All ER 258, she can choose several possible comparators. The House of Lords also decided recently in *Pickstone* v. *Freemans plc* [1988] 2 All ER 803 that even if there is a man doing the same work and being paid the same as she, she can select a more highly paid male comparator. In accordance with sections 2 and 3 of the amended Equal Pay Act, if a job evaluation study has been conducted and the applicant's job rated lower than that of the comparator, the applicant

can challenge the study on the ground that it was discriminatory. This discrimination can again be direct or indirect. If the discrimination was direct (which is analogous to 'disparate-treatment' discrimination in the United States), the applicant would have to show an intention to treat the man more favourably, by giving greater weight to his attributes or by changing the assessment procedure after preliminary results were more favourable to the woman. Examples of indirect discrimination (which is analogous to 'disparate-impact' discrimination in the United States) usually involve a finding that a neutral requirement (such as a height requirement) has a disproportionate impact on women (Willborn, 1986:428-9).

It could be argued that the United Kingdom's Amendments to its Equal Pay Act went beyond what was necessary to comply with the ECJ's judgment. Neither article 1 of the Equal Pay Directive of 1975 nor the judgment 'require that a claim to equal value must be assessed pursuant to a job evaluation study; indeed, the Court pointed out in *Commission* v. *United Kingdom* that a system of job classification is only one of the several methods for determining pay for work to which equal value is attributed' (Steiner, 1990:234). There is no doubt that *Commission* v. *United Kingdom* facilitated comparable-worth approaches in the EEC although they are not statutorily required under EEC law. Steiner, in her *Textbook on EEC Law*, laments the fact that the Court in that case did not spell out in greater detail the scope of the obligations imposed on member states. She says:

> Clearly some comparability must exist before a legitimate claim to equal value can arise. But how 'like' must two different jobs be for them to be deemed to be comparable? And if they are 'broadly' comparable, how, and in what detail, are they to be assessed in order to decide whether they are of equal value? Must every benefit received by the man and woman be weighed and compared individually . . or is it sufficient . . . that the overall package received by men and women be equal? (1990:234)

The ECJ has given some guidance regarding the factors that may be used when a job-classification scheme is devised to determine comparability. The complainant in *Rummler* v. *Dato-Druck GmbH* [1987] 3 C.M.L.R. 127 sought to challenge the factors on the ground that they were discriminatory. They included the muscular effort, fatigue and physical hardship associated with the job. The court decided that the scheme based on the strength required to carry out such work or the

degree of physical hardship that the work entailed was not in violation of the Equal Pay Directive as long as the factors were objectively justified. Objective factors are those that are appropriate to the tasks to be carried out, and correspond to a genuine need of the undertaking. But the Court also pointed out that the scheme, if it is not to be discriminatory, must take into account the aptitudes of each sex: factors based exclusively on the aptitudes of one sex, using the Court's language, contain 'a risk of discrimination' (p.141). In 1989, the Court, in *Handels-og Kontorfunktionaernes Forbund* v. *Dansk Arbejdsgiverforening for Danfoss* [1989] I.R.L.R. 532 decided that where a female worker establishes, by comparison with a relatively large number of employees, that the average pay of female workers is lower than that of male workers, the onus is on the employer to prove that the factors used are justified.

This brief review reveals that the principle of equal pay for work of equal value has the potential to develop into the comparable-worth method of wage-setting in the EEC. But because of the lack of clear judicial guidelines the implementation of the method in member states inevitably leads to differences in approach and emphasis. These differences, in turn, may defeat the economic objectives that the principle of equal pay for equal work was designed, in part, to achieve (Steiner, 1990:235). In these circumstances the introduction of further, and possibly more stringent, EEC guidelines on what constitutes a 'just' wage may be anticipated.

Pay-Equity Legislation: the Canadian Experience

In the preceding discussion of the state of the law in the EEC, we indicated that the principle of equal pay for work of equal value can easily be interpreted as requiring or permitting the comparison of dissimilar jobs. As in the EEC, the current Canadian debate on equal-pay laws 'centres on whether the concept of equal pay can only be applied to substantially similar jobs or whether it can be applied to dissimilar jobs of comparable value' (Abella, 1987:187). In Canada, federal as well as provincial 'pay equity' legislation provides for the implementation of the principle of equal pay for work of equal value. Some pieces of legislation are complaint-based whereas others are pro-active in the sense that they place obligations upon employers to develop 'pay equity' plans.

At the federal level, section 11 of the Canadian Human Rights Act of 1978 requires equal pay for work of equal value. Section 11 of the Act reads, in its relevant parts, as follows:

(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees in the same establishment who were performing work of equal value.

(2) In assessing the value of work performed by employees employed in the same establishment the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed . . .

(5) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

The Human Rights Act legislates for a complaint-based mechanism that can be activated only by parties willing to refer problems to the Canadian Human Rights Commission.

The principle of equal pay for work of equal value has also been entrenched in some provincial jurisdictions. But there are considerable differences between the respective pieces of legislation. At the provincial level, Quebec, Prince Edward Island, Nova Scotia, Manitoba and Ontario have 'pay equity' legislation of some form. Pay equity is recognised in section 10 of Canada's Charter of Human Rights and Freedoms enacted in 1975. Although the Charter applies to both public and private sectors, some commentators characterise the legislation as 'weak' because it is complaint-based (Cuneo,1990:161; Ellis-Grunfeld, 1987:227). In contrast, the relevant provincial legislatures of Prince Edward Island, Nova Scotia and Manitoba, though they apply only to parts of the public sector, are pro-active since employers are obliged to adhere to mandatory requirements to determine the extent to which they are engaged in discriminatory pay practices. Ontario's Pay Equity Act of 1987, which came into effect in January 1988, is the strongest and most influential piece of Canadian legislation on the subject of comparable worth. It applies to all public-sector employers and to all employers in the private sector who employ ten or more employees in Canada's largest province. In addition, the legislation, being of the pro-active kind, places an obligation upon employers to develop a 'pay equity plan'. The Act influenced the drafting of New Zealand's Employment Equity Bill which, however, was dropped by that country's National government elected in 1990. For these reasons, the discussion in this section will mainly focus on the Ontario legislation.

Ontario's Pay Equity Act of 1987

Ontario's Pay Equity Act of 1987 purports 'to redress systemic gender discrimination in compensation for work performed by employees in female job classes' (s.4(1)). The legislation requires the identification of an 'establishment' for the purpose of starting the pay-equity process. An 'establishment' refers to 'all of the employees of an employer employed in a geographic division' (s.1(1)). A geographic division, in turn, is defined in the Act as 'a country, territorial district or regional municipality described in the *Territorial Division Act*' (s.1(a)). In accordance with s.14(3), the employer and the relevant unions may agree, for the purpose of the pay-equity plan, that the establishment of the employer includes two or more geographic divisions. In an establishment where no employees are unionised, the employer is nevertheless under a statutory duty to prepare a pay-equity plan. The employer, in such a case, may decide that the establishment includes two or more geographic divisions (s.15).

Once the establishment has been identified, employers proceed to the identification of the male and female 'job classes'. Job classes are 'those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates' (s.1). A female job class is a job that has 60 per cent or more female members. Thus, a job class with fewer than 60 per cent female employees is not a female job class, and therefore cannot benefit under the Act. A male job class has at least 70 per cent males. Female job classes are the potential beneficiaries of pay adjustments whereas male job classes are used as comparators or targets to establish the possible higher levels of compensation for the female job classes.

The identification of the male and female job classes is followed by the establishment of the 'job rate', which is defined in the legislation as the highest rate of compensation, including all benefits, for a job class (s.1). Next, the 'value' or 'worth' of the male and female job classes is determined, using a gender-neutral evaluation system based on skill, effort, responsibility, and working conditions. The employer and the trade union negotiate in good faith on the gender-neutral evaluation system that is used for the purpose of determining the value of job classes (s.14(2)). McDermott argues that the legislative 'requirement that a job evaluation system be gender neutral essentially challenges traditional job evaluation methodology to the extent that they incorporate stereotypic notions of women's work' (McDermott, 1990:405).

When both the job rate and the value of each job class have been established, each female job class looks for a male job class of comparable value. If an appropriate match is located, the female job class is entitled to the job rate of the comparable male job class. Thus, section 6(1) of the legislation stipulates that 'pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value'. However, if there is more than one comparable male job class, the female job class is only entitled to the lowest male job rate (s.6(3)). McDermott has argued that s.6, in terms of achieving pay equity, is one of the most inequitable provisions of the Act. She continues:

> Why should people in female job classes receive the lowest possible job rate in the event that there is more than one appropriate comparator? What kind of equity is this? If, for example, there is one underpaid appropriate male job class, dominated by a minority group whose race or ethnicity operates to result in its work being discriminatorily undervalued, then female job classes have achieved pay equity, according to the Act, by being similarly underpaid. (McDermott, 1990:393)

McDermott believes that this inequity is a serious weakness of the legislation because 'it is very likely, particularly in large organizations, that there will be several possible comparable matches' (McDermott, 1990:393). On this point, she favours Manitoba's Pay Equity Act of 1985, which provides for 'the average or projected average schedule or grade of pay of male-dominated classes performing work of equal or comparable value' when there is more than one possible comparator (s.6(2)).

The Act defines in section 13 a pay-equity plan as a document in which the establishment and the job classes are identified, the gender-neutral evaluation system is described, and the results of the comparison are set out. Section 13(4) of Ontario's legislation provides that 'the combined compensation payable under all pay equity plans of the employer' shall be limited to '1 per cent of the employer's payroll during the twelve-month period preceding the first adjustments'. In accordance with sections 22–24, complaints may be lodged with the Pay Equity Commission. If the complaint is not settled, it will eventually be decided during a formal hearing

before the Hearings Tribunal, which is the adjudicative wing of the Commission.

There are indications that the implementation of Ontario's Pay Equity Act of 1987 may not be without problems. Cuneo, in his recent study on Canadian pay equity, criticises the Act on the ground that its implementation 'requires a mastery of complex technical and legal details in the legislation and in pay-equity plans and methodologies' (Cuneo, 1990:185). He also argues that legislating equal pay for work of equal value 'has considerable potential for dividing and weakening the working class, the labour movement, and the women's movement' (Cuneo, 1990:184). In particular, he contends that gender divisions are perpetuated by institutionalising comparisons between male and female jobs and wages. He refers to a 1989 survey of corporate organisations in Ontario, the results of which indicate that the pay-equity legislation has already had a strong impact on attitudes in the male workforce. Some organisations surveyed reported that 40 per cent of their male employees appeal job-evaluation results on the ground that female employees obtained pay increases at the expense of male workers. Although male employees blame the implementation of the Act for their failure to obtain suitable wage increases, Cuneo also reminds his readers that comparable-worth legislation has the potential to divide working women. He says:

> The legislative solution to equal pay for work of equal value has the potential to pit women against one another by qualifying some for pay-equity adjustments and disqualifying others merely because they are in different structural positions — such as jobs with fewer than 60 per cent women, or in workplaces that have no male-predominant job classes against which comparisons can be made, or in establishments with fewer than 10 employees. (1990:184)

Cuneo's point alerts us to the possibility that the benefits of the implementation of comparable-worth legislation may not be evenly distributed among its intended beneficiaries. We consider this issue in greater detail in Chapter 9.

Chapter 6

The State of the Law: Australia

In this chapter, we consider whether the comparable-worth method can be implemented under existing Australian law. In order to answer this question, it is necessary to investigate the law as it relates to human rights and industrial relations.

Human-Rights Legislation

Australia has no bill of rights and no constitutional guarantee of equality before the law or of equal protection of the law. However, several State and federal statutes aim to implement anti-discrimination principles. The State laws deal with discrimination on a variety of grounds, such as race, sex, marital status, physical or intellectual impairment, religion, political conviction and (in the case of New South Wales and South Australia) homosexuality. In New South Wales, the relevant statute is the Anti-Discrimination Act, while South Australia, Victoria and Western Australia each have an Equal Opportunity Act.

At federal level, there are three major enactments relevant to discrimination in employment. They are the Sex Discrimination Act of 1984 (henceforth the SD Act), the Human Rights and Equal Opportunity Commission Act of 1986 (henceforth the HREOC Act) and the Affirmative Action (Equal Employment Opportunity for Women) Act of 1986. The last-mentioned statute deals with access to jobs. It has no direct relevance to equal pay and for that reason is not discussed in this chapter.

In so far as they relate to the question of wage parity between male and female employees, the SD Act and the State Acts contain very similar provisions. Indeed, it could be shown that an equal-pay case brought on gender-related grounds that will not succeed under the SD Act has little chance of succeeding under any State law. For this reason we propose to discuss the issue of comparable worth in relation to the SD Act on the supposition that a different result would not ensue under a State Law.

The Sex Discrimination Act of 1984

The chief object of the SD Act is 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women' (section 3(a) of SD Act). Article 11, paragraph 1 of the Convention requires States Parties to take 'all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular . . . (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work'.

The above provision is an attempt to define comprehensively the ideal of equal pay for work of equal value. First, it calls for equal compensation for work of equal value. Second, it requires non-discriminatory methods of work evaluation for the purpose of ascertaining whether or not work is of equal value. Article 11 (1)(d), in requiring 'equality of treatment in the evaluation of the quality of work', implies the adoption of job-evaluation schemes. The practice of formal job evaluation is the *sine qua non* of the comparable-worth method. Assuming for the purpose of argument that this contention is valid, the question must still be asked whether this conception of equal pay, recognised by the Convention, has been implemented in the SD Act. The key provision of the SD Act relating to equal pay is found in section 14(2), which makes it 'unlawful for an employer to **discriminate** against an employee on the ground of the employee's sex . . . in the terms or conditions of employment that the employer affords the employee' (our emphasis). The word 'discriminate' in relation to sex discrimination is defined in section 5. According to section 5(2), a person discriminates on the ground of sex where such person treats another 'less favourably than, **in circumstances that are the same or are not materially different**, the discriminator treats or would treat a person of the opposite sex' (our emphasis).

This definition of discrimination in section 5 clearly indicates that the SD Act intends to prohibit unequal pay only where jobs are 'the same or are not materially different'. The Act according to its plain meaning does not command the comparison of dissimilar jobs as required by the comparable-worth method. Innes, however, argues that section 5(2) of the SD Act introduces a concept of indirect discrimination under which the comparable-worth method may be implemented (Innes, 1986:233-4). We might first remind ourselves that in the United States, repeated efforts to introduce the comparable-worth method under a disparate-impact or indirect

model of discrimination have failed. Apart from this, we submit that section 5(2) of the SD Act lends no support to comparable-worth advocacy as it is essentially concerned with barriers to entry rather than unequal compensation. The subsection states:

> For the purposes of this Act, a person . . . discriminates against another person . . . on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition —
>
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

Innes states that these provisions could prohibit an unreasonable condition or requirement which, for example, requires 'an employee to work in a particular range of duties, or have particular qualifications, before being entitled to $ X, or higher pay' (Innes, 1986:234). Attractive as it seems, this construction still means that the subsection prohibits the sorts of unreasonable conditions that deny females entry to higher-paid jobs or higher-paid grades of job categories. For example, the provision would prohibit an employer from requiring that a clerk should be six feet tall or be able to lift 100 kilograms. The reason is that these physical requirements, whilst excluding most women, have no real bearing on one's capacity to perform clerical work. The typical comparable-worth claim deals with a different type of situation. A comparable-worth claim asserts that a female-dominated job category is under-compensated in relation to another, male-dominated job category, although the two categories are of comparable worth to the common employer. To consider a hypothetical case, a comparable-worth litigant will not complain that most women cannot enter the highly paid occupation of firemen because of unreasonable requirements relating to physical attributes. The complainant will probably concede that the physical qualifications of firemen are necessary and reasonable. Rather, she may argue that nurses should be paid the same wages as firemen as their nursing work is of comparable worth to the employer.

For a claim to succeed under section 5(2), three conditions have to

be met. First, the qualifications for the higher-paying job (fireman) should substantially favour males. This may be established easily. Second, it should be shown that the complainant does not possess the qualifications required of firemen. This too may easily be proved. Third, it must also be established that the physical qualifications are unreasonable in that they have no rational or practical bearing on the work of a fireman. If this factor is not established, the case will fail under section 5(2). But a comparable-worth claimant will insist that the nurses are entitled to equal pay, not because they are unreasonably shut out of the cadre of firemen, but because their own work is of equal value to that of firemen. Section 5(2) will not help such a claimant unless she also can prove that the physical requirements are unreasonable.

Section 5(2) prohibits the imposition of requirements that are not 'reasonable having regard to the circumstances of the case'. Even if it is assumed that this subsection enjoins the creation of barriers to income levels in the abstract, the question remains whether it is unreasonable to set conditions for entry that are dictated by market forces. This question is important because in most cases the comparable-worth method can be implemented only by excluding market-based determination of wages. In the United States, the Supreme Court has, in relation to complaints of disparate-impact (indirect) discrimination, unequivocally upheld the right of employers to establish wage differentials according to market value, by recognising the defence of business necessity. In the United Kingdom, commercial necessity has been found to constitute a reasonable excuse to a charge of discrimination brought under a provision similar to section 5(2) of the SD Act (O'Donovan & Szyszczak, 1988:146).

Section 40(1) of the SD Act creates an important exemption with regard to charges of discrimination relating *inter alia* to matters of employment. It exempts from liability acts carried out in direct compliance with Commonwealth, State and Territory laws or orders and determinations made under such laws. The subsection specifically exempts anything carried out in direct compliance with 'an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment'. It is clear from this subsection that a person who exercises rights under a discriminatory wage determination is not, himself or herself, guilty of discrimination under the Act. It is, however, not clear to what extent wage-fixing tribunals are themselves bound to comply with the

provisions of the SD Act regarding non-discrimination. On the one hand, it could be argued that in exempting acts that comply with wage awards, section 40(1) has recognised the right of wage tribunals to depart from the provisions of the SD Act relating to employment. On the other hand, it could be argued that section 26(1) (which makes it unlawful for persons acting under Commonwealth law to discriminate against any person on the ground of sex, marital status and pregnancy) obliges a wage tribunal functioning under Commonwealth law to act in accordance with the anti-discrimination provisions of the SD Act. This question must ultimately be resolved judicially. However, even if the relevant SD Act provisions do control the powers of wages tribunals, it is unlikely, as we have submitted, that such provisions would be interpreted as requiring tribunals to engage in comparable-worth analyses in determining wages.

The Human Rights and Equal Opportunity Commission Act of 1986

It must be noted at the outset that the Human Rights and Equal Opportunity Commission (HREOC) Act, despite its rather expansive title, has very limited application in relation to human rights and equal opportunity. The HREOC has widely defined research, educational and promotional functions with respect to human rights in general and equal opportunity in particular. But its substantive adjudicative powers in these areas are limited in three significant respects.

First, its adjudicative powers can be exercised in relation to 'acts' or 'practices' of public authorities. In relation to any human right, the HREOC can inquire into the acts done or practices engaged in:

- by or on behalf of the Commonwealth or an authority of the Commonwealth;
- under an enactment;
- wholly within a Territory; or
- partly within a Territory, to the extent to which the act was carried out within a Territory. (It is stipulated in section 3 of the legislation that 'Territory' excludes the Northern Territory).

In relation to questions concerning equal opportunity, the HREOC can also investigate acts carried out or practices engaged in:

- by or on behalf of a State or an authority of a State;
- under a law of a State;

- wholly within a State; or
- partly within a State to the extent to which the act was carried out within a State. (Sections 3 and 30 stipulate that 'State' includes the Northern Territory).

Despite some ambiguities in the above definitions and some other related definitions, it appears that the Act has not conferred any adjudicative powers on the HREOC in relation to private conduct.

Second, the power of the HREOC is limited to certain kinds of determination: it can make recommendations but not binding decisions on allegations against public authorities (section 29(2) and section 35(2) of the HREOC Act).

Third, the HREOC's jurisdiction is limited by the definition of 'human rights' in section 3(4) of the Act. This definition ensures that the rights and freedoms recognised by the International Covenant on Civil and Political Rights or by other relevant international instruments are not automatically within the purview of the Act; rather, a reference to the rights and freedoms recognised in the Covenant is a reference 'to the rights and freedoms recognised in the Covenant **as it applies to Australia**' (emphasis added). The words in emphasis ensure that the HREOC can be concerned with international instruments on human rights only to the extent that those provisions are specifically implemented in Australia. In other words, the HREOC cannot seek to promote human rights as spelt out in the international treaties, but only as defined in Australian law. With regard to equal opportunity the Act contains its own definition of discrimination which will be discussed below.

Section 3 of the HREOC Act defines discrimination as 'any distinction, exclusion or preference . . . that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. Excluded from this definition are preferences 'in respect of a particular job based on the inherent requirements of the job' or in connection with employment in religious institutions conducted according to their religious doctrine. Under this provision the prohibited actions are those that impair 'equality of opportunity'. The latter term is not defined. In the absence of a definition, there is very little to indicate that the concept embraces or requires the adoption of the comparable-worth method. On the contrary, the exception to the prohibition based on the inherent requirements of particular jobs seem to militate against such a construction. It may be recalled from Chapter 4 that much more specific terms found in US legislation have been held

not to imply comparable-worth analyses. Our conclusion, therefore, is that human-rights legislation in Australia fails to provide an unequivocal statutory basis on which comparable-worth claims can be founded.

Industrial-Relations Law

Whilst Australian human-rights legislation offers little encouragement to comparable-worth claimants, the country's industrial-relations law and practice provide distinct opportunities for the pursuit of such claims. The basic feature of the Australian industrial relations system is the network of arbitral tribunals providing the mechanism for a highly-centralised, bureaucratic and non-consensual method of wage fixing. Principal arbitral bodies include the Australian Industrial Relations Commission (AIRC) established under the Industrial Relations Act (Cth), and the industrial relations tribunals of the several States. The AIRC is the body that replaced the Australian Conciliation and Arbitration Commission (CAC) in 1988. Insofar as it concerns the issues discussed herein, the AIRC may be regarded as a continuation of the CAC under a new name. The division of powers between the AIRC and the State tribunals is dictated by the Constitution, which gives the Commonwealth only limited powers with respect to industrial relations. Accordingly the AIRC, broadly speaking, has power only to deal with disputes extending beyond the limits of any one State. However, each State has set up its own tribunal in respect of disputes that fall within State boundaries. It is estimated that AIRC awards affect about 35 per cent of the Australian workforce. The Commonwealth's wage-fixing power is augmented by an array of specialised tribunals including the Academic Salaries Tribunal, the Remuneration Tribunal, the Federal Police Arbitral Tribunal, and the Defence Forces Remuneration Tribunal.

The AIRC must attempt to settle industrial disputes by conciliation. Where conciliation fails, the AIRC is empowered to resolve disputes by making binding and enforceable awards. These awards determine the wages and other terms and conditions of employment of the employees affected by the industrial dispute. The AIRC is not bound to enforce common-law contracts. It is required to act 'according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms'. It is also exempt from formal procedures and rules of evidence (section 11D(2) of the Industrial Relations Act of 1988). Thus, the AIRC has very wide powers to make determinations regarding wages and other conditions of employment.

When making far-reaching awards, the AIRC is required to have regard to 'the state of the national economy, of the likely effect on that economy of any award . . . with special reference to likely effects on the level of employment and on inflation' (section 90 of the Act). Despite this limitation, the AIRC has ample powers to determine at its discretion the wage levels of any class of employees. Similar wide powers are enjoyed by State tribunals.

Unlike American decisions on equal pay (discussed in Chapter 4), the AIRC and its State counterparts may not only determine what rights people have under the law but may actually create **new** rights by their own will and decision. So whereas the US Supreme Court must determine what the law **is**, the AIRC can decree what the law **ought to be**. Hence, they are not always bound by the terms of statutes in pursuing equal-pay objectives.

The Equal-Pay Decisions of 1969 and 1972

The CAC's involvement with equal-pay issues began with its equal-pay decision of 1969 (127 C.A.R. 1142). In that award, the CAC accepted the principle of equal pay for equal work. But it limited the application of the principle to situations where the same work was done by males and females within an industry covered by an award. Jobs essentially or usually performed by females were also excluded from the principle.

In 1972, the CAC Full Bench brought down another equal-pay decision in which it sought to establish a new principle defined as follows:

> The principle of 'equal pay for work of equal value' will be applied to all awards of the Commission. By 'equal pay for work of equal value' we mean the fixation of award wage rates by a consideration of the work performed irrespective of the sex of the worker. The principle will apply to both adults and juniors. Because the male minimum wage takes account of family considerations it will not apply to females. ((1972) 147 C.A.R.172, 179)

In explaining its implications, the CAC stated that the adoption of 'the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned' (p.179). The Commission also stated:

> The gap between the level of male and female rates in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for

> female classifications in the same award have generally been fixed without a comparative evaluation of the work performed by males and females. ((1972) 147 C.A.R. 172,179)

It is evident that the CAC was herein adopting the concept of equal pay for work of equal value. But does the principle, as explained above, require work-value comparisons to be made between male dominated and female dominated job categories where the work done is dissimilar? In other words, does the principle as explained, warrant comparable-worth assessments? The Commission appeared to lean in favour of such inquiries when it stated:

> Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary. ((1972) 147 C.A.R. 172,180)

The 1972 Equal Pay decision and subsequent CAC decisions affecting equal pay can be understood best if they are viewed in the context of the broad trends in industrial relations policy that have marked CAC decisions. Hancock, Polites and Fitzgibbon point out that since 1967, a major theme in Australian wages policy has been one of alternation between periods of flexibility, wherein trade unions could freely obtain wage rises outside the 'National Wage Cases', and periods of restraint when the CAC severely limited such wage increases (Hancock, Polites & Fitzgibbon, 1985:43). During periods of flexibility the CAC also implemented its ideal of 'comparative wage justice'. Comparative wage justice requires comparisons of work content in order to establish the relative worth of different jobs. It also requires that these relativities be maintained in fixing wages for the different jobs. Thus if one class of worker obtains a wage rise, the CAC would grant other classes wage rises according to established relativities (Provis, 1986:27).

The 1972 Equal Pay decision was delivered during a period of flexibility when the CAC had de-emphasised macroeconomic considerations. In coming to its decision, the Full Bench conceded that the economic cost would be substantial but maintained that if the

community accepted the concept of equal pay for females it should also 'accept the economic consequences of this decision' ((1972) 147 C.A.R. 172, 178). The concept of comparable worth, although not specifically contemplated by the CAC, would not have been impeded by the tribunal's contemporary policy.

The National Wage Case of 1983

The next important decision affecting equal pay was delivered during a period when the CAC was seeking to re-establish a system of centralised wage fixing following the disastrous wages blow-out of 1980-82. Not surprisingly, the decision was inimical to equal-pay claims. In the 1983 National Wage Case, the CAC laid down a set of principles designed to limit wage increases to those determined nationally by the CAC at six-monthly intervals. The decision sought to give effect to a key plank of the Hawke Government's economic strategy expressed in its 'Accord' with the ACTU and in the Communique of the National Economic Summit Conference. The Accord recognised that under the centralised wage-fixing system 'there shall be no extra claims except where special and extraordinary circumstances exist' ((1983) 291 C.A.R. 6, 10). The Communique stated that 'if a centralized system is to work effectively as the only way in which wage increases are generated, a suppression of sectional claims is essential except in special or extraordinary circumstances proved before the centralized wage fixing authority' ((1983) 291 C.A.R.6, 12). According to these documents, wage increases, as far as possible, were to be restricted to across-the-board adjustments, leaving little room for adjusting relativities. Hence, the policy strongly militated against equal-pay claims. The CAC unequivocally adopted this part of the policy. In doing so it ruled out the possibility of comparable-worth claims. The wage-fixing principles determined by the Commission permitted the rectification of anomalies and inequities (principle 6). But the conditions prescribed for such adjustments leaves no room for comparable-worth analysis. According to principle 6(a), anomalies can be resolved only in circumstances 'of a special and isolated nature'((1983) 291 C.A.R. 6,36) and an anomaly cannot be established on the basis of comparative wage justice or the need to maintain relativities. Principle 6(b) permits the 'resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason'. The principle further provides that the classes of work being compared should be 'truly like with like as to all relevant matters' ((1983) 291 C.A.R. 6,36). The formulation of the

inequities provision indicates an intention to adopt the concept of equal pay for work of equal value as opposed to the concept of equal pay for work of comparable worth. Any doubt on this question is eliminated by the Commission's elucidation that the principle 'should not be interpreted as allowing comparisons between employees who are not in the same occupation or profession' ((1983) 291 C.A.R. 6,37). By definition, comparable-worth analysis involves the comparison of different occupations.

The Comparable Worth Case of 1986

Despite the CAC's explicit disapproval of the comparable-worth doctrine, an attempt was made in 1986 to establish the method as a wage-setting principle of the CAC. In the Comparable Worth Case of 1986, the Royal Australian Nursing Federation and the Hospital Employees Federation of Australia (hereinafter 'the unions') based a claim for wage increases on the comparable-worth doctrine, on the ground that the doctrine was mandated by the 1972 Equal Pay Principle. The unions called for a ruling that the Equal Pay Principle was not affected by the National Wage Fixing Principles of 1983. The unions' case was supported by a number of interveners including the Commonwealth government, the ACTU, the State Public Services Federation (SPSF) and the Council of Action for Equal Pay. The Council argued that female-dominated occupations have traditionally been undervalued and that the situation could be remedied only if the concept of comparable worth was implemented (1986 A.I.L.R. 99, 100).

The Commonwealth, understandably, did not fully support this claim. It only conceded that the 1972 Equal Pay Principle was still available to be implemented in awards that had never been adjusted in the light of that decision. It further argued that owing to the possibility of flow-ons such adjustments should only be processed as Anomalies under Principle 6 of the 1983 Principles. In other words, the Commonwealth argued for restricting the application of the Equal Pay Principle of 1972 to the extremely limited circumstances set out in Principle 6 of the 1983 decision which dealt with anomalies. As we noted above, this Principle left no room for comparable-worth analyses.

The Commonwealth's argument was expressly endorsed by the CAC. The Full Bench rejected the comparable-worth method in the following terms:

> At its widest, comparable worth is capable of being applied to any classification regarded as having been improperly valued,

> without limitation on the kind of classification to which it is applied, with no requirement that the work performed is related or similar. It is capable of being applied to work which is essentially or usually performed by males as well as to work which is essentially or usually performed by females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of the present Wage Fixing Principles. (1986 A.I.L.R. 99, 101)

The Full Bench also stated that 'the use of the term comparable worth in the Australian context would lead to confusion, and in particular, we believe that it would be inappropriate and confusing to equate the doctrine with the 1972 principle of equal pay for work of equal value' (p.101). Thus the Full Bench clearly distinguished the concept of equal pay for work of equal value enshrined in the 1972 Principle from the concept of comparable worth. The Full Bench decided, following the Commonwealth's submission, that the unions should pursue their claim as an anomaly under Principle 6 of the 1983 National Wage Fixing Principles. In short, the CAC decided that the case could not be prosecuted as a comparable-worth claim.

The Status of Comparable Worth in Industrial-Relations Law

What then is the status of the comparable-worth doctrine in Australian industrial-relations law? The doctrine was rejected by the CAC and recently by the AIRC. However, it is important to remember the essential difference between AIRC decisions and those of regular courts. Courts in different jurisdictions that are called upon to consider comparable-worth claims are obliged to ascertain the state of the law on the question as expressed in the relevant statutes. The AIRC, however, is not bound by any statute on this question. It is essentially a discretionary authority whose power to grant equitable relief is circumscribed only by its duty to have regard to the state of the economy and to the principles embodied in the Racial Discrimination Act of 1975 and the Sex Discrimination Act of 1984 (section 93). Hence, on the question of comparable worth, the AIRC is bound by neither statute nor precedent. It is free to adopt the comparable-worth method in its discretion when it considers it expedient to do so.

Since 1983, the AIRC has been working within the straitjacket of the economic policy pursued under the Accord between the Labor government and the ACTU. It was unable to grant sectional wage claims without disrupting one of the most important planks of national

economic policy, namely, centralised and across-the-board adjustments of wage levels. Since 1987, the Labor government has sought to introduce a degree of flexibility to the wage-setting system in order to achieve higher productivity levels in industry. The strategy is to create inducements by way of additional wage increases for sectors that show willingness to eliminate restrictive work practices and to undertake structural efficiency adjustments conducive to greater productivity. These aims have been worked into the wage-setting principles through the National Wage Cases beginning with that of March 1987. However, the principles have done nothing to advance the cause of the comparable-worth method in Australia. On the contrary, the set of principles adopted in the National Wage Case of August 1989 positively debars comparable-worth claims. The principles relating to the resolution of pay inequities laid down in this case in part read as follows:

> The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason, shall be processed through the Anomalies Conference and not otherwise, and shall be subject to all the following conditions:
>
> (1) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.
>
> (2) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay. ((1988–1989) 30 I.R. 80, 105)

The above statement unequivocally precludes the comparison of dissimilar jobs for the purposes of pay-equity adjustments. Under paragraph (1), it is not sufficient that the compared jobs score equivalent aggregates on a point system. The principle requires that the jobs be similar in rating with respect to each attribute. Any doubt on this question is removed by the explicit language of paragraph (2). Under the comparable-worth method a job that requires much physical effort but little intellectual ability may be equated to a job that involves little physical effort and much intellectual ability. This is because the two jobs may be seen to be equal when the points allocated to the different job attributes are aggregated. On the contrary, to qualify for equal pay under the AIRC principles, the jobs would have to be considered equivalent with respect to each attribute.

In 1990, the ACTU and the Hawke Government revised their agreed wages policy to produce what became known as Accord Mark VI. The previous versions of the Accord sought to improve the structural efficiency of industry by implementing industry-wide adjustments of work practices in return for wage increases. Accord Mark VI seeks to extend this process by permitting wage/productivity trade offs at the level of individual enterprises. In the National Wage Case decision of April 1991, the AIRC refused to endorse this form of enterprise bargaining, stating that 'the parties to industrial relations have still to develop the maturity necessary for the further shift of emphasis now proposed' (Vol. 33, No. 9 A.I.L.R. 143). However, following trade union pressure the AIRC reversed its stance at the October 1991 National Wage Case and indicated that it would be prepared to approve enterprise bargaining agreements subject to certain limiting principles (Vol. 33, No. 23 A.I.L.R. 401). The major obstacle to the implementation of comparable worth in Australia has been the policy of granting wage increases on a nationwide or industrywide basis in order to keep aggregate wage outcomes within predetermined limits. Has the ACTU/Government version of enterprise bargaining (spelt out in Accord Mark VI) removed this obstacle by a radical revision of the wages policy? The answer appears to be negative. This version has as its object the introduction of greater flexibility to the wage-fixing system by permitting workers in individual enterprises to gain enhanced wages in return for gains in structural efficiency. However, it is sought to achieve this object without the risk of a wages blow-out. Hence the Accord envisages that these rewards are centrally sanctioned and linked strictly to the improvements in work practices at the enterprise. The Accord does not intend to establish a free market in labour; rather, it contemplates a system of supervised bargaining to be conducted along pre-established guidelines. There appears to be no room for comparable-worth type wage adjustments under the guidelines established by Accord Mark VI, whether the system is administered by the AIRC or achieved through industrial action.

Thus it appears that, whilst the current economic policy remains in place, neither the AIRC nor the Accord partners are likely to entertain wage demands in the nature of comparable-worth claims. Carol Lee Bacchi has pointed out that some Labor feminists are disinclined to pursue the comparable-worth method because it 'is considered a serious challenge to traditional wage-fixing principles' (Bacchi, 1990:171). One such feminist is Edna Ryan, who recently

noted the incompatibility of the comparable-worth method and the centralised wage-fixing system in these terms:

> Comparable Worth is a threat to the Central Wage Fixing System. Last year I discussed this with a member of the Council of Action for Equal Pay [CAEP] following the nurses' case and she assured me that CAEP did not advocate abandoning the Central Wage Fixing system but wanted the Comparable Worth mechanism used within the system.
>
> The Arbitration Commission saw the CAEP demand as a threat to the industrial arbitration system and a move towards deregulation of the labour market in the American free enterprise manner.
>
> In my opinion, although the Arbitration Commission has a vested interest in its own survival, the reasons for wanting to retain the Central Wage Fixing system are sound. The actual procedure in making the work value assessment is unacceptable. (Ryan, 1988:11-12)

Another commentator, Laura Bennett, reminds comparable-worth activists that although 'it does not do to overstate the uniqueness of indigenous institutions, it is still true that legal concepts cannot be shorn from their institutional and political contexts and simply transferred across national jurisdictions' (Bennett, 1988:534). David Brereton argues that even without the constraint imposed by the Accord, it is very unlikely that the Commission would endorse comparable-worth assessment. He states that the 'last thing it would want to do is to endorse a technique which would enable not just women workers, but almost everyone, to argue that their work has been undervalued *vis-à-vis* some other occupation . . . the economic and industrial relations costs of large-scale meddling with wage structures are simply too high for this to be a realistic option' (Brereton, 1986:88). Historically, the CAC has been extremely reluctant to undertake work-value assessments (Short, 1986:325).

Comparable Worth and the Powers of the Industrial Relations Commission

All this, however, does not mean that the AIRC lacks power to implement the comparable-worth doctrine if in the future it deems itself unrestrained by economic considerations. If the AIRC does adopt the comparable-worth doctrine, it is likely to have a more dramatic and far-reaching impact than in other countries. The comparable-worth

method is considered to apply only where the compared categories of workers are employed by the same employer. The AIRC, however, has power to make decisions applicable industrywide or even nationwide. In other words, its decisions may bind classes of employers or even on all employers. Comparable worth in this context would involve the classification and evaluation of jobs on a much wider scale. Christine Short remarks that comparable worth 'can really be rewritten in Australian terms as comparative work value, not just between the same occupations in different industries (like comparative wage justice), but between similar and even dissimilar occupations in different industries' (Short, 1986:329). Such a project will have a correspondingly wider impact on the economic and social order.

In Australia, the comparable-worth method has been rejected on grounds of present economic policy and of the wage-fixing traditions of the CAC. Its rejection on these narrow grounds has left unresolved many other economic, social and moral issues relating to the method. Indeed, it is wholly unsatisfactory to dispose of an important social issue by insisting that the comparable-worth method 'clashes with traditional wage-fixing mechanisms' in Australia and 'in particular with the system of centralised wage-fixing machinery that has become a sacerdotal feature of the economic and industrial scene in Australia' (anon. 1986:367). Instead, what is needed is a more rigorous examination of the assumptions that underlie the method and a careful assessment of its presumed effect on the members of the workforce, whether they be men or women. These tasks are undertaken in the following chapters.

Chapter 7

Explaining the Wage Differential: Discrimination or Choice?

The emergence of the comparable-worth method followed the realisation that the disparity between the average total male and female wages remained virtually unaffected by the removal of overt occupational entry barriers and the enforcement of the principle of equal pay for work of equal value. In the United States, where entry barriers have taken a heavy battering and the equal-pay principle has been vigorously applied, the wage disparity between male and female full-time workers remains approximately 40 per cent. This led to the inference that wage disparities continued not because men and women were paid differently for the same work but because women were disproportionately concentrated in certain lower-paid occupations (Fischel & Lazear, 1986a:895).

The case for adopting the comparable-worth method rests on three basic propositions. The first is that the disparity between the wages of male and female workers is the result of discrimination that keeps women in lower-paid occupations. This proposition forms the indispensable moral foundation of the case for comparable worth. If occupational segregation is found not to result from discrimination, it can, arguably, be said to reflect the personal choices made by women. It is reasonable to assume that rational human beings would not ordinarily choose lower-paid jobs unless they felt compensated in other ways: in which case the moral argument for comparable worth loses much of its force.

The second proposition is that, assuming occupational segregation and the wage differential are consequences of discrimination, the comparable-worth method is the right solution to the problem. The third proposition is that the method is not itself discriminatory.

The first proposition is discussed in this chapter and the other two in succeeding chapters.

Discrimination and the Market

We have to be careful when we use the term 'discrimination' in a political or legal context. People discriminate all the time but not all

acts of discrimination are considered illegal or even morally reprehensible. In our daily lives we discriminate between countless persons and things. To take a simple example: when we choose to buy a product of a particular brand from amongst a selection displayed on a supermarket shelf, we are discriminating not only against other brands but also against the manufacturers, distributors and all others associated with those products. In many situations, the law allows us to make irrational or even perverse choices. This freedom is a basic requirement of an economic order centred on the market.

In its efforts to secure material benefits to particular individuals and groups, the welfare state has drastically reduced this freedom by limiting our choices in an increasing number of situations. This trend has also affected the right of employers to employ individuals of their choice. Despite increasing government intervention, employers in most democratic countries continue to enjoy substantial freedom to select persons for employment and to offer appropriate remuneration for their services. Such choices are not considered to be discriminatory except when they are overtly or covertly based on non-economic considerations.

In the model of perfect competition, there is no room for non-economic discrimination. A worker's wage would be determined by his or her marginal product. In such a model, any wage differential between men and women will reflect productivity differences. The perfect market, however, does not exist even in the most hospitable political environment, since the requisite knowledge is too dispersed and hence too costly and impractical to harness in aid of each economic decision. However, the impossibility of mastering all relevant knowledge is the ultimate economic rationale for relying on the market as opposed to official determinations. The market, even in its imperfectly informed condition, reflects trends and patterns arising from the coincidence of decisions made by countless actors pursuing disparate personal ends. Hence it incorporates in its 'determinations' an extent of dispersed knowledge that no central planner could ever possess. In classical economic theory, the market is preferred not because it operates perfectly but because it is seen, owing to its abstract and impersonal nature, as more likely to enable persons to pursue their own ends than any mechanism of control. As a consequence it is more likely than any authority to reveal the value to an individual of goods and services provided by others.

Comparable-worth theory denies these attributes of the market. Feldberg states:

> The structure of the market incorporates historic customs, prejudices, and ideologies that connect the worth of different kinds of work with ideas about the inherent worth of workers who vary by sex, race, age, ethnicity, and other social characteristics. It is these customs, prejudices and ideologies, modified by the effects of struggles between workers and employers, rather than the nature of work or any natural economic laws, that have shaped the basic framework of wage determination. This process has systematically disadvantaged women, who have been seen as people whose primary attachments are or ought to be home and family. (Feldberg, 1984:319-20)

This argument is conceptually and factually erroneous. It confuses the market with factors that adversely affect the market. For example, in Australia, the wages of a majority of workers are determined by awards. In particular, the 'national wage case' decisions have a critical bearing on the wage levels of categories of employees. The decisions made by the Australian Industrial Relations Commission (AIRC), formerly the Conciliation and Arbitration Commission (CAC), are generally followed by State tribunals. Historically and until recently the CAC adopted a 'needs' approach to wage fixing. In 1907, Justice Higgins, in the *Harvester* judgment, established the notion of a basic social minimum wage of males. It was based not on the value of services but on the necessity of a male worker in providing for the needs of a wife and two or three children (O'Donnell & Hall, 1988:48). The female minimum wage was based on the supposed needs of a single woman. In 1919 this wage was set at 54 per cent of the male minimum wage. In later times, the CAC gave more consideration to the employer's capacity to pay wages. Yet the 'needs' concept persisted as female wages were fixed in relation to male wages. Until 1967, the CAC also allowed payments above the minimum wage, on account of skill, experience or difficulty of the work. These 'margins' were effectively determined by the Metal Trades Awards dictated by the powerful metal workers' unions. Not surprisingly they rewarded the sorts of skills and attributes that metal workers possessed. The 'flow-ons' or the adjustment of relativities was carried out in a 'wage round'. The guiding principle in these determinations was that of 'comparative wage justice', which meant that those who did the same or similar work should be paid equal wages. This principle tended to favour occupations involving work or skills similar to those done or possessed by metal workers. O'Donnell and Hall observe:

> Traditionally, wage flow-ons from the Metal Industry Award have occurred first in the areas with strong trade unions and/or a strong parent relationship with the Metal Industry Award. Industries where women predominate, particularly the clerical and service sectors, came much later in the wage round. Thus, the lag effect which occurs during decentralised wage fixation widens wage differentials until the 'wage round' is complete. (O'Donnell & Hall, 1988:50).

The work of the CAC throughout this century certainly demonstrates that it is nonsense to speak of a free labour market in Australia at non-managerial levels. Historically, if women in Australia have been discriminated against in the sphere of wage fixing it is because of the dynamics of a highly regulated industrial-relations system that gives powerful unions the preponderance of power in wage negotiations and has traditionally paid little attention to the economic value of labour to individual employers, in the marginal or any other sense. In countries such as the United States, where collective bargaining plays an important role in wage fixing, the monopoly position of some unions creates serious distortions of the labour market. As O'Donnell and Hall remark, the highly 'decentralised labour market bargaining in the US has meant wide variation in the payment workers receive, with the best rates going to workers with the most industrial muscle' (1988:43). Thus the accusation that the labour market is discriminatory is misleading to say the least. The accusation is based on the intellectual confusion of the abstract principles of the market with measures that are designed to regulate, in one way or another, the concrete operation of the market.

Although the market, in itself, is not discriminatory, there has been discrimination in employment against women and other groups. Discrimination often results from interference with the market. The key question in the comparable-worth debate is whether the concentration of women in certain occupations and the payment of lower wages in these occupations are the results of discrimination. The question of why women are concentrated in certain occupations has drawn different answers. However, they fall into two broad categories that for convenience may be termed 'discrimination theories' and 'life-choice theories'.

Discrimination Theories

In the past, barriers to female entry were identified with paternalistic laws that were said to perpetuate social stereotyping of women. It was argued that protective laws such as those against employment of

women in hazardous work and against voluntary overtime helped to lock women into typically female jobs. Despite progressive repeal of these laws, women were observed to remain in particular occupational categories. This gave rise to the new wave of discrimination theories. Four of these are examined in turn.

(i) Employers in certain occupations have a taste for discrimination. This theory holds that employers in some job categories exclude women because they have a distaste for women in such jobs (Becker, 1971:39-50). This is a highly questionable proposition. First, it assumes without significant evidence that employers choose to allow their tastes to dominate their economic judgment. By artificially limiting the pool of available labour, employers not only deprive themselves of the use of talent but also push up the price of available labour. Second, it is evident that employers have no distaste for working women in general as women are in fact employed in many job categories. Hence, if anything, employers have a selective distaste that makes them dislike women in particular occupations. This is very difficult to explain except in terms of wider factors such as social mores. In other words, preference of males in certain occupations cannot be explained only in terms of the taste of employers. Third, even if they usually hire men in preference to women, employers may not be motivated by discrimination at all. They may simply be responding to the tastes of their other (male) employees or the tastes of their customers. For example, if customers are unlikely to buy a car assembled by a female assembler (due to an irrational belief that such cars are defective or inferior), an employer's reluctance to employ women or to pay them the same salary as they pay men may be simply a reflection of the customers' tastes. This rather trite point is made by many authors such as Milton Friedman who, in *Capitalism and Freedom*, comments on fair-employment legislation. He remarks that 'employers are transmitting the preference of either their customers or their other employees when they adopt employment policies that treat factors irrelevant to technical physical productivity as relevant to employment' (1962:112). His comment implies that women are hired only when 'the wage difference between male and female labor is large enough to compensate for the disutility they incur by hiring women' (Blau & Jusenius, 1976:184).

(ii) Male-dominated labour unions force employers to discriminate against women. This theory implicitly concedes that if employers were left alone with market forces there would be no discrimination in employment, but that such discrimination was

thrust upon employers by unionised male workers. Feldberg spells out this theory:

> The capitalists, however, lacked complete control of the supply of labor. Resistance came from many quarters. Married women avoided industrial employment whenever possible. As early as 1835, skilled men led the fight to exclude or restrict the labor of women and of children. By the 1870's they did so through their unions, using such tactics as barring women outright, requiring long apprenticeships, organizing women into separate subordinate unions, or leaving them unorganized . . . Through their unions, the men fought for wages that recognized their traditional claims as skilled craftsmen and for conditions of work that accommodated their manliness. What they did not do was to aid women in organizing themselves to fight for comparable pay and conditions . . . The results were male job monopolies that excluded women and children (and later all members of particular ethnic and racial groups) and an institutionalized gender hierarchy of wages, which left men the main breadwinners and women economic dependents. (Feldberg, 1984:315)

There is no doubt that unions have much to answer for in respect of the severe distortions of the labour market that we observe today (Gunningham, 1986:240). But it is simply untrue that unions were responsible for making 'men the main breadwinners and women the economic dependents'. This social feature predates unions and even guilds by many thousands of years. Indeed, this feature characterises societies that have never known unions or guilds. Feldberg faults male unionists for their failure to assist women workers. But she does not explain why women workers did not 'assist' themselves. She assumes that there was always a sharp dichotomy of interests between male and female workers that led male workers to suppress female interests. She, like many other comparable-worth theorists, does not entertain the possibility that job segregation might have resulted from a congruence of male and female interests.

(iii) Social discrimination confines women to certain occupations. The most sophisticated of the discrimination theories holds that discrimination does not start at the workplace but in the wider society. According to this theory, subtle society-wide prejudices may induce women to avoid certain occupations and encourage them to specialise in the production of household services. Those who favour this

explanation warn against what is known as the fallacy of voluntarism, according to which it should not be assumed that occupational segregation, and its concomitant depressed wages, are the result of personal choices of women. In this context, they argue that occupational segregation is the result of culturally or environmentally induced expectations, which make it difficult for women to escape from the constraints of domesticity (Gale, 1990:10). In its extreme form, the theory asserts that the 'choice' of women to engage in child bearing and nurturing is itself a result of social discrimination (Fischel & Lazear, 1986a:897-8, 905). We do not contest the proposition that women, like other groups, have suffered active discrimination from time to time. But the proposition that discrimination accounts for the specialisation of women in the provision of household services and their confinement to particular occupations is empirically highly suspect.

This theory is plausible to the extent that it highlights the fact that women's occupational choices are strongly influenced by social expectations. But the theory commits a category mistake when it asserts that such 'social inducement' necessarily amounts to a form of discrimination. It implies that women have had no significant part to play in relation to the growth of social institutions, so implicitly reducing women to a stereotype of mindless and helpless beings incapable of making intelligent choices. More seriously, the theory totally disregards the evolutionary character of many social structures (see generally Hayek, 1976:35-54). It ignores the vast body of historical, sociological and scientific knowledge that points to the growth of society in patterns reflecting its continuous adaptation to the needs of survival. This innocence on the part of some discrimination theorists prompted a perceptive social commentator, Michael Levin, to say that 'one of the more ominous themes in the comparable worth campaign is its implicit claim that the spontaneous social factors which affect women's vocational choices are themselves forms of discrimination calling for government correction' (Levin, 1984:14).

One of the serious, and perhaps unintended, consequences of this theory is the stereotyping of women into a 'discriminated against' class, which by implication denies the fact that many women are capable of making meaningful life choices and indeed have not been discriminated against. This tendency to regard all women as members of a disadvantaged class, rather than as individuals, stigmatises those who have freely and willingly chosen 'typically' female careers. This stereotype involves a wholly deterministic, empirically unsound view of social life. Its existence is unexpected in view of the fact that

comparable-worth advocates want to repeal all stereotypes which, presumably, are embodied in paternalistic legislation.

(iv) There is discrimination not against women as a group but against individual women. This point of view freely concedes that occupational segregation largely reflects the wishes of a majority of women who opt for occupations that accord with their lifechoices. In other words, adherents to this view agree that stereotypes are useful indicators of what the majority of women want to do. However, they object to stereotyping to the extent that they are used to prevent individual women who want to pursue atypical (or typically male) careers, to freely choose their occupations. They persuasively argue that employers who reject females on a stereotypical view of women, without allowing individual women to demonstrate that they do not fit the stereotype, are guilty of discrimination. Although stereotypes may be valid generalisations based on experience, they are nevertheless a poor substitute for case-by-case assessment of individual abilities, aptitudes and career tendencies of particular female job applicants.

This argument is really aimed at removing barriers to employment and not at removing pay differentials. In concrete terms the argument calls for the dismantling of paternalistic laws and practices to the extent that these restrict the occupational choices of women. For example, those who make this argument will approve of a law preventing women from being **required** to work overtime but will disapprove of it if its effect is also to prevent individual women who want to choose to do overtime from doing so. Thus, such modification of paternalistic legislation enables those women who want to pursue non-traditional jobs (and are qualified and suited for them) to seek such work while prohibiting employers from forcing women into these jobs. This approach would lead us to approve of the opening-up of military service for women (including combat service) as long as the individual freedom of those women who dislike military service (for whatever reason) is not impeded by making such service compulsory.

Life-Choice Theories

Life-choice theories discount discrimination as the sole or dominant determinant of occupational segregation. They emphasise factors related to the life choices that women make. In 1985, the US Commission on Civil Rights came to the following finding on the issue of male-female wage disparity:

> The wage gap between female and male earnings in America results, at least in significant part from a variety of things having nothing to do with discrimination by employers, including job expectations resulting from socialisation beginning in the home; educational choices of women who anticipate performing child-rearing functions in the family and who wish to prepare for participation in the labour force in a manner which accommodates the performance of those functions, like the desire of women to work in kinds of jobs which accommodate their family roles and the intermittancy of women's labour force participation. (US Commission on Civil Rights, 1985:70)

This report has been dismissed by some feminist writers as an 'example of an anti-comparable worth rhetoric' (Brown, Baumann & Melnick, 1986:127). But the hypothesis has been strongly supported by the microeconomic investigations of human-capital theorists, which suggest that the concentration of women in lower paid occupations results principally from the lower investment in human capital that women make on account of their life choices. According to this theory, women **as a group** 'accumulate less human capital through work experience because they spend proportionately fewer years in the labor force than men' (Blau & Jusenius, 1976:185).

The principal piece of evidence used to support discrimination theory is the disparity between total earnings of males and females. This disparity is said to arise because women are 'forcibly' kept or herded in low-paying jobs. There is no logically necessary nexus between income disparities and discrimination. In any case, the income-disparity figure is itself misleading. In *Civil Rights,* Thomas Sowell describes the average total earning of women in the US as 'the 59% cliche'. He argues that the earnings gap between men and women would indeed be due to discrimination if their substitutability could be established. But he denies that this can be done. Sowell argues that we can sensibly compare the salaries only of people who are comparable, such as employed women who have never been married and employed men who have never been married. The statistical evidence used by Sowell indicates that there is no wage disparity between these two groups. On the other hand, Sowell argues that there can be no sensible comparison between married women and married men as marriage has different effects upon the two groups. Specialisation tends to take place within marriage, with males likely to pursue their careers more aggressively and women often giving up careers or

pursuing them less aggressively to produce more household services, particularly with the advent of children (Sowell, 1984:92-9). This point is also incisively made by Kondratas:

> The pay gap between married men and unmarried men is about the same as between men and women overall. Married men earn far more than unmarried men and married men with children earn even more than married men without children. There is almost no pay gap between single men and single women. Think about that. Married women, on the other hand, earn far less than single women, and married women with children earn less than married women without. Obviously this reflects not labor market discrimination, but the different roles of men and women in the family. (Kondratas, 1986:3)

Fischel and Lazear contend that not only marital status but also family size and age are crucial to the explanation of the wage gap. The larger the number of children, and the greater the spacing between children, the larger the wage differential. Age matters as well, with the differentials being smallest in the early years, then increasing until age 40 and declining thereafter (Fischel & Lazear, 1986a:899). George Gilder argues that given their life choices, some women who gain credentials and qualifications may in fact convert them into more leisure time and time with their families (Gilder, 1984:87; 1986:142). Babette Francis points out that the assertion of the wage differential as evidence of discrimination ignores 'factors such as voluntary overtime, the fact that women choose jobs that combine with their homemaking role, and they often reject promotions if it involves out-of-town transfers' (Francis, 1987:54).

Empirical studies based on refined data tend to indicate strongly that non-discriminatory causes account for as much as two thirds of the wage differential in the US (Landes, 1977:523). In fact, the human-capital model claims to explain nearly 100 per cent of the wage differential (Polachek, 1984:45). Opposing theories have been supported by many econometric studies suggesting that the wage differential is indeed traceable to factors grounded in discrimination. Yet, sophisticated as they are, these studies suffer from a basic conceptual error. They attribute to discrimination the residual variance that cannot readily be explained in terms of economic considerations.

What seems certain is that the discrimination theory fails to account for a substantial proportion of the factors affecting the wage

disparity and hence clearly is an unreliable basis for policy formulation. As Phyliss Schlafly pointedly remarks, the 59 per cent factor 'tells you as much about sex discrimination as the statistic that the average temperature in the USA is 66 degrees tells you about whether to wear a coat in Chicago today' (quoted in Francis, 1987:55).

The evidence provided by these writers does not explain **why** many women make life choices that may largely account for the earnings gap. An attempt to ground these choices in the 'nature' of women would inevitably attract severe criticism. For example, John Stuart Mill argued in his 1869 essay *The Subjection of Women* that we cannot say that 'the **nature** of the two sexes adapts them to their present functions and position, and renders these appropriate to them'. He continued:

> Standing on the ground of common sense and the constitution of the human mind, I deny that any one knows, or can know, the nature of the two sexes, as long as they have only been seen in their present relation to one another. If men had ever been found in society without women, or women without men, or if there had been a society of men and women in which the women were not under the control of the men, something might have been positively known about the mental and moral differences which may be inherent in the nature of each. What is now called the nature of women is an eminently artificial thing — the result of forced repression in some directions, unnatural stimulation in others. (Mill, 1984:276)

More recently, Janet Richards has insisted in her philosophical essay *The Sceptical Feminist* that we could know the nature of women only if we allow them to function in many different environments (Richards, 1980:54). Of course, the views of these writers do not disprove that women are naturally inclined to seek typically female jobs. In any event, if it were possible to obtain a full understanding of the 'nature' of women, there is an even chance that present behavioural patterns are reflected in it. In the ultimate analysis, these writers question the value of prevalent culture. Their views are compatible with those who argue that social prejudices are responsible for the existence of occupational segregation.

If, as life-choice theories propose, occupational segregation has more to do with the choices that women make than with discrimination, the question must be asked what purpose would be served by

efforts to modify the present gender distribution within occupations. It can reasonably be argued that such efforts are justified if they do not interfere with women's choices and have no other unacceptable social or economic cost to society. But studies show that such efforts do have substantial costs. The nature of these costs is examined in the succeeding chapters.

Chapter 8

Can Comparable Worth Integrate the Workforce?

The theories discussed in the previous chapter indicate that the causes of occupational segregation are diverse. The evidence relating to these causes is mainly anecdotal; hence, opinions are largely impressionistic. A major impediment lies in the path of acquiring precise knowledge of the factors that lead women into particular occupations. This impediment consists of the impossibility of unravelling the complexities of the individual mind and of categorising and quantifying the countless diverse factors that affect the life choices of individuals. Even to attempt such a study on a worthwhile scale may involve researchers in unacceptable intrusions into the privacy of individuals. What can reasonably be concluded from available evidence is that discrimination fails to account for a major proportion of factors affecting occupational segregation. If this be so, it can be argued that choice plays an important part in female job selection. If the implementation of the comparable-worth method impinged upon such choices, its moral justification would be seriously weakened. However, even if discrimination were to account for the existence of occupational segregation, it must still be examined whether the method is in fact capable of eliminating job and wage imbalances. If not, it can serve only the sectional interests of some female subgroups and is therefore unjustified in terms of its own rhetoric. As Holzhauer, a comparable-worth advocate, points out, if 'all the remedy accomplishes is to raise the wages of some women in some female-dominated occupations, comparable worth will not have achieved its ultimate objective' (Holzhauer, 1986:930-1).

The Desegregation Argument

Holzhauer regards the comparable-worth method as a means of breaking down sex segregation in employment altogether:

> Raising wages in female-dominated occupations will cause more men to seek those jobs, men who would otherwise have gone into male-dominated jobs. But that is not all; the movement of men into female-dominated jobs can be ex-

> pected to make room for women in the previously male-dominated jobs, further breaking down sex segregation . . . Previously female-dominated occupations will attract more men as a result of increased wage levels. Traditionally male-dominated occupations — no longer enjoying the recruiting advantage of comparatively high wages — will lose potential male workers to the previously female-dominated occupations. Employers in these male-dominated fields will either have to bid higher to recruit males or open up their work forces to women. (Holzhauer, 1986:931)

The crux of this argument is that comparable worth desegregates the workforce by creating vacancies in male-dominated occupations that can then be filled only by women, as men have been induced to take up jobs in female-dominated occupations owing to comparable wages. This argument is also proffered by Finley. She remarks that it is 'plausible to argue that if the wage disparities between predominantly female and predominantly male jobs are narrowed, then both men and women will be freer to choose what they really want to do, without feeling economically compelled' and that one 'could argue that the most choice-enhancing policy is to pay all jobs the same, so that all potential economic coercion is eliminated' (Finley, 1987:928-9). Finley implies that there are men who really prefer to pursue a career in a typically female occupation but who cannot bring themselves to do it due to the higher pay offered for working in a male-dominated job. If the wage imbalances between typically male jobs and typically female jobs are narrowed, then, so the argument goes, these men would be able to seek these 'female' jobs without feeling any compunctions, thereby promoting the integration of the workforce.

This desegregation argument begs the very crucial question whether vacancies in male-dominated occupations generally attract female applicants. The argument assumes an affirmative answer. If, however, the answer is negative, the reason must be human-capital investment, personal life choices and even discriminating entry barriers. Whatever the cause, it is clear that the mere creation of vacancies in male-dominated occupations through the comparable-worth method (or for that matter any other method) cannot desegregate the workforce. That objective can only be achieved through a combination of measures including the removal of entry barriers and the re-orientation of male and female life choices. Needless to say, such re-orientation, if it is possible at all, would require a wide range of social controls.

Consider the hypothetical case where the wages of truck drivers and office secretaries are equated. Would the fact of equal pay induce women who otherwise would have chosen to be secretaries to compete for truck driving jobs? Conversely, would men who otherwise would have become truck drivers try to become secretaries? If such competition did take place would the ratios of men to women in these occupational categories change appreciably? The comparable-worth argument as represented by Holzhauer and Finley assumes affirmative answers to these questions. It seems clear, however, that something more than the mere equation of wages is required for women to choose to become truck drivers and for men to opt for secretarial positions. A whole new set of values and expectations on the part of both men and women and workers and employers would have to be developed. The comparable-worth method cannot achieve this alone.

The desegregation argument is also suspect at a more basic level. Consider again the hypothetical case where the wages of secretaries are raised to the level of truck drivers'. Assume also that employers generally perceive males to be better truck drivers and females to be better secretaries. In this model, given the fact that a female truck driver costs as much to hire as a male truck driver, employers would first hire available males to be truck drivers. If vacancies remain, the employers would have to decide between two alternatives. They could hire females at the standard rate; or they could seek to lure back males who have joined the secretarial profession by offering a higher wage. This would be an economic decision based on productivity and cost effectiveness. Assume that employers successfully choose the latter option. If the practice of hiring male truck drivers at a higher wage continues (and this is perfectly possible within the dynamics of competition) a wage gap would re-open between truck drivers and secretaries. Comparable-worth theory would then demand that the wages for the two occupations be re-equated at the higher level. The cycle could be repeated to the point when the marginal cost of hiring another male truck driver equals the marginal product. Beyond this point, employers would seek alternative solutions such as sending goods by rail or buying bigger trucks. The only means of stopping a wage spiral in this hypothetical case would be to impose a wage limit for truck drivers. Comparable-worth theorists, for understandable political reasons, have not advocated bringing down male wages to the level of female wages. For the desegregation model to succeed, the productivity and socialisation factors must be eliminated from consideration. If not, the model is too unreal to be useful. Holzhauer

argues that raising wages of typically female jobs will create an incentive to industry to stop discriminating, the incentive being the money saved by agreeing to open up its labour force to women (Holzhauer, 1986:930). But this makes the critical unproven assumption that in every case employers will save more money by hiring women at the lower equal wage than by hiring men at a higher rate.

The desegregation argument involves the assumption that a desegregated workforce cannot be achieved without raising the wages of typically female jobs. Most comparable-worth advocates argue that women in typically female occupations are paid less than men in comparable occupations because women's work has been traditionally undervalued. They argue that employers have the desire and the ability to disregard market prices when it comes to fixing wages in typically female jobs. As Fischel and Lazear point out, this argument makes the highly unrealistic assumption that wages in female-dominated occupations are set below the competitive level by a massive cartel of discriminating employers (Fischel & Lazear, 1986b:952). Some comparable-worth literature implies that such cartels are formed by the pervasive 'taste' among employers for discriminating against women. As noted above, the evidence is inconclusive on the question whether such 'taste' is a substantial factor in maintaining the wage gap or the segregation of the workforce.

The 'Overcrowding' Theory

From the economic standpoint, the more persuasive argument is that typically female occupations draw less pay because they are more overcrowded than most typically male occupations with which they are sought to be compared. This overcrowding can occur either because a greater proportion of women choose these jobs or, as some argue, because they are forced into these jobs owing to barriers that keep them out of typically male jobs. Whatever the reason, the overcrowding exerts a downward pressure on wages in the typically female jobs. The comparable-worth response is to overcome the market-induced depression of female wages by applying what proponents of the method consider to be a more rational method of wage setting. Such a method is expected to raise female wages to the levels of comparable male wages.

But raising wages in typically female occupations does not necessarily mean that the wage gap will be eliminated or even substantially reduced. The comparable-worth method can offset market-induced depression of female wages only by disregarding the

marginal value of labour. To be effective, the method must ignore the employer's willingness or, for that matter, his ability to pay the determined wage. The method says to the employer 'if you wish to employ women in the typically female occupation F you shall pay them X, which is what you pay males in the comparable occupation M'. In other words, the method increases the employer's labour costs by raising the cost of employing persons in occupation F. If the employer can, as often is the case, profitably bear only a certain level of labour cost, he will be compelled to operate with less labour or curtail the operations themselves. Either way, there will be a reduction in employment. The cost cutting may occur in occupation F, which is where the employer is asked to pay more than what marginal values dictate. Thus the increase in female wages may well be offset by reductions in female employment. This possibility is not conjectural; it has indeed been shown to occur in comparable contexts. Professor Landes, for example, found in a study of fair-employment practices laws that gains in black wages were partially offset by increased unemployment among blacks (Landes, 1968:544-5). According to Judge Posner, Landes's study tends to confirm the hypothesis that measures requiring employers to pay particular groups more than their marginal product serve as economic incentives to employ fewer numbers of such groups (Posner, 1987:517). This point is also made by Lindsay:

> The fact that a job is rated at a particular level does not ensure that it is worth this amount to employers. On the contrary, if jobs are rated at more than their true productivity, we can be sure that employers will simply eliminate these positions. Raising the permissible level of pay for a position above its productivity does not result in higher pay for the employee; it results in the loss of a job. The effect of altering wages away from their market-determined level in either direction is therefore to reduce employment for both male and female workers. (Lindsay, 1984:159)

There is also Australian evidence relating to this hypothesis. When the sex-related 20 per cent wage differential was abandoned by the Conciliation and Arbitration Commission in the early 1970s, there was an immediate and significant increase in the female share of the aggregate wage bill. However, there was also an immediate (although fairly small) increase in female unemployment. More significantly, there was a one third reduction in the expected growth of female

employment for the remainder of the decade (Weiler, 1986:1776-7).

Some comparable-worth advocates concede that there will be short term disadvantages to women and contend that they will be offset by longer-term consequences. As mentioned above, they envisage that higher wages in typically female occupations will inevitably draw men into these occupations thereby creating shortages in typically male occupations that can be supplied only by female labour. We have already argued that this scenario involves a number of assumptions, the chief of which is that the present segregation of the workforce has little or nothing to do with the coincidence of life choices made by countless individual males and females. As we argued in Chapter 7, this assumption is factually suspect. In its most sophisticated form the assumption is that life choices of women are in fact determined by forms of social discrimination that assign to females different roles from those assigned to males. We argued that the socialisation processes that affect the life choices of males and females have no necessary connection with discrimination of females by males and that they could as easily be accounted for by factors having nothing to do with discrimination.

Even if job segregation results from social discrimination, as alleged, comparable worth by itself does little to eliminate this discrimination. Comparable-worth theory assumes that the equalising of wages will automatically lead to the cross migration of male and female workers on a scale sufficient to achieve occupational integration and hence aggregate wage parity. But such integration depends on the degree to which the method can socialise an alternative set of perceptions, values and attitudes. Even stout defenders of the comparable-worth ideal concede that the method, to achieve its objectives, must be supplemented by direct assaults on entry barriers (Holzhauer, 1986:930).

Comparable Worth and Job Evaluation

The desegregation argument presumes that occupational segregation can be overcome only by securing 'just' rewards for workers whose work has been unjustifiably undervalued. The comparable-worth method of wage setting involves the implementation of the principle that different jobs of equal 'worth' to their employer should be remunerated equally. This principle is sought to be achieved by job-evaluation procedures aimed at establishing the relative values of disparate jobs. Thus in the American case of *Lemons* the comparable-worth claim of nurses was sought to be supported on grounds that the

work of nurses was of equal value to their employer as the work of tree trimmers, painters and tyre servicemen.

The comparable-worth principle of 'equal pay for work of comparable value' draws much of its strength from the claimed efficacy of job-evaluation procedures to determine the true worth of labour to employers. But here we face our first difficulty with comparable-worth methodology. What do comparable-worth theorists mean by the terms 'value' or 'worth' to the employer? As we noted above, if the comparable-worth method of wage setting is to achieve its goal it must ignore the marginal value of labour. Otherwise it would for the most part replicate the outcomes of the marketplace: which comparable-worth theory holds to be unacceptable. The consequences of ignoring marginal values can be serious, as Fischel and Lazear demonstrate in relation to the 'comparable worth' of water and diamonds:

> Water is cheap because of its relative abundance. The first units of water are necessary for life and thus are surely worth more than diamonds. But more water exists than is necessary to support life. Thus, each additional unit of water is worth less than the first and the last marginal units can be used for such nonessential activities as swimming. Raising the price of water to its intrinsic (average) value would preclude its use for swimming even if an ample supply exists for this purpose. (Fischel & Lazear, 1986a:900)

Similar difficulties arise in relation to the comparable-worth claim of nurses in the *Lemons* case. Clearly, the work of the first nurses is more valuable to Denver than the work of the first tree trimmers, the need to save lives being more urgent than the need to trim trees. But the work of each additional nurse would be worth less to Denver. If the wages of nurses is fixed at its intrinsic value, Denver may no longer be able to afford nurses for any but the essential tasks. Such wage fixing can have a depressing effect on overall employment.

Does the above argument hold good for the public sector? It is a common perception that the public sector is either unaffected by market forces or ought to defy the dictates of the market in its expected role as the ideal employer. It is widely thought that the public sector, to varying degrees, is insulated from the discipline of the market. The administrative (non-commercial) agencies of government can pass on the costs of their social experiments to the taxpayer. The commercial agencies of government that have monopoly status can pass on such costs to the captive consumer (the taxpayer by another name). The

non-monopolistic commercial agencies of government are more directly subject to market pressures. But even these usually expect to be subsidised from tax revenue. Is the economic argument against comparable worth valid in relation to the public sector? In other words, can the cost of comparable worth in the public sector be funded without hurting anyone? The answer seems clearly in the negative. In a world of finite resources, a government that subsidises any activity must make a saving elsewhere. Thus, even in the most comprehensively monopolised and regulated economy, subsidies have their costs. They may not be apparent immediately, but as the communist states painfully found out, the more these costs are ignored, the greater they become.

Comparable-worth advocates frequently point out that job evaluations are a common industrial practice and argue that comparable worth merely seeks to make such evaluations fairer and mandatory. But there are important differences between proposed comparable-worth evaluations and industrial practice. Employers undertake job evaluations as part of market research. Job evaluations help employers hire or retain workers by providing information about the prevailing market value of particular categories of labour. Comparison of jobs is a useful analytical tool for this task. Such evaluations are usually undertaken to determine how much employees should be paid in a free-market economy, in which a job has monetary 'worth' only in relation to what someone is willing to pay for it (Brook, 1990:13). Of course, there always remains a possibility that an employer may underpay his employees even after such an evaluation study has indicated that they should be paid more. Such a situation would arguably occur when employers, in conducting a prevailing wage survey to determine wage rates for women who work in predominantly female jobs, survey only lower-paying firms. The use of such a procedure would yield unjust results if, concurrently, an employer were to survey higher-paying firms to determine wages for men who work in predominantly male jobs (Grune, 1984:5). Yet, ultimately the determination of the wage depends on the supply of, and the demand for, the particular type of labour. Assume that a managerial job evaluation finds that secretaries and data processors rate equally on a common scale. However, if data processors are harder to find than secretaries, the management will have no option but to pay data processors more than secretaries. Thus, commercial job evaluations ultimately take account of these market-related premiums (Carter, 1981:794). Comparable-worth analyses disregard these premiums.

The Subjectivity of Comparable-Worth Decisions

Our argument thus far has been that job evaluations conducted within comparable-worth theory do not reflect the true economic value of labour, since they ignore supply and demand factors. But if such market forces are disregarded, the evaluation of a job necessarily involves subjective judgments. This point is made forcefully by Phyllis Schlafly, a leading opponent of comparable worth, who argues that once market-related determinants are ignored, any 'evaluation of jobs depends on an almost endless series of arbitrary and subjective judgments' (Schlafly, 1985:3). Ironically, even some prominent feminists admit that job evaluation studies are inevitably infected with 'subjectivism'. For example, Margaret Thornton writes that the 'main drawback of the job evaluation study is that it is not possible to eradicate the subjective element because the criteria for selecting and analysing jobs, the writing of job specifications, ranking and weighting are necessarily influenced by the perceptions and biases of the personnel carrying out the study' (Thornton, 1981:480). Burton, Hag and Thompson admit that despite 'the apparent scientific basis of the techniques which use numerical measures to evaluate job worth . . . the literature on job-evaluation techniques is consistent in its emphasis on the subjective judgments that inevitably form a part of the evaluation process' (Burton, Hag & Thompson, 1987:3). Although these authors agree that there 'is no such thing as an "objective" job evaluation system' (Burton, 1988:3), the inherently subjective nature of an evaluation is not usually seen by them as a major deficiency associated with the comparable-worth method. As Richard Townshend-Smith has argued, there is no point in criticising evaluation techniques for their presumed 'subjectivism' if no objective evaluation criteria can possibly be found (Townshend-Smith, 1984:213).

While it is true that most evaluation techniques concentrate on knowledge, skills, effort and working conditions, additions and deletions of this list can easily be made to suit a predetermined outcome. This problem is compounded by the fact that different meanings may be attributed to the same factors that are chosen by comparable-worth evaluators. For example, what is to count as a 'skill' is open to reasoned debate; some definitions of this factor may even contradict one another.

It is clear that the selection or omission of some factors will either favourably or adversely affect a decision on the worth of a job. For example, the exclusion of the 'working conditions' from the list of factors to be evaluated disadvantages people who do 'dirty work'

because no points could be earned for performing work in unpleasant conditions. A further subjective judgment has to be made by the evaluator when determining the weight to be assigned to each factor. Evaluators could easily skew, within the allowable spread, the results of an evaluation by increasing the points that could be earned for a particular factor while decreasing those for another factor. Thus, the assignation of fewer points to the 'working conditions' factor than to the 'knowledge' or 'scholarship' factors would arguably advantage those employees who are formally educated and possess relevant paper qualifications. If this were to happen, a labourer whose job is rated lowly may well ask why society should value bureaucrats, academics or diplomats more highly than people who do 'dirty work'. By skilfully manipulating a points system, it becomes possible to elevate the worth of characteristics that are usually associated with white-collar jobs and to depress the worth of other characteristics, particularly those associated with labouring jobs.

Given the endless number of subjective judgments involved, the comparable-worth method is questionable as a scientific wage-setting method, since it seeks to measure what is really unmeasurable (Moens & de Lacey, 1985:10). The subjectivism may start, in fact, with the selection of an evaluator. Evaluators are seldom independent adjudicators but are hired to attain a specific result, and therefore may be inclined to skew the results in favour of the paying agency. Commenting, in June 1985, on the subjective nature of the comparable-worth method, the US Commission on Civil Rights concluded that the method 'is profoundly and irretrievably flawed' (Schlafly, 1985:4). For the same reason, the District Court Judge, who wrote the judgment in the *Lemons* case, remarked that the comparable-worth method is 'pregnant with the possibility of disrupting the entire economic system' (17 FEP Cases, p.907).

A government that implements the comparable-worth method of wage-setting would be confronted with constant attempts to reclassify jobs. Indeed, following the implementation of the method, it is not altogether unreasonable to expect that workers would constantly try to demonstrate that their jobs are more complex than they really are. Stated differently: the comparable-worth method might encourage workers to concentrate on factors that look important on the job evaluation itself, whereas those factors that are unlikely to yield 'desired' results would be overlooked. Indeed, this might be the reason why in the United States little credit is given for 'physical exertion', a factor that some organisations representing women regard as dis-

criminatory. Constant reclassifications could not possibly increase the total productivity because too much energy would be spent by the employees on proving that their job, due to its assumed or perceived complexity, requires (or deserves) higher pay.

The subjective and arbitrary nature of job evaluations significantly undermines the moral case for comparable worth, which proceeds on the assumption that it represents a scientific way of determining an employee's 'just' wage. If job evaluations are unreliable guides to the actual value of work to employers, wage determinations based on them have the effect of coercive redistribution of incomes. If so the question must be asked: who benefits and who loses from this redistribution?

Chapter 9

The Winners and Losers from Comparable Worth

We argued in Chapter 8 that, contrary to the claims of its supporters, the comparable-worth method, by itself, cannot bring about the integration of the workforce. Even if we assume (without conceding) that current levels of occupational segregation are caused by discriminatory factors, the comparable-worth method does little to break down the existing level of occupational segregation. Indeed, once women who work in typically female occupations are given substantial salary increases, they may no longer feel the need to pursue non-traditional work. We have also noted that raising wages in typically female jobs above the level employers are willing to pay in the market may reduce the numbers of women employed in these occupations without any compensatory gains in other occupations.

The Redistributive Effects of Comparable Worth

The longer-term effects of implementing the comparable-worth method can reasonably be speculated about only if we dispassionately consider how employers are likely to accommodate comparable-worth decisions in their business strategies. The natural response of an employer would be to pass on the increased cost to the customer. However, many employers may not be able to do this without reducing their market shares. Such employers would be compelled to reduce costs. Once other options are exhausted, employers would have to reduce the numbers they employ, while demanding higher levels of productivity from those retained.

In these circumstances, only certain sub-groups of female employees in some occupations stand to gain from comparable worth. These sub-groups are likely to consist of established female workers in occupations where comparable-worth claims have been successfully prosecuted. If, as we hypothesise, the numbers employed in these occupations fall as a result of fixing wages above their market level, competition for entry into these occupations will intensify. In this competition, 'Marginal workers, such as the relatively unskilled, the

young, minorities, and middle-aged women who have recently re-entered the workforce will in all probability be the biggest losers' (Fischel & Lazear, 1986a:907). The winners in this struggle are likely to be women who are relatively privileged in terms of education and social and economic circumstance.

This is, of course, not the only way in which comparable worth can generate intra-occupational discrimination. As developed in the United States, comparable-worth doctrine envisages claims by particular groups of employees against their common employer. The basis of the claim is that the **common** employer has been paying staff in typically female jobs less than he pays staff in typically male jobs within his establishment, even though their jobs are of equal value to him. Hence, a successful comparable-worth claim will benefit only women working for a particular employer. In the United States, comparable-worth payments are essentially achieved on a case-by-case basis. Therefore, these payments would be paid only to women whose jobs are rated, in a comparable-worth investigation, as being of equal value to those of men who work in typically male occupations in the same company. It does not mean that every other employer must similarly reward workers in that occupational category. For example, if the nurses succeeded in their comparable-worth claim against Denver, it would not have meant that every other city and county would have had to match that claim, in respect of their own nurses. This case-by-case operation of the comparable-worth doctrine is likely to further widen intra-occupational wage inequalities.

The raising of salaries paid to women in predominantly female jobs would inevitably be limited to selected groups of women because not all occupations in which females predominate would be subject to comparable-worth evaluation. Indeed, if comparable-worth claims were unlimited, many claims would, undoubtedly, be trivial and frivolous and there would be a never-ending (and usually costly) process of litigation. From a practical point of view, comparable-worth legislation usually limits claims to those typically female occupations where women constitute, say, 70 per cent of the relevant workforce. It is obvious that in these circumstances a job classification with a sizable female **minority** would not be subject to comparable-worth analysis, and the benefits of this method of wage-setting would therefore necessarily be unevenly distributed among female workers. The cut-off point for determining whether comparable-worth proceedings may be instituted would involve a subjective decision of the legislator and could, moreover, be manipulated skilfully by imaginative employers.

Consider the following two scenarios. The first scenario involves a company with 100 workers employed within a job category, 69 of them women and 31 of them men. The employer's company would not be subject to comparable-worth litigation since, in our hypothetical example, only companies that have a 70 per cent female majority would be subject to comparable-worth litigation. In such circumstances, it is unlikely that the employer would hire more women. Indeed, subject to a successful comparable-worth decision, if the employer were to hire one more woman, he would have to raise the salaries of **all** his female employees. Thus, since one more female employee would significantly increase the operating costs of the company, men would be hired or (more likely) no one would be hired.

Our second scenario involves the same company but with a majority of 71 female workers and a male minority of 29 workers. It is reasonable to expect that, in this situation, an employer would be keen to invent reasons for dismissing two women in order to avoid costly comparable-worth litigation that may result in his having to pay large wage rises. On the facts of either scenario, the implementation of the comparable-worth method is likely to result in a decrease in women's employment.

This raises the interesting question whether wage adjustments would have to be made each time the total number of female employees increases or decreases. If so, then the amount of the salary payments would be dependent on a factor that is not market-related because the salary payable would depend on how the employer reacts to the comparable-worth method. But the major point in this discussion is that the assumed benefits of comparable worth would not be uniformly distributed among all working women: it would in effect be a discriminatory and discretionary (and largely cosmetic) band-aid solution to the problem of occupational segregation. An across-the-board pay raise for all women would make more sense since it would benefit all employed women. The arbitrary effects of the comparable-worth method would be felt even more if men were to compare their wages to those of women, whose salaries may previously have been raised consequent to work evaluation. It is clear that the method can thus severely disrupt the industrial-relations system in the absence of ever-increasing government legislation and regulation.

Comparable Worth and Male Blue-Collar Workers

Even a perfunctory study of the comparable-worth literature reveals that the jobs of blue-collar workers are systemically downgraded. For example, in the *AFSCME* case, the state of Washington Job Evaluation

was undertaken by Norman Willis & Associates. The evaluation study valued truck drivers at 97 points, electricians at 193 and nurses at 573 points. It determined that the 'mental demands' on a nurse were worth 122 points, whereas the mental demands on an electrician were worth 30 points and on a truck driver only 10 points. This study had also a comparison which alleged that laundry workers (who are mainly female) are paid 40 per cent less than truck drivers (who are mostly male), even though their jobs were deemed to be of equal value. The Minority Report of the Illinois Commission on the Status of Women, commenting upon this result, humorously points out that 'Most people would say that . . . there is something the matter with the common sense of the experts' who claim 'that persons who dump loads of laundry into washing machines are "worth" the same wage as persons who drive big trucks on the highways' (Schlafly,1984:238).

It is not unusual to read in the relevant literature that it is unfair that men without a high-school education should earn more than a woman graduate. If this view predominates, then it is not surprising that the importance of the 'knowledge' and 'scholarship' factors of an evaluation study will be overestimated, whereas the 'working conditions' and 'physical exertion' factors will be undervalued. If this were to happen, a comparable-worth evaluator would be artificially raising the worth of paper credentials, thereby unwittingly or unintentionally promoting a paper chase among prospective applicants for jobs.

In this context, a comparison with cases dealing with access to employment is instructive. There has been a discernible trend in some Western societies to place less emphasis on paper qualifications and educational achievements during the selection process of prospective employees. Indeed, the supporters of affirmative action emphasise that positions that were formerly closed to women and minorities should be opened up by allowing the greatest possible number of people to compete. This opening-up of positions to all is usually achieved by disregarding qualifications that are not directly related to the successful performance of a job. Thus, selection guidelines increasingly emphasise the need for job-relatedness of the selection tests in order not to cull out people who, on proper testing, may turn out to be better than those who in the absence of an affirmative action program would have been hired.

The social importance of this development has been confirmed by the US Supreme Court in *Griggs* v. *Duke Power Company* [1971] 401 U.S. 424 and its numerous progeny cases in courts at all levels. In *Griggs*, the Supreme Court found that racial discrimination had oc-

curred when a required qualification was not a genuine occupational qualification justified by business necessity. It could be argued reasonably (but not proven conclusively) that the linking of qualifications to the performance of the job while disregarding other qualifications that are not immediately relevant may have improved the upward mobility of minorities and women. In any case, the affirmative-action movement, in paying less attention to paper qualifications, aims at greater job mobility in order to improve the career opportunities of job applicants. Thus, the affirmative-action movement, to the extent that it de-emphasises the importance of paper qualifications, may produce results incompatible with the comparable-worth method which, as we have argued, tends to inflate the 'worth' of these qualifications. Persons who advocate both affirmative action and the comparable-worth method need to be aware of this risk of intellectual inconsistency.

The comparable-worth method, in overemphasising the worth of paper qualifications facilitates a redistribution of positions away from lower-class men to upper-class women. This point is made by George Gilder:

> One group in our society . . . really suffers from the feminist campaign for Comparable Worth . . . they are generally lower, middle-class men who are desperately working to support their families. Their aggressiveness and commitment to the work force far exceeds the commitment of most of us. These husbands and fathers are the ones who would have to give up pay and advancement under this new proposition of Comparable Worth. In other words, a Comparable Worth society would take money and jobs away from lower-class men with high school diplomas or less and large families to support, and give money and jobs to upper-class women with credentials and qualifications. That is the essential shift throughout the economy that is being advocated today by the Comparable Worth movement. (Gilder, 1984:88)

If Gilder is correct in arguing that the comparable-worth method discriminates against blue-collar workers, it could represent a major political and electoral liability for any government persuaded to support it. For an Australian Labor government, the adoption of the comparable-worth method could result in major political embarrassment as, once the effects of the method on the career opportunities and other life choices of blue-collar workers were felt, the government would be seen as favouring up-market and well-educated women at

the expense of its traditional constituency. A similar phenomenon has already occurred in relation to environmental issues. There is evidence that the Australian Labor Party's perceived partiality to the green lobby groups has alienated some of its traditional blue-collar support.

Comparable Worth and Women in Non-Traditional Jobs

The comparable-worth method has the potential to disadvantage women who already work in predominantly male jobs. Since such women are a minority in a male-dominated occupation, their jobs would not be subject to comparable-worth evaluations. Consequently, the salaries of these women would not be raised and their salaries might actually be frozen if a typically female job were to be rated as of equal value to their job.

An instructive and sobering example is offered by Schlafly. She refers to a comparable-worth case involving a claim brought by nurses against the state of Illinois. When the nurses claimed that they 'should be paid equally with the (mostly male) electricians and engineers, eleven female state employees in non-traditional jobs tried to enter the lawsuit as intervenors' (Schlafly, 1985:2). These intervenors all worked as correctional officers (a non-traditional job). The evaluation concluded that this male-dominated job was not worth as much as the job performed by secretaries. Illinois paid prison guards $US145 a month more than entry-level secretaries, but the comparable-worth evaluation gave secretaries twelve more points than prison guards. Schlafly describes the unusual plight of these female prison guards:

> The women prison guards claimed that the present system of compensation properly rewards them for their special skills, performance of particularly difficult, dangerous and unpleasant work, their willingness to challenge stereotypes and perform nontraditional jobs . . . Put another way, the state has found that it must pay more to hire prison guards than office personnel because of the risks on the job and the unpleasant work.
>
> Ask yourself the question, how many women would be willing to be a prison guard if the pay were the same or less than the pay of a secretary? (Schlafly, 1985:2)

Thus, one of the more ironic consequences of comparable worth may be that it will penalise women who are in the vanguard of the movement towards the desegregation of occupations.

It may be argued that this outcome is unlikely in Australia, because

comparable-worth claims are likely to be pursued through the centralised wage-fixing system administered by the Australian Industrial Relations Commission (AIRC). It may be contended that comparable-worth wage adjustments made by the AIRC will be effective occupation-wide either because of the explicit terms of the awards or through the 'flow-on' effects. No doubt this could happen. But despite its far-reaching powers (both formal and informal) the AIRC still has some significant constitutional limitations of jurisdiction. Principally, its power is limited to inter-State industrial disputes. Thus certain comparable-worth claims are likely to fall outside its purview. Although these may be entertained by State industrial-relations tribunals, there is no guarantee that there will be State-wide implementation of comparable-worth claims. Hence the chances of intra-occupational inequalities resulting from comparable-worth claims can be eliminated completely only by the enactment of uniform legislation on the subject by all State and Territory legislatures. The Commonwealth has no constitutional power to enact such a law.

Other Unintended Consequences of Comparable Worth

The comparable-worth method may conceivably disadvantage female workers in other ways. When wages in typically female jobs are legislatively raised, employers operating in market conditions have to make balancing adjustments. These adjustments are likely to include expenditure cutbacks affecting some categories of workers. As we argued in Chapter 8, these cutbacks are likely to affect adversely female employment. They will also affect male employment as employers search for new economies in the workforce. In particular, an attempt to close the earnings gap by raising the salaries of women who work in typically female jobs may result in the freezing of the salaries of blue-collar workers. This expectation stems from the fact that, in difficult economic circumstances, employers do not have a bottomless pit of money.

Decreases in male employment or the freezing of their salaries would also create hardship for women who are members of the affected families or households. These effects on women can be offset if the decrease in male employment creates increases in female employment **and** the affected women are in the labour market. However, compensatory gains in female employment, even if achieved, will not be to the advantage of one group of women, namely, those who have freely chosen to provide household services for their families in preference to outside employment. Loss of family incomes

is likely to compel these women to seek employment themselves, thereby further overcrowding typically female occupations. As mentioned above, these types of job seekers who are late entrants to the workforce will be amongst those likely to suffer most from the intensified competition for jobs. Because of their lower investment in the development of their human capital, these women will increasingly be relegated to the less rewarding, less secure and more unpleasant sectors of the workforce.

Conclusions

The comparable-worth method has been advocated as a great leap forward in the achievement of equality and pay equity for women. The case for implementing the method rests on a number of assumptions about its operation and its impact on patterns of hiring and compensation. As we have sought to demonstrate, these assumptions by no means represent the necessary outcomes of comparable worth. On the other hand, we have suggested alternative outcomes of the method. In these scenarios, comparable worth is likely to benefit certain subgroups of female workers at the expense of other female workers as well as non-working women and some categories of male workers.

In its impact, if not in its design, comparable worth favours not women in general but particular interests within the female workforce. If this proposition is valid, comparable worth represents yet another demonstration of one of the realities of the modern welfare state, namely, that much of the regulation justified by reference to principles such as 'equality' and 'social justice' in fact represents the outcomes of the distributional struggles amongst interest groups. This point is conceded even by a comparable-worth advocate. For example, Nancy Barrett argues that society has an obligation to pay wages adequate to support a family at least at a minimum level. She observes that many women are single heads of households and form the major proportion of the beneficiaries of welfare payments. She sees the raising of salaries payable to women who work in typically female jobs, through the use of the comparable-worth method, as an alternative to welfare payments (Barrett, 1984).

Such appeals to social justice and equality obscure the real nature of sectarian claims and the factors that make such claims possible in the welfare state. As F. A. Hayek demonstrated in his seminal work concerning the nature of social structures, 'social justice' is often enough not 'an innocent expression of good will towards the less fortunate' but involves the 'demand of some special interest which can

give no real reason for it' (Hayek, 1976:97). Comparable worth, according to our analysis, is precisely such a demand. In facilitating the achievement by special-interest groups of advantages at the expense of others, it undermines the fabric of a free society. At its minimum, a free society requires that an individual's legitimate expectations to develop his or her talents in a satisfying career be free from arbitrary interferences. However, the comparable-worth method, due to its inevitably subjective nature, is capable of frustrating an individual's fortunes if he or she is not a member of a preferred group. Hayek's attack on 'social justice' legislation precisely concerns the inevitability of subjectivism whenever governments and their policymakers assume the role of planners and organisers who constantly distribute and redistribute social burdens and benefits. In overtly intervening in the operation of the spontaneously-developed social order, which was previously regarded as beyond the proper reach of government, a government abandons its 'pretense to being a neutral guardian of the social order' (Unger, 1976:193). As Barbara Amiel points out, the implementation of the comparable-worth method involves 'a fundamental change in the way our society operates' (Amiel, 1985:9). It involves replacing the impersonal forces of the market with the discretions and determinations of officials exercising subjective judgment. To the extent that it seeks to remove wage-setting from the influence of the market, the method also undermines the fundamental tenet of a liberal society, namely, that individuals are primarily responsible for their own well-being.

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