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**A Comparative Analysis
Of Equal Employment Opportunities
Law and Policy in
Japan and New Zealand**

A thesis submitted in partial fulfillment
of the requirements for the degree of
Masters of Arts in East Asian Studies
at Massey University

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ABSTRACT

This thesis is a comparative analysis of Equal Employment Opportunities (EEO) law and policy in Japan and New Zealand. This study was undertaken due to the fact that Japan has had an EEO law since 1986, and New Zealand first gave EEO legislative intent in the 1988 State Sector Act. and even though these laws and policies were enacted, women's position in the workplace has only changed marginally. Thus, my thesis offers extensive sign posting, starting with an analysis of theoretical perspectives of EEO.

In Japan and New Zealand it has been noted that patterns and conditions of work in both the preindustrial and industrial economies have become differentiated by gender. The many reasons for this are and include, ideological, political, economic and social, or more accurately, a complex interaction of all of these factors.

The nature of societies and government's attitudes to EEO in both Japan and New Zealand has been poor, as has been indicated by the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Unfortunately, not enough is known in both Japan and New Zealand about EEO, for both countries to implement effective EEO laws and policies.

I propose that the long-term outcome for EEO is the elimination of all forms of unfair discrimination in employment. I propose that this will be achieved when three conditions prevail in organisations. Firstly, inclusive, respectful and responsive organisational cultures which enable access to work, equitable career opportunities, and maximum participation for members of designated groups and all employees. Secondly, procedural fairness as a feature of all human resource strategies, systems and practices, and thirdly, employment of EEO groups at all levels in the workplace.

I argue that to have operational equality in employment, it is necessary to have legislation for violators of EEO, to implement solid, strategic initiatives to EEO

and give both the private sector and public sector education in how to deliver effective EEO programmes and policies.

I also suggest that as both Japan and New Zealand have ratified CEDAW, they should both be looking at implementing an Optional Protocol, which will give international backing to EEO initiatives and which has been proposed to provide better enforcement of women's human rights. The Optional Protocol would give women the right to complain to a specialist United Nations (UN) Committee (CEDAW) about violations of CEDAW by their governments. By implementing the Optional Protocol it would enable the UN Committee to conduct inquiries into serious or systematic abuses of women's rights in countries. The Optional Protocol raises many issues about the cultural context of inequalities and the way specific national histories are used to authorise certain workplace issues.

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INTRODUCTION

In Japan and New Zealand, patterns and conditions of work are differentiated by gender. The reasons for this are ideological, political, economic and social, or more accurately, a complex interaction of all of these factors. For much of this century, in both countries, the differentiation was taken for granted. That women invariably earned lower wages than men, had less bargaining power in the labour market and only ventured outside the domestic sphere because of economic necessity, even tended to be taken as axiomatic.

Since the 1960's and 1970's more attention has been paid to contemporary issues of women's work. A partial integration of gender issues into theories of development has followed, substantial empirical social research on employment and the challenge of gender analysis in theoretical studies.

In Japan as well as in New Zealand, women's work has moved away from being considered exclusively as a 'women's issue'. It is now widely recognised that an understanding of the factors influencing female labour force participation and the way in which women's involvement in economic activity has evolved is crucial to understanding the dramatic transformation of the economy and society of both Japan and New Zealand.

When I first began my Masters thesis, I decided to study what was being done in Japan and New Zealand to promote and improve equality in employment. I decided to specifically pursue a comparative study of Equal Employment Opportunities (EEO) law and policy in Japan and New Zealand. I chose to study EEO because it enables us to identify the way in which women's contribution in paid employment has been largely undervalued, despite protective measures under various legislation in both countries.

In this thesis I examine the extent to which Japan and New Zealand governments (through legislation) and companies (public and private sector)

have modified and adopted their employment and personnel management practices to promote a more egalitarian treatment of women in employment.

Arguably, EEO should cover all aspects of the employer/employee relationship, including the policy and practice of recruitment, remuneration, promotion, access to professional, technical and personal training and development, and relations among employees in the workplace. As a strategy for change, EEO is concerned with identifying and eliminating unfair discriminatory practices, creating an environment which encourages and supports the full participation of staff, and attracting and retaining a diverse staff, in a workplace in which everyone is able to participate and compete equitably, to develop to their full potential and be rewarded fairly for this contribution regardless of gender, ethnicity, disability, sexual orientation, age or family circumstances.

The 'collective' characteristic of discrimination is fundamental to understanding EEO, and it underpins the concept of 'EEO groups'. Unfair discrimination¹ refers to the way in which a person or a group of people are treated because of common characteristics that puts them outside the mainstream or dominant group (in terms of numbers or power, or both). Traditionally these characteristics include ethnicity, race, colour, gender and disability.

EEO policies typically concentrate on groups of people who allege they experience unfair discrimination and are excluded from full participation in the workforce. The result is that they may be located at the lower salary levels, and may lack access to decision-making roles and influence. Even early career success may end at a point where the 'glass ceiling' is met.

¹ Discrimination is defined in civil rights law as unfavourable or unfair treatment of a person or class of persons in comparison to others who are not members of the protected class because of race, sex, colour, religion, national origin, age, physical/mental handicap, sexual harassment, sexual orientation or reprisal for opposition to discriminatory practices or participation in the EEO process

The long-term outcome for EEO is the elimination of all forms of unfair discrimination in employment. This will be achieved when three conditions prevail in organisations:

- inclusive, respectful and responsive organisational cultures which enable access to work, equitable career opportunities, and maximum participation for members of designated groups and all employees;
- procedural fairness as a feature of all human resource strategies, systems and practices;
- employment of EEO groups at all levels in the workplace.

In order to compare EEO policies, practices and law in Japan and New Zealand and the implications of such policies, practices and law, in the first chapter I offer an overview of the theoretical perspectives of EEO in both Japan and New Zealand. I follow this with a feminist analysis of 'equity', 'equality' and 'EEO'. I define the role of feminism historically and its influence on the implementation of EEO. I discuss the social theory of equality, the radical, liberal and Marxist feminist theories of equality and show the ambiguity in some usage of concepts such as "equal" and "different". I argue that these theories do not work in any straight forward way and that they are routinely confused, however the procedures of the liberal approach, are usually preferred by many theorists and are also linked with outcomes of the radical approach to equality. I then analyse the "Good Employer" and the "Moral Obligation" theories in Human Resource management. The "Good Employer" theory is based on a 'moral' obligation for Chief Executives to put in place an EEO policy and programme within their departments. A "Good Employer" is defined in New Zealand's State Sector Act of 1988, as:

...a "good employer" is an employer who operates personnel policy-containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment...²

² (s.56(2))

I demonstrate that there is a great deal of ambiguity in the definition of “good employer” and “moral obligation”. I will show that through a commitment to the integrated practice of EEO at all levels, both in the private and public sector, of business actually ensures that the strategic human resource policy is more likely to be successful. If a strategic human resource process has been developed alongside, and in response to, the business goals of an organisation, it will indeed offer some new opportunities for EEO to increase the breadth and depth of its influence on an organisation.

Finally, in Chapter one I look at the theories and actual practice of EEO in Japan and New Zealand. I identify that to rework issues of identity in EEO is to continue to rewrite EEO language into organisational life, without relying on some conventional meanings of EEO. I show that EEO is directed at creating new possibilities for the full participation of all staff as more organisations take on the challenge of truly engaging their diversity.

In Chapter Two I explore the influence of Japanese history and economic, political and social factors on the role of women in employment. I offer this historical overview in order to present my view of Japan's need for an effective EEO law. I analyse the EEO law that was enacted in Japan in 1985 and enforced in 1986, and consider its implications. Throughout this thesis I refer to the Japanese EEOL as 1985/1986, because it was enacted in 1985 and was enforced in 1986. I will then look at the impact of the EEO law of 1985/1986, on Japanese companies' policies and the labour markets movements, in order to examine the demonstrable effects on women's position in labour markets in contemporary Japan. I conclude that Japan, due to international pressure, hurriedly ratified the United Nations Convention of the Elimination of all forms of Discrimination Against Women (CEDAW) in 1980, and emerged with a 'dead letter' EEO law in 1985/1986, because of inexperience and lack of understanding in the concepts of EEO. In chapter two case studies are considered, and they too support the fact that the EEO law of 1985/1986, is inefficient as an anti-discriminatory piece of legislation. Japanese Labour law is

then thoroughly investigated in Chapter Four when it is compared to New Zealand's Employment legislation.

In Chapter Three, I again evaluate in more detail, the economic, social and political history of EEO in New Zealand. I discuss the legal remedies that are currently available to an individual who is subjected to discrimination in employment; and intend to show that in New Zealand's legislation it is not intended to require employers to undertake a systematic review of their employment practices in order to identify and eliminate discriminatory practices. In this chapter I offer a brief overview of the history behind the implementation of EEO policies into our public and private sector.

In Chapter Four, I undertake a comparative analysis of EEO legislation in Japan and New Zealand. To do this, I differentiate both countries by evaluating their current legislation and the effect, or lack of effect, that that legislation has played in the development of equal employment opportunities. In the current Japanese employment legislation I analyse the Japanese Constitution of 1946, which stipulates equal rights for men and women in all factions of society. The Labour Standards Law (LSL) of 1947 outlined Japan's denouncement of war and respect for fundamental human rights and provides that labour conditions must be such as to provide the necessities to allow workers to live in a way befitting human beings. The LSL of 1947 also calls for labour conditions to be decided by workers and management, with both sides on an equal footing. The Working Women's Welfare Law of 1972 aimed to further the welfare and improve the status of working women by taking appropriate actions to help them reconcile their dual responsibilities of work and home or to enable them to develop and make use of their abilities.

I then look at Japan's ratification to the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1980 and the Equal Employment Opportunities Law (EEOL) of 1985/1986, which stipulates that the firm shall "endeavour" to treat women equally to men, regarding recruitment, hiring, job assignment, and promotion; and that the firm

shall not discriminate against women regarding training and education, employees welfare and benefits, retirement, age limit, and dismissal.

I analyse sections of the Japanese EEOL of 1985/1986, and discuss the usage of the word 'endeavour', its ambiguities and the lack of penalty for violators of the EEOL of 1985/1986,. I also argue that the EEOL of 1985/1986, is a hurried piece of legislation and that it is a 'dead letter' or a 'paper tiger' because of the ambiguities that exist within its citations.

Throughout the thesis I discovered that Japan intended to amend the EEOL of 1985/1986, based on its in-discrepancies, and implemented an amended EEOL as of April 1st 1999. Unfortunately, there have been no publications from Japan about the newly amended law, since April of 1999, that I have been able to locate. In Chapter Four, I argue that the new EEOL of 1999, is 70% effective of the elimination of discrimination in the workplace, but it is still 30% ineffective in achieving equality amongst the sexes within Japanese management's infrastructure.

In the New Zealand section of employment legislation, I look into the employment legislation that tried to achieve the basic premise of EEO. The Equal Pay Act 1972 in Section 2 and section 4 provides that employers cannot differentiate in pay rates between employees on the basis of their sex. Under the Human Rights Act 1993, which replaced the Human Rights Commission Act 1977 and the Race Relations Act 1971³, an employer cannot discriminate in hiring or firing, training or promotion because of their employee' sex, marital status, religious or ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation.

In 1984 government employing authorities signed a statement about equal employment opportunities. This statement recognised the need for government employers, then the largest employer group in the country, to take a leading role

in the development of EEO State Owned Enterprises (SOE's) in New Zealand came into existence with the enactment of the State Owned Enterprises Act 1985/1986. The purpose of the legislation was to promote improved performance in respect of government trading activities and control the ownership of the new enterprises. However, it failed to do so and in 1988 the State Sector Act was enacted. The State Sector Act 1988 requires chief executives of Public Service departments to develop and publish EEO programmes for their departments, and ensure that the programmes are complied with. The Act defines an EEO programme as a programme that is aimed at the identification and elimination of all aspects of policies, procedures, and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate, inequality in respect to the employment of any persons or group of persons. The State Services Commission monitors, evaluates, promotes, and develops EEO in the New Zealand Public Service.

I show that the State Sector Act and Commission poorly monitors, and evaluates their own EEO programmes, which is backed with conclusive evidence of varying working groups, employers federation members and CEDAW.

In this subsection I evaluate the Employment Equity Act (EEA) of 1990, and the repealing of this act by the National government in favour of implementing the Employment Contracts Act (ECA) in 1991. I argue that through deregulating the labour market the value of EEO is not being recognised or utilised effectively.

In Chapter Five I analyse the importance of New Zealand's and Japan's international obligations under CEDAW. I investigate whether CEDAW has had any significant influence on both country's anti-discriminatory legislation, with regard to women in employment. I consider how CEDAW influences perceptions of EEO and why Japan and New Zealand are still failing under CEDAW's guidelines, to have preventative measures against discrimination in the workplace.

³ Section 22(1) of the Human Rights Act 1993

I argue that it is important for both countries to support the proposed Optional Protocol to CEDAW, which has been proposed to provide better enforcement of women's human rights. The Optional Protocol would give women the right to complain to a specialist United Nations (UN) Committee (CEDAW) about violations of CEDAW by their governments. I also look at how the Optional Protocol would enable the Committee to conduct inquiries into serious or systematic abuses of women's rights in countries that have become parties to the optional protocol. In this chapter I emphasis the necessity of the optional protocol and the contribution it could make to full implementation of EEO in both countries.

In Chapter Six I conclude this thesis, with an discussion about what EEO is and could be. I look at how it should effectively be implemented and where New Zealand and Japan have failed in their endeavours to provide EEO through legislation, policies and programmes.

The objective of this thesis is not to make any definitive solutions to the dilemmas that have arisen with both countries inability to implement EEO, but to introduce, compare and analyse EEO in Japan and New Zealand and to highlight, through sign posting the current issues that impair EEO in Japan and New Zealand.

CHAPTER ONE

Feminist Analysis of Equity, Equality, Equal Employment Opportunities and Legislation

INTRODUCTION

In this chapter I discuss the concept of 'equality' and assess how Equal Employment Opportunities (EEO), have been used by liberal, radical and Marxist feminist theorists, and EEO practitioners. The intention is to introduce EEO in order to be able to understand theories and concepts that are used throughout the rest of this thesis.

DEFINITION OF FEMINISM.

As a social movement, feminism typically identifies that women have been wrongly restricted or socially subordinated, throughout history and in most societies. Feminism aims to change this unjust situation, through strategies to achieve equality for women, not only in terms of giving them the same rights as men in law, but also in improving the practical ways women are treated and viewed, and increasing the opportunities available to them, in both formal and informal economies.

Broadly speaking what is known as the first wave of feminism arose during the nineteenth century. During this period women became increasingly aware of their oppression, and began to take action to change their situation. An example of this is; in the 1860s middle-class women in Britain were organising to claim married women's property rights, expanded career opportunities and the vote. Middle-class women in Britain found a powerful ally in one of the most distinguished men of the age, John Stuart Mill. Recently elected to the British Parliament, Mill presented a woman's petition for suffrage in 1866. He followed this up with a motion to enfranchise women, thereby initiating the first parliamentary debate on the topic. The British suffrage campaign was launched. When in 1869 Mill published his treatise on the subjection of women, arguing the feminist case in terms of liberal

individualism, its impact was immediate and profound, not only in Britain but also in America, Australia and New Zealand.

Early feminists became involved in struggles, which aimed to improve their lives in many different ways, but their struggle to achieve the right to vote (known hereon in as 'suffrage') is the one that has been best remembered. Although the vote gave women, an increased say in the way those laws were made, and so gave them the chance to achieve alternative rights to equality. Unfortunately, the traditional attitude that women were inferior to men still persisted and as a result, women continued to be discriminated against. An example of this can be seen in New Zealand history where in the early 1900's women were being exploited through low wages and poor working conditions. The condition of "sweated labour" in the 1880's to 1900's was appalling (Nicholls 1993) with women paid far less and treated worse than men. Young women in particular would often work for nothing in the vain hope of trying to find a job.

In the 1960's a 'second-wave of feminism' pursued broad ranging civil rights activism in a number of European countries, Britain and America. Taking up issues with increasingly diverse methods to improve the position of women. For example, birth control, self-health and access to politics are said to be examples of these diverse changes within society.

At this time, the women's liberation movement gradually emerged, as groups of women who were politically active came to realise that the left wing civil rights groups that were ostensibly campaigning for equality for 'people', were still not giving equal recognition to women. To change this situation women set-up their own groups, where they could meet to share their ideas and organise campaigns against such sexism.

At the heart of feminism is the argument that most 'western' societies are based on what is often called a 'patriarchy' structuring an arrangement of a social system, which advantages men above women, in all spheres. Feminism generally opposes

such inequality and insists that women be treated as equals in employment, health and educational opportunities and in fact all areas. Some radical feminists have also argued that patriarchy tacitly condones violence against women in order to control women's choices and limited range of life choices (Tong, 1998).

Direct and Indirect Discrimination

Direct sexual discrimination arises where a person treats a woman, on the grounds of her sex, less favourable than a man is treated.

Indirect discrimination consists of treatment, which may be described as equal in a formal sense as between sexes but discriminatory in its effect on one sex. Indirect sex discrimination arises where a person imposes on a woman who is seeking some benefit (For example, a job, a condition or requirement with which she must comply in order to qualify for, or obtain, the benefit and where the condition or requirement satisfies all the following criteria:

1. It is applied equally to men and women.
2. It is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it.
3. It is to the detriment of the woman in question because she cannot comply with it.
4. It cannot be shown by the person applying it to be justifiable, irrespective of the sex of the person to whom it is applied. For example, if an employer were to state that a job required the applicant to be 6ft tall, a woman who was refused the job because of her lack of height would be able to claim indirect discrimination since all the criteria (a) to (d) would be satisfied.(Beck and Steel 1989:7-9)

Many companies still do not operate formalised selection procedures or train staff and monitor the consequences. Informality often leads to inconsistent, secretive and unaccountable recruitment practices through which sex discrimination might occur. Selectors still hold stereotyped assumptions, which flourish through informal recruitment and promotion procedures.

Under the theories and practices of EEO, recommendations are made that these informal practices should be avoided and that all employees and employers should be trained in the sex equality laws and policies that govern the workplace. The sex discriminatory practices are the responsibility of the employer. Companies should also monitor their practices and workforce profile to identify how often and where barriers to equal opportunities are occurring.

EQUALITY

In this section I look at some feminist theories of equality, in particular I discuss liberal and radical feminist perspectives and how equality of opportunity is defined in practice as well as in theory. I discuss the pluralistic approach to equal employment opportunities (EEO), analyse the 'good employer' theory of human resource management theory and conclude with an analysis of the perceptions of equality of opportunity.

It is conventional to identify four types of Equality, in social theory writings:

- 1) The doctrine of equality of persons, or ontological equality; which means that all people of any race, gender, sexual orientation, culture, ideology, and social status, will be treated equally and fairly amongst each other in any given situation.
- 2) Equality of opportunity to achieve goals; which means that every person will be treated equally and will all be given the opportunity for education, job assignment and recruitment in their attainment of their own personal goals.

- 3) Equality of condition, in which the conditions of life are made equal by legislation.
- 4) Equality of outcome or result.(Abercrombie 1984 :88).

Radical critics of society argue that equality of opportunity is supported by liberalism¹ and equality of condition is a form of change, which aims to reform rather than abolish the prevailing system of inequality. Radical objections against these two forms of equality also argue that the analogy between society and competition itself reflects the dominant ideology of capitalism. For example, in the nineteenth century, social darwinism conceptualised society in terms of a struggle of survival. Against these metaphors socialists argue for equality of outcome through a programme of political and economic revolution which would remove the social and economic causes of inequality. The aim of socialism is thus, to destroy inequalities (the ultimate cause of which is private ownership of the means of production) and to satisfy human need equally regardless of the accidents of birth (such as sex).

These types of equality have been criticised by Abercrombie (1984:89), as either not feasible or not desirable. For example, it is argued that the achievement of radical equality is unrealistic, because it would require the socialisation of children away from the family in order to minimise the inheritance of property, the prohibition of competition and achievement, and a universal training programme in co-operative values and altruism. Critics also argue that empirical research shows that radical attempts to secure equality over a long period have not been successful, because inequalities of class, status, power and authority can never be wholly eradicated. It can be further argued that equality of condition and outcomes are not necessarily desirable, because they conflict with other values such as personal freedom and individualism.

¹ **Liberalism** views the state as the legitimate authority for enforcing justice and acting as an arbiter between conflicting interest groups in the public world of economics and politics.

While some sociologists have devoted considerable energy to the study of inequality, the conditions for equality and the development of egalitarian social movements have been neglected in mainstream social research and policy making. The contemporary value placed on equality is the product of egalitarian ideologies, alongside, the expansion of status hierarchies as a result of urbanisation and the development of mass communication as an aspect of the rise of mass society, which is complexly differentiated in socio-economic terms.

Liberal feminism essentially claims that because women are rational beings like men, they should be entitled to the same legal and political rights. Liberal feminists have therefore argued and campaigned over the last three hundred years for women's right to education, employment, political participation and full legal equality. Liberal feminism concentrates on rights in the public sphere and may not, emphasis an analysis of power relationships that exist within the home or private life because it assumes that the justice of its cause will ensure success and that men will have no reason to oppose it. Liberal feminism assumes that it is up to the individual women to make the most of their opportunities once political and legal equality has been won.

In contrast a radical feminist approach argues that men's patriarchal power over women is the primary power relationship in human society. It further argues that this exercise of power is not confined to public worlds of economic and political activity, but that it characterises all relationships between the sexes, including the most intimate (Bryson, 1992:2-3)

A key area of disagreement in these two approaches remains in the 'difference/ equality' debate. Many feminists according to Bryson (1992:4), have always been unwilling to grant any political significance to the biological differences between men and women, on the grounds that these will always be used to a women's disadvantage. Bryson, (1992:4), also states that some feminists have long argued that women are innately superior, and there is now a strong strand within modern radical feminism that insists that biological differences colour the whole of our lives.

Bacchi (1990:xi) claims that that the whole difference/equality debate within feminism is a distraction from the need to develop a broader understanding of equality that can acknowledge the diversity of individual circumstances:

...if society catered appropriately for all human needs, men and women included, discussions about women's sameness to or difference from men would be of little significance...(Bacchi, 1990:xi)

LIBERAL, RADICAL, AND MARXISTS PERSPECTIVES OF EQUALITY.

Sayers (1994:121) states that the two typical perspectives of inequality in the workplace are these liberal and radical feminist perspectives. There is also the Marxist feminist perspective, which will also be introduced in this chapter. I now look at the approaches in relation to equal employment opportunities (EEO).

Liberal Feminism

Liberal feminist theorists such as; Mary Wollstonecraft, John Stuart Mill, Harriot Taylor, Betty Friedan and contemporarily Bella Abzug, ²Eleanor Smeal, Pat Schroeder, and Patsy Mink, view the state as the legitimate authority for enforcing justice and acting as an arbiter between conflicting interest groups, in the public world of economics and politics (Craig in Duplessis 1992:226).

According to the liberal theory the state has a responsibility to make sure individuals have equal opportunity to compete in the market economy, regardless of their class, gender or ethnicity.

Liberal feminists use the lever of citizenship to argue that the state is not a neutral arbiter because patriarchy constantly manipulates it (Duplessis 1992:226). Liberal feminists in New Zealand, particularly Janet Sayers, have drawn attention to the lack of women represented in decision-making positions within the state (Sayers,

² Members of the National Organisation for Women in the United States of America.

1994). The politics of EEO can be understood through liberal feminism's dual focus on equal citizenship and fair competition in a meritocratic system.

A liberal feminist's view of EEO is that equality can be achieved if equal numbers of men and women are represented at all levels of social and political organisation. The predominantly liberal view is related to issues of representation. Liberal versions of EEO use strategies such as redefining merit, family-friendly employment policies and managing diversity strategies that do not seriously challenge the operation of the 'pure market forces' (Sayers 1994:125).

The liberal feminist perspective on EEO is based upon social contract theories of the sixteenth and seventeenth centuries, which emphasise the 'fundamental equality of all men based on men's alleged equal potential for rationality' (Jaggar and Rothenberg, 1984:83). In particular this notion of equality refers to the equal capacity of individuals to compete in the marketplace as economic self-maximisers able to rise in society as far as their talents allow.

The role of equal opportunity programmes is central for two reasons. First liberal feminists, argue that the state is not neutral and that through equal opportunities the number of women, who are in powerful positions, needs to be increased. Such an increase in numbers, it is argued Armstrong, 1994 cited in Sayers 1994:190, will remedy distortions in the operation of decision-making in the economy and in politics caused by the prevalence of white middle-class men in powerful positions. Secondly, EEO is seen as central to the pursuit of equal citizenship and fair competition in any civil society based on merit (Armstrong *ibid.*). That is, equal opportunity needs to be guaranteed to allow individuals to exercise their talents freely and to allow society to harness the skills of all its members. The liberal theory rests on a notion of self-interested individuals competing in the public worlds. This is important because it runs counter to the identification of EEO target groups, focusing instead on outstanding individuals competing in the public arena; individuals who are, ideally, imaginative by responsibilities for the caring work associated with the private sphere (Armstrong 1994 in Sayers 1994:190).

Thus, the liberal model of EEO focuses on talented individuals being assisted in their career advancement in the hope that their presence will correct any imbalances in decision-making at the top levels within organisations. However, the women using this strategy are those who seem best able to mimic the full-time, continuous service model of employment, typically professional men who have the support of a full-time partner at home.

Radical Feminism

A radical feminist perspective sees the state as representing male interests either as an agent of patriarchy or as an oppressor of itself (Franzway cited in Duplessis 1992:229). For radical feminists, the basis of women's oppression lies not in social organisation or physical domination, but in a patriarchal control of culture, religion, and knowledge. Radical feminism argues that this power is not confined to the public worlds of economic and political activity, but that it characterises all relationships between the sexes.

Radical feminists see the state as an instrument of patriarchal oppression. Arguably this is problematic at the level of practice. It is precisely the 'legal objectivity and impersonality of procedure' (Duplessis 1992:231), which provides a necessary lever for women's interests in EEO, industrial rights and anti-discrimination law. In addition, a too easy equation of state power with male interests underplays the significance and the impact of women's struggles in law making and legal procedure (Duplessis 1992:231).

Radical feminist views look into the underlying structural reasoning for inequalities in regard to the position of men and women. A common radical feminist view identified by Sayers (1994:121) is that existing social and organisational structures are of course patriarchal and are capitalist and by their nature incompatible with the notion of equity and social justice. Accordingly equality is only possible under this model, when the existing male-dominated structures are broken down and power is redistributed among all groups and especially to women (Weineke 1991 cited in Sayers 1994: 121).

Radical versions of EEO may be strategies such as establishing quotas, mainstreaming programmes and other interventionist strategies that are more structural in their approach. A feminist radical view is concerned with the restructuring of work place power relationships.

A radical feminist perspective on EEO emphasises the political nature of difference, particularly embodied differences such as gender. In contrast to the liberal argument for equal treatment, the radical perspective celebrates and politicises the importance of difference as a basis for special treatment. In a context where liberals have argued successfully that gender differences are irrelevant and that individuals should receive equal employment rights and privileges, the radical perspective embraces difference as enriching the social and cultural diversity of the workplace. It argues that 'special cases' may need to be considered to accommodate a diversity of needs in the workplace.

At a theoretical level, radical feminists reject liberalism as disassociating individuals from the context of their families, ethnic or religious groups and class. In this sense, the radical perspective problematises the distinction liberals draw between the public and private sphere and argues instead for the politicisation of the 'personal' and a valuing of it, whether it be women's ability to bear children or the diversity of cultural experience within the workforce (Sayers 1994:193). Thus, the radical perspective opposes the abstract concept of individual at the heart of liberal theory, as a character who is curiously disassociated from the responsibilities of home and health and as a model which implicitly supports white, male, able-bodied workers as the norm.

The divisions between the two perspectives (liberal and radical) are 'ideological as well as tactical' (Goodman and Taub 1986:23 cited in Sayers1994: 193). A radical feminist perspective suggests purposeful intervention in the employment process to ensure EEO target groups are fairly distributed across organisational hierarchies. Moreover, the radical perspective does not focus on equality of opportunity, but rather on equality of effects or outcomes, arguing that to fully

include the human diversity within the labour force, barriers to the full participation of all groups, must be removed.

Scott (1994) has suggested that radical perspective endorsement of the recognition of the seemingly 'natural' differences of gender and ethnicity, may return the debate to a conservative dogma where discriminating against EEO target groups is justified as simply a recognition of their 'natural' differences (Scott 1988 cited in Sayers 1994:194). Joan Scott (1988) provides an example of this dilemma, in her discussion of the famous Sears, Roebuck and Co versus the EEOC case. Which concerned women who were excluded from selection for highly paid commission sales jobs on the basis that due to cultural differences and long standing patterns of socialisation, women were simply not interested in such jobs. The Sears, Roebuck and Co Versus the EEOC case showed that the psychological tests the women were obliged to take to apply for these jobs were clearly discriminatory, including a 'vigour' scale asking such questions as: 'Do you have a low-pitched voice?' 'Have you ever done hunting?' 'Have you participated in wrestling?' 'Have you participated in boxing?' 'Have you played on a football field?' (Milkman 1986:382). Although this is a clear breach of the rudiments of EEO, the court found in favour of the Sears Company and judged that they had not intentionally discriminated against women.

Ruth Milkman (1986:382) comments on the case where feminist historians Alice Kessler-Harris and Rosalind Rosenberg testified on opposite sides as to women's *EQUAL* or *DIFFERENT* nature. Milkman especially notes the perils of arguing for 'difference' and 'women's culture' within a conservative political climate. Milkman (1986:382) insists that we attend to the political context of seemingly timeless principles,

We ignore the political dimensions of the equality versus difference debate at our own peril, especially in a period of conservative resurgence like the present. As long as this is the political context in which we find ourselves, feminist scholars must be aware of the real

danger that arguments about “difference” or “women’s culture” will be put to uses others than those for which they were originally developed. That does not mean we must abandon these arguments or the intellectual terrain they have opened up; it does mean that we must be self-conscious in our formulations, keeping firmly in view the ways in which our work can be exploited publicly. (Milkman 1986:382)

Milkman (1986:382) implies that equality is our safest course, but she is reluctant to reject difference entirely.

A close look at the evidence in the Sears cases suggests that equality versus difference may not accurately depict the opposing sides in the Sears case. During the testimony, most of the arguments against equality and for difference were, in fact, made by the Sears lawyers or by Rosalind Rosenberg. They constructed an opponent against whom they asserted that women and men differed and that “fundamental differences”; the result of culture or long standing patterns of socialisation- led to women’s presumed lack of interest in commission sales jobs. In order to make their own claim that sexual difference and not discrimination could explain the hiring patterns of Sears, the Sears defence attributed to EEOC an assumption that no one had made in those terms; that women and men had identical interests (Scott 1988 cited in Hirsch 1990:139).

Alice Kessler-Harris did not argue that women were the same as men; instead, she used a variety of strategies to challenge Rosenberg’s assertions. Firstly, she argued that historical evidence suggested far more variety in the jobs women actually took than Rosenberg presumed. Secondly, she maintained that economic considerations usually offset the effects of socialisation in women’s attitudes to employment. And, thirdly, she pointed out that, historically, job segregation by sex was the consequence of employer preferences, not employee choices. The question of women’s choices could not be resolved, Kessler-Harris maintained, when the hiring process itself predetermined the outcome, imposing generalised

gendered criteria that were not necessarily relevant to the work at hand. The debate was not then around equality versus difference but around the relevance of general ideas of sexual difference in a specific text (*Signs* 1986:757-779)³

To make the case for employer discrimination, EEOC lawyers cited the biased job applicant questionnaires and statements by personnel officers, but they had no individuals to testify that they had experienced discrimination, be it indirectly or directly. Kessler-Harris referred to past patterns of sexual segregation in the job market as the product of employer choices, but mostly she invoked history to break down Rosenberg's contention that women as a group differed consistently in the details of their behaviour from men, instead insisting that variety characterised female job choices, that it made no sense in this case to talk about women as a uniform group. She defined equality to mean a presumption that men and women might have an equal interest in sales commission jobs. She did not claim that women and men, by definition, had such an equal interest. Rather, Kessler-Harris and the EEOC called into question the relevance for hiring decisions of generalisations about the necessarily antithetical behaviours of women and men.

The Sears case was difficult and complicated by the fact that all the evidence was statistical, while the issues raised were largely philosophical. The Sears case offers sobering lesson in the operation of a discursive, that is, a political field. Analysis of the language used provides insight not only into the manipulation of concepts and definitions but also into the implementation and justification of institutional and political power.

In Joan Scott's words (Scott in Hirsch, 1990:142-145), the argument for women's 'difference' from men in this particular case, underscored the 'stigma of deviance' from the male norm. Alternatively, the argument that women are equally talented and deserve equal opportunity to pursue any job, leaves in place a 'faulty

³ *Signs* 1986:757-779

neutrality', according to Scott where the real differences in the life opportunities of subordinate groups are rendered invisible.

A resolution of the "difference dilemma" comes neither from ignoring nor embracing difference, as it is normatively constituted. Instead it seems that any critical feminist position should always involve two moves. The first is the systematic criticism of the operations of categorical difference, the exposure of the kinds of hierarchical exclusions and inclusions it constructs, and a refusal of their ultimate 'truth'. A refusal, not in the name of an equality that implies sameness or identity, but rather in the name of an equality that rests on differences, that confound, disrupt, and render ambiguous the meaning of any fixed binary opposition (such as 'equal' and 'different'.)

It is important to note here, in particular reference to this thesis that neither of these theories work in a pure way and the two are routinely confused with the preferred procedures of the liberal approach widely assumed to result in the preferred outcomes of the radical approach and so on. I now turn to look at the theoretical underpinnings of EEO. The Sears Roebuck case has been used within this chapter to heighten the differences that exist in people's definition of equality and difference.

Marxist Feminist Perspective

According to Marx (Giddens 1989:710-711) the power of men over women only comes about as class divisions appear. Women come to be a form of 'private property' owned by men, through the institution of marriage. Women will be freed from their situation of bondage when class divisions are overcome (Giddens 1989: 710). Marxists believe that modern societies are riven with class inequalities, which are basic to their nature. His theory suggests that there are major divisions of power, like those affecting the differential position of men and women, and that they can ultimately be derived from economic inequalities.

Marxist and Marxist feminist writers, states Walby 1990:33, explain the pattern of women's employment as determined by capitalist relations. The capital-labour relationship critically shapes women's lower pay and lesser labour force participation. Women are seen as a subordinate and a marginal category of worker whose greater exploitation benefits employers, although a sub-group of this school sees women's position in the household, rather than paid labour, as an achievement rather than a failure of the working class. There is great variation within written analysis as to the explanation of gender relations in paid employment and the significance of this for class relations. Marxism is above all a theory of work under capitalism and has created some useful tools of analysis for explaining structural inequality at work. For the most part however, the emphasis has been on class inequality, and the patterns of gender equality at work have not been adequately explained. (Briar 1994)

Earlier Marxists and socialist feminist writings, which assumed that the gender division of paid and unpaid work were in the interest of capitalism, have tended to be modified, because of the difficulty of proving that gender divisions and the split between public and private worlds are any more beneficial to capitalism than any other form of social organisation. Some socialist feminist writings, along with liberal feminists have therefore tended to assume that gender divisions at work are simply the result of old fashioned ideas. (Briar 1994)

Marxists feminists believe that it is impossible for any one, especially women, to obtain genuine equal opportunity in a class society, where wealth produced by the powerless many, ends up in the hands of the powerful few. (Tong, 1992:2) What is distinctive about Marxist feminism is that it invites every woman, whether popular or bourgeois, to understand women's oppression not so much as the result of the intentional actions of individuals but as a product of the political, social, and economic structures associated with capitalism. (Tong, 1992:39). Marxists feminists have tended to focus on women's work related concerns. In doing so they have helped us understand, among other things, how the institution of the family is related to capitalism; how women's domestic work is trivialised as not *real* work;

and, finally, how women are generally given the most mundane and low-paying jobs. Comparable worth is in the estimation of many Marxists feminists, an opportunity to challenge the market basis of wages, that is to force us to reconsider why we pay some people so much and others so little. (Feldberg 1984:311-313)

Convinced that a person's gender is the best explanation for why that person's salary is either high or low, comparable worth advocates, be they Marxist or Non-Marxist, urge employers to evaluate their employees objectively, that is, without paying attention to their race, class, ethnicity or gender. In order to evaluate a job or worker objectively, all that the employer needs do is to sum up the "worth points" (Tong, 1992:59), for the four components found in most jobs:

1. Knowledge and skills, or the total amount of information or dexterity needed to perform the job.
2. Mental demands or the extent to which the job requires decision making.
3. Accountability, or the amount of supervision the job entails.
4. Working conditions, such as how physically safe the job is. (Remick cited in Tong 1992:59).

The Marxist feminist theory of equal employment opportunities is central when dealing with the inequality that women face in the workplace, by being placed in low paid jobs and the balance with which women have to undertake between 'family' and 'work'. The phrase, 'a women's work is never done' is true in accordance with Marxist feminist theory. Marxist feminists see women in lower paid jobs, hence debates on equal pay for equal work and a valuing of unpaid domestic work also. Marxist feminist theory also highlights the necessity for equal pay legislation and equal employment opportunities legislation. Certain roles have been forced on both sexes throughout eternity. Stereotyped assumptions about women as 'homemakers' and men as 'breadwinners' are still common among employers

and result in women being recruited. Organisations have traditionally valued women as part-time workers, secretaries and most recently as 'temps' and this trend continues. These are generally low paid, low status jobs, currently with low security as companies tighten their belts and slim their resources. There is a strong drive in many organisations for a 'family-friendly' working environment, which enables a woman some leverage in her employment to also manage her family, as long as it does not jeopardise her productivity.

EEO treats women and men equally, without any sex discrimination, by removing recruitment inhibitors, using objective selection and recruitment processes, equalising reward packages and including women in training programmes. The employers who are likely to gain are those who recognise that the employment of cheap labour is merely a short term gain, in the long term the company benefits more by recognising and cultivating the skills and experience of their employees and then by being able to retain them.

Theoretical Perspectives to EEO

Jewson and Mason (1986:307-315) conducted one of the most important studies regarding EEO. They described the approaches to EEO as "liberal" and "radical", although they were not specifically referring to the feminist taxonomies I have used previously, but drawing more broadly on the social theory. In their view the aims of the two types of policies are as follows:

...the aim of liberal equal opportunities policies is the removal of unfair distortions to the operation of the labour market by means of institutionalising fair procedures in every aspect of work and employment...The radical approach is very different. It seeks to intervene directly in workplace practices in order to achieve fair distribution of rewards among employees, as measured by some criterion of moral value and worth. Thus, the radical view is concerned primarily with the outcome of the contest rather than the rules of the game, with the fairness of the distribution of rewards

rather than the fairness of procedures (Jewson and Mason 1986:315).

Jewson and Mason (1986:315) go on to argue that in practice these two concepts are regularly confused. Specifically, the preferred procedures of the liberal approach are widely assumed to result in the preferred outcomes of the radical approach. Jewson and Mason argue that 'policy makers thus evolved their beliefs and negotiating stances out of a fluid and paradoxical amalgamation of philosophically antithetical positions (Jewson and Mason 1986:308). The main problem with this analysis is that the policies are in contradiction to each other.

Cockburn (1989:213-225) proposes the replacement of Liberal and radical dichotomy with the notion of an EEO agenda of greater or shorter length. The short agenda entails the modification of personnel and Human Resource Management (HRM) policies that are essential to the liberal model. The longer agenda entails a project of transformation that incorporates the radical agenda of fair outcomes for target groups. The longer agenda also recommends the critical examination of the nature and purpose of institutions and the processes by which the power of some groups over others in institutions is built and renewed. Cockburn (1989:225) argues for a reorganisation of work structures so that diverse people can exert more control over their institutions.

Human Resource Management (HRM) writers have been concerned with similar ambiguities although their focus has tended to be on the humanitarian versus management theories and practices.

In fact in the teachings of EEO in certain universities around New Zealand tend to treat EEO as a concept of 'Management diversity', a way in which companies organisational and management systems should diversify or change the way they currently think, and realise that by introducing a EEO policy they are gaining the most skilled person for any job.

The 'Good Employer' Theory in Human Resource Management

HRM has been concerned with unitarist and pluralistic models in much the same way as EEO has been concerned with the managerialist equity debate. HRM has tried to argue that a strategic management approach of the trickle down effect or a 'top down' effect of unitarist views does not take into account, employees concerned.

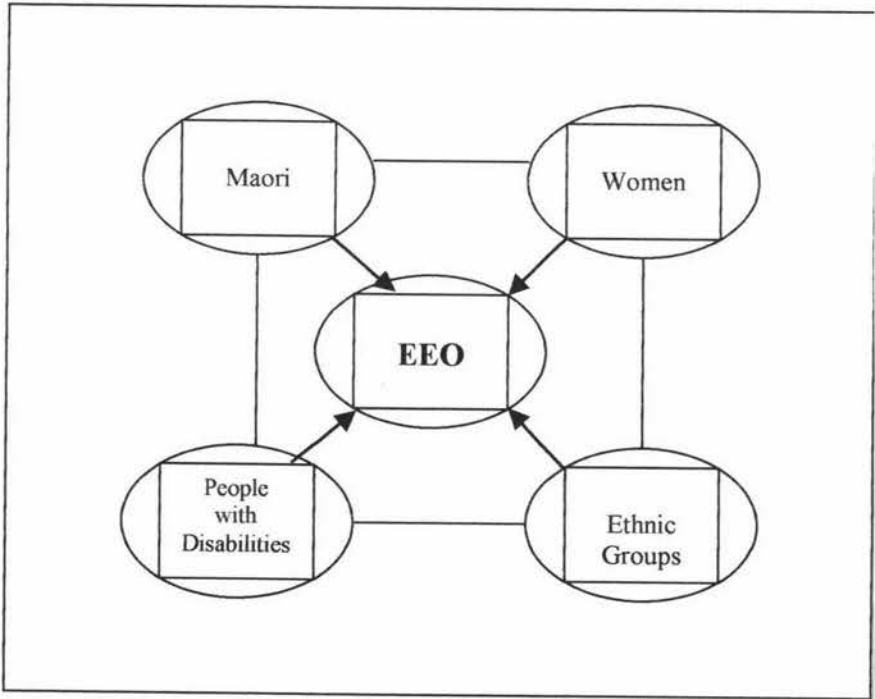
Boxall (1991) attempts to link EEO into the HR strategy through his attempt to define the concept of 'Good Employer' and 'Moral Obligation'. Boxall points out a number of process and policy domains where chief executives (the good employer) must exercise strategic choice. Interesting issues include the extent to which chief executives will build strong direct communications with employees and the kind of relationships they will seek to build with unions. He also states that there are also issues relating to the way in which the 'merit principle' is interpreted, whether in relation to the specific position applied for or in relation to a more specific dynamic career concept. Similarly, there are questions relating to the balance between internal and external recruitment and in relation to the development of recruitment procedures that uphold EEO principles without undermining the consistency of the selection process.

A notion of 'goodness through moral obligation' is useful because it allows us to understand how an EEO policy might operate within a pluralistic HRM perspective. This view suggests a commitment to the integrated practice of EEO at all levels of the business actually ensure that the strategic human resource policy is more likely to be successful. Job evaluation systems, performance appraisal systems, and selection tests are seen as often imperfect from an EEO perspective; pay structures are influenced by perceptions of value and worth that particularly affect the work traditionally done by women and stereotyped views of what constitutes 'merit' persist. A strategic approach to human resources will not by definition provide for equity concerns.

Pluralistic Perspective

A pluralistic approach to EEO recognises that different groups have rapid stakes in the employment relationship and that they are interrelated. Pluralism is seen to be a useful theoretical tool with which to analyse the relationship between competing groups within EEO including 'target' groups, other workers and managers, as well as the role of the state in responding to demands of interest groups and setting policy regarding EEO (Sayers, 1994:123)

The following diagram featured in Sayers' discussion and is relevant in explaining how distinct 'target groups' may interrelate with each other through an EEO strategy. The diagram demonstrates how the 'target groups', those groups that appear to be discriminated against in employment practices, should come together in a 'true' employment policy. I mean by this that should an employer endorse 'good employment practices' through an EEO policy, then these target groups will be granted equal employment opportunities.



According to Sayers (1994:124) using such a perspective highlights the distinct nature of each group's aims and aspirations and strategies, but also allows us to portray EEO's role. Pluralism and the notion of being a 'good employer' appears to be more obvious for those interested in modelling the practice and theory of EEO.

THEORY VERSUS PRACTICE.

This section analyses the theory versus practice in the implementation of EEO into the workplace. Rae Torrie and Deborah Jones (1998) enter into an interesting discussion in their construction of a collaborative 'story' about EEO in the New Zealand public service. In this story they draw on the productive uncertainties of Feminist/Postmodernist analysis and the experience of working in the EEO field. Their convention is a theory/practice split. Jones states:

It maintains the metaphor of science that theory is somehow pure and that practice is its testing ground.

In this discussion (Torrie and Jones 1998:229-237), Deborah Jones⁴ writes about the role of the 'theory'. Rae Torrie⁵ is the 'practice', without respecting the boundaries between theory and practice are impossible to distinctly maintain. They discuss EEO groups as identity categories- about how these are constructed within the policy discourses that produce the possibilities within which EEO practitioner's work. Their particular interest in this paper is in how emerging EEO groups engage with, contest, and stretch the existing frameworks for constructing identity as equality/inequality.

⁴ Deborah Jones teaches in the School of Business and Public Management at Victoria University. Her research interests include EEO and biculturalism in the public service, and 'doing management' after restructuring.

⁵ Rae Torrie came into the field of EEO via feminism and social work. She is currently Chief Adviser EEO for the State Services Commission, having worked as both an EEO practitioner and policy adviser in public service for over nine years.

Rae Torrie stipulates that EEO is both an outcome and a strategy. As an outcome, EEO is concerned with equity, with access to equal opportunities in all aspects of employment, recruitment, development and promotion, where each person is able, should they choose, to reach their full potential regardless of gender. As a strategy EEO is concerned with identifying unfair discrimination in the workplace and with developing strategies to redress this. She questions why in 1984 under the State Sector Services Commission, was the strategy of defining EEO groups introduced. She also questions what are the intended consequences of the use of such a strategy and what are some of the unintended consequences. What about new EEO groups as the context changes, and can new EEO groups be added using different criteria.

Torrie feels that EEO, unlike anti-discrimination legislation, is based on the principle that people have a right to fairness and equitable treatment in society, and on the recognition that some people are discriminated against on the basis of their membership of a particular group.

Torrie states (1994:229-237), encourages the development of workplaces in which discrimination in employment is less likely to occur; anti-discrimination legislation provides a remedy for addressing such discrimination in employment when it does occur. She states that targeting specific groups is a strategy aimed at legitimately exploring and identifying the particular barriers faced by members of that group, and at developing and implementing activities to redress this discrimination and disadvantage. Torrie believes that developing an understanding of each group's differences, encourages bias-free thinking and behaviours that take into account the unique needs and strengths of each individual.

Jones assumes that 'bias' means that people identify difference in terms of group categories and then make the difference mean some kind of inferiority. Jones believes that people will notice and code difference, and that assumptions about difference then produce discriminatory behaviours. She feels that the attempt to

replace 'bias' with some objective bureaucratic concept such as 'merit' is thus full of difficulty, which she states that EEO practitioners seem to have also decided.

Arguably this is so because the 'merit' principle assumes that free competition between individuals will ensure that the most able and deserving will move into the top decision-making positions, irrespective of attributes such as ethnicity, being able bodied or gender. The merit principle is firmly based upon the notion of equality of opportunity to compete. Problems with 'merit' have been compounded because some jobs are rated as more highly skilled simply because men have traditionally performed them. Recognition of the 'discriminatory element' in the valuing of women's and men's jobs formed an important part of the argument in favour of equal pay for work of equal value, but has not figured largely in EEO. This is problematic because the target groups have been expected to make themselves acceptable by retraining to compete with men in men's jobs, when in fact they could have stayed where they were and had their existing jobs revalued.

For many years the public sector has adopted the merit principle in its recruitment and selection procedures. However, the private sector does not have the same record of supplanting patronage systems with merit-based appointment procedures. Instead, it is inclined to view the merit principle as constituting a set of regulations which government imposes through the anti-discrimination and affirmative action laws. (Burton, Ryall and Todd, in Still, 1995).

The way *merit* is largely interpreted largely depends on the assumptions, perceptions and values of the people and organisations applying the principle. For Instance, the Oxford Concise Dictionary defines *merit* as a "quality of deserving well; excellence; worth; something that entitles to reward or commendation". While this gives an overall view of the ideas underlying merit, it is not very helpful in the employment context. A more appropriate definition is given by Burton in Still 1995,

who describes merit, in the employment context as,

The relationship between a person's job related qualities and those genuinely required for performance in particular positions. The focus of a merit selection process is on what the job applicants possess, by way of skills, experience, qualifications and abilities, which are required to achieve the outcomes expected from effective job performance.(Still 1995:2)

Despite the advances that have been made, there are still a number of barriers impeding women's career progress. Although much attention had been paid to structural impediments (such as personnel procedure and processes) through anti-discrimination and equal opportunity provisions, little change has occurred in relation to the influence organisational culture can have on women's career progression. (Still 1995:8)

There has also been little removal of barriers preventing people's movement between occupations and functional areas either in the wider workforce or within organisations; and the removal of stereotypes and assumptions about the capacities of people who occupy low level jobs (Still and Buttrose in Still 1995). Still 1995, suggests the result is that not only does a 'glass ceiling'⁶ prevail in organisations, but also 'glass walls'⁷ and 'sticky floors'⁸.

Jones establishes that the 'diversity ' models offer the alternative that difference can be valued and seen as a contribution to an organisation, rather than as a

⁶ The term 'glass ceiling' refers to vertical sex segregation in organisations. The term has been variously described as a transparent barrier that keeps women from rising above a certain level, or those artificial barriers based on attitudinal or organisational bias that prevent qualified individuals from advancing upward.

⁷ Glass wall is another term for occupational segregation. The walls refer to the horizontal barriers in organisations that prevent employees from moving between functional areas or from service divisions into line management. Gender stereotypes are believed to underlie this concept.

⁸ Sticky floor is a metaphor which describes how some jobs prevent women from getting their careers off the ground.

barrier to equality based on the rule of the same (status quo). Jones feels that EEO practitioners probably actually draw on both these ways of thinking about categorising difference, sometimes acting as if it can be erased, and sometimes as if it can be seen as adding value.

Torrie agrees that the issue of 'bias' and 'merit' raise some interesting issues that are central to how those who are working in EEO construct and understand discrimination and therefore, how they seek to change.

Torrie then goes on to state that in the late 1980's in New Zealand and early 1990's, EEO practitioners attempted to tackle this limited construction of merit through EEO training and awareness sessions and through changes in recruitment and selection procedures. Torrie comments that managers and staff were encouraged at that time to consider and recognise the ways in which they practiced discrimination and on the basis of certain assumptions about how a particular task could or might be done. Torrie then discusses the shift overall in society and the public service in relation to EEO, which I discuss in Chapter 4 of this thesis. She feels that because of New Zealand's battle with EEO, that there has been a definite shift towards 'difference' as being valuable and important to an organisation has gained influence. The approach has been to consider the cost to an organisation of unfair discriminatory practices, and to note that an EEO program is the prime strategy for ensuring that the 'fair treatment for all' standards in anti-discrimination legislation are met. The alternative approach has been emphasising the benefits to an organisation of having a diverse workplace is one of the keyways of achieving EEO.

EEO practitioners like Torrie and Jones argue that a representative workforce within the public service produces better services and superior policy advice. They also argue that perceptions of an organisation as a fair employer will encourage a wider recruitment pool; that changing demographics require changing composition in the workforce. To deliver to a diverse community, an organisation needs to have within its ranks and at all levels, a range of people who can consult and work

effectively with the communities it represents. Torrie and Jones generally feel that it is always necessary to keep the meaning of 'merit' in play, recognising that there are possible costs (financially) in trying to fix merit, and costs in not fixing it as well. The reshaping of the merit principle illustrates the constantly shifting environment in which EEO practitioners work with the concept of equity, and of the need to rework and redefine what this means in the face of new experiences of inequality, and to create new strategies to address these.

Torrie and Jones (1998) feel that EEO practitioners and theorists have to engage with existing discussions of equality and difference, but in the process of defining these issues, they are challenging, extending, and reworking what equality and difference mean in practice. Torrie's parting words basically sum up the general feeling amongst theorists and practitioners of and for EEO.

With the constant reshaping of merit, the boundaries around EEO groups must be flexible to allow for new groups to emerge. To rework issues of identity in EEO is to continue to rewrite EEO language into organisational life, without relying on the always already understood meanings of EEO. It entails exploring how EEO can work in new ways. It is directed at creating new possibilities for the full participation of all staff as more organisations take on the challenge of truly engaging their diversity.

CONCLUSIONS

Liberal feminists in New Zealand have drawn attention particularly to the lack of women represented in decision-making positions within the state. The politics of EEO similarly reflect liberal feminism's dual focus on equal citizenship and fair competition in a meritocratic system.

A liberal feminist view of EEO is that it can be achieved if equal numbers of men and women are represented at all levels of organisation. Liberal versions of EEO can be strategies such as redefining merit, family-friendly employment policies and

managing diversity strategies that do not seriously challenge the operation of the 'pure market forces' (Sayers, 1994:125).

The liberal feminist perspective on EEO is based upon social contract theories of the sixteenth and seventeenth centuries, which emphasise the 'fundamental equality of all men based on men's alleged equal potential for rationality' (Jaggar and Rothenberg, 1984:83 in Sayers 1994:190). First liberals, particularly liberal feminists, argue that the state is not neutral and that through equal opportunities the number of women who are in powerful positions, needs to be increased. The liberal theory pivots on a notion of self-interested individuals competing in the public worlds.

A radical feminist perspective on EEO emphasises the political nature of difference, particularly embodied differences such as gender. This perspective suggests purposeful intervention in the employment process to ensure EEO target groups are fairly distributed across organisational hierarchies.

Scott (1994) has commented that the radical perspective's endorsement of the recognition of the seemingly 'natural' differences of gender, ethnicity, etc., will return the debate to a conservative dogma where discriminating against EEO target groups is justified as simply a recognition of their 'natural' differences.

As a strategy EEO is concerned with identifying unfair discrimination in the workplace and with developing strategies to redress this. Apart from the theoretical issues that have been discussed in this chapter, a strategic human resource process that has been developed alongside, and in repose to, the business goals of the organisation, does indeed, as illustrated, offer some new opportunities for EEO to increase. A commitment to the integrated practice of EEO at all levels of the business actually ensures that the strategic human resource policy is more likely to be successful.

A discussion of the theory which underpins the EEO debate is highly necessary as the establishing chapter of this thesis especially, as it is strategically important to clarify the analyses that is being worked with by all in EEO, to avoid isolation from other issues, such as the link between managerialism and a much more restricted model of EEO and to avoid the distorting effects of operating with an implicit theoretical perspective on EEO without being aware of its implications.

Within my thesis, these issues are discussed specifically in the context of the situation of Japan and New Zealand. An historical background to the implementation of EEO programmes, policies and legislation, alongside a comparative analysis of EEO in Japan and New Zealand, and an overview of Japan and New Zealand's international obligations under CEDAW to the implementation of EEO is evaluated.

CHAPTER TWO

Equal Employment Opportunities in Japan

INTRODUCTION

This chapter examines the extent that history has played in shaping of Equal Employment Opportunities Law (EEOL) in Japan. I firstly look at the historical and sociological factors that have led to a formal EEO law being enacted in Japan. Secondly, I then analyse the EEO law that was enacted in 1985 and enforced in 1986, and consider its implications and briefly look at the impact of the EEOL itself on companies' policies and the labour market movements and examine the demonstrable effects on women's position in the labour markets in contemporary Japan. These are discussed to determine whether the Japanese EEOL 1985 and enforced in 1986, is a deadletter as is often alleged. In the latter part of this chapter I offer two case studies, which I then critically analyse and discuss.

BACKGROUND TO EQUAL EMPLOYMENT OPPORTUNITIES LAW IN JAPAN

Japan is a country steeped in tradition, culture, and history. It appears that women were accorded better treatment back in 57AD, than during any other period in Japanese History. The mythological "ancestor" of the emperors was known as the "Sun goddess" Amaraterasu and who as a woman, at least a first suggests more gender equality than subsequently apparent in Japanese history.

Japanese society has been shaped from many influences; the most important being Confucianism, Buddhism and Samurai based feudalism. The Japanese, as in all societies derived from the Chinese Confucian heritage, value the group over the individual. It is frequently alleged that the group, be it family or society at large is more important than the individual, such that group needs take precedence over individual needs (Friedman, 1992:1). In practice this often means that the Japanese define their well being and sense of accomplishment through the success of the group. In addition to the importance of the group, Confucianism emphasised the supreme position of the male, and a hierarchical power structure for society.

Confucianism and Buddhism combined with the military class of Japan to form the samurai¹ class. The ascension of the samurai code of life to become the law of the land drastically changed the place of women in Japan (Friedman,1992:1). Before the advent of the Samurai in the fifteenth century AD, Japanese society had been ordered largely on matrilineal lines. The combined influences of Confucianism, Buddhism and Samurai culture forever changed the position and place of the women in Japanese society. These three institutions were all highly discriminatory towards the roles and positions occupied by women. Confucianism stressed the pre-eminence of men over women stating:

A woman is to obey her father as daughter, her husband as wife, and her son as aged mother (Masako, 1978:17).

A basic tenant of Buddhism is that enlightenment is not possible for women but is reserved for men alone. Buddhism from the earliest of times affected the position and the role of women. It consisted of so many sects that it is impossible to make a definitive statement, but a fair judgement is that it has ranged from being ambivalent, to being hostile to women.

However, with the rise of the samurai, physical strength and martial prowess became essential. The Japanese social system was based upon the segregation of "superior" and inferior", but there was also a hierarchy of sex and age.

It was not until the Tokugawa Period of 1600-1868 that the growing influence of Confucianism fortified a trend toward masculine ascendancy, by insisting upon the maintenance of a rigid hierarchy of sex and age. Confucianism portrayed women as important for bearing children and perpetuating the family, rather than as help mates or objects of love. Perhaps better evidence for the position of women at least in the upper reaches of society, can be seen in the fact that from the middle of the seventeenth century, when women were barred from service as government

¹ Warrior

officers under laws which were already a reflection of the influence of Confucianism. The latter together with Buddhism were to be important agents in the institutionalised repression of women in Japan.

A woman during the Tokugawa period was expected to be completely obedient, industrious, and silent. Failure in any of these or if she was barren, unfaithful, jealous, or ill would be cause for a divorce. Women of this time were increasingly expected to show their humility and subservience by using honorific speech when addressing men and by referring to themselves in humble terms²

The Tokugawa samurai's thinking on the male-female relationship persisted into this modern period. Nitobe Inazo, a Christian remarked around the turn of the twentieth century that:

[Feudal] woman's surrender of herself to the good of her husband, home and family, was a willing and honourable as the man's self surrender to the good of his lord and country. Self-renunciation...is the keynote to the loyalty of man as well as the domesticity of woman (Nitobe, 1905:135).

The Meiji period of 1868-1912 was a period in which industrialisation created new jobs for the people. However, it also imposed new hardships upon the working class. In traditional Japan, the relationship between the employer and the employee was assumed to be one of benevolence and kindness from above and loyalty and obedience from below (Hane, 1992:144).

In the textile factories and the mines, conditions were particularly bad, and there was extensive exploitation of female labour. The employers, who claimed that it was necessary so as to enable Japan to compete effectively with the industrially

advanced Western nations, justified low wages. Gradually, the treatment of females at work began to concern even some employers, and thus in 1911, the Factory Act was passed, ostensibly to improve their conditions. All mines and factories employing more than fifteen workers were required to limit the workday for women, and children under fifteen years of age, to twelve hours, including one hour of rest. The importance of this Act, probably lies in its very existence, rather than in its effect.

The Meiji period of 1868-1912 may have legally abolished the Tokugawa social class system, but it did little to change the status of women. They were still considered to be inferior beings, subject to the control of the patriarchal head of the family. Except for factory work, few women were employed in the business or professional fields. The employment of married women was very uncommon; even those who worked in factories were released upon marriage.

Feminist leaders such as Hiratsuka Raicho established a group called the *Seito Society* (Blue Stocking Society) in 1911, with the aim to discover and develop the suppressed talents of Japanese women. The Society constituted a pioneer effort in combating engrained customs. During the Taisho Era of 1912-1926 Hiratsuka began work for equal political rights for women in 1919. In 1920 Hiratsuka, along with Ichikawa Fusae formed the New Women's Association, and asked not only for equal opportunities for women, but also for protection of the rights of mothers and children. Their efforts did not produce much as far as immediate results were concerned, but they did start the movement for equal opportunities for the women of Japan.

During the 1920's an increasingly large number of girls were beginning to be employed as typists, telephone operators and clerks, but they were paid anywhere from one half to two thirds of the pay that their counterparts received for the same

² The end result was the evolution of the Japanese language in such away as to include the most minutely differentiated styles of speech between men and women and between "superior" and "inferior" persons by

work. The impact of the war economy on the work experience of Japanese women was not as great as that in the European countries. In part this was because Japan did not have a history of having to rely on its female labour force during the First World War, and partly because the governments effort in mobilising the female workforce was delayed in World War Two (Lam, 1992:8). There were strong concerns that women's participation in the labour force might lead to a reduction in the population. The final decision to mobilise women did not come until the autumn of 1943, which was of course, too late. By that time there was a shortage of raw materials and the productive capacity of the economy was on a rapid decline. Women were still only treated as an auxiliary labour force, and policy statements from the government specified that women were to be used only for " simple and easy work" (Akamatsu, 1977: 33-35). Women entered the labour force and were the crutch that held Japan's fragile economy together.

The sweeping reforms imposed, in post-war Japan, by the Allied Occupation, had the greatest impact on Japanese women. They brought dramatic changes in the legal status of Japanese women. With these changes came a vast improvement in the status of Japanese women, especially with the introduction of the Articles of the Constitution in 1946. Article 14 in particular stated:

All of the people are equal under the law and there shall be no Discrimination in political, economic, or social relations, because of race, creed, sex, social status or family origin.

Article 24 stipulated equality of the sexes in family life as well. Finally, women were granted equal rights with men under this new constitution³.

The present Japanese Constitution, promulgated in 1946, stipulates equal rights for men and women. Consequently, the problem of sexual discrimination in Japan

means of intricate levels of distinctions between humble and honorific words, phrases and speech patterns.

³ The Constitution of 1946 is examined in greater depth in Chapter Four of this thesis.

is one of gaining equal opportunity. In Japan it appears that equality is not so much the governing principle of democratic society, but arguably a tool to be taken up when appropriate. Sometimes there is more freedom in this approach than in the strictly principled approach.

In Japan, questions of fairness and equality seem to be conceived from a long-term, multidimensional perspective. Although the husband and wife in a household or the co-workers in an office may not seem to be treated equally at any particular point in time, those involved in decision making consider the question from a broader perspective. In facing specific day-to-day situations, Japanese women tend to be extremely pragmatic if the advantages and disadvantages balance out; in the long run, people are willing to accept the relationship as fair and equal (Iwao, 1991). The precondition for achieving this balance, of course, is a long term, trusting relationship between employee and employer.

There are some situations in which Japanese women are quick to demand equality especially in the education sector. However, in other sectors it appears, where they do not feel it is an important issue, such as within administrative jobs and the service and hospitality industry. When they wish to protest against unfair treatment, nevertheless, they are less likely to opt for a direct confrontation that leaves bad feelings on both sides than to let the party concerned know indirectly, or plainly, that they are unhappy with the situation (Akiba, 1998).

The Labour Standards Law of 1947 provided for equal pay for equal work and granted women a series of protective measures in the areas of working hours, night work, underground work, maternity leave, holidays and restrictions on dangerous work. However, these externally imposed changes took a long time to become an established practice. It could be said, that in reality, the Labour Standards Law and the concepts and principles behind the Labour Standards Law, never really took root and it was not until the 1960's that some women workers began to challenge their employers' discriminatory employment practices. They did

this through the courts system by using the equal rights provided for them under the constitution and the Labour Standards Law (Lam, 1992).

However the court process in Japan, is long and complicated, largely because of its structure. The structure of the judicial system in Japan consists of the Supreme Court (*saiko saibansho*); 8 high courts (*koto saibansho*) in the eight principal geographical subdivisions of the country; 50 district courts (*chiho saibancho*) in the principal administrative units; 50 family courts (*katei saibansho*); and 452 summary courts (*kanii saibansho*) located throughout the country. All cases before the Supreme Court are appeals; it does not possess original jurisdiction over original cases. The Constitution⁴, also provides that the Supreme Court is the court of last resort.

The high courts are essentially appellate courts in the first instance for the crimes of insurrection, preparation for or plotting of insurrection, and of assistance in the acts promulgated. District courts have original jurisdiction over most cases with the exception of offences carrying minor punishment and a few others reserved for other courts. In addition, they are courts of appeal for actions taken by the summary courts. Family courts came into existence in 1949. Summary courts have jurisdiction over minor cases involving less than ¥ 900,000)⁵

With very few exceptions, civil courts judge labour cases in Japan. Since the Japanese system does not rely on earlier court judgements as precedents, each judge is free to consult his or her own authorities and deal with issues and interpret the law according to their own rights. This applies to the courts at each level as well as to the individual courts and judges. The Supreme Court tends to be very conservative in dealing with labour cases, and a decision favourable to the complainant at lower levels may well be overturned when they reach the Supreme Court.

⁴ Article .81

⁵ (\$8000 NZ approx. as quoted in Japan Profile of a Nation (1994:72

All discrimination cases begin in the district courts. In a typical case, an employee challenging dismissal or compulsory retirement faces two kinds of proceedings. In the first she carries a provisional suit, asking the court to order the employer to continue the employee in her employment status until the end of the trial itself, because she pleads there is a strong possibility that she will win the case. At the same time, she enters the employer's actions as null and void because they infringe good public order or the constitutional guarantees or other provisions of the labour law (Cook, 1980:37).

In the Labour Standards Law of 1947 under Article 4 it guarantees equal pay for equal work. Article 62 prevents women from working during the hours from 10pm to 5am. Article 61 regulates the maximum amount of overtime allowed per day. Article 63 prohibits women from doing dangerous work, and did not allow them to work underground. Article 19 states they may not be dismissed during maternity leave or for thirty days after it.

Although the reforms represented by the 1947 Act strengthened the legal rights of women in Japan, their social, political, and economic conditions have not improved measurably. In 1972 the Diet adopted the Working Women's Welfare Law that aimed to further the welfare and improve the status of working women by taking appropriate actions to help them reconcile their dual responsibilities of work and home or to enable them to develop and make use of their abilities (Cook, 1980:15).

The Welfare Law was enacted against the background of high economic growth with increased demand for additional labour. The Welfare Law was enacted with an aim:

to further the welfare and improve the status of working women by taking appropriate actions to help them reconcile their dual responsibilities of work and home or to enable them to develop and make use of their abilities-ILO 1972.

The law however, was only recommendatory and not mandatory, and it was left to the women's bureau of the Ministry of Labour to persuade employers to voluntarily accept its standards.

In the years that followed the enactment of the law, the bureau, working through its prefectural offices was able to point to many examples of employers who had introduced some of the recommended reforms, but the law remained a mere statement of goals and intentions. Practical measures of the law proposed to employers that there be provisions for child care facilities for the working women that they employed, but there were no measures to enforce the recommendations.

The advantage of this policy was that there was an upsurge in the number of middle-aged women entering the work force, the majority of whom were employed as part time workers. The government's welfare policy has been criticised extensively by the women's movement in Japan, based on the grounds that it encouraged more women to work part time and attempts to preserve the traditional family system by stressing the importance of women's roles as mothers and wives. This basic policy orientation remains unchanged in the current EEOL.

Japan has been extremely slow in granting women equal rights in the workplace. Employment practices, which were overtly discriminatory against women and were explicitly, prohibited by legislation, were until the last decade part of the norm of the employment system within Japan. Many companies differentiated against women not only in recruitment but also in wages, job assignments, training, promotion, and retirement age .⁶

Why then, did the Japanese government feel it necessary to revise the above laws and in place an Equal Employment Opportunities law?

Since, the middle of the 1970's there has been rapid growth in the service economy of Japan. Women entered jobs in the growing service sector at a faster rate than men. Companies found it hard to ignore the demands and needs of women whose performance and morale were important for their competitiveness. The shortage at that time of young qualified labour, pushed companies to recruit more female graduates, who of course they were largely only twenty years earlier. Some companies started to introduce special career development programs for women during this time (Lam, 1992:6). The growth of the service sector and the increase in specialist and technical jobs have expanded job opportunities for women. Japanese companies of this time were rather indifferent to women's career development issues, some companies began to introduce new policies in an attempt to open up promotion opportunities for women and to improve their morale.

These special career development programs were introduced to 'revitalise' (*joshi rodoryoku no kasseika*) the female work force. This in effect did not work overly well, because the attributes promoted were not conventionally acceptable as 'feminine' in Japan at this time, especially following an era of public subordination.

Generally speaking, because Japanese are not litigious people, and that their culture places high value on loyalty to their group, and in employment, their company, it can be seen that it is particularly difficult for an individual woman to break such constraints and charge an employer in open court that he/she has been unfair, unjust and not loyal to them as the employee. Japanese are more likely to seek out an individual who is mutually respected by both the employer and employee to mediate their differences, thus saving face for each of the litigants by proposing a settlement each can accept. (Cook, 1980:35).

In 1980 Japan participated in the world conference of the United Nations' decade for women and agreed to ratify the Convention for the Elimination of All forms of

⁶ Ministry of Labour 1981 Survey

Discrimination Against Women (CEDAW) by 1985.⁷ The provisions in Article 2 of the convention called for the removal of all forms of discrimination, in wages and in the broader aspects of employment, such as recruitment, training and promotion. In order to meet this requirement, the introduction of a law that provided equal employment opportunities and equal treatment became was undertaken by the Japanese government. In May of 1981, the Japanese Government officially reiterated that the foremost priority of the second half of the United Nations' decade was to review any existing legislation and to formulate appropriate measures, including legislation to ensure equality for women in employment (Japan's Prime Ministers Office, 1981).

The first aim of the campaign for EEO was to establish women's right to work, that is, their right to live by virtue of their right to work, including their right to make the most of their abilities and to have them duly recognised. The second aim was to establish the principles of respect for motherhood and of men and women sharing responsibility for the family. The third goal was to guarantee equal working conditions that would enable both men and women to work in health and safety while fulfilling their family responsibilities. The larger goal of this campaign was to change the very standards of employment in Japan, based as they are on the division of labour that leaves housework and the raising of children, entirely up to women, so that men can devote their full energy to the company. In other words, the campaign was an attempt to adjust the standards of the workplace to cater to some of the needs, wants, and desires, of working women.

Realisation of this goal involved more than opposing any rigid revision of the Labour Standards Law, it required the elimination of job discrimination in harmony with the upgrading of labour standards for men, so that those standards can be applied equitably to men and women alike. These goals represent an attempt to change the very essence of labour in Japan, so achieving them is no easy task. The proper procedure would have been to propagate these concepts, draw up an

⁷ This is discussed in Chapter 5 of this thesis.

effective equal opportunity law, and then ratify the UN convention and boost Japan's international image. However, the Japanese government was compelled to instigate the necessary legislation at short notice.

The economic pressures for change culminated in the enactment of the Equal Employment Opportunities Law (EEOL) in May of 1985. The new legislation was partly the product of international pressures on Japan⁸.

The new law was the culmination of the following developments. Early in 1979, the Tripartite Advisory Council on Women's and Young Workers' Problems, a statutory advisory body to the Ministry of Labour, appointed a committee of so called experts to study the 'substance of sexual equality in employment' and to develop standards for future legislation. Over the seven-year period, it attempted repeatedly to draw up concrete guidelines for the legislation but because of conflicting views among the committee members it proved extremely difficult to reach a general consensus. The main controversy centred around two areas: firstly, whether the protective measures provided in the Labour Standards Law were an obstacle to equality and secondly, the scope and measures for ensuring equality in employment. This battle between management oriented committee members, feminists, and labour orientated members continued until 1982. It was in May of that year that the committee of experts issued a report representing an effort to reach a compromise between conflicting views on the issue of protection of the female workforce. However, even then it failed to provide any concrete guidelines with regard to the proposed legislation for guaranteeing equality on all levels.

In view of the approaching deadline for ratifying the UN convention, the neutral members came out with a 'compromise plan' in February 1984. The Tripartite Advisory Council finally submitted a recommendation to the Government in March of 1984. Unfortunately opinions were still divided on the concrete measures to be

⁸ The idea for introducing a law providing equal opportunities was first proposed in 1978, however, was not passed until Japan was put under pressure internationally, until 1985.

taken. At the last minute the Ministry of Labour took a strong administrative initiative, declared the council's recommendations as a reasonable compromise and drafted a bill, based on neutral members' position and submitted it to the Diet in May of 1984. It passed the Diet a year later, in time for Japan to ratify the UN convention that summer, marking the end of the UN decade for women⁹.

As stated the Bill was intended to bring domestic legislation into line. Of course, with the United Nations Convention on the Elimination of All forms of Discrimination Against Women, which Japan signed in 1980 and had pledged to ratify by 1985, the last year of the United Nations Decade for Women. Debate on the Bill was touched on in a large part of an article by Michiko Hasegawa, an associate professor of philosophy at Saitama University, in the May 1984 Chuo Koron (Hasegawa, M. 1984). Hasegawa takes issue with the United Nations convention on which Japan's EEO bill was based.

Specifically the stipulation that not only laws and regulations but "customs and practices" that discriminate against women be modified and abolished. Also, that "social and cultural patterns of men and women be modified, with a new view to achieving the elimination of prejudices and customary with all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for men and women". Not only does this provision infringe on the cultures of individual nations, she claims, but it represents an attempt to thrust the values of the white race on "the individual cultures of non-western ethnic groups", thus threatening their "cultural ecology".

Famous political commentator Yayama Taro, writing in the May 1984 Shokun, attacked the Bill from a somewhat different perspective (Yayama, 1984:5). He opposed the Bill on three different grounds. Firstly, Yayama suggested that it threatened the system of lifetime employment and seniority based wages that

⁹ Genuine debate on issues is rare in Japan, but prior to the enactment of the EEOL, general interest magazines devoted considerable space for a full-blown debate, with the bone of contention being the Equal

underlies Japan's social stability and corporate vitality. Secondly, he suggested that it threatened to destroy Japan's culture and traditions as well as the values held by the greater majority of the people. Thirdly, he indicated that in the drafting of the EEO Bill the government conspired to cover up the real problem points that existed within management practices throughout Japan.

Mayumi Moriyama, a member of the House of Councillors and former director general of the Labour Ministry's Women's and Young Workers' Bureau, has long been an advocate for Equal Opportunities in Japan. She replied to Yayama in the June 1984 Shokun (Moriyama, 1984 June). She pointed out that the EEO Bill included no punitive measures for failure to comply with hiring, promotion, and the other provisions that so worried Yayama. She also noted that many companies have already incorporated the bills mandatory provisions, such as equality in employee training and benefits.

In the August Chuo Koron, Hanami Tadashi, an expert in law opposed both Hasegawa and Yayama (Tadashi, 1984:2). In answer to the charge that the UN convention represents the foisting of Western values on Japanese culture, he maintains that the document was an expression of the universal ideal of sexual equality. He also took the issue with the assumption that the attempt to change people's attitudes through legislation was wrong. Those who believe this, he observes, are forgetting the substantial contribution that new legislation made to the democratisation of post-war Japan.

Hanami also objected to the way opponents of the proposed equal employment opportunity law seemed to think that it was going to force women to work outside the home when all it was designed to do, was to provide men and women with equal opportunities. In response to the protests that the proposed law would lower industrial efficiency, Hanami makes the point that the distribution industry, for one, favoured the employment of more women precisely in the interest of greater

efficiency. He also stated that even if problems of efficiency did arise in some sectors of Japan, efficiency should never be held up as the sole criterion for industry but should always be balanced by equal consideration for fairness.

The final version of the Law that emerged from the Ministry of Labour in May of 1984 and was eventually enacted in May of 1985 and enforced in 1986, which nevertheless turned out to be very much a product of compromise with the management's position. It of course prohibits discrimination on the basic training, fringe benefits, retirement, and dismissal but with regard to recruitment, job assignment and promotion, it urges employers to 'endeavour' to treat women equally with men. Strictly speaking, the new legislation granted women no new rights that they had not already had through litigation in the 1970's and early 1980's, except for prohibiting discrimination in basic training. The Japanese Government thus seems to prefer a step by step approach, taking into account employment practices that are distinctively Japanese. The Japanese government described the passing of the new legislation as a great historical moment of all kinds of movements against discrimination in Japan (Ministry of Labour, Japan, 1986:2).

THE MAIN ASPECTS OF JAPAN'S EQUAL EMPLOYMENT OPPORTUNITIES LAW -*Danjo koyo kikai kintoho*

In June 1985 Japan finally ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations General Assembly in 1979. In keeping with the provisions of this convention, the Equal Employment Opportunity Law (EEOL) was passed in May of 1985 and took effect in April of 1986.

Under the EEOL the law outlines various *normative* measures to be taken by employers:

Article 7 has the stipulation of equity in the recruitment and hiring of women in the employment system of any Japanese company. It provides that employers shall endeavour to provide women equal opportunity with men with regard to recruitment and hiring of workers.

Article 8 similarly provides that employers should endeavour to treat female workers equally in promotion and assignment of workers.

Since these articles require the employer only to make best efforts in promoting equality in recruitment and promotion, they do not establish a legal obligation to establish actual equality. Within the EEOL of 1986 it is the duty of the employer to endeavour to deal with special employment management for pregnant women. Under the Child Care Leave Law of 1998 it is now the legal duty of the employer to arrange special employment management for pregnant women.

Articles 7 and 8 call on businesses to make efforts to eradicate discrimination on the basis of gender in regard to recruitment, hiring assignment of duties, and promotion; prohibits discrimination against women in regard to training, health and welfare benefits, retirement, resignation, and dismissal. However, there are no penalties for employers that do not comply; and calls for the creation of an equal opportunity conciliation commission in each prefectural women's and young worker's office to settle disputes.

The 1985/86 EEOL simply set forth the employer's moral duty to endeavour to provide equal opportunity for women and men. As for the duty to endeavour, some assert that the EEOL is a 'paper tiger' since a violation of the "duty to endeavour" is subject to no sanctions. Others see the duty to endeavour as providing a solid basis for administrative guidance, a means more effective than criminal or civil sanctions in the Japanese social context.

In the area of recruitment and hiring the employers were advised that it was their duty to endeavour to try and provide Equal Opportunity. This also applied with

assignment and promotion within a company or practice. Prohibition of discriminatory treatment by the 1985/86 EEOL was limited to discrimination in vocational training, fringe benefits, mandatory retirement age, mandatory retirement by reason of marriage, pregnancy or childbirth, and dismissals (Articles. 9, 10, 11).

There is also only partial prohibition of discrimination in the area of fringe benefits within the Japanese EEOL. With mandatory retirement, most Japanese companies have introduced a 'teinen' system, which means that on reaching a certain age a person must retire from work, whether he/she wants to or not. The age limit is usually from 55-60. On retiring, a lump sum of money is given and at resignation and dismissal there is prohibition of discrimination.

Under the 1985/86 EEOL the preferential treatment of women (in Part time jobs) is legal, though it should be illegal in principle. If there is a dispute, and a mediation procedure is needed, then that is to be commenced on both parties' agreement. However, in reality it should only be commenced on one party's request. Unlike the LSL, the EEOL has no criminal penalties. Apart from an encouragement of voluntary resolution (Article 13) and administrative advice upon request (Article 14), the 1985/86 Law only establishes mediation procedures to cope with dispute arising thereunder. The Director of the Prefectural Women's and Young Workers' Office can refer the dispute to the Equal Opportunity Mediation Commission for mediation (Article 15). The Commission consists of three learned persons nominated by the Labour Minister (Article 17). In the 1985/86 Law there is no sanction for companies who violate the regulations stipulated by the law. However, it is felt that there should be some form of publication of offending companies' names. There is also no provision set out for sexual harassment. This is generally dealt with under the Labour Standards Law, but I feel that there should be some support by the government.

A breach of the current EEOL is not punishable in the courts system of Japan, hence the amendments that come to the fore in April of 1999, which will be discussed in depth later within this section.

Japanese corporations were strongly opposed to the new Equal Employment Opportunities Law, on the grounds that a western concept such as this would not work in Japanese society and that Japanese tradition would be threatened by it. Even some women opposed the law, fearing that it would mean the loss of certain protective measures found in the Labour Standards Law (Araki, 1998).

As a result of opposition from both female labour and management, the original intent of the Equal Employment Opportunities Law was weakened considerably during the process leading up to the governments draft and once the law was enacted its enforceability was in serious doubt.

The Women's Bureau, which was responsible for drafting the 1985 Law has been, and remains, concerned with protection for women. The Bureau has been in charge of protecting women by, for example, restricting overtime, holiday work and night labour, weightlifting and harmful jobs for women.

The Bureau took the equality issue to be part of protecting women, and never properly understood the fact that equality and protection of women are legal values that are counterpoised. It is quite symbolic that the EEOL was originally introduced as an Amendment to the Working Women Welfare Law of 1972. Thus, the official full title of the EEOL was Law Respecting the Improvement of the Welfare of Women Workers Including the Guarantee of Equal Opportunity and Conditions for Men and Women in the Field of Employment (the name of the Law was changed with the 1997 Amendment, to become the Law Respecting the Guarantee of Equal Opportunity and Conditions for Men and Women in the Field of Employment). Right from the beginning, therefore, equality was regarded as a part of protection, which, in turn, was deemed to "include" equality.

As a result of this confused understanding of equality and protection, the fundamental contradiction between these two values was never understood by women bureaucrats who were in charge of drafting the EEOL. At the same time, women's groups, including female trade unionists who promoted equal employment legislation, strongly advocated keeping full protection for women, even while demanding equality legislation.

Both policy makers and supporters of the legislation categorically refused to admit the inconsistencies inherent in attempting to provide full equal opportunity for women workers who were denied work on an equal basis with men in terms of overtime, holiday and night labour, heavy weightlifting and other dangerous jobs.

In order to make a compromise with employer groups and conservative political leaders who opposed equality legislation, equality and protection became matters of political dealing. Thus, the EEOL was passed as a compromise, some parts dealing with protection of women were omitted on condition that certain protective provisions of the Labour Standards Law were kept.

Is the EEOL 1985/86 a Dead Letter?

The 1985/86 EEOL is criticised as a paper tiger, or a dead letter, not only because the scope of prohibition against sex discrimination is narrow but also because the law does not provide effective sanctions against violations. Unlike the Labour Standards Law, the EEOL has no criminal penalties. Apart from an encouragement of voluntary resolution under Article 13 and administrative advice upon request under Article 14, the 1985/86 Law only establishes mediation procedures to cope with dispute arising thereunder. In each prefecture in Japan there is a Women's and Young workers' office, which is given jurisdiction to provide assistance in the settlement of the dispute for claims made under the EEOL (except, significantly, for disputes arising under Article 7 regarding hiring and recruitment. These are met under the Labour Standards Law). Voluntary settlement under current law requires the agreement of both parties to take corrective action and the Office only plays an advisory role in any settlement.

The Director of the Prefectural Women’s and Young Worker’s Office can refer the dispute to the Equal Opportunity Mediation Commission for mediation as states Article 15. The Commission consists of three learned persons nominated by the Labour Ministry (Office of Gender Equality 1997).

The mediation procedure has not been utilised at all until 1994 because the procedure however, can only be commenced when BOTH parties to the dispute, agree to mediation. The first mediation procedure began in 1994 and a settlement proposal was made in February 1995. Since the settlement proposal has no binding effect, the parties refused to accept it and the dispute was not settled. Up until recently, mediation procedures could only be started with the agreement of both labour and management, so that in 13 years only 106 employees from 14 enterprises had applied for mediation (Japan Labour Bulletin, 1995). Only one of those cases involving one enterprise and seven employees was ever mediated¹⁰.

Trends in Female Employment Since the Enactment of the EEOL 1985/86

Population of 15 year olds and over in Labour Force (Japan) (Ten Thousand Persons)

	Male							Female						
	Population 15 years old and over	Labour force			Not in labour force	Labour force participa- tion rate (%)	Ratio of unemployed in labour force (%)d	Population 15 years old and over	Labour force			Not in labour force	Labour force participa- tion rate (%)	Ratio of unemployed in labour force (%)d
			Employed	Un- employed						Employed	Un- employed			
Annual Average														
1989	4854	3737	3654	83	1091	77.0	2.2	5120	2533	2474	59	2564	49.5	2.3
1990	4911	3791	3713	77	1095	77.2	2.0	5178	2593	2536	57	2562	50.1	2.2
1991	4965	3854	3776	78	1088	77.6	2.0	5233	2651	2592	59	2561	50.7	2.2
1992	5002	3899	3817	82	1090	77.9	2.1	5281	2679	2619	60	2590	50.7	2.2
1993	5044	3935	3840	95	1101	78.0	2.4	5326	2681	2610	71	2639	50.3	2.6
1994	5078	3951	3839	112	1122	77.8	2.8	5366	2694	2614	80	2669	50.2	3.0
1995	5108	3966	3843	123	1139	77.6	3.1	5402	2701	2614	87	2698	50.0	3.2
1996	5136	3992	3858	134	1140	77.7	3.4	5435	2719	2627	91	2712	50.0	3.3
1997	5180	4027	3892	135	1147	77.7	3.4	5481	2760	2665	95	2716	50.4	3.4
1998	5209	4026	3858	168	1177	77.3	4.2	5519	2767	2656	111	2747	50.1	4.0
1999	5232	4024	3831	194	1199	76.9	4.8	5552	2755	2632	123	2790	49.6	4.5

¹⁰ Technically, modifications should be introduced so that the mediation procedure can be commenced upon the application by one party, namely that of the worker.

Great fears were entertained over the effectiveness of the Equal Employment Opportunities Law since it was inaugurated in 1985/86. The change of female employment was far more rapid than had been expected though steadfast expansion of female employment in both facets of supply and demand and a business boom following enforcement of the EEOL.

The female labour force continued to expand in 1996 (Japan's Ministry of Labour 1996), reaching 27,190,000 (40.5% of the total labour force [67,110,000]). In 1985/86, the year in which the EEOL went into effect, the female working population was 23.67 million; the labour force participation rate stood at 48.7 percent and the proportion of women in the total workforce was only 39.7 percent. Changes are also observable in the types of jobs women are employed in, further expanding the job fields for women. Although many are still in clerical jobs, some women have been venturing into such field as skilled work, manufacturing, and construction, which were traditionally male dominated. Furthermore, there are an increasingly visible number of women doing professional and technological jobs, further expanding women's domain in the company. In 1996, 79.3% (20,840,000) of female workers were company employees. The number had been steadily rising, as in 1996 there were 360,000 more than in 1995 alone. The number of female employees as a percentage of total employees has also increased annually, climbing from 32.0% in 1975 to 39.2% in 1996. 61.6% of all female company employees were working in services, wholesale and retail trade, and the restaurant industry. Growth in numbers has been substantial in these fields and by adding finance, insurance, and real estate to this, the number rises to 67.3% (ibid.).

However, clerical and office work accounted for the highest proportion of female employees, followed by craft, construction and manufacturing workers, professional and technical workers. Job areas which have seen the largest growth since 1975 by numbers are clerical and retailed work, followed by professional and technical occupations, sales workers and protective service and service workers .

The typical working woman in Japan earns 63% of the average man's pay compared to New Zealand where women earn 76.8% of males' average ordinary time weekly pay (CEDAW Report 1998 Article 11:5). In international comparisons, this figure is frequently quoted as evidence in itself that Japanese women are at more of a disadvantage in the workplace than their peers are internationally. Unfortunately, the trend here also suggests that the gender wage gap in Japan is actually beginning to worsen, with the longer length of service and participation in the workplace, by Japanese women. Here is an area that needs to be addressed and recognised, by the Japanese government, in order to keep this gap from widening.

The average age of female employees was 36.5 in 1995 and the length of service was 7.0 years, they are also steadily increasing when corresponding them to figures for male employees which were 40.1 and 12.9 years respectively (Office of Gender Equality 1997). In 1975, there were 3,880,000 female part time workers (employees in non-agricultural or non-forestry industries who work less than 35 hours a week). In 1996, however, the figure had risen again to 6,920,000 (25.5% of the total number of the female labour force). Part time workers amounted to 10,150,000, representing 15.1% of the total labour force, out of that a total of 68.2% were women (ibid.). Thus, the number of working women and that of female employees in particular, increased and their job fields expanded. Behind this lies a growing number of women who possess both a willingness to work and ability to do so (Japan Labour Bulletin 1995).

The employment situation for women changed at a rate far more than had been expected after the enactment of the EEOL. The media called the 1990's an 'era of women', but stirred controversy about female employment, and women's advance into society based upon smoothly progressing careers. Employment opportunities, within Japan's current economic slump are now deteriorating quickly. It is doubtful that social change was brought on by the EEOL, but rather the worker shortage

provoked by what has been called “bubble economics”¹¹ was the motive power expanding employment opportunities for women.

Bearing in mind that Japan’s EEOL is a labour law that is within the jurisdiction of CEDAW I believe that there should be effective sanctions against violations of the EEOL. This in turn should improve the current employment situation of women in Japan. Arguably, if any employer violates prohibition in terms of recruitment, hiring, assignment, promotion, training and education, fringe benefits and termination, he/she should be a) prosecuted and b) it should be made public the fact that the employer and the company have exploited women and that they are not an Equal Employment Opportunity employer.

There are four main criticisms of the EEOL 1985/86 as suggested by Mutsuko Asakura (1991:51):

- EEOL is one sided in support of women permitting women to be kept in lower paying jobs. It has permitted employers to give women “favourable treatment”, such as recruiting them only for certain positions. This practice, in fact, has allowed companies to keep men and women on different career tracks.
- The EEOL has merely encouraged employers not to discriminate on the basis of gender in recruiting, hiring, placing or promoting; its provisions were not mandatory.
- The EEOL lacks an effective dispute resolution mechanism. In saying that employers are under no obligation to respond to requests for arbitration of complaints brought by employees. Without, the agreement of both parties, government officials can not and will not intervene.

¹¹ A ‘bubble economy’ is an economy, which is extremely volatile, which relies on global economies for its stability.

- The EEOL provided no mechanisms for preventing sexual harassment or for handling harassment claims.

It is important at this point to note that not all equal opportunities are directed at women. The 1985/86 law had two seemingly contradictory purposes, in that one was to attain equal employment opportunity for women. The other was to promote women's welfare and elevate the status of women workers. From the viewpoint of the latter, disadvantageous treatment for women and vis-à-vis men should be prohibited, but the law is not concerned with more favourable treatment of women.

The Ministry of Labour's official interpretation was that, whereas restricting recruitment to male candidates would violate the law, restricting it to women (e.g. recruiting part time jobs for women only) would not, because recruiting only for women would provide more employment opportunities for women. In this sense, the term 'equal opportunity' meant not equal treatment of women and men but "one sided equality" by providing women, whose employment opportunities are traditionally restricted, with the same opportunities as men. This one sidedness was severely criticised in that it allowed the entrapment of true equality in the workplace (Araki, 1998).

Japan's equal employment policy attempts to eliminate sex discrimination began with a modest intervention entailing duty to endeavour, rather than outright prohibition, since the latter would entail drastic modification of current practices. Through administrative guidance and campaigning, a gradual but steady modification of societal and companies' consciousness toward equal employment was sought. It should be noted as a matter of interest that as a feature of Japan's equal employment policy, that the policy of harmonising work and family life has developed simultaneously with the anti-sex discrimination policy.

Through their cautious pursuit of total equality with men, Japanese women reveal an awareness that their having to bear equal economic responsibility with men does not always serve their best interests. True equality as stipulated by Iwao

Sumiko in a lecture presented as part of the Japan festival in 1991, would limit the Japanese women's current options and level of enjoyment of life considerably, and consequently many Japanese women prefer to publicly avoid debating the subject. While some women want to pursue a fully fledged career and demand equal treatment with men, the majority of the women entering the labour force even tend to leave their jobs after only working four or five years. A problem is how to provide equal treatment for those who want a career while continuing to offer jobs that meet the needs of the non-career-minded majority. Many large companies have tried to work at a realistic solution in trying to implement equality, by introducing a choice of a two-track career system.

One is referred to as *Ippanshoku*¹², which literally is a clerical track, or as the Japanese say 'Office ladies jobs'. The other is *Soogooshoku*¹³, which is more of a managerial track career. The *Soogooshoku* is exclusively for women but does not entitle job rotations which involves relocation to another city, but the women choosing this career track, are paid less and have fewer if any, chances of promotion than their male counterparts. With the *Soogooshoku*, the women choosing this managerial track receive supposedly, the same treatment as men, including the possibility of transfers to other locations. Although, this dual track system is supposedly gender neutral on its face, in fact based on statistics for approximately 52% of Japanese companies with more than 5,000 employees, suggest that, the *ippanshoku* class is only for female employees and is not a dual track system. Further, although the *Soogooshoku* classification is applied to both females and males, only approximately 2.5% of the *Soogooshoku* are actually female and consequently, given the opportunity to be considered as a candidate for higher status. In addition to this, in terms of regular and temporary workers, only 9.4% of male employees are temporary compared to 39.8% of female temporary workers.

¹² Ippanshoku will also be referred to as untenured Position

¹³ Soogooshoku will also be referred to as a tenured position.

Promotion of women to managerial jobs such as *bucho* (bureau chief), *kacho* (department chief) or *kakaricho* (section chief) is still limited. Only 7.1 percent of *bucho*, 20.1 percent of *kacho* and 39.6 percent of *kakaricho* are women. The percentage of women in *bucho* and *kakaricho* positions has even declined since 1995, from 8.4 percent and 42.4 percent, respectively. Thus, it is no wonder the government itself has admitted in its white paper that between 1995 and 1998 Japan registered the least improvement among 10 industrialised nations in terms of women's participation in government and corporate decision-making processes. (Tadashi Hanami January 1,2000)

In their practical approach to the problem of women's diverse attitudes to work, companies specifically ask women to choose between the clerical and managerial track when recruiting and then test them accordingly. The dual track employment system should possibly be viewed as a singularly Japanese style approach in its emphasis on reality rather than principle. With this implementation women now fall into two main groups; a small, very talented elite, whose ambitions may run even higher than men's, and a great mass majority, whose members (though many are just as talented), do not want to work so hard that it will interfere with their family responsibilities and enjoyment of life.

Unlike New Zealand, Japanese companies tend to recruit a new batch of graduates once a year rather than fill particular positions when they arise within the company. The members of this group undergo a graduate programme in training and are then distributed among the company's departments. Such a system is of course expensive, and employers were previously unwilling to bear the expense of training women, who they presume are likely to resign within a few years. With the implementation of the EEOL a growing number of companies have had to begin providing on job training for women. Such firms may be left empty handed if the women soon quit, even though a well trained female work force is a plus for society as a whole.

Case Studies and Their Outcomes

The following section will deal with recent cases in Japan, after the implementation of the EEOL. It will show that the 1985/86 EEOL is not effective as it lacks formal procedures of redress. The cases chosen have been selected because under the EEOL, management practices changed, and a two-track career option was established, as discussed in earlier sections. The cases show the employee's situations and comment on the cases and on the 1985/86 EEOL ineffectiveness in resolving or prohibiting these problems from arising within the workforce in Japan.

CASE ONE: MATSUDA YUMIKO (*not her real name*) ¹⁴

Is in her seventh year of employment at the general trading company where she found employment on graduation from junior college. She holds an untenured office position in the sales division in charge of ocean vessels. Matsuda has begun preparations to become a qualified tax agent in order to find some independence. She clearly states that today's companies prefer to only use untenured¹⁵ workers for their own convenience.

Under a philosophy of rewarding ability and work record, the company where she works adopts a system under which employees are paid according to their talents. However, this system applies only to tenured positions. Thus, it does not apply to those in untenured positions like Matsuda (Akiba 1998). She states, that however hard she works to build up her work record, those in untenured positions do not get proportional recognition. No matter how many years she works there, she will remain in the same job. That does not do a lot for staff moral in untenured positions.

¹⁴ Akiba Fumiko 1998, Vol.43 no 504 pg. 6

¹⁵ Tenured and Untenured positions are job categories created in personnel administration that designate different courses of employment adopted mainly by large corporations under the EEOL 1986. Tenured positions indicate the type of employment traditionally deemed suited to men. It means working in mainstay areas of business and in principle does not involve job transfers. Most men work in tenured positions and although some women work in them as well most end up in untenured office positions.

Matsuda was offered a tenured position, during the initial stages of the Japanese recession, because many of her fellow employees had left, and the daily "supplementary" workload had also increased. In order to resolve this dilemma confronting untenured positions, a large number of companies have instituted a system according to which employees are moved from untenured to tenured positions based on an overall evaluation of their ability, ambition and future hopes. Matsuda feels that women who work in tenured positions may work at the same workplace, but they aren't given the same chances for career development as men are, specifically that women are not evaluated on the same terms as men.

As can be seen in this case study women are being indirectly discriminated against in the workplace. Employers are required by the EEOL1985/86 to treat both sexes equally in recruiting, hiring, placement, and promotion. The above case is in violation of that stipulation within the EEOL, but it is not punishable. Unfortunately the employee was forced to look at alternative employment.

Under New Zealand's Employment Contracts Act 1991 (ECA), this woman would have the grounds for constructive dismissal, but in Japan that she may be hard pushed to find support from her colleagues, because as mentioned previously the Japanese do not like public confrontation. Also the employee concerned may not want to lose face with her peers, so she would not pursue this case any further than perhaps this case study.

CASE TWO: MAEDA MIDORI – (not her real name) ¹⁶

Maeda Midori worked in a tenured position for nearly ten years at a city bank following her graduation from college. Five years ago she resigned and now manages a consulting company.

¹⁶ Akiba Fumiko 1998, Vol.43 no 504 pg. 6

She resigned from the bank because she was not being appointed to a managerial position and she felt conspicuous when her inquiries about the reason produced no clear explanation from her supervisor.

She states that she can understand it if her abilities were not suited to the job. However, the fact that her supervisor could not give a clear-cut explanation led her to believe that the reason she was not promoted was because she was a woman. She also stated that in male oriented companies, there was an old saying "genius is slow to mature", but they apply that only to men and not to women.

Her reasoning behind this was that many men have worked at the same company until retirement, and although in many cases they never had great work records while they were young, over time their talents blossomed. Nevertheless, few women have ever worked at the same company for a long period, and so the old saying is not applicable to them. If they fail even from a young age to boost their performance they lose their job and receive a negative evaluation.

Maeda explained that the dilemma that caused the most considerable stress within her job, was the fact that at companies with a small number of women working at the same level as men, often a negative evaluation given to a woman with a poor work record, was not merely applied to that individual woman, but is extrapolated to women in general, leading to the assumption that all women perform badly. Thus, each individual woman's work record reflected on all women, putting them under extreme tension to perform the same job as their male peers, and they could not afford a single mistake.

It is clear from these case studies and others that are discussed in Chapter three, that the development of EEO to promoting good business policies and practices, as well as providing many other benefits, is not sufficient in itself to ensure this within any organisation.

In Japan no case against an employer has ever made it to a court of law. This is most likely due to the fact that any mediation procedure can only be commenced when both parties to the dispute, agree to mediation. Just to get to that point takes on the form of a long paper trail. In that a complaint must be laid to the employer, then to the Director of the Prefectural Women's and Young Worker's Office, and then through to the Equal Opportunity Mediation Commission, for mediation. This in itself has been widely quoted as taking at least two years. The mediation procedure was not utilised at all until 1994 because the procedure can only be commenced when both parties to the dispute agree to mediation. The first mediation procedure began in 1994 and a settlement proposal was made in February of 1995. Since the settlement proposal has no binding effect, the parties refused to accept it and the dispute was not settled.

Should either of the Japanese women mentioned in the above case studies have chosen to fight the system of tenured and untenured positions, they would have to go through the above procedure and probably without their employers support.

Voluntary settlement under the current EEOL requires the agreement of both parties, and more often than not it is an employers' word over an employee's, and hence the man's word versus woman's word. More stringent and effective regulations are necessary in Japan's EEOL, especially as many assert that the 1985/86 EEOL is a paper tiger since violation of the "duty to endeavour" is subject to no sanction. These case studies are indicative of the fact that the 1985/86 EEOL has only a narrow scope of prohibition against sex discrimination.

CONCLUSIONS

It is difficult to pinpoint why such discrimination has persisted, even after the Equal Employment Opportunity Law 1985/86 was passed. Many factors have contributed to the persistence of discrimination within the employment system within Japan. One reason that is commonly voiced as contributing to the difference between the work position of male and female employees is that many female workers resign after marriage. Further, ironically, employers sometimes use the provisions

designed to protect female workers under the Japanese Labour Standards Law of 1947, as an implicit basis for discriminating against women. For example, late night work for female employees, between 10.00pm and 5.00am, is generally prohibited in the Labour Standards Law Article 64-3. A certain maximum number of hours is stipulated by law for overtime for female workers, which is much less than the limitation for male workers Labour Standards Law Article 64-2.

Based on these provisions, employers claim that they have difficulty in providing female workers with equal opportunity for job assignments, promotion, etc. As I have indicated some male employees and husbands continue to believe that the "norm" in Japanese society is for women to be responsible for taking care of the family, cooking, cleaning, taking care of children and other domestic work. Married female workers still, in fact, have more responsibilities than husbands for domestic work in many cases, which have forced female workers to decide to have part-time, temporary work and avoid job assignments requiring overtime. Despite the above societal factors and the general inequality of opportunity for female workers, Japanese law does provide certain protections designed to ensure the equality of opportunity for all employees in Japan.

The Japanese Ministry of Labour points out that the Equal Employment Opportunity Law of 1985/86, is a developing piece of legislation and that the requirements stipulated in the law represent no more than temporary minimum standards aimed at raising the average norm of equal opportunities in the Japanese enterprise community by reducing the number of "bad practice companies" According to the Ministry of Labour, the spirit of the law goes beyond the requirements stipulated in the law itself. Good practice employers, that is those, who have already satisfied the minimum requirements, are expected to fulfil their "moral obligations" by making "further efforts" in providing equal opportunities for women in respect of the spirit of the law (Ministry of Labour 1985/86:44).

However, the business recession after the burst of the economic bubble in the 1990's, has cast a shadow on the employment of women that steadily expanded,

having a great impact particularly on recruitment and hiring women. For instance, consider hiring of four-year college graduates in the technological field. Companies which hired only male graduates accounted for 61.7% of all firms questioned, far surpassing the figure of 37% which employed both men and women graduates (Ministry of Labour 1986:44).

It is fair to say that jobs for women have certainly undergone changes and have expanded in number. They have steadily changed qualitatively also and women have advanced into a variety of job fields. The fact is however, EEOL or not, that the effects of the business recession have had a far greater effect on women than they have on men. Expanded employment of women was due to the fact that amid the worker shortage resulting from the nation's bubble economy, women were funnelled into vacant positions unable to be filled by men. But women were the first to go once there were no more positions left vacant. It is clear, that male dominance is still deep-rooted in corporate attitudes toward a preference for men. Also, the present EEOL has been evidently unsuccessful in changing such corporate behaviour.

In the midst of overt discrimination between men and women in recruitment and hiring, it is natural that voices calling for reinforced legal effectiveness of the EEOL have been raised. It appears essential to forbid discrimination against women in recruitment, hiring, assignment and promotion and to make prohibitions effective by administrative commission which has authority to give orders with a legal force (Imada, 1996).

The current generation of Japanese women are in some ways victims of the past, trapped in the conflicting poles of old and new. This conflict is clearly shown by a woman trying to come to terms with her position in society and within the workforce. Reinforcing the restraining power of the EEOL is not enough to realise equal employment opportunities, for both men and women in contemporary Japanese society.

CHAPTER THREE

Equal Employment Opportunities in New Zealand

INTRODUCTION

Within this chapter I will look into the history of Equal Employment Opportunities (EEO) in New Zealand. Firstly I will start with a brief social history of women in the workforce in New Zealand. I then briefly discuss current legislation that attempts to curb the exploitation of women in the workplace. I then introduce two case studies to support my statements on EEO in New Zealand and what I see as the necessity of full implementation of EEO policies. This chapter is a brief overview of the background of EEO in New Zealand, EEO which will be examined in-depth in chapter four.

BACKGROUND OF THE NEW ZEALAND SETTLER EXPERIENCE¹

The experience of 'going out to work', and the understanding that men should be involved in paid work while women engaged in unpaid work at home, were brought to New Zealand by British settlers. Right from the very beginning, the view that women should be economically dependent on men was inconsistent with the fact that many of the first women settlers were single women who arrived to earn their own income. They were employed as domestic servants, farm labourers, and textile and clothing workers. Accordingly, these women had been encouraged to come to New Zealand to 'find a good husband and start a new life'. They were needed at the time primarily as workers and were employed to do much of the hard and dirty work in the colony, for the lowest of wages (Novitz, 1987: 25)

¹ I am concentrating here on non-Maori history but Horsfield and Rei discuss Maori women's experience of employment, for further reference.

At the time only a minority of married women were officially in paid work, many women supplemented their husbands wage by dressmaking, taking in washing, caring for other people's children, or providing meals and board. In the nineteenth century many women whose households depended on their earnings also worked at home sewing flour bags and clothing for large firms. They were supplied with the materials and paid on a piece-rate basis. There were of course considerable advantages in this for the employers. It was a means of avoiding the Factory Acts of 1891, 1892 and 1894) which attempted to curb the exploitation of women workers, and thus meant that that Act could be avoided because no minimum conditions were set. This kind of "Outwork" also made it very difficult to unionise the labour of the lowest paid workers. In essence the Factories Acts, not only limited women's working hours but actually excluded them from doing certain jobs. Thus, inequalities slowly crept into the labour market.

The women who received the lowest rates of pay in the 1890's were those working as domestic servants, who usually worked the longest hours by occupation. The rates of pay were lowest for women when they were doing the work most women did in their own homes for no pay at all. Women doing similar work to that of men were paid considerably less for their labour. The average skilled seamstress for example, would earn 20 shillings a week. A tailor however, could earn £3 10s.

According to Novitz (cited in Cox, 1987:25), given the fact that young women could barely earn enough to pay for food, clothing, and shelter, marriage became an economic necessity. Their marriage and withdrawal from the workforce, of course perpetuated women's low earnings, and reinforced ideas about women's marginal place in the workforce.

Women's low wages have been both a product of ideology about the family which assumes women's economic dependence on man and a source of that dependence, for women's earnings had seldom been sufficient to support

themselves and their children independently of a male partner or the state.

Some employers benefited from the opportunity to buy women's labour for less than it costs to meet their daily needs.

In the 1890's, New Zealand entered an era of prosperity that was to last until the ~~beginning of the 1920's~~. As wool prices gradually rose and the expanding dairy and frozen meat industries began to profit from improved prices on the London market, business confidence and internal investment recovered. Overseas loans reactivated development projects and made cheap credit available. Prosperity in this era was, unevenly distributed. Wage earners generally fell behind many farmers and self-employed businessmen and unemployment ran at a surprisingly high level. Up to 10% of the population was unemployed in an intermittent and seasonal manner in the years preceding the First World War. Had it not been for the outbreak of the War in 1914, New Zealanders might have been forced to modify their dependence on the British market to diversify.

Following the war years, with the help of settlement schemes for returned soldiers, rural land values rose quickly. Farmers' cheques suddenly enlarged and the general atmosphere of prosperity during the War helped to consolidate the pattern of economic development that had emerged in the early 1900's. The 1920's were a time of wide spread disillusionment and political instability as well as economic insecurity.

The 1920's witnessed the onset of a recession and by the 1930's the New Zealand economy was suffering from economic depression and from a renewed structural crisis. The growing strength of the tertiary sector lost ground in the 1920's and 1930's firstly to the secondary sector and later to the primary sector, as people returned to the rural areas during the depression

It was at this time that the principle of equal pay became part of the agenda of women's groups and became a high priority once female suffrage was won in

1893. Of particular concern to women's groups of these times were the abominable conditions under which many women and girls worked. The publication of the findings of the Sweating Commission highlighted the plight of women who were being exploited through low wages and poor conditions. The condition of "sweated labour" in the 1880's meant that women were paid far less, and treated worse than men. Young female apprentices would often work for nothing in the vain hope of continuing employment. Thus, demand for equal pay and Equal Employment Opportunities (EEO) in New Zealand arose from appalling working conditions for women in the 1890's. The conditions of 'sweat labour' highlighted not only the need for better health and safety conditions in the workplace, but also the disparity in wage rates between men and women.

Until 1926 the trend towards increasing participation by women in the New Zealand labour force was evident, with a gradual but sustained upward growth from 23 percent in 1901 to 27 percent in 1926 (Carmichael, 1975:80). During this time a significant portion of women worked in domestic and related services, but women were also moving into "pink collar" areas such as office and clerical work and telephone and telegraph operators. Later on, employment opportunities arose for women in teaching, nursing and office and clerical work. In manufacturing industries, opportunities for women were concentrated in the food processing, clothing, woollen mills, and footwear industries.

During the 1930's depression, women teachers were refused employment by the Education department and single women received virtually no employment relief. When unemployment relief was established for single women through the Women's Employment Committees, it involved a six week course in cooking and sewing and the expectation that the women involved would find domestic work in the homes of the prosperous families. It was only after the Employment Promotion Act of 1936 that women over the age of 20 were able to register as unemployed and were afforded assistance by the state to find paid work. Few women in employment could in fact be replaced by men because men of the time did not

have the skills to replace typists, sewing machinists, laundry workers, telephonists, and nurses. Gender specific skills had become an integral part of New Zealand's labour market.

During the depression, the ideology of women's domesticity was used to discourage women from entering into paid employment. At the same time however, the practical necessities of meeting their families needs pushed women into trying to find paid work regardless of their personal inclinations.

Women's groups remained active throughout the 1930's; The Working Women's Movement campaigned for sustenance for unemployed women and pensions for deserted wives with children. The First Labour Government's stimulation of local industry brought more women more work in offices and factories. The 1940's saw the emergence of nursery schools, which were based on progressive educational philosophy and established to provide both care and education for children. It is argued that their acceptance was limited because the concept of early childhood care and education was at odds with the ideals of motherhood, despite the economic need and the reality of working women's lives. Thus, there was a separation of the care and education components of the service, with care becoming the prerogative of the few charitable community childcare centres opened in the 1930's. Women whose husbands were away at war, as a supportive parenting co-operative initially started this during the 1940's.

World War Two marked a turning point in the increasing participation in the labour force when jobs became freely available (Ebbett, E.1981: 5). As men vacated their jobs, women were encouraged to enter them. The ratio of women to men among those in full-time employment rose from 27:100 in 1936, to 34:100 in 1945. However, it was during the Second World War that the scene was set for women's patterns of labour force participation, which would persist through to the present day's situations. In the short term, the Second World War was a catalyst for increased levels of female participation in the labour force in New Zealand. When the War broke out, women were encouraged to take on their men's jobs. The

establishment of the National Register of Manpower in 1942 required that women between the ages of 18 and 30 years of age register as reserve labour. Nearly 6,000 women from this reserve pool were directed into work. Women took over jobs traditionally limited to men in industry, agriculture, retailing, transport, and offices. Thousands more drove trains, trams or cars or worked in factories or on farms (Day cited in Middleton. & Jones 1992). By 1944 it was compulsory for all women up to the age of 44 to register if they did not have dependants under 16; if they refused to work then they were breaking the law. It now became socially acceptable and sometimes financially necessary for married women, including mothers to work. (Corner 1988:17). Between 1936 and 1945 the proportion of married women in paid employment rose from 8.5 to 17.2 percent, and for many of them, it was their first experience of the working world. (Forster 1969 in Corner 1988). As they became aware that they were capable of doing 'men's jobs' they found they had common grievances; the injustice of doing the same job for lower pay and the lack of opportunity for women to have permanent careers in the public service. To remedy such grievances they became actively involved in employee organisations and a new phase in the movement for equal pay.

In September 1942, a general article on women war workers appeared in the Christchurch press, written by Caroline Webb, President of the Business and Professional Women's Federation. 'The main battle' she wrote:

will certainly be in the Public Service, where women are employed under conditions that are nothing short of scandalous. Although the Public Service Act makes no discrimination between the sexes, regulations and administrative procedure have been used to keep women in the lowest grades of the service, to pay them at consistently lower rates than men, and to appoint them only as a temporary members of the service... To shelve the problem of women's economic rights or to refuse them a

*worthwhile career in the Public Service on the grounds that they will eventually marry is becoming daily less plausible.*²

Some progress in the equal pay movement was made at the 1943 Public Service Association's (PSA) annual conference when a sub committee was appointed to investigate a scheme of family allowances in relation to equal pay and its application to the public service

In April 1945, Mary Boyd, on behalf of the PSA, presented the Case for Equal Pay for Equal Work to the Consultative Committee. A rate for the job and equal opportunity in employment and promotion was stressed. (Corner 1988:25) Corner (1988:28) states that after a careful study of the case the Public Service Consultative Committee agreed 'in principle', that reward for services should be based on the value of the work done without any discrimination in regard to sex', but foresaw practical difficulties if equal pay was introduced into the public service before being applied to industry generally and before universal family benefits were introduced. Equal pay was therefore restricted to positions above the basic grade and to specific occupations, such as librarians.

In Corner 1988, Mary Boyd and Rona Bailey recall that they were more concerned about equal opportunity and equal status than they were about equal pay. They wanted women to be eligible for recruitment to the public service for permanent careers.

Throughout the War years, government legislation continued to underpin inequities between the earnings of men and women. The Minimum Wage Act 1945 provided for minimum adult rates of £5 5s a week for men and £3 3s for women. Other legislation also acted as a barrier to participation by women in certain occupations, such as the Apprentices Act of 1948, which outrightly excluded women. Only hairdressing was one of the trade exceptions.

² Press, 15th September 1942,p.4

However, when the War was over and the men returned the only "Thanks" that women received was to be told that they could and should do only one thing, return to full time housework and mothering. The decade following 1945 saw the level of participation of married women aged 16-29 barely increased in the work-pool. Nonetheless, middle aged married women re-entered the workforce in steadily increasing proportions from 1945.

It has been suggested by Aitken (Aitken cited in Bunkle & Hughes 1990) that the improved educational and economic capacity of women during the post war period provided a setting for the second wave of active public feminism. Again, labour force issues were the central concern to women advocating improvements in the status of women in New Zealand, particularly improved working conditions, equal pay, and a diversification of the paid occupations open to women.

In 1947 the National Council of Women (NCW) stated its support for equal pay, with remits requesting equal pay and opportunity, recommending that the Government set up a commission to investigate the question of equal pay along the same lines as that of the British Royal Commission. In 1948 they decided to urge the government to amend the Minimum Wages Act to include equal pay and reaffirmed their support of trade unions, the public service, the professions and supporting organisations.

The early 1950s saw the rapid growth of the Public Service Association equal pay campaign as influential Public Service Association personalities encouraged existing committees and inspired the formation of new ones. At the same time, however, the opposition of the Public Service Commission intensified.

From 1954 onwards the movement for equal pay became more planned and powerful.

The Labour party began to take a more positive stand on the issue of equal pay in its 1954 manifesto promising,

'Encouragement of progressive reduction in margins of pay between men and women until the ideal of equal pay for equal work for the job is attained' (Corner 1988:36)

In 1957, the Council for Equal Pay and Opportunity was established alongside of a lengthy campaign of public service women. In mid 1958 a 250 page Working Party Report was compiled and the Labour Government appointed an Equal Pay Implementation Committee in October 1959. As a result, in 1960 equal pay for women in the public service began to be phased in over a five-year period. Despite such measures, gaps in the earnings of men and women continued throughout the period with average female factory workers wages amounting to half of those of males as late as 1968.

The early 1960's was a period of economic expansion and full employment which created a demand for female labour. Census statistics indicate however, that since the mid 1960's women have been more likely to be unemployed than men have. This phase of the evolution of women's participation in the labour force witnessed the emergence of part time work as a modern method of working. This was in response to labour shortages in the 1950's and 1960's when married women were a majorly untapped source.

By the mid 1970's, the long post war boom was clearly and unfortunately was at an end in New Zealand. New Zealand was in an economic crisis characterised by rising unemployment, high net outward migration, near stagnation in the farming sector and a downturn in the building industry and its supply industries. Despite this economic downturn the increase in female labour force participation continued strongly through to the 1970's. With an increasing female workpool, the emergence of the Women's Liberation Movement (WLM) in New Zealand, was no surprise.

Throughout the 1970's the WLM began to make its presence felt within trade unions in the workplace and in separate organisations of working women. A range of women's organisations arose, such as the Working Women's Alliance, the Women's Unions and the Working Women's Council, advocating not only the right of women to work and to do so for equal pay, but also the right to paid maternity leave, free childcare facilities and the unemployment benefit. As a result the concept of 'community childcare' became established in various forms, mainly by women who, while wanting to continue with their careers, also wanted quality care and education for their children (Cook cited in Codd, Harker and Nash (eds.) 1990).

Also in the 1970's, women's organisations such as Women for Equality were active, offering support to women in industrial disputes. Equal pay actions were a political priority for the WLM, whose member went onsite at factories handing out leaflets which told women how much more their male counterparts earned. They urged the working women to join the WLM and lobby employers through their unions for equal pay. In 1972, the principles for equal pay, introduced a decade earlier in the public sector, and were extended to the private sector under the Equal Pay Act. Under the Act, separate provisions were made for the remuneration of female employees, awards and agreements, which were the main documents establishing basic pay levels, to provide equal pay for women by the year 1977.

Women's groups were, however, not content with the Act, as it failed to take into account the different values placed on different occupations. In female dominated occupations, there were often very few men by which to set "equal rates". Therefore, the Act did not deal with horizontal segregation, that is the fact that men were concentrated in different occupations than women. Very few claims for equal pay could be made, since very few men and women actually worked at exactly the same job. The Act did not address vertical segregation either, where men were promoted to fill the top positions in job hierarchies, because women were not performing the same jobs as these men, they could not claim for equal pay.

There was no legal enforcement on employers to prevent their continuing to discriminate against promoting women to high level jobs. The Act did nothing to remedy the fact that women's work was given a much lower value, both in terms of recognition and actual wages, than work performed by men. So, women who dominated in occupations such as nursing, started from a position where their work was undervalued and under paid and under the Equal Pay Act, can not claim for higher wages. The Act did not deal in any way with the existing sexual division of labour in society and the inequalities that arise from it. Many have also argued that the Equal Pay Act was inadequate as the Act should have contained and covered equal pay for equal value.

Some employers exploited these inadequacies. New sex segregated jobs were created where previously there had been a mixed workforce, by giving jobs new and different names, hiring a few men to do menial labour at exceptionally low rates of pay, so that it could not be claimed that women were earning less than the lowest paid man.

Women's groups advocated that equal pay should be given for work of comparable value. Despite the efforts of the WLM and the extension of the Equal Pay Act to the private sector in 1972, the gap between the ordinary time earnings of women and men narrowed by seven percent only from 72% to 79%. It also was not until 1972 that the restrictions in the Apprentices Act of 1946, which excluded women, were removed. Throughout the late 1970's and early 1980's, there was growing acceptance by official agencies that women and girls in New Zealand were not necessarily offered the same range of educational opportunities, occupational opportunities and hence life chances as their male counterparts.

In New Zealand the first wave of reform saw the elimination of state sponsored inequality in pay through the Equal Pay Act 1972, access to apprenticeships in the Apprenticeship Act 1974, access to educational and Employment Opportunities in the Human Rights Commission Act 1977, and access to night shift work in the Factories and Commercial Premises Act 1981 (Novitz cited in Cox 1990). Despite

these advances, as the 1970's and 1980's progressed, it became clear that, while individual employment rights might have improved, social inequalities still continued. While the Equal Pay Act 1972 eliminated differences between individual men and women doing the same work, it did not eliminate the collective pay gap between men and women.

In 1977 the Human Rights Commission Act began to address individual discrimination and the systemic development of Equal Employment Opportunities (EEO) started with the State Services Commission policy promulgated in 1984. This specifically covered women, Maori, minority ethnic groups and people with disabilities and was signed by all "Government Employing Authorities"³.

In 1985 the Employers Federation published its policy statement on EEO and again this was recommendatory, rather than being a binding document. Recognising the changing role of women and the changes needed to address systemic discrimination in the workforce, the federation initiated this preliminary step to encourage and persuade their members to implement EEO policies and practices.

EEO was first given legislative intent in the State Owned Enterprises Act of 1986, which required the State Owned Enterprises to be "good Employers" with an EEO programme. What an EEO programme comprised of was not defined nor was there any form of monitoring or reporting requirement. In 1988 the State Sector Services Act, specified that all State Sector employers were to have an EEO programme, designed to eliminate barriers to the advancement in employment of women, Maori, minority ethnic groups and people with disabilities. The Act also outlined annual reporting requirements with provision for regular monitoring of results. As wage gaps, occupational segregation and differential rates of unemployment continued, or indeed worsened during the 1970's, individuals concerned with social equity became disenchanted with "first wave" EEO practices. The early hope that

³ Anyone working with the government service. For Example, the Ministry of Education, the Ministry of Women's Affairs.

collective social inequalities could be remedied by guaranteeing individual equality of opportunity seemed misplaced.

During the 1970's and 1980's, individuals concerned to close the "gaps" in the performance of women and minorities as groups grew disenchanted with Equal Opportunity programmes. Consequently recruitment, selection and promotion methods were sought which would more rapidly achieve the goal of equal outcome:

That of course is fairer job distribution and power among men and women (Industrial Relations Infonet: 1). Adopting a new strategy to address pay inequity, unions and women directed their energies away from the courts to securing, under the explicitly pro-women Labour government, legislative changes which culminated in the passing of the Employment Equity Act of 1990.

The Employment Equity Act of 1990 (EEA) was passed on the 17th of July 1990 and came into force on the 1st of October 1990. As its short title indicated the EEA introduced the concept of employment equity encompassing equal employment opportunity as well as pay equity. The EEA contained three major parts. To ensure the EEA did not follow the fate of its predecessor and become derailed by judicial intervention, the first part established the office of the Employment Equity Commissioner. Her responsibilities focussed on assisting employers; unions and workers to develop and implement equal employment opportunities programmes, and conduct pay equity assessments.

The second part required all employers in the public sector to develop and implement EEO programmes over a stated period. While the issues to be incorporated in the programmes are set out in the Act, the method of implementation was left to the discretion of the individual employer. Under the EEA compliance with legislative requirements could be enforced by application for compliance to the Labour Court.

The third part of the Act dealt with pay equity. It required an employer, union or twenty workers in a female occupation, defined as an occupation in which 60 percent or more of the workers are female, to apply to the Employment Equity Commissioner to make a pay equity assessment for their particular occupation. An applicant had to specify two male workers as the basis for pay equity comparison. Exercising considerable discretion the Commissioner was empowered to determine the occupational classes for assessment.

The assessment process involved comparing the same skills, effort and responsibility, minimum rates of remuneration in any award or agreement, regional differences, extraordinary working conditions, recruitment and retention factors.

Once determined this assessment was required to be included in an award, agreement or contract by negotiation between, employee or union and employer. It did not 'require' any group to apply for a pay equity assessment; it only permitted such applications under the law. Where an agreement could not be reached it was referred to the arbitration Commission for final offer arbitration. It was also to determine the period during which the assessment should be implemented (Wilson cited in Deeks and Perry 1992:113).

While the EEA comprehensively addressed employment equity, properly for the first time in New Zealand's history, it was criticised as providing, "a long and cumbersome procedure full of many checks and balances" (Wilson cited in Deeks and Perry 1992:113) that would require amendment if it was ever to achieve pay equity. Developing the policy, drafting and enacting what is known as Geoffrey Palmer 'last legislation' took six long years of constant lobbying from both outside and within the formal political process.

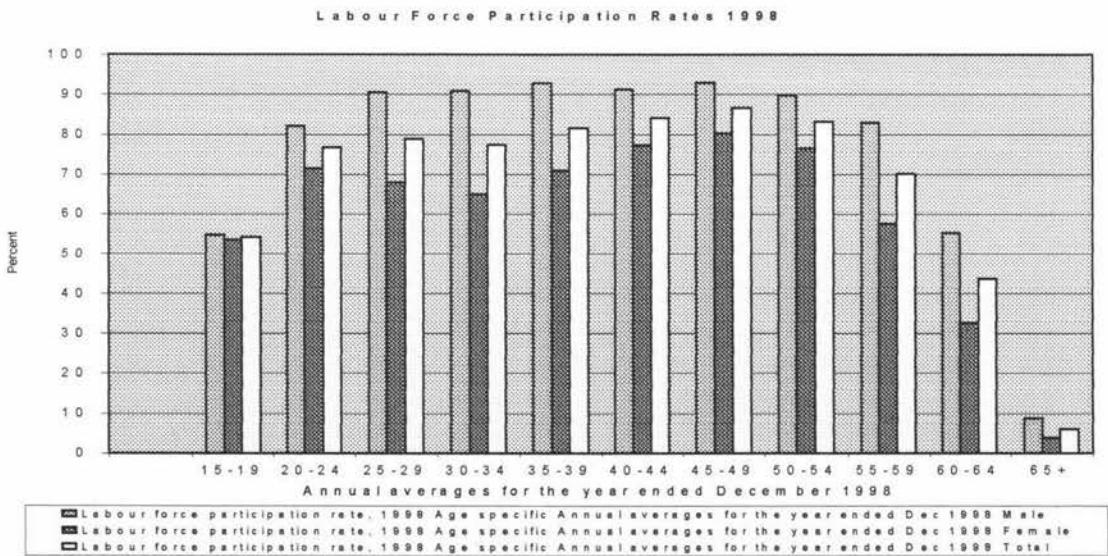
At that time, the New Zealand Government was in turmoil. Geoffrey Palmer resigned after only 18 months as Prime Minister in September of 1990, leaving Mike Moore as Prime Minister for exactly one month. With a sagging economy, high unemployment figures, unpopular privatisation and a deficit amounting to

4.7% of the gross national product, National, led by Jim Bolger won the vote to govern New Zealand. One of the first pieces of legislation the incoming National government passed in December of 1990, was the repeal of the Employment Equity Act. The Minister of Labour noted:

“ The Government is firmly supportive of the removal of workplace discrimination on the basis of gender or membership of a minority group. The government does not however, support legislation which imposes mandatory procedures on private sector employers or which achieves pay equity through a centralised and prescriptive mechanism. It is therefore decided to repeal the Employment Equity Act”. (Birch,W. 15th November, 1990)

The government also abolished the Commission for Employment Equity.

Trends in Female Employment in New Zealand.



Source: Household Labour Force Survey⁴

⁴ Department of Statistics, New Zealand.

In the year ended December 1998, women made up 45 percent of the labour force. This compares with 43.7 percent five years ago and 42.6 percent a decade ago. At every age group, however, male participation is higher than female participation, the difference being particularly marked in the main child-bearing ages (between 25 and 34). For the year ended December 1998, the overall labour force participation rate for males was 73.7 percent compared with 57.2 percent for females.

Full-time and part-time work

People whose usual hours of work are 30 or more per week are classified as working full time, whereas those whose usual hours of work are between 1-29 hours per week are classified as working part time. For the year ended December 1998, an average of 1,327,100 New Zealanders were employed in full-time work and 397,900 in part-time work. Compared with five years ago, full-time employment has grown by 11.2 percent and part-time employment by 24.5 percent. However, over the last decade full-time employment has grown by 7.9 percent, while part-time employment grew by a massive 42.8 percent. (Household Labour Force Survey 1998)

Hours of work

Employed persons by actual working hours,⁽¹⁾ 1993 and 1998

TABLE 1:

	Males		Females	
	1993	1998	1993	1998
Actual hours worked per week	(000)			
0 hours	53.7	60.3	53.8	64.1
1 - 9	27.8	32.6	60.8	77.7
10-19	28.7	40.5	80.1	94.9
20-29	37.3	46.8	82.5	107.6
30-34	50.3	55.2	62.5	70.2
35-39	44.4	49.7	60.0	62.5
40	247.8	236.7	155.7	156.6
41-44	43.8	46.7	21.8	28.5
45-49	94.2	116.0	32.4	43.5
50 and over	217.7	263.1	55.6	71.9
Not specified	1.3
Total	847.1	947.5	666.1	777.5

(1) Annual average for the year ended December. ... Denotes estimates fewer than 1,000 and subject to sampling errors too great for most practical purposes. Some discrepancies may exist between totals and the sum of their component items due to rounding.

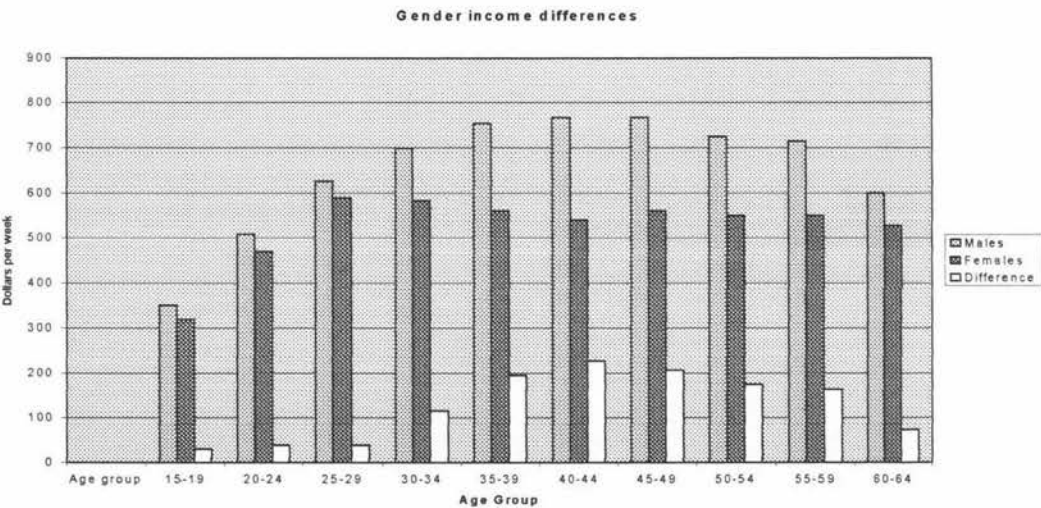
Source: Household Labour Force Survey

Average total weekly hours, as measured by the Quarterly Employment Survey, have remained in the range of 38.7-39.4 paid hours since 1987, and have been increasing during the last four years. Actual hours worked per week (as opposed to usual hours) have changed between 1993 and 1998. The table above illustrates the growth in people working part time, and also indicates that of those working full time, more people are now working longer hours than they did five years ago.

Gender income differences

Median wage and salary income for full-time workers by age and sex, June 1998

Figure 2:



Source: New Zealand Income Survey, June 1998

From these figures the relative closing of the earnings gap between men and women may reflect a number of different trends working together. The gender wage gap will not narrow over the next five years, if the current trends continue. The above statistics suggest that an improvement in the ratio of female to male wage rates will depend on changes within government and within industry. Women's patterns of participation in the labour force vary in accordance with age and stages in the family and individual life cycle. Essentially what has occurred is a

shift from a unimodal, left skewed profile, with labour force participation being restricted to the period prior to marriage or prior to childbearing, to a so-called 'm-shaped curve'. This shift reflects some fundamental changes in the nature of women's participation to the current situation where labour force participation is common prior to marriage, followed temporary withdrawal from the labour force at prime childbearing ages and re-entry at a more mature age. At any age women are more likely than their male counterparts to work part-time in order to supplement the families income. The fact that there is an increase in the proportion of young, single and childless women joining the part-time labour force suggests that there is a shrinkage in the availability of full-time jobs, and that these women are therefore likely to be underemployed. Part-time jobs, notes Briar 1992, have a number of disadvantages for women, which can be summarised as follows:

- Lower rates of pay
- Menial status of part-time jobs and extreme occupational segregation.
- Lack of job security
- Lack of prospects for training and promotion

Part-time employment has been inferior to full-time work in terms of pay and opportunities.

There is continuing evidence of a wage gap between female and male earnings ratios. The factors contributing to this wage difference are complex and interrelated, and the proportion that is discriminatory or non-discriminatory can not be quantitatively established. The cause of continuing discrimination lies in the undervaluing of work performed predominantly by women, and in the lack of opportunities for women to fully participate in the labour market.

The most effective means by which to address both the matter of undervaluation of women's work, and the lack of equal employment opportunities, is to enact effective legislation that is specifically designed to redress both these matters. The differences in women's participation in the labour force and in wages suggests that

there is still a need for a more proactive approach to EEO and to equal pay and equal value within New Zealand.

EQUAL EMPLOYMENT OPPORTUNITIES POLICY AND LEGISLATION IN NEW ZEALAND.

There is a virtual absence of voluntarily adopted EEO programmes in New Zealand. In the 1997 annual report of the EEO Trust, the total membership consisted of 29 Foundation members and 219 members. Of those memberships 107 were government departments. In a November 1997 EEO Trust Index Summary, they published the following statements:

- That the majority of New Zealand workplaces are failing to seek competitive advantage by valuing diversity.
- A recent survey showed that one third of the respondent organisations were not aware of the legislative requirements of parental leave or equal pay. Apart from public sector organisations there are few organisations that have provided conditions (such as domestic leave and parental leave) over and above that statutory minimum.
- Very few organisations that do have an EEO policy use it for competitive advantage when recruiting staff.
- Less than a third of organisations had a written or documented EEO plan, although a further 20% were intending to develop one.
- Just over a fifth of respondents have responsibility or accountability for EEO built into managers' performance contracts.
- There is little information from the private sector to suggest that an innovative approach is being taken to EEO conditions within contracts such as domestic and parental leave.

Despite ten years of efforts by the Human Rights Commission, the Employers Federation, the CTU, and the EEO Trust, employers appear to have ignored the

assertion that “ implementation of an EEO programme is good business management” (Human Rights Commission, 1989:17) while

“ Very few private sector organisations have effective EEO programmes...”(Human Rights Commission, 1989:17)

In some senses this simplifies the investigation; EEO in NZ has proven to be and probably will remain, a management practice almost entirely dependent on compelling legislation for its existence. In any analysis of EEO in NZ, the state's conception of EEO is central.

In 1988 the Labour Government passed a series of acts and amendments, notably the State Sector and Local Government Amendment Acts, which required all government agencies to operate “ a personnel policy that complies with the principle of being a good employer”.

Section 56 of the State Sector Act states these “ good employer” provisions include ‘requirements for an EEO programme’; the ‘impartial selection of suitably qualified persons for appointment’; and ‘recognition of the employment requirements of women’.

In addition, an EEO programme is defined as:

“A programme that is aimed at the identification and elimination of all aspects of policies, procedures, and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate inequality in respect to the employment of any person or group of persons...”

On one hand an employer is required to have policies that include

“ the impartial selection of suitably qualified persons for appointment: and the assurance that . A chief executive shall give preference to the

person who is best suited to the position “ (State Sector Services Act 1998 s56)

At first these appear to be clear commands to managers across the country to run ‘liberal’ EEO programmes. The key word “recognise” is not defined in the legislation and the individual responsible for implementing EEO must turn else where for assistance.

In “ A guide to EEO in Local Government” readers are told:

“ The purpose of an EEO programme is to develop objectives and strategies to remedy any discrimination against members of target groups which has been disclosed by the statistical analysis of the work force... Special measures maybe necessary to open opportunities for employment for certain groups who have traditionally not been well represented in that area of work...” (Local Government Employers Association 1990:38-39)

Once again a manager could be excused or plead ignorance, by feeling a little confused. Employment Equity is a term that captures the concept of fairness and justice, and the need to have equality of outcomes, which must be the overriding principles of any scheme to address discriminatory behaviour (Wilson 1988:9). Arguably, the decline in interest in EEO among Employers and managers in the last four years in New Zealand should be of considerable concern. Despite the often repeated assertion that EEO is “ good business management”, the private sector in New Zealand has remained largely disinterested, or unconvinced, while EEO in the public sector appears to have lost much of its momentum it enjoyed under the previous Labour government.

In attempting to please both liberal and radical agendas (as discussed and illustrated in Chapter One), the present New Zealand vision of EEO sends

contradictory messages to all those who are, or have been, required to implement the vision.

After the government repealed the Employment Equity Act it established the Working Party on Equity in Employment. On the Working Parties recommendation the EEO Trust was established in 1991 to promote the business benefits of EEO to employers through out New Zealand.

The EEO Trust

The EEO Trust is a membership-based organisation, which has a blend of public and private sector members. It is governed by a Board of Trustees and managed by a small team based in Auckland, New Zealand. The EEO Trust is resourced by membership donations, sponsorship and by limited government funds, which match at a ratio of 2:1, membership donations to an agreed maximum. The EEO Trust works to move employers from awareness and acceptance of EEO to action. The EEO trust supports the principles and practices of Equal Employment Opportunities as a means of ensuring all applicants and employees have equal opportunity to achieve their potential. The Trust believe that EEO is a good business practice, and that their organisation will benefit from a diverse workforce (EEO Trust 1998:2)

A policy statement from the EEO Trust, states it is committed to recognising and valuing different skills, talents, experiences and perspectives of employees and that the EEO Trust expects all contractors to it to operate equitable employment practices.

The Key responsibilities of the EEO Trust are:

- The development and dissemination of educational material promoting EEO, EEO programmes policies and practices.
- The development and implementation of projects which promote EEO

- The commissioning of research on EEO issues and practice and also the review, monitoring and maintenance of a database of EEO resources and personnel.
- Acknowledgement and recognition of those businesses which actively promote and adopt EEO programmes, policies and practices.
- Promotion within New Zealand of the attitudes and behaviour, which will enhance or assist in achieving all or any of the purposes listed above.

In 1993, the Human Rights Commission Act was amended. Under the Human Rights Act of 1993, it is unlawful to discriminate in employment on any of the grounds listed in the Act⁵, where a properly qualified job applicant, or applicant for promotion, would otherwise be the best person for the job. Such a person may not be refused the available job, nor may he/she be offered it, nor provided with it, on terms and conditions less favourable than those offered or provided to someone else with similar capabilities, employed in the same or substantially similar circumstances. This includes less favourable superannuation (with some exceptions), other fringe benefits and opportunities for training, promotion, and transfer (Government Services Press). The Human Rights Act itself provides a practical reason why EEO policies and programmes should be introduced and put into practice.

The New Zealand Employers Federation has long supported the principle of equal opportunities in employment, education and training, emphasising how important it is that employment decisions be made on the ground of relevant merit, not on a basis of personal characteristics unrelated to ability. EEO should literally mean that no one is excluded from a job for which he/she is skilled and qualified by inappropriate processes, rules and attitudes.

⁵ This Act is discussed in-depth in chapter 4

However, because the EEO Trust is donation based it costs an organisation \$100 to join, and that is without paying for the resource material that is needed to have a good EEO Policy.

Clearly, achieving EEO in New Zealand is going to be a battle. Achieving employment equity requires a fundamental change in workplace culture, which extends beyond merely have a 'Trust'. Legislative and workplace reform must be combined to develop and implement a successful employment equity strategy. Realistically, New Zealand women have never been so well placed, as they are today to achieve this. It is felt that it is time in New Zealand, to begin unfinished business and develop a fresh approach to employment equity that acknowledges the differing needs of working women leading to policy and practices that positively discriminate and empower women to be different, but equal to their male counterparts.

In the next section of this chapter, I analyse two case studies and prove the ineffectiveness of New Zealand's current labour legislation, and EEO strategies.

CASES STUDIES IN NEW ZEALAND

The following case studies are readily sourced to emphasis the need for EEO legislation in New Zealand. They have been through the New Zealand Courts system, but have had to be assessed against the Human Rights Commission Act and the ECA.

Case One: K v R&B Ltd. C173/96, 13th August 1996

A real estate sales person had worked for a larger national real estate firm for fifteen months before becoming pregnant. She continued to work and in her eighth week of pregnancy, her manager let her know that "in her condition she should be at home with her feet up" and that it "wasn't the job or the place for pregnant women". The manager said it was "bad for the company image if she greeted prospective buyers by waddling around with her stomach sticking out"

The salesperson had a miscarriage and was admitted to hospital. While she was there her manager passed on one of her best deals to another staff member without consulting her. She thought this was a clear confirmation of the manager's desire that she leave and resigned shortly afterwards (Tirohia, 1997:2) A complaint was made to the Human Rights Commission and was investigated thoroughly. The Complaints Division formed the opinion that she had been unlawfully discriminated against, in terms of Section 22 of the Human Rights Act of 1993.

Following conciliation, the parties agreed to settle on the basis that the manager apologise for using the word "waddling", the company educate staff on the Human Rights Act of 1993, assure future compliance and pay general damages of \$10,000 to the former real estate salesperson.

Pregnancy discrimination is included in sex discrimination and in the above scenario it is more emphasised because it has happened with in the workplace. Under the Human Rights Act 1993, it is unlawful for an employer to discriminate against an employee or a job applicant because she is pregnant or because it is assumed she may become pregnant at some time in the future. Not only does the Human Rights Act 1993 protect employees from this sort of discrimination, but also so in addition, do the Employment Contracts Act 1991(ECA). Complaints under the ECA however, are taken to the Employment Tribunal. A woman can choose whether to take a complaint under the Human Rights Act or the Employment Contracts Act, but she can not do both.

If the real estate firm employing this woman had, had an operational EEO programme, this kind of situation would have never eventuated. It appears that the real-estate firm in question, did not bother with writing policies on this kind of behaviour and had not educated the workers on their employees rights under the Human Rights Act 1993 or the Employment Contracts Act of 1991. What is more they appear to have not implemented an effective EEO programme either as part of the private sector they are not obligated to do so either.

Case Two: Proceedings Commissioner v Air New Zealand Ltd. Equal Opportunities Tribunal, 16th December 1988

Air New Zealand Ltd. employs both female and male cabin crew staff. Until 1975 men and women were allocated different duties and their rank structure and rates of remuneration were different. Women were employed as flight hostesses with limited opportunity for promotion, and men were employed as flight stewards with a career path that could culminate in the position of Chief Purser (New Zealand Employment Law Cases 1989:96614-96616).

In 1975, Air New Zealand Ltd. and the cabin crew union concluded an agreement that became known as the "equal opportunity agreement". It had been agreed that, henceforth, all new recruits would be treated equally and the 1975 agreement made further special provision for the senior women who were already employed as flight hostesses. The women were to be given the opportunity for promotion in the flight steward ranks, but could only become eligible for promotion after having completed 40 consecutive operating sectors at work in the galleys. Even then, the promotions would only come after those of all men who had been employed before a certain date. Only a limited number of women chose to take this opportunity (New Zealand Employment Law Cases 1989:96614).

From 1980 to 1987 duties in the first class cabin became preserve of persons on a special roster known as the "B" roster. Almost all people on the "B" roster were women. "B" roster crew was not given the same opportunities for promotion than those on the "A" roster. Any person who elected to take the "B" roster and later wished to join the "A" roster could do so, but they would go to the end of the senior cabin crewmember seniority list.

The overall effect of this division of career tracks (not decided by the individual) was that a number of women had career paths that were well behind that of those men who had joined the airline at the same time as they had, or even later (New Zealand Employment Law Cases 1989:96615). A number of women who had

joined the airline before 1975 had complained to the Human Rights Commission because of the lack of alignment with their male counterparts in respect of seniority and promotional opportunity. In 1985 and 1986 the union and the airline attempted to reach an agreement that would address these issues. However, when it became clear that the differences were irreconcilable, the Proceedings Commissioner commenced proceedings in the Equal Opportunities Tribunal. The Commissioner sought the following treatment of this case:

- a) A declaration that Air New Zealand Ltd. had been in breach of the Human Rights Commission Act 1977 in that it had omitted to offer certain women the same opportunities for promotion as male employees in accordance with their years of experience.
- b) An order restraining such actions
- c) Damages in respect of loss of salary, other extra payments and superannuation benefits in respect of humiliation and ;
- d) Orders requiring Air New Zealand to place women named at the levels of seniority equivalent to those of the male cabin crewmembers with whom they commenced employment.

Unfortunately, the tribunal cannot be regarded as a “court of law”, and so the above proceedings were not Statute-barred (that is, enforceable by reference to statute). The Tribunal is an administrative tribunal that has a particular role to play promoting the advancement of human rights in New Zealand, and although it is required to act in a judicial manner, this does not make it a “ court of law”⁶.

⁶ Thus, the powers of the tribunal are quite different from those of a “court of law”. As an example: the Tribunal has a power to receive evidence that might otherwise be inadmissible, it has an obligation to act in accordance with equity and good conscience without regard to technicalities, and it is deemed to be a Commission of Inquiry.

Thus, any claims for damages were unfortunately beyond the jurisdiction of the Tribunal and must be determined by a High Court. However, this did not prevent the tribunal from granting the other remedies sought. It was in the interests of all concerned to do so (New Zealand Employment Law Cases 1989:966616).

The above proceedings highlighted a need for both the Union and the Airline to develop positive policies to promote non-sexist attitudes within their organisations, and they have to date done so. (New Zealand Employment Law Cases 1989:96677)

Observations of Case Studies

It is clear from these case studies that the development of EEO as conducive to promoting good business policies and practices, as well as providing many other benefits, is not sufficient in itself to ensure its progress within any organisation. In the Public Sector the public service are clearly more advanced in both countries than in the private sector. Although Japan has an EEO Law, employers have found many loopholes to get around it. Because it was a hurried law, policy makers did not look into the logical loopholes that were held within it. New Zealand needs legislation. This legislation needs to specify the designated groups, require the provision of EEO plans which will be monitored, give clear guidelines and frame works for compliance and hold all chief executives accountable for EEO in this country.

In as far as New Zealand is concerned, many women are now under some form of protection from the ECA 1991, and the Human Rights Act of 1993. However, because you can not use both Acts in your defence, guidelines have become drawn as to what Act a complaint falls under. Thus, beginning the paper trail again with no real effect for the compulsion of Equal Employment Opportunities. New Zealand has a range of measures to deal with gender inequity, but because of the seriousness of gender disparities that have arisen in this country, there is arguably a need for some form of legislative measures.

CONCLUSIONS

Much has been done in New Zealand's history to promote and legislate for Equal Employment Opportunities. The experience of 'going out to work', and the understanding that men should be involved in paid work while women engaged in unpaid work at home, were brought to New Zealand by British settlers. In the nineteenth century many women whose households depended on their earnings worked at home sewing flour bags and clothing for large firms.

The Factories Acts of 1891, 1892 and 1894 attempted to curb exploitation of women workers, but in actual fact limited the working hours and limited the 'types' of women able to work within the limitations that were set. Some employers benefited from the opportunity to buy women's labour for less than it costs to meet their daily needs.

During the depression of the 1930's, the ideology of women's domesticity was used to discourage women from entering into paid employment. The Minimum Wage Act 1945 provided for minimum adult rates of £5 5s a week for men and £3 3s for women.

The early 1960's was a period of economic expansion and full employment which created a demand for female labour. In 1957, the Council for Equal Pay was set up and as a result, in 1960 equal pay for women in the public service began to be phased in over a five years period.

This phase of the evolution of women's participation in the labour force witnessed the emergence of part time work as a modern method of working. A range of women's organisations emerged, such as the Working Women's Alliance, the Women's Unions and the Working Women's Council, advocated not only the right of women to work and to do so for equal pay, but also the right to paid maternity leave, free childcare facilities and the unemployment benefit.

In New Zealand the first wave of reform saw the elimination of state sponsored inequality in pay the Equal Pay Act 1971, access to apprenticeships in the Apprenticeship Act 1974 access to educational and Employment Opportunities in the Human Rights Commission Act 1977 and access to night shift work in the Factories and Commercial Premises Act 1981.

Women's groups advocated that equal pay should be given for work of comparable value. In 1977 the Human Rights Commission Act began to address individual discrimination and the systemic development of EEO started with the State Services Commission policy promulgated in 1984. New Zealand's international obligations in relation to EEO were outlined in the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Convention arguably offers a major impetus for women's advancement in New Zealand. In 1988 the State Sector Services Act, specified that all State Sector employers were to have an EEO programme, designed to eliminate barriers to the advancement in employment of women, Maori, minority ethnic groups and people with disabilities. The Act also outlined annual reporting requirements with provision for regular monitoring of results. Adopting a new strategy to address pay inequity, unions and women directed their energies away from the courts to securing, under the explicitly pro-women Labour government, legislative changes which culminated in the passing of the Employment Equity Act of 1990.

The Employment Equity Act of 1990 (EEA) was passed on the 17th of July 1990 and came into force on the 1st of October 1990. This Act was promptly repealed by the incoming National Government in November 1990. Determined to deregulate the labour market in New Zealand, the National government vigorously promoted the Employment Contracts Act in 1991.

After the government repealed the Employment Equity Act it established the Working Party on Equity in Employment. On the Working Parties recommendation the EEO Trust was established in 1991 to promote the business benefits of EEO

to employers though out New Zealand. In 1993, the Human Rights Commission Act was amended. Under the Human Rights Act of 1993, it is unlawful to discriminate in employment on any of the grounds listed in the Act, where a properly qualified job applicant, or applicant for promotion, would otherwise be the best person for the job.

It appears that legislative and workplace reform must be combined to develop and implement a successful employment equity strategy. Realistically, New Zealand women have never been so well placed, as they are today to achieve this. Arguably, it is time in New Zealand, to begin unfinished business and develop a fresh approach to employment equity that acknowledges the differing needs of working women leading to policy and practices that positively discriminate and empower women to be different, but equal to their male counterparts.

CHAPTER FOUR

A Comparative Study of Equal Employment Legislation in Japan and New Zealand.

INTRODUCTION

In this chapter I compare Japan and New Zealand's EEO legislation and policy and the two countries' efforts in the implementation of the principles of EEO. Japan brought in an EEO law in 1985/1986, as an effort to eliminate discrimination in the work force as previous labour legislation had failed to do so. To show the efforts that have been made by the Japanese government to eliminate discrimination in the workforce, I will summarise all of Japan's legislation in pertinence to employment and the elimination of discrimination that preceded the EEOL of 1985/1986, and repeat this exercise for New Zealand and then a comparison will be made.

Sections of the wording of the Japanese EEOL and New Zealand's employment law will be analysed and I will consider how they have been implemented through management practices in each country. I will then examine the necessary amendments to be made to the employment legislation in both countries, in order for them to comply with the Convention on the Elimination of All Forms of discrimination Against Women (CEDAW).

JAPANESE EMPLOYMENT LEGISLATION

The surrender in World War Two took the form of acceptance of the terms of the Postdam Declaration, which called for the removal of obstacles to democratic tendencies and the establishment of a peace-loving government in accordance with the freely expressed will of the Japanese people. In October 1945 Prime Minister Shidehara Kijuro appointed Matsumoto Joji to head a committee to investigate the question of constitutional revision. The following February the staff of the US General Douglas MacArthur, the supreme Commander of the Allied powers (SCAP), became convinced that the Matsumoto committee was incapable of adequately democratising the

constitution and that the Far Eastern Commission (representing the Allied powers) might soon intervene in the matter. MacArthur directed his Government Section to formulate a model constitution for Japan. The Government section's hastily drafted constitution was based in part on a policy paper of the American State War Navy Co-ordinating Committee (SWNCC). On the 13th of February 1946 Government Section officials delivered their draft to the Japanese cabinet (Kodansha International, 1994:40).

After difficult negotiations, SCAP and the Japanese officials agreed on a draft constitution based on the SCAP model. On March the 6th 1946 the Shidehara cabinet published the text, as its own handiwork. To ensure legal continuity with the imperial constitution, the proposed new constitution was passed in the form of a constitutional amendment almost unanimously by both houses of the Imperial Diet, and on November the 3rd 1946 it was promulgated by the emperor, to become effective on the 3rd of May 1947. Hence forth to be known as the Japanese Constitution (Kodansha International, 1994:40).

Japanese Constitution of 1946:

The Japanese Constitution of 1946 stipulates equal rights for men and women in all aspects of society. The introduction of the Articles of the Constitution in 1946 were seen to give regulatory advice and assistance to Japanese society. Japan has a democratic system of government. The Japanese Constitution, which came into effect in 1947, is based on three principles: sovereignty of the people, respect for fundamental human rights, and pacifism.

The following are the Articles that are pertinent to the discussion of EEO:

Article 11.

The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 12.

The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilising them for the public welfare.

Article 13.

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 14.

All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

(2) Peers and peerage shall not be recognised.

(3) No privilege shall accompany any award of honour, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Article 24 stipulated equality of the sexes in family life as well.

The present Japanese Constitution, promulgated in 1946, stipulates equal rights for men and women. Consequently, the problem of sexual discrimination in Japan is about how to gain equal opportunity. In Japan it appears that equality is not so much the governing principle of democratic society as a tool to be taken up when appropriate. Sometimes there is more freedom in this approach than in the strictly principled approach.

With the constitution and the Allied Occupation of Japan, by the United States of America, came legislative reforms in education, health and labour. The Labour Standards Law of 1947 will now be discussed, as part of this legislative reform, that took place in Japan, post World War Two.

Labour Standards Law of 1947:

The Labour Standards Law of 1947 outlined Japan's denouncement of war and respect for fundamental human rights. The Labour Standards Law Articles that are relevant to EEO are as follows:

Article (I), paragraph 1 provides that,

"Labour conditions must be such as to provide the necessities to allow workers to live in a way befitting human beings" (Foreign Press Centre 1994)

Article (2), paragraph 1, calls for labour conditions to be decided by workers and management, with both sides on an equal footing. This is to ensure that, whatever social or economic disparity may exist between workers and their employer, labour management will negotiate from a position of equality to determine contracts and other labour conditions (Foreign Press Centre 1994). Article (3) applies the principle of equality under the law, guaranteed in Article 14 of the Constitution, to labour conditions.

The term "labour conditions" is generally understood to refer to treatment of workers in the workplace and the assignment of duties. One school of thought insists that it also extend to hiring practices. The Supreme Court, however, has ruled that Article 3 applies only to labour conditions after hiring (Foreign Press Centre 1994).

Article 4 forbids wage discrimination against women. The courts have made it clear that women are entitled to the same compensation as men for the same

work, not only in regard to basic wages but also in regard to allowances and benefits (Foreign Press Centre 1994).

Article 14 states that all people are equal under the law and that there would be no discrimination in political, economic, or social relations because of race creed, sex, social status, or family origin. It also provided for equal pay for equal work and granted women a series of protective measures in the areas of working hours, night work, underground work, maternity leave, holidays and restrictions on dangerous work (Foreign Press Centre 1994).

It is interesting to note here that after World War II the wage system in Japan was structured to guarantee each worker's livelihood, and tended to vary with life-cycle needs. In the 1960s, when the overall standard of living was improving, educational level, gender and tenure were taken into greater account in the personnel evaluation system, and the seniority wage system was introduced. The seniority-centred wage system was predominant until around 1975

Working Women's Welfare Law of 1972:

The Working Women's Welfare Law of 1972 aimed to further the welfare and improve the status of working women by taking appropriate actions to help them reconcile their dual responsibilities of work and home or to enable them to develop and make use of their abilities. Enacted against a background of high economic growth with increased demand for additional labour, it aimed

'to further the welfare and improve the status of working women by taking appropriate actions to help them reconcile their dual responsibilities of work and home or to enable them to develop and make use of their abilities'- (ILO 1972)

The law, however, was only recommendatory and a statement of goals and intentions rather than of recommended conditions.

A positive outcome of this policy was an upsurge in the number of middle-aged women entering the work force. The majority of whom however, were employed as part time workers. The government's welfare policy has been criticised by many on the grounds that it encourages more women to work part time and attempts to preserve the traditional family system by stressing the importance of women's roles as mothers and wives. This basic policy orientation remains unchanged in the current EEOL.

It is also of interest to note here that around 1975 many Japanese firms began to introduce ability-centred personnel management systems. These lasted until around 1995. During those years 90 percent of Japan's large companies and 50 percent of its small- and medium-sized companies adopted ability grading as part of their personnel management systems. Under this system, a worker acquired the skills and abilities required for his job within the company. As the worker acquired more ability and experience in his work, his grade goes up with it. Wages come to consist of two parts — one based on the employee's age and one based on his ability. The ability-based portion was in principle equal for any two individuals with identical abilities regardless of other factors. Moreover, the portion based on age introduced at the majority of Japanese companies was based not on notions of seniority, but with the idea of providing some guarantee with regard to each employee's standard of living and life-cycle needs.

Convention for the Elimination of All Forms of Discrimination Against Women¹.

Japan complies with the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). In 1980, Japan participated in the world conference of the United Nations' decade for women and agreed to ratify the convention of the elimination of all forms of discrimination against women by 1985. The provisions in Article 2 of the convention called for the removal of all forms of discrimination, not only in wages but also in the broader aspects of employment, such as recruitment, training and promotion. In order to meet this

requirement, the introduction of a law that provided equal employment opportunities and equal treatment became a hot task for the Japanese government.

The Equal Employment Opportunities Law 1985/1986.

The Equal Employment Opportunities Law (EEOL) of 1985/1986 stipulates that any firm shall “endeavour” to treat women equally to men, regarding recruitment, hiring, job assignment, and promotion; and that the firm shall not discriminate against women regarding training and education, employees welfare and benefits, retirement, age limit, and dismissal. There is however, no penalty for violation of the above.

Under the EEOL the law outlines various *normative* measures to be taken by employers. Article 7 of the Japanese EEOL 1985/1986 has the stipulation of equity in the recruitment and hiring of women in the employment system of any Japanese company. It provided that employers shall endeavour to provide women equal opportunity with men with regard to recruitment and hiring of workers (Foreign Press Centre 1994).

Article 8 of the Japanese EEOL 1985/1986 similarly, provides that employers should endeavour to treat female workers equally in promotion and assignment of workers (Foreign Press Centre 1994).

Since these articles require the employer only to make best efforts in promoting equality in recruitment and promotion, they do not establish a legal obligation to establish actual equality. Within the EEOL of 1985/1986 it is the duty of the employer to endeavour to deal with special employment management for pregnant women. Under the amended Child Care Leave Law of 1998 it is now the legal duty of the employer to arrange special employment management for pregnant women.

¹ CEDAW will be discussed in depth in Chapter Five

A breach of the current EEOL is not punishable in the courts system of Japan, hence the amendments that come to the fore in April of 1999², which will be discussed in greater depths later within this section.

Japanese corporations were strongly opposed to the new Equal Employment Opportunities Law, on the grounds that a western concept would not work easy application in Japanese society and that it potentially undermined Japanese tradition. Even some women opposed the law, fearing that it would mean the loss of certain protective measures found in the Labour Standards Law of 1947.

The Equal Employment Opportunity Law, enforced in 1985/1986, exerted much impact on Japanese society. During the last 10 years, the number of female employees has increased by 1.3 percent. In addition, the range of job fields open to women has been expanding, with women now venturing into areas that were traditionally reserved for men. Meanwhile, women's consciousness of work and their abilities and the environment surrounding them are also undergoing significant changes. Equal treatment between women and men in corporate employment management has not been fully achieved yet. In order to improve the situation, the Equal Employment Opportunity Law was revised in 1997. Further consolidating an environment in which both women and men can share the family burden and improving conditions for both sexes to enable their participation in fair competition are important tasks to be tackled.

The Equal Employment Opportunities Amended Law 1999.

On 13 March 1998, related ministerial ordinances and guidelines were published on the parts of the amended Equal Employment Opportunity Law (passed June 1997) which came into effect in April 1999. The main content of these is as follows. Moreover, ministerial ordinances and guidelines related to health control measures for women employees during pregnancy and after childbirth (effective as of April 1998) were published in September 1998.

² Amendments to the 1985/1986 EEOL came in April of 1999, during the writing of this thesis and will be discussed in Chapter Six.

Prohibition of discrimination against women:

The amended Equal Employment Opportunity Law prohibits discrimination against women in areas from recruitment and hiring through mandatory retirement age, retirement and dismissal. Under the recent amendments, not only the exclusion and disadvantageous treatment of women but also measures applied only to women or giving preference to women are prohibited in principle with a view to the discriminatory effect that they have against women. Guidelines have been stipulated on these amendments which clarify the specific content of the discrimination prohibited against women in regard to recruitment, hiring, assignment, promotion and training. Examples of prohibited treatment indicated in the guidelines include the following:

- Measures excluding women: recruitment of male university graduates only; women not assigned to sales;
- Measures disadvantageous for women: positions only given to women commuting from their parents' home; examinations for Promotion given only to men;
- Measures applied only to women or giving preference to women: recruitment of female part-time staff, guest reception training for women only;
- Abolition of restrictions on late-night work by women: With the abolition of regulations on late-night work by women under the Labour Standards Law, guidelines have been stipulated on the details of the kind of working environment which needs to be provided, where employers assign women employees to late-night work.
- Restrictions on late-night work by workers engaged in child care or family care: Ministerial ordinances related to the range of workers who can request restricted assignment to late-night shifts and the procedures involved in making such requests have been stipulated, as have guidelines as to issues to which employers must give consideration in terms of restricted assignment to late-night work.

The revised EEOL of 1999 makes violators of the initial EEOL 1985/1986, liable for their misconduct. The revised EEOL of 1999 re-addressed the issues of fringe benefits and hours of work, and categorically defined the term 'good employer'.

Conclusions will be drawn at the end of this chapter as to the inadequacies of these laws and a comparison between New Zealand and Japan will be made.

NEW ZEALAND EMPLOYMENT LEGISLATION.

Within the next section of this chapter, I evaluate legislation that is currently in place in New Zealand, in 1999 and pinpoint the flaws and loopholes that are evident in employment legislation. I look at the reasoning behind the state's inability to ensure full equal employment opportunities for women. I then look at the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), in particular the obligations of New Zealand and Japan to ratify to CEDAW, and what I argue is the necessity for an Optional Protocol. The place of lobby groups associated with instigating EEO in both countries are analysed and compared in terms of their strength and influence on both country's governmental decisions over EEO legislation.

The objective of achieving an equal employment opportunities (EEO) environment that addresses the needs of those who are vulnerable or disadvantaged in the labour market is supported by anti discrimination legislation. As discussed in Chapter three, the Equal Pay Act 1972 under Section 2 and Section 4 provides that employers cannot differentiate in pay rates between employees on the basis of their sex. Under the Human Rights Act 1993, which replaced the Human Rights Commission Act 1977 and the Race Relations Act 1971, under Section 22(1), an employer cannot discriminate in hiring or firing, training or promotion because of their employees, sex, marital status, religious or ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation.

Discrimination in terms and conditions of employment, training, promotion and dismissal because of the employees colour, race, ethnic or national origins, sex, age, marital status or religious or ethical belief, and sexual harassment are also grounds for taking a personal grievance under the current Employment Contracts Act 1991 (Section 27 and Section 28).

Employees may make a complaint under the Human Rights Act 1993, or may use the personal grievance procedures under the Employment Contracts Act to enforce their rights in cases of discrimination or sexual harassment. Where both procedures are available, the employee must choose one or other procedure.

CURRENT EMPLOYMENT LEGISLATION IN NEW ZEALAND

In 1984 government employing authorities signed a statement on equal employment opportunities. This statement recognised the need for government employers, then the largest employer group in the country, to take a leading role in the development of EEO State Owned Enterprises in New Zealand came into existence with the enactment of the State Owned Enterprises Act 1986. The purpose of the legislation was to promote improved performance in respect of government trading activities and control the ownership of the new enterprises.

The thrust was to reorganise New Zealand's public service by separating commercial from non-commercial activities and constituting state-owned enterprises (SOE's) to carry on the commercially oriented activities.

Before corporatisation, the public sector in New Zealand included departments with commercial functions as well as commercial public corporations. Government departments delivered services often provided in other countries by private (or public) enterprise. Thus, the Department of Energy was responsible for both coal and electricity production, and the Forest Service was involved in the commercial production of forest products; the Post Office ran the telephone system and a bank as well as postal operations.

The origins of state-owned enterprises were tied to financial non-performance, the underlying causes of which were a lack of clear objectives and poor management systems. Labour Government ministers were unable to effectively exercise financial control over state trading organisations using conventional methods of ministerial responsibility. Information systems were inadequate,

Designed to help the government ration the [allocation] of annual resources, not measure the value of what [was] produced. (Douglas, 1993: 177)

In the 1986 Statement on the Labour Government Expenditure Reform, it was estimated that the net after-tax cash return to the taxpayer that year on NZ \$20 billion in assets of government owned corporations would be zero (in an economy with a Gross Domestic Product of NZ \$45 billion at the time).

The legislative instrument for corporatisation was the State-Owned Enterprises Act (1986); the minister responsible described its purpose as follows:

...the government has decided to establish state-owned corporations which will take over major areas of state trading activities and be run as profitable operations. State trading activities need greater freedom from bureaucratic controls, greater clarity of objectives, sorting out of conflicting roles, and more streamlined structures. (cited in Lojkin 1992:34)

There were three broad objectives in creating SOE's:

to separate commercial and non-commercial activities, with clear commercial objectives for SOE boards and management and government funding for non-commercial activities;

to implement "competitive neutrality", defined as follows: "as far as possible, all competitive advantages and disadvantages arising from statutes should be removed" and;

to provide incentives for management to perform well, which included "arm's length" accountability to the political executive and Parliament.
(Scott et al. 1990:145)

Thus, State Owned Enterprise's (SOE's) were established with a capital structure relevant to their industrial sectors, and were required to pay taxes and earn a competitive rate of return on equity. There was a program of deregulation. Virtually all statutory monopolies enjoyed by SOE's were removed, exposing them to open competition from the private sector. For example, one of the SOE's formed from the former Post Office Department, Telecom Corporation of New Zealand, saw the end of its monopoly on the supply of telephone equipment and services; moreover, within a year or two, the national telephone network was to be deregulated.

The changes in accountability were based on ministerial responsibility for broad policy objectives and ministerial approval of the strategy for achieving the and SOE management independence "to get on with the job with minimum political interference."

The main features of the accountability system were outlined as follows according to J. Boston (1987:435):

establishment of specific objectives and performance measures for each SOE, in consultation with ministers;

performance objectives and plans (and targets) made public at the beginning of the reporting period (SOE's provide this information through Statements of Corporate intent, which are tabled in the

House of Representatives and may be examined by committees of the House);

Regular reporting of actual performance against targets, with monitoring of SOE performance by the Treasury and appropriate government departments. That monitoring is carried out through reviews of longer-term strategy, annual operating plans (the Statements of Corporate Intent) and quarterly results; and

New incentives (and sanctions) for senior managers, such as performance pay.

The SOE policy met with considerable financial success. Studies carried out by the New Zealand Institute of Economic Research (1993) show that, across seven of the larger SOE's, revenue rose by 15 percent between 1988 and 1992, and after-tax profits quadrupled from NZ \$262 million to NZ \$1.023 billion. Those financial gains were accompanied by significant staff reductions: from 1987 to 1992, staff numbers in the same seven SOE's declined by 53 percent.

Three examples of individual SOE performance from Douglas (1993:180) illustrate the point further:

- The Post Office Savings Bank, in its first year as an SOE, cut staff by 30 percent, reduced its retail outlets by 40 percent and turned an expected loss of NZ \$50 million into a NZ \$31million profit.
- In six months, the new Forestry Corporation achieved a NZ \$59 million turnaround; it returned a cash surplus of NZ \$24 million, compared to a cash deficit of NZ \$35 million recorded in the six months before becoming an SOE. Within 12 months, the number of employees had been cut from 7,000 to 2,600, without loss of output.

- New Zealand Post reduced its staff by 30 percent in its first four years as an SOE; since corporatisation it has put NZ \$190 million back into the public purse through tax and dividend payments to the government.

EEO was first given legislative intent in the State Owned Enterprises Act 1986, which required the State Owned Enterprises to be “good employers” with an EEO programmes. The Act defines an EEO programme as a programme that is aimed at the identification and elimination of all aspects of policies, procedures, and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate, inequality in respect to the employment of any persons or group of persons. The State Services Commission monitors, evaluates, promotes, and develops EEO in the New Zealand Public Service.

The State Sector Act 1988 has been central in reforming State sector management in New Zealand. As stated in the long title to the Act, the main purposes of the Act are to:

- ensure that employees are imbued with the spirit of service to the community;
- promote efficiency;
- ensure responsible management;
- maintain appropriate standards of integrity and conduct among employees;
- ensure that every employer in the State services is a good employer;
- promote equal employment opportunities (EEO); and
- provide for the negotiation of conditions of employment.

The State Sector Act 1988

Following Labour's re-election in 1987, the theme of greater efficiency in government, embodied in corporatisation and related initiatives, together with a willingness to apply economic theories and new policies, led to fundamental revision of the legislation governing the public service (Fundamental Revision of Management Structures - The State Sector Act (1988)).

The 1988 State Sector Act extensively amended the 1962 Act and replaced the State Services Conditions of Employment Act (1977). Under the earlier legislation, the public service was uniform and unified, with a service-wide classification (grading) system. There was a career in service, offering employees a 40-year career if they so desired, with tenure. Public servants moved among departments and enjoyed a standard set of working conditions and rates of pay (Fundamental Revision of Management Structures - The State Sector Act (1988)).

Appointments and promotions, although based on a merit principle³, were seen by many to be constrained by personnel management conventions, supported by an appeal authority. Employees were told that the number of years on the job was a significant determinant of "merit", and that the appeals tribunal upheld this. It was difficult for outsiders to be appointed to the public service; they needed to demonstrate "clearly more merit" than insiders (Fundamental Revision of Management Structures - The State Sector Act (1988)).

Traditionally, the State Services Commission had exercised strong central control over the public service. Its powers extended from the management of office accommodation to the review of efficiency and economy in each department, as well as ultimate authority in personnel matters.

³ Merit principle is discussed in chapter 1

The State Sector Act of 1988 succeeded the State Owned Enterprises Act of 1986, in facilitating the re-organisation of the public service, was the improvement of managerial performance and economic viability of the State Owned Enterprises Act of 1986.

The State Sector Act 1988 creates the statutory positions of State Services Commissioner and Deputy State Services Commissioner. Each Chief Executive, under the Act, is responsible to the appropriate Minister for carrying out the functions and duties of the department (including those imposed by Act or by government policy); providing advice to Ministers; the good conduct of the department; and the efficient, effective and economical management of the activities of the department.

The Act devolves most employer responsibilities to individual chief executives (Section 32 of the State Sector Act 1988). The personnel responsibilities of chief executives include 'good employer' and EEO responsibilities, and the duty to act independently of Ministers in 'matters relating to decisions on individual employees'.

The Act details the statutory responsibilities of the State Services Commissioner in respect of:

- the appointment and review of performance of chief executives;
- the constitution and management of the senior executive service;
- public-service pay-fixing and personnel management; and
- advice to government on machinery of government issues.

In 1988 the introduction of the State Sector Act placed specific expectations on Public Service Chief Executives and the State Sector Commission for the

delivery of EEO. Each year chief executives are required to develop and publish an EEO programme for the department and report on its achievement.

State Sector Services Act of 1988 specified that all State Sector employers were to have an EEO programme, designed to eliminate barriers to the advancement in the employment of women, Maori, minority ethnic groups and people with disabilities.

The State Sector Commission has annually sought from government departments, a report on progress against the previous year's plan, a statistics report and a copy of the EEO programme for the forth-coming year. Departments are also required to complete a questionnaire about established EEO practices, specifically those that are characteristic of the early stages of EEO development, and to provide background information about the organisation. Once those reports are received, they are evaluated and reported on yearly to the government and every four years to CEDAW.

The State Services Commission, working in support of the State Services Commissioner's statutory responsibilities, promulgates values & standards of behaviour for the Public Service. It also provides assurance to the Government that the State Sector has the capability to deliver the Government's objectives, appoints and develops Public Service chief executives, and advises the Government on the performance of Public Service departments and agencies.

In 1994 the State Sector Services Commission, under the recommendations provided by CEDAW undertook a comprehensive review of EEO in the Public Service since signing in 1984. The resulting report, *EEO: 1984-1994 and Beyond*, noted that important progress had been made in the Public Service since 1984. The report found that members of EEO groups were, and are still, generally located in the lower salary levels and less skilled occupations, and were therefore most vulnerable to the downsizing which had occurred

throughout the period of 1984-1994. This is consistent with the reduction in representation of EEO groups between 1988 and 1992.

However, a slowing down of restructuring since 1992 has been associated with greater stability, and some increases, in the proportions of EEO groups in the Public Service workforce. Between the period of 1984 and 1994, the changes in representation and distribution of EEO groups has been generally encouraging. According to the report, of all the EEO groups, women have realised the most significant gains. Women have made significant gains in overall representation (53% of all public service staff); and in their representation at salary levels above \$60,000 according to the report. There did however, remain key areas for further progress. In particular, there was a need to consider EEO policy and practice in a devolved Public Service environment, which was vastly different from that which existed in 1984 and in 1988. The preliminary findings of the project "*EEO 1984-1994 and Beyond*" suggested that the way forward for EEO in the next five years would be characterised by three stages:

1. Alignment of EEO with departmental business goals,
2. Integration with strategic Human Resource planning and practice; and
3. Customisation or "fit" of the implementation and operation of EEO in terms of organisational culture, size, structure and systems.

The National government in 1994 released a document titled *EEO in the Public Service up to 2010*. In it the National government is looking for a blend of the merit principle being accepted and the EEO platform being firmly built on that principle. What it tries to do is put EEO into context, because the government felt that EEO policies were not accomplishing what the government had wanted when they had expected each Chief Executive and each senior manager to see EEO as part of their normal human resources strategy. The new document challenges each Chief Executive Officer and their senior managers to become more accountable in the eyes of the Public Service and to think proactively

about the current employment group, who is represented in their agency, and ask the searching question whether that employment group does reflect the New Zealand population, their experiences, their ability and their diversity.

Employment Equity Act of 1st of October 1990.

Despite the best efforts of personnel working in the area, significant progress was not achieved in EEO until legislation was introduced requiring government employers to take action. The legislation ensured that both personnel and monetary resources were channelled into addressing equal employment opportunities with organisations on a structural and systematic basis.

Adopting a new strategy to address pay inequity, unions and women directed their energies away from the courts to securing, legislative changes, which culminated in the passing of the Employment Equity Act of 1990. As its short title indicated the EEA introduced the concept of employment equity encompassing equal employment opportunity as well as equal pay.

The EEA 1990 introduced for the first time, legislation covering equal employment opportunities in the private sector. The Act provided for a three year phasing in of EEO programmes for private sector companies with 50 or more workers. Private sector employers were required to lodge their programmes with the Commissioner for Employment Equity, and to develop these programmes on a systematic basis, which addressed the institutional discrimination of, designated groups in order to manage a diverse workforce in a changing New Zealand population.

Section 28(a) stated the obligation of employers in relation to Equal Employment. Section 28 (a) also stipulated that employers develop an Equal employment opportunities programmes for the workers employed by that employer. Section 28(b) stipulated that employers, in developing an equal employment opportunities programme must consult with workers and appropriate unions about the development of an effective EEO programme that

suited the industry in which they were involved. Section 28(c) ensured equal employment opportunities programme developed by the employer complied with the provisions of the EEA Act, and that the programme complied with any minimum requirements established by the Commissioner.

Section 35 dealt with the power to order compliance and penalties of non-compliance to the new EEA. Where any person had not observed and not complied with s28 the Labour Court by order may require that person to do any specified thing, or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement. Section 35(2) stipulated that where the Commissioner alleges that there had been a non-observance or non-compliance of the kind, the Commissioner may commence proceedings against any person in respect of the non-observance or non-compliance by applying to the Labour Court for an order of the kind.

The EEA of 1990 therefore, contained three major parts. Firstly, the establishment of the office of the Employment Equity Commissioner, whose responsibilities focussed on assisting employers; unions and workers to develop and implement equal employment opportunities programmes, and conduct pay equity assessments. The second part required all employers in the public sector to develop and implement over a stated period, EEO Programmes. While the issues to be incorporated in the programmes are set out in the Act the method of implementation was left to the discretion of the individual employer. Under the EEA compliance with legislative requirements could be enforced by application for compliance to the Labour Court. The third part of the Act dealt with pay equity. It permitted an employer, union or twenty workers in a female occupation, defined as an occupation in which 60% or more workers are female, to apply to the Employment Equity Commissioner to make a pay equity assessment for their particular occupation.

There was considerable tension in the private sector over the employment equity issues. Supporters of EEO, such as the Labour government, BP Oil (NZ), and Margaret Wilson, argued that little progress had been achieved voluntarily by employers under the EEA and that EEO programmes should be mandatory. Most unions such as the Education sector union, Nurses union, and ASTI supported the employment equity agenda but promoted differentials in certain areas.

Employer groups argued that compulsion would lead to resentment and resistance to implementing the legislation and therefore any programmes should be voluntary. They also argued that compulsion was contrary to the concept of a free market and therefore in contradiction to the general direction of economic policy. In addition, they suggested that the 'bureaucracy' of EEO proposals would restrain managerial right. They felt that the government would have too much intervention on their own management practices. The whole debate of theory versus practice, as discussed in chapter one, began to raise questions within the private sector, as to who was really the 'boss': the government, or the owner/operator, as an employer?

There was little information on the costs of the EEO programmes for employers, the employers did not know whether they should implement EEO programmes, based on what they perceived to be correct, or whether they had to employ an employment consultant and pay in excess of \$20 per phone consultation⁴, or anywhere up to \$3,500 for an EEO programme for their businesses, and whether they would have to employ a human resource manager or an EEO officer in order to monitor the progress of EEO within their businesses. Some employers saw that there could be benefits from having an EEO programme, albeit not easily monitored, resulting from improved personnel policies.

The implementation of EEO programmes, under the EEA of 1990, appeared to be an expensive exercise for the private sector, and with a flagging economy,

high unemployment figures, unpopular privatisation and a deficit amounting to 4.7% of the gross national product concerns, within the business sector, about the Labour Government were readily aired in New Zealand society.

1990 was an election year in New Zealand. The Labour led government was perceived in the press to have placed the country close to third world status. The National government used this fear in their campaign, highlighting and using high unemployment through privatisation under the State Owned Enterprises Act of 1986 and huge trade deficits as their marketing tools. One of the first pieces of National Party legislation the incoming National government passed in December of 1990, was the repeal of the Employment Equity Act. The Minister of Labour noted:

The Government is firmly supportive of the removal of workplace discrimination on the basis of gender or membership of a minority group. The government does not however, support legislation which imposes mandatory procedures on private sector employers or which achieves pay equity through a centralised and prescriptive mechanism. It is therefore decided to repeal the Employment Equity Act” (Bill Birch, A.G.M of the New Zealand Employers federation, 15th November, 1990).

In an effort to promote an efficient labour market without the intervention of trade unions, the National government implemented the Employment Contracts Act of 1991(ECA). The difference between the EEA (1990) and the ECA (1991) was that there was no compulsion for the private sector to implement EEO programmes and there were no penalties for non-compliance of an EEO programme. The employees had the right to negotiate on a contract basis and contracts are offered only for a specified period of time, thus giving the employer the right to only employ people for a period in which the required job needed or should have taken.

⁴ Current fees at MIRCAM employment consultants.

In the next subsection I take a closer look at the Employment Contracts Act of 1991, and review their approach to EEO and its implementation.

The Employment Contracts Act 1991 (ECA).

The Employment Contracts Act of 1991 (ECA) is known as the Act to promote an efficient labour market, it was intended to promote efficiency not equality through offering contracts to the employees, thus eliminating the need for Trade Unions. The employees had the right to negotiate on a contract basis and contracts are offered for a certain period, and only the time required to 'do the job'. Thus, supposedly making the workpool more effective in their deliverance of their jobs.

The ECA (1991) was intended to promote efficiency, where as the EEA (1990) was intended to promote equality, here in lies the differences between the Labour government's policy of equality and National government's policy of efficiency. Under Labour's restructuring through the State Owned Enterprises Act 1986, members of EEO groups were generally located in the lower salary levels and less skilled occupations and were therefore most vulnerable to the downsizing which had occurred throughout the period of 1984-1994. This is consistent with the reduction in representation of EEO groups between 1988 and 1992

This is clearly represented in the reduction of the Employment Tribunal's equitable jurisdiction where equity and good conscience is only applicable to collective contracts. When employment relations adopted a formal contractual framework in 1991 the equitable jurisdiction was reduced.

Under the ECA, an employee can make a personal grievance claim for disadvantage under section 27 and discrimination under section 28 to redress an employment inequality. Under section (27) "*personal grievance*" means any grievance that an employee may have against the employer or former employer because of a claim, s27 (a), that the employee has been unfairly dismissed; or

s27 (b) that the employee's employment, is or are affected to the employee's disadvantage by some unjustifiable action by the employer or under section 27(c) that the employee has been discriminated against in the employee's employment; or that under section 27(d) that the employee has been sexually harassed in the employee's employment; or under section 27(e) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of an employees organisation.

Under Section 27, an employee may have a legitimate personal grievance where an employer can prove.

Under Section 28 of the ECA, discrimination occurs if an employer (Section 28(a)), or a representative of the employer, engages in any discriminatory behaviour during employment. This includes discrimination in the terms of employment (Section 28(b)), conditions of work, fringe benefits, opportunities for training, promotion or transfer, dismissal, or if the employer retires, or requires or causes an employee to retire or resign, or any other detriment (Section 28(c)).

In contrast to the Human Rights Act of 1977, the ECA does not make specific reference to indirect discrimination⁵. An allegation of discrimination often involves either a course of conduct which appears to be discriminatory in form but is innocent in substance, or, to the contrary, a course of conduct which appears to be quite proper in form but has an underlying basis of discrimination. A strong suspicion of discrimination is not enough under the ECA to take a case against an employer.

At the time the ECA was passed it was presented as offering women the opportunity to negotiate more flexible wages and conditions of employment in direct negotiations with their employers. Supporters of the ECA argued that this would strip away institutional forms of discrimination up till then, contained in

awards⁶, which helped to perpetuate women's unequal access to earnings. Supporters of the ECA claimed that women would find new ways of negotiating wages and conditions of employment, ways that were independent of the restrictions of the old system, and firms would develop new work arrangements that responded to the needs of women.

Alternatively, it could be said that despite the passage of the ECA, the ability of women to effectively bargain satisfactory contracts has not convincingly improved. It could be argued that there could be no real freedom without equality. Apart from the specific provisions of the Employment Contracts Act, its greatest harm lies in its promotion as the only way to regulate the labour market (Wilson M 1997). The ECA also appears to have '*casualised*' the labour market. In saying that, under the ECA there is no true job stability any longer in New Zealand. Before the 1980's it was unheard of for a female to have to hold down two or three jobs in order to equate to full time status and earn the same money. The emphasis in the public and private sector of New Zealand, on good management and efficiency, and on tightly specified contractualism, has resulted in a loss of spirit of service and standards of integrity within the labour market of New Zealand.

Human Rights Act 1993 (HRA)

Under the Employment Contracts Act of 1991 and the Equal Pay Act of 1972, the central relationship became the individual employer/employee relationship and there was no longer any centralised system of registration of awards. To compensate for this the Human Rights Commission Act 1977 was amended in that section 15(12) was repealed. This section had provided that if a complaint related solely to equal pay it was to be referred to the Secretary of Labour (unless the complaint was against the Crown). A provision similar to section 15(1)(b) of the Human Rights Commission Act 1977 was inserted into the Equal Pay Act

⁵ A definition of indirect discrimination features in chapter one.

Under section 22 discrimination in employment matters of the HRA the following is stipulated. Section 22(1a) where an applicant for employment or an employee is qualified for work of any description, it is unlawful for an employer, to refuse or omit to employ the applicant on work that is available. Under section 22(1b) it is illegal to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description. Section 22(c) states that it is illegal to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated. Section 22(d) states that it is also illegal under this section, to retire the employee, or to cause the employee to retire or resign, by reason of any of the prohibited grounds of discrimination.

Under section 22 of the HRA, an employee may make a complaint on the grounds that they have received less favourable terms of employment by reason of sex. The Human Rights Commission, where appropriate, refers any complaint to the Equal Opportunities Tribunal who are specialists in gender issues.

With reference to wage issues, which appear to figure more prominently in any complaint, litigation under the HRA 1993 is limited by the evidential requirements necessary to establish comparisons between employees in the "same or similar employment". With the disintegration of collective bargaining and emphasis on individual contracts under the ECA 1991, it is increasingly difficult to gather salary details, and the Commission has no power to gather this sort of data. This leaves women employees rarely able to access the

⁶ For Example: rigid demarcations, additional loading on the hourly rate for part time workers which made them more expensive to employ

evidence required to substantiate a claim for less favourable terms of employment under the HRA.

The elimination of discrimination is dependent upon an individual having the information, the ability to take the risk of adverse employer reaction and also the conviction to speak out by making a complaint. It is the Commission's experience, suggests Joychild (1998), that most employees wish to retain harmonious relationships with their employer, and do not wish to either gain a reputation as a trouble-maker or damage their relationship by making a complaint which is usually perceived by the employer as a breach of trust and loyalty. This is also characteristic of Japanese employees.

In the Commission's experience (Joychild, 1998), complaints are usually made after the employment relationship has already been severely damaged and it is perceived that there is little to lose. When a woman does remain after making a complaint, she often leaves as part of the settlement.

Through a combination of the Employment Contracts Act 1991 provisions, with its one-on-one bargaining emphasis, and the Privacy Act which makes salary details a private matter, very little transparency is left in the pay system. The Human Rights Commission, as according to Joychild (1998), is also aware of some employment practices whereby employees are forbidden from disclosing their salary to any other employee as part of their employment contract. Women do not have access to the information to know whether they are being paid less than their male counterparts, either within or outside their organisation, in similar or dissimilar work. Even now, for women performing the same job as men, they are usually left with little more than a suspicion or discomfort. The Human Rights Commission, does have the power to investigate and require such information as would identify whether discrimination exists. It should be noted that because of the privacy rights of other persons the Commission is not always in a position to advise the complainant of comparable male remuneration.

It has never been tested, but is generally assumed by the Commission that the obligation placed on the employer under section 22 (1) (b) is to treat all employees of that employer without discrimination. It could be argued that the obligation could extend to require an employer to pay the same rate to its group of women workers as another employer pays to a group of male workers doing similar work. However, it is unlikely that such an argument would succeed.

COMPARISONS TOWARDS A CONCLUSION

Current Japanese law takes two approaches to achieving equal employment opportunity between the sexes, a prohibition of and redress for discrimination based on sex, and legal assistance to facilitate employees' harmonisation of work and family life. The former is mainly regulated by the Labour Standards Law (LSL), the Equal Employment Opportunity Law of 1985/1986 (EEOL 1985/1986), and the case law.

However, discriminatory treatment of women is still evident especially in the areas of recruitment and hiring, where discrimination against female graduates in the 1990's was covered by the media and led to a realisation of the limitations of the current regulations. Many within Japan believe that more stringent and effective regulations are necessary. Simultaneously, opinions that special protection for women in the LSL hinders the realisation of equal employment between men and women were voiced not only by management but also by women workers.

The 1985/1986 Law had two seemingly contradictory purposes. One was to attain equal employment opportunity for women. The other was to promote women's welfare and elevate the status of women workers (1985/1986 EEOL Article 1 and 2). From the viewpoint of the latter purpose, disadvantageous treatment for women vis-à-vis man should be prohibited, but the Law is not concerned with more favourable treatment of women.

The 1985/1986 Law was criticised as a paper tiger not only because the scope of prohibition against sex discrimination was narrow but also because the Law

did not provide effective sanctions against violations. Unlike the LSL, the EEOL has no criminal penalties. Apart from an encouragement of voluntary resolution (1985/1986 EEOL Article 13) and administrative advice upon request (1985/1986 EEOL Article 14), the 1985/1986 Law only establishes mediation procedures to cope with dispute arising thereunder.

Criticism of the 1985/1986 EEOL can be summarised in the three following points:

- 1) its one-sided support of women permitted women to be kept in lower-paying jobs;
- 2) the 1985/1986 law did not prohibit discrimination in terms of recruitment, hiring assignment and promotion, but merely set forth a duty to endeavour; and
- 3) the Law lacked an effective dispute resolution mechanism.

Japan's equal employment policy concerning the elimination of sex discrimination began with a modest intervention entailing a duty to endeavour rather than outright prohibition, which would entail drastic modifications of current practices. Through administrative guidance and campaigning, a gradual but steady modification of societal and companies' consciousness toward equal employment was sought. It should also be noted as a feature of Japan's equal employment policy that the policy of harmonising work and family life has developed simultaneously with the anti-sex discrimination policy. This might be evaluated as a method in a consensus-oriented society like Japan for redressing practices that are deeply rooted but deemed socially inappropriate.

In order to improve the situation, the Equal Employment Opportunity Law was revised in 1997. The Equal Employment Opportunities Amended Law 1999 Prohibition of discrimination against women. The amended Equal Employment

Opportunity Law of 1999 prohibits discrimination against women in areas from recruitment and hiring through mandatory retirement age, and dismissal. Under the recent amendments, not only the exclusion and disadvantageous treatment of women but also measures applied only to women or giving preference to women are prohibited in principle with a view to the discriminatory effect that they have against women. The Japanese path to EEO, has been one of hurried legislation and inadequate education of its instigators.

Finally, as far as the current legislation in New Zealand is concerned, rather than breaking down the barriers to employment equity, the State Sector Services Act 1988 and the Employment Contracts Act of 1991, has given employers more scope to exploit women. Labour market restructuring , under the National government in 1991, the disintegration of multi-employer contracts and demise of the service sector unions has left many women employee's unprotected and vulnerable to free market forces. Increasing 'casualisation' of the workforce and "workplace flexibility" has benefited productivity at the expense of advancing equity objectives.

For many years the public sector has adopted the merit principle in its recruitment and selection procedures. However, the private sector does not have the same record of supplanting patronage systems with merit-based appointment procedures. Instead, it is inclined to view the merit principle as constituting a set of regulations which government imposes through the anti-discrimination and affirmative action laws. (Burton, Ryall and Todd, in Still, 1995).

There has also been little removal of barriers preventing people's movement between occupations and functional areas either in the wider workforce or within organisations; and the removal of stereotypes and assumptions about the capacities of people who occupy low level jobs (Still and Buttrose in Still 1995).

Japan's EEOL of 1985/1986 concerning the elimination of sex discrimination began with a modest intervention entailing a duty to endeavour rather than outright prohibition, which would entail drastic modifications of current practices, whereas within New Zealand employment contracting under the ECA has resulted in a widening pay gap and deteriorating conditions of employment for a large number of women workers. Legislative and workplace reform must be combined to develop and implement successful employment equity strategies in both New Zealand and Japan. When the two countries are compared there appears to be a shortfall in the basic understanding of what employment equity is and how both the private sector and public sector can effectively endorse EEO within their own infrastructure.

In the next chapter assess Japan and New Zealand's international obligations in relation to equal employment opportunities under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) with a view to ratifying to the Optional Protocol, which is in its final drafting stage. I also intend to evaluate the influence that women's lobby groups in Japan and New Zealand have had on the implementation of equal employment opportunities law and policy.

CHAPTER FIVE

The Role of CEDAW and Women's Lobby Groups In Japan And New Zealand.

INTRODUCTION

This chapter explores Japan and New Zealand's implementation of their international obligations under the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹. Within this chapter I look at whether CEDAW has had any significant influence on both Japan and New Zealand's anti-discriminatory legislation, with regards to women in employment. How CEDAW influences our own perception of EEO and why Japan and New Zealand are still failing under CEDAW's guidance, to have preventative measures against discrimination in the workplace.

THE ROLE OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) came into force in September 1981. By October 1999 it had 165 States parties making it the second most widely subscribed international human rights treaty in existence. Yet violations of women's human rights are still widespread in many countries. Women seem to not be aware of their rights and continue to have difficulty getting remedies for violations of these rights. A United Nations Committee of experts monitors the covenants set out by CEDAW in each case. These people are experts in Human Rights and are nominated by the State parties and appointed by United Nations body with a view to regional distribution and expertise.

In 1976, during the drafting of CEDAW, a complaint procedure was suggested, but this was not taken up. Some delegates argued that complaints procedures were needed for "serious international crimes" such as apartheid and racial discrimination, rather than discrimination against women, in the workplace. In June of 1993, the World Conference on Human Rights in Vienna acknowledged the need for new procedures to strengthen implementation of women's human rights and called on Council on the Status of Women (CSW) and the Committee to "quickly" examine the possibility of introducing the right of petition through the preparation of an Optional Protocol to CEDAW.

In late September, early October of 1994, an independent expert group met at the Maastricht Centre for Human Rights and adopted a draft Optional Protocol. Participants came from all regions and included members of CEDAW, the Human Rights Committee, and the Committee on the Elimination of Racial Discrimination and other experts in the field of international human rights and the human rights of women. January of 1994 saw that CEDAW adopted Suggestion No. 7 setting out the desirable elements of an Optional Protocol. In March 1995 Governments, inter-governmental organisations and non-governmental organisations (NGOs), at the request of CSW, were invited by the secretary-general to submit their views on an Optional Protocol.

In Beijing, September 1995 at the 4th World Conference on Women called on UN member States to support the elaboration of the Optional Protocol. March 1996 saw that the CSW established an open-ended working group on the Optional Protocol. The group discussed the idea of the Optional Protocol and some of the main issues raised by it. CSW recommended that the group continue its work in 1997 and requested two reports from the secretary-general: A comparative survey

¹ CEDAW is a United Nations (i.e. international) Treaty aimed at promoting achieving women's equality with men in law and policy of the nation states which are party to it. CEDAW defines discrimination against women and specifies measures to be taken to enable the full realisation of (women's) Human Rights.

of other international procedures (A report on the views of Governments, intergovernmental organisations and Non-Government Organisations (NGO) on the idea of an Optional Protocol

In March 1997 The Open-ended Working Group of the CSW on the Elaboration of an Optional Protocol to CEDAW discussed a draft Optional Protocol prepared by the Chairperson, Ms Aloisia Wörgetter, of Austria, in informal meetings. A member of the CEDAW, Justice Sylvia Cartwright (New Zealand), participated as a resource person. Representatives of NGOs made statements about some issues relating to the violation of women's human rights.

The Working Group, completed a first reading of the Chairperson's draft, agreed to the text of some articles of the draft Optional Protocol and Refined and amended alternative formulations for the outstanding article. The secretary-general had prepared one report to support the negotiations containing an annotated comparison of the draft Optional Protocol with the provisions of existing international human rights instruments.

In March of 1999 The Working Group continued its deliberations The Working Group adopted the optional protocol, as did the Commission, which also adopted a draft resolution for the Economic and Social Council.

The Optional Protocol to CEDAW improves on and adds to existing enforcement mechanisms for women's human rights, it would also improve states and individuals understanding of CEDAW, which would be instrumental in Japan and New Zealand, because unfortunately very little has been heard about the Convention in both countries since their ratification. The Optional Protocol also stimulates states to take steps to implement CEDAW, and this would also heighten the awareness in Japan and New Zealand, as the Convention is considered to be a major human rights instrument with respect for women's struggle for EEO, and surely that must be seen to be relevant. The Optional Protocol also encourages

changes in discriminatory laws and practices, to eliminate what has transpired in the past, and give international legislative backing to efforts to improve the status of women in both countries. It is intended to enhance existing mechanisms for the implementation of human rights within the UN system and create greater public awareness of human rights standards relating to discrimination against women.

In 1980, Japan participated in the world conference of the United Nations' decade for women and agreed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by 1985. In 1984 New Zealand also ratified with the CEDAW. Under the Convention, State Parties have to report to the ILO "Committee of Experts" as to steps New Zealand and Japan are taking to comply with their obligations.

When dealing with EEO, Article 2 and Article 11 of the Convention holds most pertinence. Article 2 Stipulates that (CEDAW 1998 Status of Women in New Zealand) state parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and to this end undertake; Article 2 (a) states that the State will embody the principle of the equality of men and women in their national constitutions through law and other appropriate means to ensure the practical realisation of this principle. Article 2(b) stipulates that the state will adopt appropriate legislative and other measures, to prohibit all forms of discrimination against women. In Article 2(c) the State must establish legal protection of the rights of women on an equal basis with men and to ensure effective protection of women against any act of discrimination and Article 2(g) suggests that the State will repeal all national penal provisions which constitute discrimination against women.

Article 11 of CEDAW states that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular; Article.11 (1a) the right to work; Article.11 (1b) the right to the same employment

opportunities, Article.11 (1c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training and Article.11(1d) provides for pay equity.

Unfortunately, there has been no commentary from CEDAW on Japan's obligations since their ratification in 1985 at the time of writing this thesis. However, CEDAW has made comments on New Zealand's attempts to legislate against discrimination of women.

The CEDAW Committee noted on New Zealand that there are increases of women in part-time work and casual work and an insufficient number of full-time jobs for women. The committee expressed concern that the impact on women of economic restructuring in the country continues to be insufficiently addressed by the New Zealand Government.

Secondly, the CEDAW Committee was seriously concerned that the Employment Contracts Act of 1991, which emphasises individual contracts rather than collective agreements, constitutes as a major disadvantage for women in the labour market due to their dual role of work and family commitments.

The CEDAW Committee also expressed concern at the continuing wage differentiation between women and men and at the impact of the repeal of the Pay Equity Act for women's equal pay. The Committee has urged the New Zealand Government to assess the impact of the existing free market legislation on women's ability to compete on an equal level with men in the labour market and to assess the benefits that women derived from the favourable economic situation of recent years. It recommended that the government recognise maternity as a social function, which must not constitute a structural disadvantage for women with regard to their employment rights.

It appears that both New Zealand and Japan have been slow in granting women equal rights, even though both countries have ratified with the CEDAW. Unfortunately, because CEDAW only implies a moral obligation to equality for both countries, they do not feel compelled to fulfill all aspects of their moral obligations. As far as Japan is certainly concerned, many believe that Japan was only trying to 'up' their international image, and hurriedly constructed a piece of legislation to do so. In their hurry, they overlooked the general necessities of an EEOL, which will be dealt with in a later subsection of this chapter.

The deregulation of the labour market throughout the last ten years has not been overtly beneficial to women in New Zealand, and the Employment Contracts Act of 1991 has limited women in the tenured positions that are currently available within this country.

Arguably, both New Zealand and Japan need to take heed of the recommendations that have been put to them by CEDAW. It can only be of great benefit to their International Image, and more importantly would grant women a more equitable environment in which to live and work.

THE IMPACT OF WOMEN'S LOBBY GROUPS IN JAPAN AND NEW ZEALAND

Women's lobby groups in New Zealand and Japan have been influential in the degree of the achievement of employment equality within the two countries. This section deals with the background of those lobby groups and more specifically deals with how and why they came about, what they have done and are doing, and the obstacles they have faced on their road to ensure equality in employment for women both in New Zealand and Japan.

Women's Lobby Groups in Japan and their influence on Employment Law.

As outlined earlier, the efforts of feminist leaders such as Hiratsuka Raicho established a group called the Seito Society (Blue Stocking Society) in 1911, with the purpose being that they could discover and develop the hidden talents within

the women of this time. It did constitute a pioneer effort in combating engrained customs. During the Taisho Era of 1912-1926 Hiratsuka began work for equal political rights for women in 1919. In 1920 Hiratsuka, along with Ichikawa Fusae formed the New Women's Association, and asked not only for equal opportunities for women, but also for protection of the rights of mothers and children.

Their efforts began the movement for equal opportunities for women in Japan. Japanese women's entry into the labour market in the ensuing years from the 1940's to the 1960's did not signify a real improvement in their status in society. Traditional norms, which stipulated women's place and role as primarily in the home shaped employer's policies. This overall situation created a sense of discontent and oppression among Japanese women in the 1970's and the existing Japanese movement could not respond usefully to the dramatic changes in the lives of Japanese women in the 1960's and 1970's.

However, the new feminist movement of the 1970's was a response to these inadequacies. The new women's movement advocated establishing a clear self-identity among individual women as their first step. The new movement use consciousness-raising as a means not only of getting women to recognise themselves as victims of sex discrimination but also to have them lay bare their own: inner "feminine consciousness". The new movement emphasised the dual oppression of women, promoting both the abolition of social class and gender inequality as leading to the social and economic liberation (and self-determination) of women.

Many women's lib groups were formed in the early 1970's; most of which sought to establish a clear self-identity and coherent vision of the social situation for women. Some of these groups also tried to set up collectives consisting solely of women in order to develop women's independence from men.

Late in May of 1972, soon after the First Women's Liberation Convention, a revision of the Eugenic Protection Law aimed at prohibiting abortions for economic reasons was proposed in the National Diet under the influence of this new found self identity of feminist groups. Among the new women's groups that were organised around specific issues were the: Groups to Protect Sexist Court Judgements against Working Women and Unmarried Women; the Group against Sex Tours to Korea for Japanese Men; the Group to promote co-education in the Study of Home Economics in High School; and the Group Supporting Abortion and the Contraceptive (Upham, 1987:126-164).

The most representative of the groups formed in the mid 1970's and one that focused on specific social issues was the International Women's Year Action Group, formed in 1975. This group was founded at the initiative of Fusae Ichikawa and Sumiko Tanaka, both members of the Diet, and was joined by members of women's groups of long standing. These groups worked on specific discriminatory conditions in areas such as employment, education, mass media government and administration and tried to make existing social institutions more egalitarian (Tanaka, 1995:346 cited in Fujimura-Fanselow, 1995).

In the early 1970's public attitudes toward this movement and its members were negative, and the movement was mostly ignored or regarded by the government as made up of troublemakers. However, the United Nations sponsored 1975 International Women's year forced the Japanese government to take seriously and act on the problem of sex discrimination. As a result, in November 1975 the Headquarters for the Planning and Promotion of Policies Relating to Women was set up in order to incorporate into national policy the decisions made at the World Conference of the International Women's Year. In the late 1970's, the Japanese government established the National Women's Education Centre, and local governments, including the Tokyo Metropolitan Women's Information Centre established many other women's centres.

An inclination toward issue oriented activities of the feminist movement, which came to be obvious in the latter half of the 1970's, developed further throughout the 1980's. The Japanese Feminist movement in the 1980's witnessed the advancement of women's studies. In response to the statements in the World Plan of Action of the International Women's Year and CEDAW, the Japanese government, at the national level and more prominently, at the local level, also began to promote a research based study of women's social status.

The most significant and relevant move by feminists in Japan in the 1980's was the enactment of EEOL. Those in the feminist movement as well as the labour movement had been struggling for effective anti-sex discrimination legislation since the end of the 1970's. Efforts to introduce bills through the opposition parties were met by resistance on the part of the ruling party, but as the deadline for the ratification of CEDAW drew near, the government proposed its own bill.

Disagreement arose within the feminist movement, over whether protective measures designed specifically for women in the existing LSL should be removed so that women could more readily penetrate various spheres of industry together with men or be kept intact, since without certain regulations, such as limitations on overtime work, working conditions for most women, who in actuality bore most of the household responsibilities, would worsen (Tanaka, 1995:346 cited in Fujimura-Fanselow 1995).

Unfortunately, the feminist movement could not reach a consensus over this issue, and this left it unable to organise a unified front against employers and the government. In order to break through this state of affairs, it has been deduced that it will be necessary for the Japanese feminist movement to unify itself and pursue ways to transform the socio-cultural system based on the division of gender roles and the control and subjugation of women's sexuality. Women's studies, it has been suggested, must provide the movement with a lucid analysis of the

mechanisms underlying women's oppression and also present viable strategies for confronting this oppression (Tanaka, 1995:346 Fujimura-Fanselow, 1995).

Women's Lobby Groups in New Zealand and their influence on Employment Law.

As stated the early feminists, differed from those of the 1970's, in agitating not only for equal political, social and economic rights for women but also for the moral reform of New Zealand society. They drew on two traditions: the evangelical revival of the late eighteenth and early nineteenth century, and the equal rights movement that had emerged from the eighteenth century.

Early New Zealand women believed themselves to be equal to men, but they also regarded themselves as different. They thought that their role as mothers was vitally important and that nature had fitted them for that purpose. Occupations outside the home were sought only for unmarried women or those without dependants. They wanted the government to be more caring and moral. They demanded the right to participate in politics not only because they were citizens but also because they thought they had distinctive womanly attributes that would benefit the government and New Zealand society. Basing their arguments on a mixture of natural rights and expediency, they contended that their intervention was both just and necessary; legislation would be more equitable and humanitarian because of their involvement (Nicholls, 1993).

On a suggestion in 1895, by the Women's Franchise League in Dunedin, which suggested that women's organisations should federate, the International Council of Women (ICW) asked Kate Sheppard to start a National Council of Women for New Zealand, and this organisation remains strong today.

In the humanitarian field, the NCW passed resolutions asking for free and longer education for children and better care and training for those who were orphaned or neglected, universal old age pensions and prison reform, with remedial rather than punitive methods employed, the classification of criminals, improved conditions, and the abolition of capital punishment. They also agitated for the appointment of women inspectors, police, doctors, lawyers, jurors and government officials. In implementing its humanitarian objectives, the NCW made considerable progress (Nicholls, 1993). Initially Seddon had been opposed to women getting the vote, but once they had it, he used it to his advantage, promoting New Zealand as a country with the cutting edge. As long as the NCW was seen to be purifying politics, strengthening the role of wife and mother and resolving social problems and not challenging male power directly, politicians were prepared to concede to its demands. Thus, watered down versions of NCW resolutions found their way into New Zealand Statute books. Between 1896 and 1900, sixteen Acts were passed on which the NCW claimed to have had influence, including the Criminal Code Amendment Act of 1896 and the Inebriates Institutions Act of 1898, which established institutions for alcoholics (Nicholls, 1993). However, only two Acts dealt with the equal rights of women. They were the Female Law Practitioners Act of 1896, which enabled women to practice law, and the Divorce Act of 1898 which, after thirteen years agitation by women's groups, finally made conditions of divorce equal for men and women (Nicholls, 1993).

In the nineteenth century many believed that the women's movement in New Zealand would die away as it experienced great difficulties, but at the same time was a stream of continuity between issues taken up by women's groups and their strategies collectively devised to deal with them. Arguably the suffragists entered into a zone, presumed to be off limits and challenged both women and men in New

Zealand to not just tolerate the conditions in which they lived and worked in New Zealand, but to fight for some semblance of social equality².

Women's groups remained active throughout the 1930's .The Working Women's Movement campaigned for sustenance for unemployed women and pensions for deserted wives with children. The First Labour Government's stimulation of local industry brought more women more work in offices and factories. The 1940's saw the emergence of nursery schools, which were based on progressive educational philosophy and established to provide both care and education for children. It is argued that their acceptance was limited because the concept of early childhood care and education was at odds with the ideals of motherhood, despite the economic need and the reality of working women's lives. Thus, there was a separation of the care and education components of the service, with care becoming the prerogative of the few charitable community childcare centres opened in the 1930's. This initially started during the 1940's by women whose husbands were away at war as a supportive parenting co-operative. These hard times for women lasted until the beginning of World War Two as demonstrated in chapter three, when jobs for obvious reasons became freely available (Ebbett, 1981:5).

It has been suggested by Aitken (1980) that the improved educational and economic capacity of women during the post war period provided a setting for the second wave of active public feminism. Again, labour force issues were the central concern to women advocating improvements in the status of women in New Zealand, particularly improved working conditions, equal pay, and a diversification of the paid occupations open to women in the 1960's to 1980's.

² It is notable that the efforts of suffragist were firmly supported by some male leaders of the time. This is explored by Grimshaw (1972)

In 1957, the Council for Equal Pay was established and as a result in 1960 equal pay for women in the public service began to be phased in over a five years period. With this increasing female work-pool saw the emergence of the Women's Liberation Movement (WLM) in New Zealand. They began to make their presence felt within trade unions and, in the workplace and society in general.

Equal Pay actions were a political priority for the WLM, whose member went onsite to factories handing out leaflets which told women how much more their male counterparts earned. They urged the working women to join the WLM and press within their unions for equal pay. In 1972, the principle for Equal Pay, introduced a decade earlier in the public sector, was extended to the private sector under the Equal Pay Act. Under the Act, it made separate provisions for the remuneration of female employees, awards and agreements, which were the main documents establishing basic pay levels, had to provide equal pay for women by the year 1977.

CONCLUSIONS

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) came into force in September 1981. An Optional Protocol to CEDAW has been proposed to provide better enforcement of women's human rights. The Optional Protocol will give women the right to complain to a specialist United Nations (UN) Committee (CEDAW) about violations of CEDAW by their governments.

The first aim of the campaign for EEO was to establish women's right to work, that is, their right to live by virtue of their right to work, including their right to make the most of their abilities and to have them duly recognised. The third goal was to guarantee equal working conditions that would enable both men and women to work in health and safety while fulfilling their family responsibilities.

The new women's movement in Japan advocated aimed at establishing a clear self-identity among individual women as their first step. The new movement emphasised the dual oppression of women. The women's movement up to that time had relied heavily on the view that women and men were in the same situation insofar as they were both oppressed and that the abolition of social class would lead to the liberation of women.

The Japanese Feminist movement in the 1980's witnessed the advancement of women's studies. In response to the statements in the World Plan of Action of the International Women's Year and CEDAW, the Japanese government, at the national level and more prominently, at the local level, also began to promote the study of women.

In New Zealand the concepts derived from CEDAW, were implemented into New Zealand's 1988 State Sector Services Act, Employment Equity Act (EEA) 1990, Employment Contracts Act (ECA) 1991 and the Human Rights Act 1993.

In the 1998 report from CEDAW on New Zealand an expert commended New Zealand's legislation on human rights, but noted shadowy areas in the national labour code. Equal pay for work and equal value was elaborated in the International labour Organisation (ILO) conventions, upon which some points of the CEDAW against women rested. It appears that both New Zealand and Japan have been slow in granting women equal rights, even though both countries have ratified with the CEDAW.

It is clear from this and preceding chapters that the roads toward realising the dream of EEO in both countries are varied, diverse and contestable. There is a strong and definite need for the female labour force to keep a firm hold on their visions and to push their employees and society into realising the necessity for EEO in the workplace. There is still some of the basic work that needs to be done, and there are many out in society and in the workplace who are not willing to

implement, let alone realise that EEO in the long run has outstanding benefits. There is clearly a need for an Optional Protocol to come through in CEDAW, there is also a strong need for both Japan and New Zealand to return to the original essence of EEO and full legislation is necessary for EEO to be achievable in the future.

CHAPTER SIX

Conclusions

Feminists strategize in a variety of ways to achieve equality for women, not only in terms of giving them the same rights as men in law, but also in improving the practical ways women are treated and viewed, and increasing the opportunities available to them, publicly and privately

Liberal feminism essentially claims that because women are rational beings like men, they are entitled to the same legal and political rights; and that it is up to the individual women to make the most of their opportunities, once political and legal equality have been won. The politics of EEO in New Zealand reflect liberal feminism's dual focus on equal citizenship and fair competition in a merit based system.

Radical feminist views look into the underlying structural reasoning for inequalities in regard to the position of men and women. The radical view is concerned with the restructuring of work place power relationships. The radical perspective on EEO emphasises the political nature of difference, particularly embodied differences such as gender. The radical perspective suggests purposeful intervention in the employment process to ensure EEO target groups are fairly distributed across organisational hierarchies.

Equality versus Difference has been used to characterise conflicting feminist positions and political strategies. In the Sears case this debate joined then not around equality versus difference but around the relevance of general ideas of sexual difference in a specific text.¹

A discussion of the theory which underpins the EEO debate has been highly necessary throughout the writing of this thesis, as it is strategically important to clarify the analyses that is being worked with by all in EEO, to avoid isolation from

¹ Rosenberg's "Offer of Proof" and Kessler-Harris's "Written Testimony" appeared in *Signs* 1986:757-779

other issues; such as the link between managerialism and a much more restricted model of EEO and to avoid the distorting effects of operating with an implicit theoretical perspective on EEO without being aware of its implications.

As a strategy EEO is concerned with identifying unfair discrimination in the workplace and with developing strategies to redress this. Apart from the theoretical issues that have been discussed in this thesis, a strategic human resource process that has been developed alongside, and in repose to, the business goals of the organisation, does indeed, as illustrated, offer some new opportunities for EEO to increase.

Japan has been extremely slow in granting women equal rights in the workplace. Employment practices, which were overtly discriminatory against women and were explicitly, prohibited by legislation, were until the last decade part of the norm of the employment system within Japan.

Japan participated in the world conference of the United Nations' decade for women in 1980 and agreed to ratify the Convention for the Elimination of All forms of Discrimination Against Women (CEDAW) by 1985. The economic pressures for change and Japan's international obligations to CEDAW culminated in the enactment of the Equal Employment Opportunities Law (EEOL) in May of 1985 (enforced in 1986).

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) came into force in September 1981. An Optional Protocol to CEDAW has been proposed to provide better enforcement of women's human rights. The Optional Protocol would give women the right to complain to a specialist United Nations (UN) Committee (CEDAW) about violations of CEDAW by their governments.

It would enhance existing mechanisms for the implementation of human rights within the UN system and create greater public awareness of human rights standards relating to discrimination against women.

I feel that the reason Japanese corporations were strongly opposed to the new Equal Employment Opportunities Law, was based on the grounds that a western concept would not work in Japanese society and that Japanese tradition would be threatened by it.

The 1985 /1986 EEOL simply set forth the employer's moral duty to endeavour to provide equal opportunity to women as to men. Many Japanese see the duty to endeavour as providing a solid basis for administrative guidance, a means more effective than criminal or civil sanctions in the Japanese social context.

Criticism of Japan's 1985 /1986 EEOL can be summarised in the three following points:

- 1) its one-sided support of women permitted women to be kept in lower-paying jobs;
- 2) the 1985 /1986 law did not prohibit discrimination in terms of recruitment, hiring assignment and promotion, but merely set forth a duty to endeavour; and
- 3) the Law lacked an effective dispute resolution mechanism.

Equal employment opportunities, within Japan's current economic slump are now deteriorating quickly. Bearing in mind that Japan's EEOL is a labour law that is within ratification of CEDAW I believe that there should be effective sanctions against violations of the Japanese EEOL. This in turn should improve the current employment situation of women in Japan. The Japanese EEOL 1985 (enforced in 1986) is one sided in support of women, permitting women to be kept in lower paying jobs. It has permitted employers to give women "favourable treatment",

such as recruiting them only for certain positions. This practice, in fact, has allowed companies to keep men and women on different career tracks.

Reinforcing the restraining power of the EEOL is not enough to realise equal employment opportunities for both men and women in contemporary Japanese society. It is evident that the social, economic, and political spheres are closely linked together and each contributes in forming the lives of women. Examining the history of the industrialisation and democratisation of Japanese society reveals that economic development did not provide full opportunity for women's liberalisation and empowerment.

I feel that as far as Japan is concerned, neither strategy makers nor women can simply add or subtract social, political and economic factors to improve the status of and establish, equality for women in employment. These factors are deeply rooted within society and require careful strategic planning.

It is obvious that the EEOL has had very little impact in changing Japan's traditional employment structure with its segregated labour markets and job opportunities for men and women, even more than a decade after its implementation.

The traditional employment structure has two aspects. First there is a core labour force (regular employees) under long-term employment arrangements, with strong job security, better working conditions, and other privileges such as company welfare benefits and facilities (so-called life-time employment). Exclusively men with good educational backgrounds occupy the core labour force.

Particularly in larger companies, the core labour force is also dominated by male-monopolised decision-making positions. Second, there is a peripheral labour force (non-regular employees) mostly composed of women, minorities, men with inferior educational backgrounds, the handicapped, employees who failed in their first job, and, more recently, illegal foreign workers. (Tadashi Hanami January 1,2000)

The traditional male-dominated corporate culture of Japanese companies was established through daily business practices based on long-term personal relationships between subordinates and superiors, and among colleagues. Important decision-making often takes place in an informal way through personal relationships between privileged regular employees. Women are excluded from such decision-making processes not only in terms of formal position, but also in their daily informal personal relationships.

This corporate culture is deeply entrenched in Japanese society today, and is integrated into Japan's political, educational and bureaucratic systems. Thus, the issue of equal employment opportunity is closely connected with the issue of equality in society in general. (Tadashi Hanami January 1,2000) The Basic Law for a Gender-equal Society recently passed the Diet, and can be expected to deal more broadly with the issue. However, this Law also contains a fatal defect, a lack of any specific compliance enforcement measures. This defect is connected with the Japanese legal culture, which avoids the universalistic approach of Western legal thinking.

As already mentioned, Japanese bureaucrats always prefer mediation, a way of settlement by compromise, to black-and-white judgements by the courts, or enforcement of legal norms in a universalistic way.

Obviously, the Japanese way of administrative guidance with advice, suggestions, recommendations, consultation and persuasion - including through implication and bestowal of favour and disfavour, could be to some extent effective in implementing a policy goal, as proponents of Japanese administrative guidance have argued. However, such a method of enforcing policy goals very much depends on voluntary compliance by companies, and does not work for those companies unwilling to change long-held prejudices. Even in the case of decent law-abiding companies, it is not easy to change their fundamental employment structure, which has been firmly established during the entire post-war period, and

in which discriminatory practices against women and minorities have been firmly integrated. (Tadashi Hanami January 1,2000)

As part of the administrative apparatus of government, planners not only have to meet the short term goals imposed on them by governments which may change, but also work within the constraints imposed by planning decisions made in the past and by the structure of the national economy, itself embedded in a global economic system. Modern society in Japan still carries the legacy of the traditional sex-segregated perspective of economic, political and social issues and prohibits women from pursuing their interests as men do. (Tadashi Hanami January 1,2000)

The effectiveness of the EEOL very much depends on voluntary compliance. However, the traditional HRM policies of Japanese companies have been formulated on the basis of a strong concern for labour force efficiency. Furthermore, under the current bleak employment situation in Japan, companies are desperately trying to save labour costs, and their HRM policies are focused on how to promote maximum efficiency with maximum labour force competency. Companies will never provide equal employment opportunity to women (or minorities) as long as they are unable to compete with men on a completely equal footing.

Thus, the most important problem for Japanese women is whether they are qualified to compete with efficient men in a fully-fledged, efficient labour force, in spite of the burdens of child-birth and child-care. This latter handicap may be overcome to some extent by improving child-care and nursing facilities, and promoting equality at home. Therefore, the recent series of government policy initiatives promoting nursing and child-care leave, and the establishment of nursing and child-care facilities in the workplace, are highly appreciated. These policy measures are probably the best that Japanese bureaucrats can be expected to achieve in the current climate of economic difficulties.

Introducing such policies to create prerequisites for equal employment in the present social context is more likely to be effective than adopting the Western approach, which teaches through deterrence, punishing violations with exorbitant damage awards.

The difference between Western and Japanese approaches is how to teach the employer. The Western way is to teach by using extreme damage awards, or to correct employer behaviour through direct enforcement of certain HRM steps in the name of "affirmative action." The Japanese way is to teach employers via personal contact, and to manipulate their behaviour by creating a friendly environment.

The Western approach, which enforces equality through administrative agencies and courts, is certainly effective, since it is able to create equal treatment, and correct employer behaviour, either directly through the use of public power, or through deterrence measures such as exorbitant damage awards.

Compared to New Zealand and other Western countries, Japanese women have been slow in developing their equality consciousness for their equal rights. Experience in the United States, the United Kingdom and New Zealand suggests that active intervention by the government in the provision of equal opportunities policies for women was largely a result of political campaigns and lobbying by women's pressure groups. In Japan, women's pressure groups have not consolidated as a major social force to exert pressures on the government to intervene more actively in equal opportunity issues. The women's voice was almost unheard in the process of drafting the 1985 (enforced in 1986) EEOL. The present legislation is a manifestation of the dominance of management power in Japanese society.

In New Zealand, the government employing authorities signed a statement in 1984 on equal employment opportunities. EEO was first given legislative intent in the State Owned Enterprises Act 1986, which required the State Owned Enterprises to be "good employers" with an EEO programmes. The State Services Commission

monitors, evaluates, promotes, and develops EEO in the New Zealand Public Service.

The introduction of the State Sector Act of 1988 placed specific expectations on Public Service Chief Executives and the State Sector Commission for the delivery of EEO. The State Sector Services Act of 1988 specifically stated that all State Sector employers were to have an EEO programme, designed to eliminate barriers to the advancement in the employment of women, Maori, minority ethnic groups and people with disabilities.

Legislative changes following a new strategy to address pay inequity culminated in the passing of the Employment Equity Act of 1990 (EEA). The EEA introduced the concept of employment equity encompassing equal employment opportunity as well as equal pay into the private sector.

After the National government repealed the Employment Equity Act it established the Working Party on Equity in Employment. On the Working Parties recommendation the EEO Trust was established in 1991 to promote the business benefits of EEO to employers though out New Zealand. The EEO Trust works to move employers from awareness and acceptance of EEO, to action. The EEO trust supports the principles and practices of EEO as a means of ensuring all applicants and employees have equal opportunity to achieve their potential.

As far as the current legislation in New Zealand is concerned, rather than breaking down the barriers to employment equity, the Employment Contracts Act of 1991, has given employers more scope to exploit women. Labour market restructuring, under the National government in 1991, the disintegration of multi-employer contracts and demise of the service sector unions has left many women employees unprotected and vulnerable to free market forces. Employment contracting under the ECA has resulted in a widening pay gap and deteriorating conditions of employment for a large number of women workers.

Achieving EEO in New Zealand and Japan is going to be a battle. Realistically, New Zealand women have never been so well placed, as they are today to achieve this. It is felt that it is time in New Zealand, to begin unfinished business and develop a fresh approach to employment equity that acknowledges the differing needs of working women leading to policy and practices that positively discriminate and empower women to be different, but equal to their male counterparts. Legislative and workplace reform must be combined to develop and implement successful employment equity strategies in both New Zealand and Japan.

An important lesson that Japanese women can learn from their counterparts in New Zealand, is that grass roots lobbying and political campaigns from women themselves are important means for propelling equal opportunities issues to the top of the political ladder. Without this, from the Japanese and New Zealand women, the future of equal employment is unlikely to progress beyond its present limit. Japanese and New Zealand women cannot achieve full and real equality on men's terms. The male work norm will have to change and the Japanese and New Zealand management system will need to be challenged, for the goal of equality in employment to be achieved.

POSTSCRIPT

As already mentioned, I undertook this research and thesis in an Election year for New Zealand. Until November the 27th 1999, National under the leadership of Jenny Shipley held government for nine years. On Saturday the 27th, Labour was voted into power under the careful guidance of Helen Clarke and her Coalition partner Alliance leader Jim Anderton. It one of their top priorities as a newly voted government to repeal the current Employment Contracts Act (ECA) and implement the Employment Relations Act (ERA). Government will not sit until December the 20th and will only have three working days sitting in parliament. Therefore, it can be perceived that the new coalition government will only be able to start the administrative processes of the repeal before they adjourn for the Christmas vacation.

The new ERA will apparently, is a combination of ECA initiatives with subtle changes in regard to bargaining power, the 'Good-faith' sentiment and union membership. It could be seen to be the new wave of EEO in New Zealand with stricter measure of anti-discriminatory measure under the ERA and State Sector Service.

In this postscript I will detail the new ERA and give running explanations of the effects it will have as far as EEO and women are concerned in this country.

Labour's Proposed Policy on Employment Relations.

Labour believes that the legislation governing employment relations should recognise the interdependence of workers and employers; promote and sustain economic growth; and assist in achieving a fair distribution of resources. Legislation, Labour feels, should also recognise that the balance of power or influence between employees and employers is not equal. Labour believes that the

best way to redress this imbalance is to encourage the collective organisation of workers and to foster collective bargaining as a preferred means of establishing the rights and obligations of workers. These beliefs are shared very widely internationally and form the basis of core ILO conventions.

The current ECA does not and can not achieve these objectives because it is based on the philosophy that market power should determine all outcomes. Labour's policy is founded on the understanding that employment relationships are not just contractual, but are human relationships and should be treated differently. Labour will therefore replace the ECA with new legislation which:

- Promotes collective bargaining
- Recognises unions
- Ensures union membership is voluntary
- Is consistent with I.L.O conventions

The legislation will recognise that union membership will be voluntary, not all workers will wish to join a union or be covered by a collectively negotiated agreement. The legislation will give individuals the choice of an individual employment contract but Labour will ensure that individuals have adequate protections to negotiate individual contracts. These protections will include a more comprehensive minimum code of workers' rights (including minimum wages, holidays, access to grievance procedures etc.), the promotion of safer workplaces through better occupational safety and health legislation and systems for enforcing these rights.

Employment Relations Act

Labour intends to introduce new industrial relations legislation. The working title of the new legislation is the Employment Relations Act. Its objectives will include:

- Establishing an employment relation's framework, which provides for the orderly conduct of relations between workers and employers. The legislation will be consistent with the major ILO conventions and require both unions and employers to conduct their collective relationship in good faith;
- Promoting collective bargaining between employers and unions;

ILO Conventions and Freedom of Association

Labour's legislation will be written to be consistent with the core ILO conventions, particularly conventions 87 and 98, which require there to be freedom of association for all workers and employers. This means that the legislation will stipulate that:

- There must be no discrimination against workers on the grounds of their status as union members. In the case of a complaint of such discrimination, the onus of proof should be on the employer to show that discrimination has not occurred;
- There should be no interference by other parties in the affairs of unions or employer organisations.

The Duty to Act in Good Faith

Labour's legislation will impose a duty on both unions and employers to conduct their collective relationship in good faith. While that will be of particular importance during negotiations, the duty will apply at all times. It will require both parties to be honest in their dealings with each other.

Specifically in relation to bargaining, the duty will include:

- An obligation to meet and consider any proposals made by the other party;
- An obligation to respect the choice of representatives and/or advocates;
- An obligation to provide information necessary for the purpose of bargaining.

The duty to act in good faith will not imply a duty to settle a collective agreement.

Negotiations for a collective agreement will be deemed to have commenced on the filing of the appropriate notice. The legislation will also include provisions setting out the conditions under which negotiations are deemed to have been finalised or have broken down for the purposes of determining the application of the good faith bargaining duties.

The Department of Labour will play an active role in promoting good faith and the Employment Tribunal will have specialist mediators with appropriate background and training, whose role will be to facilitate good faith bargaining. All parties to collective bargaining will have the right to initiate mediation. The duty to act in good faith will ultimately be enforced by the Employment Court, which will have the power to impose a wide range of remedies including economic sanctions

Individual Contracts

Workers will be free to bargain for individual contracts if they choose to do so, and will retain the current protections in terms of access to personal grievance and dispute procedures and will be required to be given a written contract. Individual employment contracts will not be allowed to be inconsistent with an applicable collective agreement.

If they choose, individuals may appoint a person to represent them in negotiating their contract. In addition, employers will be required to be 'good employers' and to ensure all employment relationships with individuals are based on 'trust and confidence'. Workers will also be protected in law from unfair individual employment contracts. Nothing in the legislation will prevent a person representing more than one individual in negotiations for individual contracts.

State Sector Services under Labour

Labour expects the wastage of public funds to stop and a new era of moderation, frugality and integrity to develop in the public sector. All public sector agencies, including crown entities, will be expected to perform in line with these new expectations.

In the past the state has accepted that it should set an example as a 'good employer'. In recent years this leadership role has largely vanished. Labour believes that the state should once again lead by example and be at the forefront of ensuring implementation of EEO programmes, proper training programmes, etc.

Labour is allegedly committed to a strong public service that employs quality staff on fair pay and conditions. It is also clear that the current 'do more with less' approach to the state sector might be encouraging short-term savings to be made, but little recognition has been given to the likely long-term impact. Government departments have been forced to reduce permanent staff numbers and make more and more use of consultants to work on particular projects. This has led to a reduction in career opportunities within the state sector and also to a loss of corporate memory. Hence government departments have staff turnover rates of greater than 20 % and an overall reduction in the depth of the public service.

The State Sector Act will be amended to require reporting on personnel matters including turnover, proportion on fixed term arrangements and the proportion of

function contracted out, on an annual basis. Labour will re-establish a public service that recognises the importance of experience and which provides proper career structures and proper rewards. Employers will be expected to pay more attention to personnel strategies. State employers, including the state owned enterprises would be required to take a lead in the new government's modern apprenticeship system.

That will also mean that state sector employers will once again have to accept their responsibility to be 'good employers'. Negotiations over remuneration will not be confined just to annual salary rates. Issues such as superannuation access to training and related matters need to be included.

Transition Arrangements

Labour will ensure that transition arrangements are put in place which protect the status of existing contracts providing that any such contract that has an expiry date more than three years after the date of the introduction of the legislation will be deemed to expire three years from that date.

With respect to any contract entered into after 1 January 1999, the legislation will also contain a mechanism via which on the application of either the employer or the union representing the workers involved, and after a ballot of the affected union members, the contract may be deemed to expire on 1 July 2001. There will also be transitional provisions to allow for the termination of any imposed contract negotiated from the beginning of this year by mid 2001. This is to eliminate the practice of five or even ten-year contracts, which has recently gained favour amongst a few employers. It will also ensure a period of adjustment before the new legislation can be substantially put into practice at the enterprise level.

Finally, the repeal of the ECA, will be of exceptional benefit to women in employment and to the implementation of EEO in New Zealand. By making

employees and employers more accountable for their own performances and practices will surely mean a deeper understanding and implementation of EEO in both the private and public sector of New Zealand's economy.

As far as the State Sector is concerned, in recent years the leadership role has largely vanished. Labour believes that the state should once again lead by example and be at the forefront of ensuring implementation of EEO programmes, proper training programmes, etc. Labour is committed to a strong public service that employs quality staff on fair pay and conditions.

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