

**Underrepresentation of Women in Leadership Roles: Should
New Zealand Adopt Quotas or Targets in the Private Sector as
Temporary Special Measures?**

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‘One should not assume that all women want to work, but it is safe to say that women want to be given the same freedom as men to choose to work if they want to; and if they do choose to work, they should have the same chance of finding decent jobs as men.’¹

¹ S. Kring and M. Kavar *Guidelines on Gender in Employment Policies* (International Labour Organisation, Geneva, 2009) at 7.

Chapter 1 – Introduction

Over the last decade women have increasingly entered the workforce in New Zealand,² making considerable progress into male-dominated spheres.³ Despite this women are still paid less than men,⁴ overrepresented in the lower status occupations,⁵ and underrepresented in the higher status occupations.⁶ The underrepresentation of women in leadership and management roles is to be the focus of this dissertation.

Women in New Zealand now attain more undergraduate degrees⁷ and make up a larger proportion of professional occupations than men⁸. However, women remain significantly underrepresented in management level roles.⁹ Gender inequality in top-level roles is a New Zealand wide issue, but is especially prevalent in the private sector, which employs 80 per cent of New Zealand's workforce.¹⁰ Within the public sector women make up 34 per cent of Parliament, hold 35.2 per cent of board positions on Crown company boards, and fill 24.1 per cent of chief executive roles in

² Statistics New Zealand "Celebrating 120 years of women's suffrage" (2013) Ministry of Women's Affairs <<http://mwa.govt.nz/documents/celebrating-120-years-womens-suffrage>>.

³ New Zealand Human Rights Commission *New Zealand Census of Women's Participation* (New Zealand Human Rights Commission, Wellington, 2012) at 46-137.

⁴ Statistics New Zealand "Table: Average Weekly Earnings (Employees) by Industry (ANZSIC06) and Sex (Qrly-Mar/Jun/Sep/Dec)" (2014) <www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=bd68c0b0-738f-4d6f-8285-5ad21c157539>.

⁵ National Equal Opportunities Network "Women" (viewed October 2014) <www.neon.org.nz/eeogroups/eeoprogressforwomen>.

⁶ Ministry of Women's Affairs *CEDAW Report 2010: The Status of Women in New Zealand* (Ministry of Women's Affairs, Wellington, 2010) at iii.

⁷ Statistics New Zealand, above n 2.

⁸ Statistics New Zealand "Table: Persons employed by Sex by Occupation, ANZSCO (Annual-Dec)" (2013) <<http://www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=faldf648-aaa8-49f3-9870-bd0e22e7adff>>

⁹ Statistics New Zealand "Table: Persons employed by Sex by Occupation, ANZSCO (Annual-Dec)" (2013) <<http://www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=faldf648-aaa8-49f3-9870-bd0e22e7adff>>.

¹⁰ M. Mintrom and J. True "Framework for the Future: Equal Opportunities in New Zealand" (2004) Human Rights Commission <www.hrc.co.nz/New Zealand/hrc_new/hrc/cms/files/documents/04-Aug-2005_18-17-56_PDF_Full_Framework_for_the_Future.pdf> at 34.

the public services.¹¹ In comparison, the private sector has a dismal number of women in leadership roles. Of the Top 100 NZSX companies, women make up 14.75 per cent of directors¹² and 5 per cent of chief executive officers (CEO).¹³ Over half of these Top 100 NZSX companies do not have a single woman on their board.¹⁴ Further to this, women's representation in legal and accounting partnerships sits between 15 per cent and 19 per cent.¹⁵ These numbers are up on previous years, but progress is slow, averaging around 2 per cent increases in women's representation, per year.¹⁶ Based on the current statistics and pace of progress, women's representation will not go above 35 per cent for at least 10 more years.

The 'leaky pipeline' is the preferred metaphor for describing the processes causing women's underrepresentation at the top levels.¹⁷ The leaky pipeline identifies that there are many points along talented women's career pathways where they either drop out, or are stalled in their progress.¹⁸ Studies by Catalyst support the leaky pipeline theory by showing that women, with equivalent qualifications as men, are disadvantaged throughout their career.¹⁹ Common explanations for why women are not represented in top levels include: that they choose not to pursue these roles; balancing family and work is too hard; or that women do not have the skills to perform the roles. These explanations will not be under analysis. The major issue that will be under consideration is how employment selection processes may play a causative role in the underrepresentation of women in leadership positions. The emphasis will be on the private sector, as this sector employs the majority of New Zealanders, and is the sector with the most gender disparity in top-level positions.

A possible explanation for the differences in women's representation, at top levels, in the private and public sector, is the different legal obligations on employers in each

¹¹ New Zealand Human Rights Commission, above n 3, at 16.

¹² At 46.

¹³ At 46.

¹⁴ At 47.

¹⁵ At 55, 74.

¹⁶ At 46, 47, 55, 74.

¹⁷ Ministry of Women's Affairs "Realising the opportunity: Addressing New Zealand's leadership pipeline by attracting and retaining talented women"(2013) <<http://mwa.govt.nz/documents/realising-opportunity-addressing-new-zealand's-leadership-pipeline-2013>> at i.

¹⁸ At i.

¹⁹ N. Carter and C. Silva *Pipelines Broken Promise* (Catalyst, 2010) at 3.

sector. Under the State Sector Act 1988, which regulates the public service, employers are under positive obligations to promote gender equality in their employment decisions,²⁰ as well as being bound by anti-discrimination law.²¹ In comparison, private sphere employers are not under any positive legal duties to promote gender equality and are only required to comply with anti-discrimination law.²² Chapter 2 will assess anti-discrimination law and discuss its limited ability to ensure that women have equal employment opportunities. Chapter 2 will also consider the processes employers in the private sector use for selecting candidates, and establish how these may favour men.

New Zealand is under a number of international law obligations, which require the state to protect women from discrimination and ensure they have equal opportunities for selection and promotion. Chapter 3 will establish what these international law obligations entail and how the inadequacies of New Zealand's employment framework (as set out in Chapter 2) mean that New Zealand may be in breach of its obligations. The recommendation that New Zealand introduce temporary special measures will also be considered.²³

Chapter 4 analyses two gender equality strategies, quotas and targets, to establish whether either would be appropriate for New Zealand to adopt as temporary special measures. Case studies of Norway (quotas) and Australia (targets) will be used to assess the effectiveness of these strategies. Chapter 5 then considers whether either of these strategies would be suitable for New Zealand and makes recommendations on what, if any, actions New Zealand should take.

²⁰ State Sector Act 1988, s56.

²¹ Employment Relations Act 2000, s103-105; Human Rights Act 1993, s21-s23.

²² Mintrom and True, above n 10, at 8.

²³ Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/New Zealand L/CO/7 (2012) at [19].

Chapter 2 – Inadequacies of New Zealand’s Employment Framework

The current private sector employment framework is inadequate for ensuring that women have opportunities equal to men to achieve top-level positions. Employers in the private sector are under minimal obligations to actively achieve gender equality. Due to this, they are permitted to use selection processes that indirectly favour men.

I. Limitations of the Legal Framework

A. Anti-discrimination law

Private sector employees are prohibited from discriminating against women, due to their sex, under the Human Rights Act 1993 (HRA) and Employment Relations Act 2000 (ERA). Both the ERA and HRA recognise discrimination can be direct or indirect.²⁴ Under s103 (1)(c), of the ERA, an employee has a personal grievance if they can show they have been discriminated against in the course of their employment. Section 104 provides that an employee will be classified as having been discriminated against, in a number of circumstances, where the direct or indirect reason for the way the employee was treated is a prohibited grounds of discrimination (in this context, sex).²⁵ Section 22 of the HRA is substantially similar to s104 of the ERA, but one notable difference is that the HRA is not limited to discrimination occurring in the course of employment. Section 22 (1)(a) of the HRA has a wider scope and can deal with discrimination in the application process. Where an applicant for employment is qualified for a potential job and is refused or omitted employment because of their gender it will be considered unlawful discrimination.²⁶

Anti-discrimination law, as the sole legislative approach to promoting gender equality in the private sector, is inadequate in a number of ways. Firstly, it relies upon a wronged employee to bring a claim against their employer.²⁷ In 2011 246 gender

²⁴ Employment Relations Act, s104; Human Rights Act, s65.

²⁵ Employment Relations Act, s104.

²⁶ Human Rights Act, s22(1)(a).

²⁷ Mintrom and True, above n 10, at 60.

related discrimination complaints were made to the Human Rights Commission.²⁸ However, a 2011 survey reported that of the 7,000 women surveyed in their study 280 said they had been discriminated against by reason of their gender.²⁹ Only a very small percentage of New Zealand women were surveyed, and yet the numbers of women that reported having experienced gender discrimination exceeded the number of yearly complaints. This is strong evidence that not all employees who experience discrimination will make a complaint.³⁰

Employees are further disadvantaged by having the burden of proving all the elements in a claim of discrimination, on the balance of probabilities.³¹ The Authority in *Anderson v Fullers Group Ltd*, in the context of discrimination on the grounds of age, stated that:³²

The Act requires that age be directly or indirectly causative of the employer's actions. It follows that it is not enough to show that age was taken into account; age must have either directly or indirectly caused Fullers Group's actions.

Accordingly, in the context of gender, the employee would be required to establish that their gender was the reason the employer acted in a certain way. It is difficult for an employee to establish the subjective reasoning of the employer without rare direct evidence (e.g., being told 'you're not getting a promotion because you're a woman').³³ Establishing the employer's reasons for behaviour becomes even more difficult when

²⁸New Zealand Human Rights Commission *Tracking Equality at Work* (New Zealand Human Rights Commission, Wellington, 2011) at 14. Sex discrimination and employment complaints includes complaints on the basis of pregnancy, gender preference in pre-employment and parental leave.

²⁹S. Proctor-Thomson, N. Donnelly and G. Plimmer "Constructing workplace democracy: Women's voice in New Zealand public services. (Public Service Association & Industrial Relations Centre, Victoria University of Wellington, 2011) < <http://mwa.govt.nz/inspiring-action-for-gender-balance/constructing-workplace-democracy-womens-voice-new-zealand-public> > at 29. The women surveyed in this study were employed in the public sector.

³⁰E. Rasmussen *Employment Relations in New Zealand* (2nd ed, Pearson, 2002) at 210.

³¹*Post Office Union Inc v Telecom (Wellington) Ltd* [1989] 3 New Zealand ILR 527 (LC) at 26-28. "...the Court has found that it is incumbent on the party bearing the onus of establishing a matter to prove to the Court that each fact (and all of them together) upon which it relies are more likely to have been so than not." At 26.

³²*Anderson v Fullers Group Ltd* [2012] New Zealand ERA Auckland 397 at [72].

³³D. Allen "Reducing the Burden of Proving Discrimination in Australia" (2009) 31(4) Sydney Law Review 579 at 583.

the employer may not have intended to discriminate, but may have done so subconsciously.³⁴ The processes associated with unconscious bias will be discussed further on in this chapter.

Many instances of gender discrimination will not result in a complaint being made. Further to this, even where an employee does bring a claim, they may fail to meet the evidential burden, despite in fact having been discriminated against. Accordingly, discrimination may be unlawful, but the law is not ensuring that discrimination is adequately identified or remedied.

B. No Positive Legal Duties on Employers

Whilst the law provides valuable redress to individuals who can establish a claim of discrimination, it only redresses the outcomes, and not the causes of discrimination.³⁵ As such, even where an employee is successful in a discrimination claim, this will not get them back their missed opportunities. Women's representation in top-level roles is improving, but slowly. To quicken the pace institutional change may be needed, and anti-discrimination law does not allow this, as it is limited to providing remedies at an individual level.

However, despite the limits of anti-discrimination law, there is the possibility that its existence acts as a deterrent. Where employers are aware that they could be subject to a discrimination claim, which would have costly repercussions for the business, employers may be motivated to treat their employees fairly and employ them on an equal basis.

Nonetheless, the law in New Zealand fails to put private sector employers under any positive legal duty to promote and achieve gender equality.³⁶ A positive duty:³⁷

³⁴ At 583.

³⁵ Mintrom and True, above n 10 at 27.

³⁶ At 35.

³⁷ At 92.

...requires employers to be pro-active in creating a workplace that is fair and equitable to all people taking into account their diversity and not merely free of direct or intentional discrimination.

Under s4 of the ERA, employers are under a positive duty to deal with employees in “good faith”.³⁸ Section 4(4) does not refer to gender equality as a consideration, nor has there been any case law that contemplates whether the duty of good faith incorporates a duty to ensure gender equality in employment. Accordingly, while the duty to act in good faith may be a positive obligation on employers, it is not a positive obligation for the purpose of achieving gender equality.

The lack of positive obligations on private sector employers can be compared with the public sector employer’s duty to be a “good employer”.³⁹ To fulfill the “good employer” requirement all chief executives covered by the State Sector Act 1988 must operate a personnel policy (including the equal employment opportunities programme) to ensure the fair and proper treatment of employees.⁴⁰ This policy is to include:⁴¹

...provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring... recognition of the employment requirements of women.

In combination with operating a personnel policy, the chief executives are also required to have an equal employment opportunities (EEO) programme in place. Section 58 sets out that an EEO programme is:⁴²

... 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 of the employment of any persons or group of persons.

³⁸ Employment Relations Act, s 4(1)(a).

³⁹ State Sector Act, s 56.

⁴⁰ State Sector Act, s56.

⁴¹ State Sector Act, s 56(2)(g).

⁴² State Sector Act, s 58.

These positive obligations on employers in the public sector recognise the need for proactive steps to be taken to ensure that women are not disadvantaged in their employment due to their gender. Further to this, Fiona Edgar provides evidence that the legal obligations on public sector employers have been effective.⁴³ Women employees in the private sector, like those in the public sector, could have had their right to equal employment opportunities recognised and protected had the Employment Equity Act 1990 had not been repealed. Under this statute private sector employers who employed more than 50 employees were required to maintain an EEO programme.⁴⁴ However, this legislation was swiftly repealed in 1991 leaving employers in the private sector under minimal legal obligations.⁴⁵

After the Employment Equity Act was repealed the EEO Trust was formed to assist the private sector to promote equal employment opportunities.⁴⁶ The EEO Trust carried out surveys between 2002 and 2007. In 2007 the survey was distributed to 398 EEO Employer Group members,⁴⁷ 64 per cent of whom completed the survey.⁴⁸ 2,679 surveys were also sent to other organisations, 3.7 per cent of whom completed the survey.⁴⁹ The EEO Trust explained that:⁵⁰

The survey is not based on a random sample and, with EEO Employers Group members forming the main part of the sample, plus voluntary

⁴³ F. Edgar “Equal Employment Opportunity: Outcomes in the New Zealand Public Service” (2001) 26 New Zealand JIR 217 at 224. In reference to s56 of the SSA 1988 Edgar concludes “there is some strong statistical evidence found in this analysis which supports the conclusion that the legislation has been effective. The results indicate that, with respect to representation rates, the public service consistently and comprehensively outperforms the general labour force. The representation rates found in the public service are nearly double those for the wider labour force.”

⁴⁴ Mintrom and True, above n 10, at 26.

⁴⁵ At 26.

⁴⁶ At 26.

⁴⁷ EEO Trust “EEO Employers Group” (2014) <www.eeotrust.org.New Zealand /group/index.cfm>. EEO Employer Group members are employers/organisations that have signed up as members of the EEO Trust and are committed to ensuring equal opportunities for New Zealand’s diverse population.

⁴⁸ Equal Employment Opportunities Trust *EEO Trust Diversity Survey Report 2007* (2007) <www.eeotrust.org.New Zealand /research/diversity.cfm> at 10.

⁴⁹ At 10.

⁵⁰ At 10.

response from the other 99 interested employers, findings are likely to be biased towards those with an interest in diversity issues.

The high percentage of surveys distributed, but not completed, is evidence that organisations will avoid providing information on their gender equality practices if they are not compelled to. This “suggests that most private sector employers do not recognise the importance of producing EEO policies and plans.”⁵¹ The EEO trust, whilst initially government funded, has had significant funding cuts in recent years.⁵² It is now largely reliant upon donations from members and accordingly has limited resources to create and monitor gender equality policies in the private sector.⁵³ Further to this, even if adequate funding was available the EEO Trust has no binding legal powers to ensure private sector compliance.⁵⁴

C. Summary

The combination of inadequate anti-discrimination law and the lack of positive duties on employers are of significant concern. It means that satisfactory systems are not in place to prevent discrimination and that where discrimination does occur it may be brushed under the rug. As many instances of discrimination are not all being prevented or remedied a number of women may be disadvantaged in their employment opportunities, which may prevent them from reaching top-level positions.

II. Biased Selection Processes

As employment in the private sector is largely unregulated employers are legally free to determine their selection processes – so long as they are not discriminatory. In contrast, public service employers are under an obligation to advertise vacant

⁵¹ Mintrom and True, above n 10, at 33.

⁵² Equal Employment Opportunities Trust “Equal Employment Opportunities Trust Annual Report 2012” (2012) <www.eeotrust.org.New Zealand /content/docs/reports/EEOpercent20Annualper cent20Reportper cent202012per cent20CMYKper cent20Lowerper cent20Res.pdf> at 7. In 2011 government unmatched funding was \$552,695. In 2012 this was decreased to \$110,000.

⁵³ Rasmussen, above n 30 at 225.

⁵⁴ Mintrom and True, above n 10, at 34.

positions and to select the candidate best suited for the job.⁵⁵ However, private sector employees can employ within their social networks and in doing so favour their family and friends if they so desire.

A. The ‘old boys’ networks’

Najib’s study assessed barriers to women’s representation on corporate boards in New Zealand. It identified that informal networks and personal contacts play an integral role in being appointed to board positions.⁵⁶ The directors in this study recognised that men are more likely to have these networks and contacts and that the social activities of boards often have the effect of excluding women⁵⁷. Fawcett and Pringle’s study provides further evidence that employment selection processes in the private sector rely on informal networks.⁵⁸ Their study showed that the procedures used for appointing CEO’s in New Zealand lack structured interviews, do not assess candidates on any specified job criteria and instead rely upon informal networks.⁵⁹ The men currently filling the majority of leadership positions, who will be in charge of appointments to other leadership roles, will likely have informal networks mainly consisting of other men. This is due to individuals preferring to associate with those similar to them.⁶⁰

Women’s lack of presence in these ‘old boys’ networks’ may prevent them from being approached for vacant leadership roles, resulting in their career progression being hindered in comparison to men.

B. The meritocratic system and unconscious bias

⁵⁵ State Sector Act, ss 60, 61.

⁵⁶ R. Najib “Women On New Zealand Corporate Boards” (Thesis for degree of Master of Commerce in Accountancy, Finance and Information Systems, University of Canterbury, 2008) at 61-64.

⁵⁷ At 61-64.

⁵⁸ R. Fawcett and J. Pringle “Women CEOs in New Zealand: Where are you?” (2000) 15(5/6) Women in Management Review 253 at 259.

⁵⁹ At 259.

⁶⁰ L. Rivera “Hiring as Cultural Matching: The Case of Elite Professional Service Firms” (2012) 77(6) American Sociological Review 999 at 1000.

The ‘old boys’ network’ may be influential in some positions, but other employers will fill vacant roles using formal selection processes. Due to the “strong individualistic and merit-orientated nature of New Zealand society”⁶¹ New Zealand employers are likely to select and promote candidates based on their merit. It is this belief, that employing by merit is the fairest selection process, which may prevent New Zealand private sector employers from engaging with the issue of gender inequality.⁶² By believing the process they use is fair employers may be blind to the barriers women face in employment. A common argument, based on the meritocratic system, is that women’s low presence in top-level roles is due to women not being qualified or experienced enough.⁶³ However, this argument fails to consider that the merit-based system may itself be operating in a way that prevents women from being recognised – regardless of their merit.

To fulfill its purpose of selecting the best candidate the merit-based must satisfy the following three elements:⁶⁴

1. The selection process must not consider any factors that are not related to the capabilities required by the role.
2. The capabilities of the candidates need to be validly assessed. This requires that candidates capabilities are quantified and compared consistently, it is also necessary for the capabilities assessed to reflect job performance.
3. Thirdly for the selection process to select the best candidates, potential candidates must have had equal opportunities to get into the candidate pool to begin with.

⁶¹ B. Jackson and R. Fischer “Biculturalism in Employee Selection or ‘Who Should Get the Job’? Perceptions of Maori and Pakeha Job Applicants in a New Zealand European Student Sample” (2007) 36(2) New Zealand Journal of Psychology 100 at 105.

⁶² C. Fox “The higher you go, the wider the gap” in *Women in Leadership: Understanding the gender gap* (CEDA, 2013) at 24.

⁶³ At 24.

⁶⁴ J. Whelan and R. Wood *Gender Equality Project, Targets and Quotas for Women in Leadership: A Global Review of Policy, Practice, and Psychological Research* (The University of Melbourne, Melbourne Business School, 2012) at 9.

If these elements are fulfilled and selection is based solely upon merit, gender should not be a relevant consideration. However there is empirical evidence that this process is capable of being tainted with gender considerations.

A study based on Heidi Roizen provides evidence that gender can be the major or sole determinant in a selection decision.⁶⁵ In this study subjects read a story based on how Heidi became successful in her profession. The only thing that differed between the conditions was whether the candidate's name was "Heidi" or "Howard". Whilst they were viewed to be equally competent, Heidi was viewed more negatively and subjects reported she was not "the type of person you would want to hire or work for".⁶⁶ This indicates that where qualifications are equal, decision makers will favour men over women.

A study by the Catalyst organisation supports these findings in the workplace. This study assessed the career success of women and men with MBA degrees working in companies.⁶⁷ Women were found to start in a lower level job post MBA.⁶⁸ It was also shown that even where men and women did start on the same level men considerably outpaced women in their career development.⁶⁹ Catalyst controlled for aspirations, parenthood, years of experience, industry and global region.⁷⁰ This indicates that, due to their gender, women are being prevented from progressing in their careers, which is a necessary precondition for attaining leadership positions. Further to these findings, another study by Catalyst confirmed that women's underrepresentation was not due to using different career strategies than men.⁷¹

These studies provide evidence that women, who have high career aspirations and have the requisite qualifications, may still be at a disadvantage to men in reaching leadership positions. How does this occur in a merit-based system? One reason may

⁶⁵ K. McGinn, and N. Tempest "Heidi Roizen Harvard Business Case Study Case 800-228" (Harvard Business School Publishing, Boston, 2009) cited in S. Sandberg *Lean In: Women, Work and the Will to Lead* (WH Allen, UK, 2013) at 39-41.

⁶⁶ At 40.

⁶⁷ Carter and Silva, above n 19, at 3.

⁶⁸ At 3.

⁶⁹ At 4.

⁷⁰ At 4.

⁷¹ N. Carter and C. Silva *The Myth of the Ideal Worker: Does Doing All the Right Things Really Get Women Ahead?* (Catalyst, 2011) at 6.

be that women are not applying for leadership positions in the same numbers as men.⁷² If this were the situation, regardless of the merit of the women, statistically they would be less likely to be represented in top-level roles. There is insufficient information available on the number of women applicants for leadership roles in the private sector. As such, this proposition is difficult to assess. However, an alternative explanation is that the cognitive processes of the selectors can undermine the neutrality of employment selection processes. There is extensive evidence that humans frequently rely on gender stereotypes in their thought processes, which can cause unconscious bias to influence their decision-making.⁷³ Where unconscious bias is present women may be disadvantaged no matter what percent of the applicants they represent.

Men and women have traditionally held different roles in society. Whilst men have undertaken the role of breadwinner, women have been homemakers. This has led to women and men being associated with different traits. Men are perceived to be agentic, which entails being dominant, decisive, ambitious and individualistic.⁷⁴ In comparison, women are perceived as being communal, which entails being helpful, compassionate, gentle and soft-spoken.⁷⁵ Two theories of managerial stereotypes have arisen based on these gender roles and traits. The “think manager think male” stereotype presumes that being a good manager is related to being a man⁷⁶. In comparison, the “think manager think masculine” stereotype associates agentic traits with leadership.⁷⁷ A recent study shows that masculine characteristics and male leaders are preferred by managers; therefore, confirming the presence of managerial stereotypes.⁷⁸ Interestingly, the higher the proportion of women managers in the

⁷² A. Fitzpatrick “Report on representation and Development of Women for Top Leadership Roles in the New Zealand Public Service” (2011) Institute of Policy Studies
<www.eeotrust.org.nz/content/docs/information/Developmentper cent20ofper cent20Womenper cent20forper cent20Leadershipper cent20Rolesper cent20inper cent20NZper cent20Publicper cent20Service.pdf> at 19.

⁷³ J. Whelan “The barriers to equality of opportunity in the workforce: The role of unconscious bias” in *Women in Leadership: Understanding the gender gap*” (CEDA, 2013) at 59.

⁷⁴ A. Koeing and others “Are leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms” (2011) 137(4) *Psychological Bulletin* 616 at 617.

⁷⁵ At 617.

⁷⁶ J. Stoker, M. Van der Velde and J. Lammers “Factors Relating to Managerial Stereotypes: The Role of Gender of the Employee and the Manager and Management Gender Ratio” (2012) 27 *Journal of Business and Psychology* 31 at 32.

⁷⁷ At 32.

⁷⁸ At 31.

organisations, the more feminine traits and feminine leaders were appreciated.⁷⁹ Therefore, it is those organisations where women are most underrepresented in leadership positions that are most likely to rely on gender stereotypes. Reliance on gender stereotypes, which favour men as leaders, can create bias against women; consequently, preventing women from being selected for leadership roles.

Where a woman does show the requisite agentic traits to be considered competent for a leadership role she will likely still be considered more negatively than her male counterpart. By displaying agentic characteristics women are considered to violate stereotypical expectations and consequently face a backlash consisting of negative evaluations, economic reprisals and social penalties.⁸⁰ This puts women in a “dammed if you do, doomed if you don’t”⁸¹ position, whereby:⁸²

They can enact communal behaviours and be liked but not respected or enact agentic behaviours and be respected but not liked. In either case they risk being disqualified for leadership roles.

Stereotypes can be activated unconsciously and therefore can influence decision making without the employer being aware of it.⁸³ This is concerning as stereotypes will most often not be an accurate representation of reality.⁸⁴ This could result in women being unfairly disadvantaged in employment selection processes.⁸⁵ Whilst the studies described above have not been carried out in New Zealand they are based on psychological processes of human beings generally, making them relevant to employment decision-making in the private sector of New Zealand. Further, they are consistent with research in New Zealand. Najib’s study of women on New Zealand boards identified male directors as holding “negative assumptions about women”.⁸⁶

⁷⁹ At 38.

⁸⁰ L. Rudman “Self –Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management” (1998) 74(3) *Journal of Personality and Social Psychology* 629 at 629.

⁸¹ Catalyst *The Double-Bind Dilemma for Women in Leadership: Damned if you Do, Doomed if You Don’t* (Catalyst, 2007) at 1.

⁸² L. Rudman and P. Glick “Prescriptive Gender Stereotypes and Backlash Toward Agentic Women” (2001) 57(4) *Journal of Social Issues* 743 at 744.

⁸³ Whelan, above n 73, at 59.

⁸⁴ Ministry of Women’s Affairs, above n 17, at 4.

⁸⁵ At 4.

⁸⁶ Najib, above n 56, at 74.

This indicates that New Zealand men are influenced by gender stereotypes. Therefore, it is possible the men making employment decisions in New Zealand are being influenced by unconscious bias. Whilst not investigated in Najib's study, there is evidence that bias is not limited to men; women have also been found to display bias towards other women.⁸⁷ An experimental study on gender bias, where science faculty members displayed gender bias towards selecting a male for a laboratory manager position, showed that females and males equally exhibited bias against the female candidate.⁸⁸

C. Summary

Giving private sector employers free reign to employ whoever they wish, so long as they don't discriminate, allows the use of selection processes that are biased against women. Women are less likely than men to be in the informal networks of the men currently dominating leadership positions. Further to this, even where an employer does not employ from within their informal networks women applicants will be disadvantaged if the employer is influenced by unconscious bias. The presence of unconscious bias can prevent the meritocratic system from fulfilling its purpose of selecting the best candidate available.

III. Chapter Summary

The unregulated selection processes used by organisations in employment are disadvantageous to women's career progression and the law is currently incapable of preventing this. New Zealand's inadequate employment framework prevents women from having opportunities equal to men and allows discrimination to occur. Accordingly, women are being deprived from advancing into top-level positions. As long as employers are not under positive obligations to promote gender equality they will be unlikely to analyse and adjust their selection procedures. As such, if the current framework were to endure then women's representation in leadership roles will

⁸⁷ C. Moss-Racusin and others "Science faculty's subtle gender biases favor male students" (2012) 109(41) Proceedings of the National Academy of Sciences of the United States of America 1674 at 1674.

⁸⁸ At 1674.

continue to progress at a slow pace. With these inadequacies in mind the next chapter will assess whether New Zealand is breaching its international law obligations.

Chapter 3 International Law Obligations

New Zealand cannot simply sit back, do nothing, and rely upon the private sector to voluntarily achieve gender equality, because to do so would be to breach of New Zealand's international law obligations. The long title of the HRA specifically provides that its purpose is 'to provide better protection of human rights in New Zealand in general accordance with UN covenants or conventions on Human Rights'. New Zealand is a party to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁸⁹, the International Covenant on Civil and Political Rights (ICCPR)⁹⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹¹ which all set out various obligations related to ensuring equality for women.

I. Duty to Prevent Discrimination

Article 2 of the CEDAW and Article 26 of the ICCPR recognise women's right to live free from discrimination. Both of these articles require not just anti-discrimination legislation to be in place, but also that state parties actively take part in preventing discrimination. General Recommendation number 28, on the CEDAW, states: ⁹²

Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors.

⁸⁹ Convention on the Elimination of all forms of Discrimination against Women [CEDAW] (opened for signature 1 March 1980, adopted 10 January 1985, entered into force 3 September 1981).

⁹⁰ International Covenant on Civil and Political Rights [ICCPR] (opened for signature 19 December 1966, adopted 28 December 1978, entered into force 23 March 1976).

⁹¹ International Covenant on Economic, Social and Cultural Rights [ICESCR] (opened for signing 19 December 1966, adopted 28 December 1978, entered into force 3 January 1976).

⁹² Committee on the Elimination of Discrimination of Discrimination against Women *General recommendation No.28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/GC/28 (2010) at [13].

Further to this, General Comment number 28, on the ICCPR sets out “The State party must not only adopt measures of protection but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”⁹³

Anti-discrimination legislation, as the only mandatory measure for preventing discrimination in the private sector (as described in chapter 2), is not sufficient because it relies on a wronged woman to bring a claim and the burden of proof can be difficult to overcome. This means that many instances of discrimination are not reported or remedied. Further to this, there are no positive duties on employers to treat women and men equally. Therefore, although the law in New Zealand may be upholding the obligation to prohibit discrimination, it is not upholding the obligation to prevent discrimination by making use of positive measures. By not addressing these problems with, “all appropriate measures” and “without delay”,⁹⁴ New Zealand has not taken the required steps to eliminate discrimination as required under international law.

II. Duty to Ensure Equal Employment Opportunities

The CEDAW and ICESCR include obligations specific to women achieving equality in employment. Article 11 (b) of the CEDAW requires States Parties to ensure that men and women have the same rights in their employment, specifically, the right to the same employment opportunities, including the same criteria for selection in matters of employment. Article 7 of the ICESCR requires States Parties to recognise everyone’s right to be promoted to an appropriate higher level, subject to no considerations other than those of seniority and competence. Under Article 3 of the CEDAW New Zealand is under an obligation to take all appropriate measures to ensure equal opportunities for women in their employment. Article 2 of the ICESCR requires New Zealand to take steps to the maximum of its available resources, with a view towards achieving progressively the full realization of women’s rights to equal opportunities in employment, by all appropriate means, including particularly the adoption of legislative measures.

⁹³ Human Rights Committee *General Comment 28, Equality of rights between men and women (article 3)* CCPR/C/Rev.1/Add.10 (2000) at [3].

⁹⁴ CEDAW, above n 89, art 3.

New Zealand is also a party to the Beijing Declaration and Platform for Action,⁹⁵ which requires New Zealand to;⁹⁶

1. Take positive action to build a critical mass of women leaders, executives and managers in strategic decision-making positions; and
2. Create or strengthen...mechanisms to monitor women's access to senior levels of decision-making; and
3. Review the criteria for recruitment and appointment to advisory and decision-making bodies and promotion to senior positions to ensure that such criteria are relevant and do not discriminate against women.

New Zealand places no obligations, other than prohibiting discrimination, on private sector organisations making employment decisions. As established in Chapter 2 this allows the 'old boys' networks' and the influence of unconscious bias to disadvantage women and undermine their right to equal opportunities. These selection processes also allow considerations other than seniority and competence to be considered. By giving the private sector free reign in their employment decisions New Zealand is not upholding its international law obligations. New Zealand is failing to take "all appropriate measures"⁹⁷ and make use of the "maximum of its available resources",⁹⁸ to ensure women have opportunities equal to men in their employment.

New Zealand's failure to uphold its international law obligations has been recognised by the various United Nations Committees reporting on New Zealand's progress under the CEDAW, ICCPR and ICESCR.⁹⁹ All these Committees voiced concern about the low representation of women in high level and managerial positions in private enterprises.¹⁰⁰ The concluding observations of the Committee on the

⁹⁵ United Nations *Beijing Declaration and Platform for Action* adopted at The Fourth World Conference on Women A/CONF.177/20 and A/CONF.177/20/Add.1 (1955).

⁹⁶ United Nations, at [194].

⁹⁷ CEDAW, above n 89, art 2.

⁹⁸ ICESCR, above n 91, art 2.

⁹⁹ Committee on the Elimination of Discrimination against Women, above n 23; Human Rights Committee *Concluding observation of the Human Rights Committee: Consideration of reports submitted by States parties under article 40 of the covenant* CCPR/C/New Zealand L/CO/5 (2010); Committee on Economic, Social and Cultural Rights *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant* E/C.12/New Zealand L/CO/3 (2012).

¹⁰⁰ Committee on the Elimination of Discrimination against Women, above n 21, at [18]; Human Rights Committee, above n 99, at [9]; Committee on the Economic, Social and Cultural Rights, above n 99, at [14].

Elimination of Discrimination against Women encouraged New Zealand to make use of temporary special measures (TSM) to realise equality.¹⁰¹

III. Temporary Special Measures

In its 2012 report, the Committee on the Elimination of Discrimination against Women encouraged New Zealand to consider the use of TSM.¹⁰² The Committee recommended that New Zealand:¹⁰³

...include in its equality legislation provisions to encourage the use of temporary special measures, in both public and private sectors, in order to accelerate the realization of women's de jure and de facto equality with men in all areas and sectors.

Article 4 of the CEDAW sets out:

Adoption by state parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination...but shall be in no way entail as a consequence the maintenance of unequal or separate standards. These measures shall be discontinued when the objectives of equality of opportunity and treatment have been completed.

Section 73(1) of the HRA allows for the use of TSM in New Zealand.¹⁰⁴ However despite this, successive New Zealand governments have avoided implementing TSM for the purpose of achieving gender equality.¹⁰⁵ To eliminate vertical gender segregation in employment, to better protect women from discrimination and to fulfill

¹⁰¹ Committee on the Elimination of Discrimination against Women, above n 23, at 19.

¹⁰² At 19.

¹⁰³ At 19.

¹⁰⁴ Human Rights Act, s73(1) provides:

(1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute such a breach if—

(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and

(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

¹⁰⁵ Ministry of Women's Affairs, above n 6, at 5.

the recommendations of the Committee on Elimination of Discrimination Against Women New Zealand needs to seriously consider implementing TSM.

TSM are further defined in General Recommendation 25.¹⁰⁶ “The term ‘measures’ encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as...preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems’.¹⁰⁷ “Special” refers to the measures being “designed to serve a specific goal”¹⁰⁸ and “temporary” refers to the measure only being in place till the specific goal has “been achieved and sustained for a period of time”.¹⁰⁹

The specific goal under consideration here is achieving gender equality in top-level jobs within the private sector, and legislation is the measure under contemplation for achieving this goal. Targets and quotas are two popular strategies for achieving gender equality that could be implemented as TSM via legislation. These strategies will be considered in the following chapter.

¹⁰⁶ Committee on the Elimination of Discrimination Against Women *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (2004).

¹⁰⁷ At [22].

¹⁰⁸ At [21].

¹⁰⁹ At [20].

Chapter 4 Temporary Special Measures - Law Reform Options

I. Gender Equality Strategies

A. Quotas

Gender quotas require women be represented to a certain number, or to make up a certain proportion, of people within a specific role.¹¹⁰ Norway was the first country in the world to introduce gender quotas into the private sphere. This was achieved by legislating for 40 per cent women representation on Public Limited Liability (PLL) company boards in 2003.¹¹¹ Following Norway's lead, a number of other countries have implemented gender quotas on corporate boards.¹¹²

It is this use of quotas in the private sphere, to increase women representation on boards that will be assessed in considering whether quotas would be an appropriate TSM to legislate in New Zealand.

B. Targets

Another gender equality strategy that New Zealand should consider legislating as a TSM is gender targets. For the purpose of this dissertation, targets are "specific, measurable goals, set by an organisation at their own discretion, with discrete

¹¹⁰ J. Whelan and R. Wood "Increasing gender diversity through targets with teeth" in *Women in Leadership: Understanding the gender gap*" (CEDA, 2013) at 33.

¹¹¹ M. Teigen "Exchange of good practices on gender equality: Women in economic Decision-making, Discussion paper – Norway" (2012) European Commission <http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/no_discussion_paper_no_2012_en.pdf> at 2.

¹¹² At 2. Other countries that have introduced gender quotas on corporate boards include: Spain, Iceland, France, the Netherlands, Belgium Italy and Malaysia.

timeframes in which they are to be achieved”.¹¹³ Targets have predominantly been implemented through corporate governance codes and stock exchange listing rules.¹¹⁴ This chapter will analyse these two strategies to ascertain whether either would be suitable for New Zealand to adopt as a TSM. This analysis will assess the effectiveness of the two strategies and compare their advantages and disadvantages. The following evaluation will make use of case studies, to explore the practicality of each of the strategies. Norway will be used as the case study for quotas, and Australia for targets.

II. Current Target and Quota Practices

A. Australia’s experience with gender targets

The ASX Corporate Governance Council (ASX CGC) introduced targets in its Corporate Governance Principles and Recommendations (CGPR) in 2010. Under the ASX CGC CGPR framework improvement in women’s representation on boards is encouraged through an “if not, why not”¹¹⁵ approach, whereby companies listed on the ASX can choose between either complying with the CGPR or explaining why they have not done so in their annual report.¹¹⁶

Under 1.5 of the CGPR, a listed entity should:¹¹⁷

- . (a) have a diversity policy which includes requirements for the board or a relevant committee of the board to set measurable objectives for achieving gender diversity and to assess annually both the objectives and the entity’s progress in achieving them;
- . (b) disclose that policy or a summary of it; and
- . (c) disclose as at the end of each reporting period the measurable objectives for achieving gender diversity set by the board or a relevant committee of the

¹¹³ Workplace Gender Equality Agency “Targets and Quotas: Perspective Paper” Australian Government: Workplace Gender Equality Agency <www.wgea.gov.au/learn/about-setting-gender-targets> at 1.

¹¹⁴ P. Hastings *Breaking the Glass Ceiling: Women in the Boardroom* (3rd ed, Paul Hastings LLP, 2013).

¹¹⁵ ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (3rd ed, ASX Corporate Governance Council, 2014) <www.asx.com.au/regulation/corporate-governance-council.htm> at 3.

¹¹⁶ At 3.

¹¹⁷ At 11.

board in accordance with the entity's diversity policy and its progress towards achieving them, and either:

(1) the respective proportions of men and women on the board, in senior executive positions and across the whole organisation (including how the entity has defined "senior executive" for these purposes); or

(2) if the entity is a "relevant employer" under the Workplace Gender Equality Act, the entity's most recent "Gender Equality Indicators", as defined in and published under that Act.

The commentary provides that measurable objectives "should include appropriate and meaningful benchmarks that are able to, and are, measured and monitored for effectiveness in addressing any gender imbalance issues in an organisation".¹¹⁸ Accordingly, "measurable objectives" are targets. An example of an assessment of progress towards measurable objectives (targets) can be seen at Appendix 1.¹¹⁹

There are a number of advantages associated with the introduction of the gender targets via a non-legislative framework. Firstly, the introduction of new legislation is a drawn out and complex process whereas rules set outside the legal framework are far easier to implement, allowing change to begin sooner. Rules implemented via a body internal to the private sector are also likely to face less opposition than legislation. Reports that have analysed compliance with the ASX diversity recommendations show that in 2013 98 per cent of the ASX 200 companies had a diversity policy in place, as recommended.¹²⁰ Further to this 86 per cent of ASX 200 companies set measurable objectives¹²¹, and disclosure of the proportion of women at different levels in their organisations was between 84 per cent and 93 per cent.¹²² This is an impressive result considering that the recommendations are voluntary. The CGPR are well observed by companies due to the ASX CGCs respected position as an expert

¹¹⁸ At 11.

¹¹⁹ KPMG "ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended between 31 December 2011 and 30 December 2012" (2013) <www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Documents/asx-corporate-governance-council-principles-diversity.pdf> at 21.

¹²⁰ At 12.

¹²¹ At 21.

¹²² At 27.

and leader in the field of corporate governance.¹²³ Good corporate governance practices are associated with investor capital as such companies are enticed to comply to ensure they retain a competitive edge.¹²⁴

Nevertheless, under this non-legal framework targets are not reaching their full potential. BlackRock's analysis of the annual reports of ASX 200 companies shows that organisations are "applying a largely 'minimum standard' mindset to reporting of their diversity reporting obligations."¹²⁵ This is likely due to the lack of incentive for companies to do more than the bare minimum and the absence of specific criteria for setting measurable objectives. Companies are not legally obligated to comply with the ASX diversity recommendations nor are there any sanctions for non-compliance or inadequate measurable objectives.

To be successful in achieving gender equality targets need to be "specific, challenging goals".¹²⁶ Yet, analysis of the disclosures made in 2013 shows that measurable objectives under the ASX principles/recommendations are at times merely aspirational.¹²⁷ An example, of a merely aspirational statement is, "to achieve a diverse or skilled workforce".¹²⁸ Measurement and compliance against a target such as this would be difficult to monitor due to the lack of specificity.¹²⁹

Companies also failed to disclose who was accountable for implementation and monitoring of their diversity policy.¹³⁰ For targets to be fully effective there needs to be mechanisms for feedback and accountability in place.¹³¹ Accountable management is necessary for cultural change in an organisation to occur.¹³² Without identifiable and

¹²³ ASX "Corporate Governance Council" (October, 2013) <www.asx.com.au/regulation/corporate-governance-council.htm>.

¹²⁴ ASX Corporate Governance Council, above n 115, at 3.

¹²⁵ Blackrock Investment Management (Australia) Limited "Glacial Change in Diversity at ASX 200 Companies: Can corporate Australia escape the imposition of diversity quotas?" (2012)

<www.wgea.gov.au/sites/default/files/BlackRock_Glacial_Change_in_Diversity_at_ASX200_companies.pdf> at 3.

¹²⁶ Whelan and Wood, above n 64 at 25.

¹²⁷ KPMG, above n 119, at 3.

¹²⁸ At 19.

¹²⁹ At 19.

¹³⁰ Blackrock Investment Management (Australia) Limited, above n 125 at 3.

¹³¹ Whelan and Wood, above n 110 at 39.

¹³² At 3.

accountable individuals targets may become a sham; created for the purpose of complying with the rules, but with no intention of being fulfilled. Whilst the ASX CGC may make the private sector more aware and accepting of gender diversity practices, it does not have the authority to place obligations on organisations outside of those companies which are listed on the ASX.

B. Norway's experience with gender quotas

Norway is an excellent case study for the effects of quotas, as it was the first country in the world to introduce quotas for boards of directors of directors in 2006. The Norwegian Public Limited Companies Act 1997 requires men and women to be represented on the companies' boards in specific numbers and proportions.¹³³ The harsh sanction for non-compliance, dissolving a company,¹³⁴ ensured that companies complied with the gender quota in Norway. Whilst no companies were non-compliant and forced into dissolution,¹³⁵ there were a number of companies that avoided the quota by becoming private or registering in other countries.¹³⁶ Of the 563 companies that were public limited liability in 2003, only 346 remained by 2005 and only 179 by 2008.¹³⁷

¹³³ Norwegian Public Limited Liability Companies Act, s 16-11a *Requirements regarding the representation of both sexes on the board of directors*

(1) On the board of directors of public limited liability companies, both sexes shall be represented in the following manner:

1. If the board of directors has two or three members, both sexes shall be represented.
2. If the board of directors has four or five members, each sex shall be represented by at least two members.
3. If the board of directors has six to eight members, each sex shall be represented by at least three members.
4. If the board of directors has nine members, each sex shall be represented by at least four members, and if the board of directors has more members, each sex shall represent at least 40 percent of the members of the board.

¹³⁴ Norwegian Public Limited Liability Companies act, Chapter 16.

¹³⁵ K. Adhern and A. Dittmar "The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation" (2011) University of Michigan <<http://webuser.bus.umich.edu/adittmar/NBD.SSRN.2011.05.20.pdf>> at 1.

¹³⁶ Bertrand and others "Breaking the Glass ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway" (2014) The University of Texas at Austin <www.utexas.edu/cola/_files/jd25763/norway_boards_5_2014.pdf> at 7.

¹³⁷ At 7.

III. Diversity Outcomes of Quotas and Targets

Both targets set under the ASX CGC CGPR and quotas in Norway are aimed at increasing female representation in companies at board level. As such, changes in the proportion of women on relevant boards are a measurable outcome and a basis for comparing targets and quotas.

A. Women representation on company boards

Since the ASX CGC introduced recommendations and principles requiring companies listed on the ASX to set targets women have rapidly been appointed to the boards of ASX 200 companies. As of 31 August 2014, women made up 18.3 per cent of directors, up from 8.3 per cent pre the targets being introduced in 2009.¹³⁸ So far in 2014 women have comprised 28 per cent of new ASX 200 board appointments, which is 6 per cent more than in each of the previous two years.¹³⁹

Whilst Australia has increased women board representation by 9.9 per cent in 4-5 years under a voluntary targets strategy, Norway increased women board representation by 22 per cent over three years using a mandatory quota.¹⁴⁰ This resulted in women representation on boards of PLL companies reaching the required 40 per cent in 2009.¹⁴¹ Quotas are capable of producing significant results in a reasonably short period, making them a desirable option.¹⁴²

Gender equality, especially at leadership levels, is an outcome that although sought after for decades has been difficult to attain. Whilst other strategies may be capable of realising gender equality, at this point in time, quotas are the only strategy to have

¹³⁸ Australian Institute of Company Directors “Appointments to S&P/ASX 200 Boards” (October, 2014) <www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Board-Diversity/Statistics>.

¹³⁹ Above, n 138.

¹⁴⁰ A. Storvik and M. Teigen “Women on Board: The Norwegian Experience” (2010) <<http://library.fes.de/pdf-files/id/ipa/07309.pdf>> at 8.

¹⁴¹ At 8.

¹⁴² Workplace Gender Equality Agency, above n 113, at 3.

reached near equal representation of women and men on company boards within the private sector. This gives quotas a distinct advantage as a gender equality strategy.¹⁴³

1. Golden skirt phenomenon

A common criticism of the quota in Norway is that many of the additional board positions to be filled by women were taken up by women who already held board positions.¹⁴⁴ This group of prominent women has been referred to as the ‘golden skirts’. The emergence of the ‘golden skirts’ is viewed negatively because their presence continues to limit the number of women who are in leadership positions.¹⁴⁵

This concern is somewhat overstated as there is a near equivalent group of prominent men who hold multiple directorships, ‘the golden suits’.¹⁴⁶ In Norway 11 per cent of men and 17 per cent of women hold more than one board position.¹⁴⁷ As such, the ‘golden skirts’ should not necessarily be regarded as an adverse outcome of increasing women representation, but rather as normal practice reflecting the demand for experienced directors.¹⁴⁸ The majority of board members, 83 per cent women and 89 per cent men, are board members for only one company.¹⁴⁹ Therefore, the large number of board appointments made following the quota must have been filled by women who were not already in board roles.¹⁵⁰

Analysing the number of women that hold multiple directorships in the ASX 200, it can be seen that Australia has more of an issue with ‘golden skirts’ than Norway. In Australia, 27.5 per cent of women held multiple directorships compared to 13.5 per cent of men.¹⁵¹ This is a significant difference worthy of some concern as it indicates

¹⁴³ At 3.

¹⁴⁴ C. Seirstad and T. Opsahl “For the few not the many? The effects of affirmative action on presence, prominence, and social capital of women directors in Norway” (2011) 27 *Scandinavian Journal of Management* 44 at 48.

¹⁴⁵ Teigan, above n 111, at 11.

¹⁴⁶ J. Treanor “Norway’s female boardroom pioneer rejects quotas for women” *The Guardian* (24 January 2013) <www.theguardian.com/business/2013/jan/24/norway-female-boardroom-ibsen-reject-quota>.

¹⁴⁷ At 11.

¹⁴⁸ At 11.

¹⁴⁹ At 11.

¹⁵⁰ At 11.

¹⁵¹ Equal Opportunity for Women in the Workplace Agency *Australian Census of Women in Leadership* (2012) at 15.

that women representation may be increasing, but the number of women who hold board positions is not. An exclusive group of women being appointed to board roles does little to realise gender equality, as majority of women will continue to face barriers in their careers.¹⁵² It may take time for targets to increase the pool of experienced women; accordingly, conclusive remarks on what the higher proportion of ‘golden skirts’ means should be avoided at this stage.¹⁵³ If the gap between the proportion of men and women who have multiple directorships does not lessen over the upcoming years then it will become a valid concern.

2. Increased women representation in non-board roles

An effective gender equality strategy should increase women representation not only on boards, but also in other leadership roles within organisations. As such, it is important to consider whether the quotas and targets show evidence of being able to increase women’s representation in non-board leadership roles.

There is evidence that quotas in Norway have had modest trickle down effects.¹⁵⁴ At a recent conference Teigen identified an increase in the percentage of women chairing PLL companies, from 8 per cent in 2008, to 13 per cent in 2014.¹⁵⁵ Further to this, Teigen identified that PLL companies had a higher percentage of women in their executive committees.¹⁵⁶ Whilst these roles are not subject to a quota they are still roles within the board. Bertrand provides evidence that flow down effects also extend to non-board roles.¹⁵⁷ Bertrand’s study showed that the higher the proportion of female directors the higher a female employees chance that she will be a top five earner in a PLL company.¹⁵⁸ The top five earners would likely be C-suite

¹⁵² Seirstad and Opsahl, above n 144, at 50.

¹⁵³ At 52.

¹⁵⁴ M. Teigen “Quotas on company boards in Norway” (Presented to Gender Equality Review Conference, Hofburg, Vienna) 10-11 July 2014
<<http://www.osce.org/pc/122577?download=true>> at 7.

¹⁵⁵ At 4.

¹⁵⁶ At 6.

¹⁵⁷ Bertrand, above n 136, at 2.

¹⁵⁸ At 19.

employees¹⁵⁹; therefore the fact that women only filled 3.2 per cent of CEO roles (a C-suite role) in 2012 is evidence that any flow down effects are limited.¹⁶⁰

Without up to date statistics it is difficult to propose whether or not flow down effects have occurred. Additionally, it is difficult to identify what period of time must pass before conclusions can be drawn as to whether quotas lead to flow down effects.¹⁶¹ Based on the evidence currently available, any flow down effects of quotas that existed would be limited.

There was also an expectation that the quota on PLL companies would pressure the private companies not caught by the quota legislation to follow the lead and increase women representation on boards. However, with women representation on private boards only increasing by one percent between 2006 and 2011 the quota has not had flow down effects on the boards of private companies.¹⁶²

Between 2012 and 2014 the proportion of women on ASX 200 boards increased from 15.4 to 18.3 per cent.¹⁶³ This was mirrored by an increase in the proportion of women in senior executive roles from 20 to 22 per cent and an increase of women in the organisation from 35 to 37 per cent.¹⁶⁴ This may be evidence supporting the existence of flow down effects. However, when considering the ASX 500, representation of women on boards is stagnant at 10 per cent in 2012 and 2014.¹⁶⁵ Further to this, women representation in the roles of CEO and chair of the board has increased marginally. Between 2010 and 2012 the percentage of ASX 200 companies with female CEOs increased from 3 per cent to 3.5 per cent.¹⁶⁶ Similarly, the percent of women chairing ASX 200 boards increased from 2.5 per cent to 3 per cent.¹⁶⁷ It is worth noting in 2012 the ASX CGC requirement to set targets had been on force

¹⁵⁹ At 19.

¹⁶⁰C. Rice “Report from Norway: Women at the top have less power than men” (2012) Science in Balance <<http://curt-rice.com/2012/01/10/report-from-norway-women-at-the-top-have-less-power-than-men/>>.

¹⁶¹ Bertrand, above n 136, at 20.

¹⁶² Teigen, above n 111, at 10.

¹⁶³ Australian Institute of Company Directors, above n 138.

¹⁶⁴ KPMG, above n 119, at 27.

¹⁶⁵ At 28.

¹⁶⁶ Equal Opportunity for Women in the Workplace Agency, above n 151, at 27.

¹⁶⁷ At 20.

only two years. As such, there may have been more of an increase in the past two years. However, there is currently no data assessing this. It is also possible that any flow down effects from targets will take more time than what has passed to emerge. At this stage it is therefore difficult to ascertain whether or not targets have had, or will have, flow down effects in Australia under the target regime.

If the evidence for flow down effects remains minimal then quotas ability to increase women's representation in other leadership roles, outside company boards, will be limited. For quotas to apply there needs to be an identifiable role. Board members are easily identifiable due to requirements in company law that directors be identified on a public registrar. Also, the role of director is consistent across companies despite the different industries. In comparison, other leadership roles are not consistently defined, nor have consistent roles due to the different structures of organisations. Whilst defining a role for quotas to apply to would be difficult, it is possible. A further difficulty is that quotas are inappropriate for leadership roles that can only be held by one person, such as CEOs and chair of the board.

In comparison, targets can be set for any leadership roles and as they are created internally, they can be developed to reflect the unique structure and industry the organisation operates in. Not only can targets be set to increase the numbers of women in specific roles, they can also be used to identify, assess and breakdown the barriers that are preventing women from reaching leadership level. The breakdown of barriers can help ensure women have an equal chance to compete with men at every level of their career. By doing so, women would become more equally represented in the pool of applicants considered for leadership roles.

IV. Possible Limitations of Quotas and Targets

Targets and quotas have both been shown to increase women's representation on boards. These improvements need to be balanced with any potential limitations and/or negative consequences. The main challenge for ensuring targets are successful is the attitude of the individual in charge with enforcing targets and tracking their progression. Quotas can be challenged on the ground that they violate the merit principle, which is associated with a number of negative reactions. Further to this,

there is a risk that women appointed to leadership roles, under quotas or targets may be considered mere tokens or experience backlash.

A. Limitation of targets – managerial support necessary

To ensure targets are effective two conditions need to be satisfied. The first is that the manager who is put in the position of tracking and implementing the target must accept the goals that have been set and be committed to fulfilling them.¹⁶⁸ Secondly this individual must have the requisite resources to be able to ensure the target can be met.¹⁶⁹ A common limitation on the success of targets is the mindsets of the managers of the organization.¹⁷⁰ For example if the managers have strong gender essentialist beliefs they will be of the view that women and men are innately different and that women's differences are the reasons for their lack of representation at leadership level.¹⁷¹ Managers holding these beliefs would be likely to view targets as unnecessary and unfair. Accordingly, a manager holding this belief would be unlikely to accept the targets and lack the commitment necessary for the targets to be successfully implemented.¹⁷² It is vital that the managers who will be in charge of implementing targets recognise that women do face barriers and that they see the value in achieving targets. This is a limitation of targets, as the law cannot guarantee that an appropriate individual is in charge of implementing and monitoring targets.

B. Limitation of quotas – violation of the merit principle

Many people hold the view that if women were good enough to be in leadership roles then they would not need special treatment to get there. Chapter 2 established that in fact our employment processes may not be giving women equal opportunities to be selected and promoted. However, until this is understood violations of the meritocratic system will be viewed adversely.

¹⁶⁸ M.C Kernan, B. Heilmann and P.J Hanges "Effects of goal choice, strategy choice, and feedback source on goal acceptance, performance and subsequent goals" (1991) 21(9) *Journal of Applied Social Psychology* 713 cited in Whelan and Wood, above n 54, at 25.

¹⁶⁹ Whelan and Wood, above n 64, at 25.

¹⁷⁰ At 25.

¹⁷¹ At 25.

¹⁷² At 25.

1. Reactions when appointed under an affirmative action selection process

When women are selected on a preferential basis, due to their gender, there may be a number of negative outcomes. Experimental studies have shown that when women are selected on a preferential basis they evaluate themselves as less capable; Observers view the women selected by the process as less competent; and the men who miss out view the process as unfair.¹⁷³ The majority of these negative reactions are tempered when merit is emphasised to be part of the selection process.¹⁷⁴ Heilman and others showed that where the candidates, observers and individuals passed by are informed of the competence, qualifications and deservingness of the female candidate, the negative reactions subsided significantly.¹⁷⁵ However, some negative reactions remained even when merit was emphasised as part of the selection process.¹⁷⁶ Women beneficiaries were less committed to staying in a leadership role when appointed due to their gender and men who were passed by in the preferential process were less willing to help the women appointed¹⁷⁷. Residual negative reactions by the observers were also shown.¹⁷⁸

It is not necessary for targets to violate the merit principle; accordingly, there is less of a concern that negative reactions would occur from the use of this strategy. As employers complying with targets retain full autonomy in whom they employ, they are able to balance increasing women's representation with making sure that that candidates fulfill necessary requirements for the role. Accordingly, to comply with targets an employer may preferentially employ a female candidate where a male and a female candidate are otherwise equally qualified for a role. In this scenario, so long as considerations of merit criteria are publically emphasised negative reactions could be kept to a minimum.

¹⁷³ At 198.

¹⁷⁴ At 202.

¹⁷⁵ At 203.

¹⁷⁶ At 203.

¹⁷⁷ At 203.

¹⁷⁸ At 203.

In comparison, where compliance with a gender quota is required, merit may not play a central role in the decision-making process. Where a certain number of women must be represented in a position, employers may select a woman – to fulfill the requirement – whom does not have the qualifications and capabilities considered necessary. Based on the empirical evidence discussed above, if women were appointed and merit was not prioritised in the selection process, they may experience negative reactions. However, where the women candidates available for the quota positions do fulfill the necessary requirements, it is possible that the merit principle could still be upheld, and emphasised, minimising negative reactions.

2. Competence of women appointed under non-meritorious system

Opponents of quotas claim that they result in “less competent women replacing more competent men”.¹⁷⁹ In contrast proponents of quotas claim that quotas ensure the pool of qualified candidates is fairly assessed.¹⁸⁰ There is conflicting evidence as to which of these positions is correct.

Research suggests that quotas may improve the proportion of high performing women who will apply for a position and that this results in no overall drop in performance.¹⁸¹ In their recent study Niederle, Segal and Vesterland created a scenario in which participants had the choice of being paid for correct answers to math problems or enter into a tournament against other participants, and if successful in winning receive a substantially higher monetary reward.¹⁸² Men entered the tournament condition in higher numbers than women. However, when a new rule was made that for every male winner there would have to be a female winner the number of women entering the tournament condition increased whilst the number of men decreased. In the condition where there is effectively a quota in place, performance was the same regardless of gender. The authors explain:¹⁸³

¹⁷⁹ Storvik and Teigen, above n 140, at 6.

¹⁸⁰ At 6.

¹⁸¹ M. Niederle, C. Segal and L. Vesterlund “How Costly Is Diversity? Affirmative Action in Light of Gender Differences in Competitiveness” (2013) 59 *Management Science* 1 at 2.

¹⁸² At 3-5.

¹⁸³ At 2.

Our results suggest that when high performing women fail to enter competitions they can win, then affirmative action can have a larger than expected effect on applicants and this response can reduce, if not eliminate, the anticipated cost of achieving a more diverse set of winners.

There is evidence for this finding in the women appointed to board roles following the introduction of the quota in Norway. The women appointed into board positions after the quota was introduced decreased the gap in observable qualifications between women and men board members that existed before the quota was in place.¹⁸⁴ This suggests that the quota encouraged more qualified women to apply, or alternatively, that organisations undertook improved talent identification processes to locate women they would not otherwise have been considered.

However Adhern and Dittmar identify that the women directors, who obtained their role under the quota system, had less CEO experience than male and female board members who held their positions before the quota.¹⁸⁵ Opponents to quotas and/or targets may interpret this as evidence that women are not qualified for taking on leadership positions. However, this fails to recognise the numerous barriers in place that prevent women from getting this experience. If women are not given equal opportunities they are unable acquire the required experience. This is precisely what targets and quotas are aiming to overcome. The short-term detriment of less experienced board members is outweighed by the long-term benefit of more women having equal opportunities to receive leadership experience and obtain top-level roles.

In terms of educational qualifications the female board members who were appointed after the quota came into force are more highly qualified than the board members pre the quota. This is consistent with the experimental study discussed, which indicates that quotas will encourage highly qualified women to apply for board positions. Based on this, the ability of the women appointed can be emphasised and negative reactions can be minimized. However, so long as the women appointed post-quota have less CEO experience than board members pre-quota they may be subject to negative

¹⁸⁴ Bertrand, above n 157, at 11. “absolute improvement in educational and professional background for women.”

¹⁸⁵ Adhern and Dittmar, above n 135, at 3.

reactions. This is because the competence, qualifications and deservingness of the women in these roles cannot be justified on meritorious grounds.

C. Women appointed under quotas/targets treated as ‘tokens’

A common argument against targets and quotas is that women appointed under these processes will be treated as ‘tokens’; employed because of their gender, not because of their abilities.¹⁸⁶ Elstad and Ladegrad’s study assessed whether female board members in Norway were treated as tokens.¹⁸⁷ It was predicted that if women were considered tokens they would be likely to censor their opinions to avoid conflict,¹⁸⁸ men board members would share less information with the women,¹⁸⁹ women may be excluded from social interactions that occur outside of the board context¹⁹⁰ and women would have less influence on the board.¹⁹¹ Contrary to these predications, women board members perceived themselves to be engaged in their positions with a high level of information sharing, minimal levels of self-censorship and high levels of influence.¹⁹² This is evidence contrary to tokenism, which would have predicated that women would experience negative outcomes, causing them not to interact to the same level as non-token women.¹⁹³ Further to this, no significant difference was identified between the women who were directors on boards required to comply with the quota and those that did not.¹⁹⁴ If women who became directors were simply tokens to fulfill quota requirements one would expect that these women would perceive themselves as having less influence than those women who were selected without the quota. The fact that this study shows evidence to the contrary suggests that tokenism does not occur on boards and is evidence that “tokenism seems to be more of a perceived threat than an actual problem”.¹⁹⁵

¹⁸⁶ C Fox, above n 62, at 29.

¹⁸⁷ B. Elstad and G. Ladegrad “Women on corporate boards: key influencers or tokens?” (2010) 14(1) *Journal of Management and Governance* 1.

¹⁸⁸ At 6.

¹⁸⁹ At 7.

¹⁹⁰ At 7.

¹⁹¹ At 8.

¹⁹² At 16.

¹⁹³ At 16.

¹⁹⁴ At 18.

¹⁹⁵ A. Sweigart “Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool for Progress in the United States and Canada (2012) 32(4) *Northwestern Journal of International Law & Business* 81A at 96A.

The conclusions from this study are limited due to only 6.3 per cent of the sample companies being PLL companies required to comply with the gender quota.¹⁹⁶ It may be that women on quota boards do experience consequences associated with tokenism, but that not enough quota companies were included in the study to reveal this association. Another limitation is that perceptions of the male board members on the input of women are not studied.¹⁹⁷ It is possible therefore that despite women's perceptions of their role on the board in practice they may be treated as tokens. Without studies from men's perspective it is difficult to know whether women's perceptions are an accurate reflection of reality. Elstad and Ladegrad recognise this limitation to their study and also recognise that influence is difficult to assess objectively.¹⁹⁸ They also recognise that the results found may be unique to Norway, a country that values and promotes gender equality.¹⁹⁹

Women would be more likely to be treated as tokens when appointed under a quota process, rather than under a target process. Quotas force women to be selected primarily due to their gender. Where organisations do not choose to increase women's representation there is a higher risk that the women appointed would be treated as tokens. This is due to their gender being the salient reason for their selection, rather than their ability or skills. However, as targets are internally set and voluntary, organisations can choose to select women rather than being forced. Where organisations choose to appoint women it would be expected that there would be organisational support, which could prevent women being treated as tokens. Further to this, targets can ensure that women are appointed primarily for their skill and ability, with gender as a secondary condition.

D. Backlash to increased women's representation

Blalock proposes that as a minority (women) increases in numbers they will threaten the majority (men) and cause the majority (men) to increase sexist behaviour – in an

¹⁹⁶ Elstad and Ladegrad, above n 187, at 8.

¹⁹⁷ At 16.

¹⁹⁸ At 16.

¹⁹⁹ At 17.

attempt to protect their position of dominance.²⁰⁰ In accordance with Blalock's theory, the significant increase in women on boards, in a short timeframe, through quotas, or targets, could be predicted to create negative backlash from male board members. Studies have not identified whether this has occurred on boards in Norway and Australia. Nonetheless, it may be a valid explanation for why women in Norway and Australia are not being appointed to roles such as CEO in higher numbers. One of the core roles of the board of directors is to select the CEO of the company.²⁰¹ It may be that the men on the board (who still make up the majority) are blocking women from taking on further leadership roles, as this would threaten male dominance. Without any studies assessing whether Blalock's theory is supported in the context of increased women on boards it is not possible to conclude if there is any valid concern that backlash will occur.

The issue of backlash is also more likely to occur under quotas than targets. Quotas require a significant change in the representation of women in a short period. Going from a low level of female representation to near equal representation of males and females would significantly threaten male dominance. Accordingly, it could be expected that backlash would be likely to occur as a consequences of introducing a mandatory gender quota. However, women's representation under targets can increase steadily, rather than all at once, which may minimise backlash.

E. Summary of the possible limitations of quotas and targets

The effectiveness of targets can be limited if the individual in charge of implementing and monitoring them is not committed to achieving gender equality. Whilst this is problematic the limitations of quotas far outweigh those of targets. Quotas are more likely to violate the merit principle, more likely to result in women being treated as tokens and more likely to create backlash. Without conclusive evidence it is not possible to know whether these possible effects would occur under quotas and/or targets. As the law cannot prevent these issues, they must be taken into consideration. If women who are appointed to top positions have negative experiences it may deter further women from aspiring to these positions, which defeats the purpose of

²⁰⁰ H. Blalock *Toward a Theory of Minority-Group Relations* (Wiley, New York, 1967).

²⁰¹ Adhern and Dittmar, above n 135, at 174.

introducing targets or quotas. These possible negative reactions could justify avoiding the use of quotas and possibly targets. However, this needs to be balanced against the likelihood that any initial negative reactions would decline with time as women in such positions becomes accepted as the norm.²⁰²

V. Chapter Summary

The standout benefit of quotas is that they guarantee a specific level of women representation in the roles they are applied to. Another positive outcome of quotas is that the women who were appointed to board positions after the quota came in place were more highly qualified than board members pre the quota. Quotas have also been shown to have modest flow down effects. However, many companies delisted as PLL companies to avoid the quota and there are difficulties associated with applying quotas to roles outside of the board of directors. Both of these factors limit the scope of quotas. Another concern associated with quotas, more so than targets, is that the women who are appointed to board roles via quotas may experience negative treatment. However without further evidence it is difficult to realise this concern.

Targets, whilst not to the same extent as quotas, have increased women representation on boards noticeably. So far, there is evidence that targets, like quotas, have had limited flow down effects. However, the flexibility of targets allows them to be applied to a wide number of roles more easily than quotas. Further to this, women appointed to top-level roles via targets are less likely to be subject to negative reactions than if appointed via quotas. Nonetheless, targets are voluntary so there is the risk of companies setting aspirational and inadequate goals and/or measures, as has been shown in Australia. Australia's use of targets has created a significant group of 'golden skirts', which may reveal women's opportunities have not changed, other than for those women already in leadership roles. Another possible issue with targets is that their effectiveness can be limited depending upon the beliefs and commitment of the individual accountable for implementing the targets.

²⁰² Whelan and Wood, above n 64, at 24.

Chapter 5 Recommendations for New Zealand

I. Ability of Quotas and Targets to Overcome the Limitations of New Zealand's Employment Framework

In considering whether or not New Zealand should adopt quotas or targets it is important to assess the ability of these strategies to overcome the current limitations of New Zealand's employment framework, as were established in Chapter 2.

Quotas require employers to actively fill positions reserved for women. As such, they impose positive duties on employers, which are currently lacking under the legal framework of New Zealand. Further to this, the reservation of positions for women prevents informal networks and unconscious bias influencing the decision-making processes. However, as quotas are usually only used for specific roles the employment processes for non-quota allocated positions will still be at risk of being undermined by bias and discrimination.

The effectiveness of targets in preventing discrimination and minimizing bias is more difficult to identify, as it depends on both the specific targets set and the commitment of the employer to the targets. Regardless of the specifics, by setting targets the organisation will be taking positive actions towards realizing gender equality in leadership, which is more than what is required under the current New Zealand framework. For targets to be as effective as possible at preventing discrimination and biased selection processes, organisations should be required to set targets that establish job criteria and formal selection processes. However, even if this was done targets, unlike quotas, cannot ensure that unconscious bias is completely abolished.

Quotas are a better strategy for ensuring that employment decisions are made free of gender-bias and for ensuring that women are equally represented with men in leadership roles. However, this needs to be balanced with the other advantages and disadvantages of targets and quotas.

II. Suitability of Targets and/or Quotas for New Zealand

A. Liberal vs Radical model

New Zealand has tended to take a liberal approach to implementing gender equality in employment.²⁰³ The liberal concept is centered on “equality of opportunity”, which proposes that equality is achieved through fair competition.²⁰⁴ The liberal model recommends that policies be put in place to eliminate discriminatory practices and thereby provide that “the rules of competition” are fairly applied to both men and women.²⁰⁵

In comparison, the radical model is based on the premise of “equality of results”.²⁰⁶ The radical model criticises the liberal model on the basis that actual equality of opportunity cannot transpire, due to the historical and continuing societal dynamics that favour men and undercut women²⁰⁷. Accordingly, under this approach the role of the law is to ensure women and men are equally represented in leadership roles. The radical model proposes that this is to be done through positive discrimination, which entails “deliberate manipulation of employment practices so as to obtain a fair distribution of the deprived or disadvantaged population within the workforce”.²⁰⁸

The radical model unquestionably promotes quotas. However, targets can fit under both models, depending on how organisations use them. Targets can be used to eliminate discriminatory practices and provide equality of opportunity for women and men, which may consequently improve women’s chances of reaching top-level positions. Alternatively, targets can set a specific level of representation women are to fulfill, and go about achieving this without necessarily engaging with the barriers that disadvantage women.

²⁰³ Rasmussen, above n 30, at 201.

²⁰⁴ D. Dahlerup and L. Freidvall “Quotas as a ‘Fast Track’ to Equal Representation for Women” (2005) 7 *International Feminist Journal of Politics* 26 at 30.

²⁰⁵ Rasmussen, above n 30, at 201.

²⁰⁶ At 202.

²⁰⁷ At 202.

²⁰⁸ N. Jewson and D. Mason “The theory and practice of equal opportunities policies: liberal and radical approaches” (1986) 34(2) *The Sociological Review* 307 at 322.

B. Opposition towards quotas

As New Zealand traditionally applies the liberal model, quotas are highly unlikely to be implemented in New Zealand.²⁰⁹ The Human Rights Commission identifies that “successive administrations have denied any interest in debate about quotas in the belief that it would evoke negative political and business reactions”.²¹⁰ This can be compared with Norway, where quotas were introduced with broad political support.²¹¹ This is likely due to Norway’s egalitarian culture, which is committed to realising gender equality and already had a number of quotas and affirmative action policies in place.²¹²

The business community of New Zealand also shows opposition towards adopting quotas. A spokeswoman on behalf of NZX stated they do not support quotas and the Institute of Directors considers quotas to be a “last resort”.²¹³ Further opposition to quotas, from the general New Zealand public, is shown in Casey, Skibnes and Pringles study.²¹⁴ This study carried out interviews with 17 women in New Zealand. These women were either currently, or had previously been, directors, executive officers of the EEO Trust or academic researchers.²¹⁵ When asked about the use of quotas “New Zealand respondents uniformly expressed strong views against affirmative action and quotas”.²¹⁶ Whilst this study only interviewed a small number of women, due to their positions they would be more likely than most women in New Zealand to support gender equality strategies. This is significant, as it would be predicted that women, if anyone, would be supportive of quotas, as they would benefit if they were introduced.²¹⁷

²⁰⁹ Rasmussen, above n 30, at 201.

²¹⁰ New Zealand Human Rights Commission, above n 3, at 7.

²¹¹ Storvik and Teigen, above n 140, at 5.

²¹² M. Teigen, above n 111, at 3.

²¹³ Cecile Meier “Call for New Zealand X to act on gender quotas” (16 April 2014) <www.stuff.co.nz/new-zealand/the-press/business/9945942/Call-for-New-Zealand-X-to-act-on-gender-quotas>.

²¹⁴ C. Casey, R. Skibnes and J. Pringle “Gender Equality and Corporate Governance: Policy Strategies in Norway and New Zealand” (2011) 18(6) *Gender, Work and Organization* 613 at 620.

²¹⁵ At 620.

²¹⁶ At 624.

²¹⁷ D. Harrison and others “Understanding attitudes toward affirmative action programs in employment: Summary and meta-analysis of 35 years of research. (2006) 91 *Journal of Applied Psychology* 1013 at 1021.

C. Scope of quotas in New Zealand

If New Zealand were to follow Norway's example and introduce gender quotas for publically listed companies a large proportion of New Zealand employers and employees would not be affected. Companies listed on the NZSX only employ 6 per cent of New Zealand's employees.²¹⁸ Of those 6 per cent of employees, only a small percentage of women would possibly benefit, as quotas would likely only cover board positions. The use of quotas on the boards of PLL companies in Norway did not have substantial flow down effects and did not increase women representation on private boards. As such, it would be expected that quotas would create very little improvement in gender equality across the top levels of the private sector in New Zealand.

Whilst the scope of quotas could be increased by applying them to definable leadership roles other than directors, or by applying them to private companies, the reality is that New Zealand is not a country likely to introduce a mandatory gender quota on public companies let alone in other circumstances. One core reason for this is the significant number of family owned companies that would be affected.²¹⁹ New Zealand would also be unlikely to extend the use of quotas to non-board roles, as this has yet to have been done in the private sector, by any country.

D. Recommendation - Quota

The potential problems associated with quotas outweigh the benefits they provide. Additionally, quotas are not likely to be supported in New Zealand. If they were, they would likely be limited in scope. Accordingly, I would recommend that quotas are not a suitable temporary special measure for New Zealand to adopt.

E. Support for targets

²¹⁸ Kompas "Kompas New Zealand Business Information" (2014) Free Trial www.kompas.co.New Zealand /business-information.php; Statistics New Zealand "Employment Size Group by Business Type 2000-13" (October 2014) <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7609#>>

²¹⁹ G. Thorton "PRIMA Global Research Report" (2002) <www.grantthornton.co.nz/Assets/documents/pubSeminars/PRIMAglobal.pdf> at 25. 60% of New Zealand business owners consider the business to be a family business.

Whilst there is neither evidence of support, nor opposition, of targets from parliament, it is likely that targets would be considered more suitable than quotas, as they incorporate aspects of the liberal model that New Zealand is fond of. Whilst targets also represent the radical model, in the sense that they are somewhat focused on the measurable outcome of increased women representation, they are nowhere near as radical as quotas.

The general public and business community of New Zealand showed considerable opposition to quotas; however, there have been substantial signs of support for following Australia's lead and making use of targets. When the NZX was considering the adoption of the ASX diversity provisions, a number of organisations and businesses voiced their support for the inclusion of the requirements that listed companies have a diversity policy and set measurable objectives (targets).²²⁰ However the NZX went ahead without including these provisions, meaning New Zealand listed companies are only required to report on the gender breakdown of their directors and officers.²²¹ The NZX chose not to implement gender policies or targets due to wanting to allow issuers flexibility and because of the potential compliance costs associated with these requirements.²²²

²²⁰ Women on Board NZ "Submission by Women on Boards NZ: Part II- NZX Proposed Diversity Listing Rule" (2012); ChapmanTripp "Submission on NZX Listing Rules Consultation" (2012); Equal Employment Opportunities Trust "EEO Trust Submission on Proposed Amendments to the NZSX/NXDX Listing Rules for NZX's Main Board and Debt Market" (2012); Human Rights Commission "Submission by the Human Rights Commission: NZX Proposed Diversity Rule" (2012); New Zealand Law Society "NZX Market Rules for the Main Board/Debt Market – Proposed Gender Diversity Reporting Rule" (2012); Human Rights Commission *New Zealand Census of Women's Participation* (Human Rights Commission, 2012) at 9 "Global Women's chair Dame Jenny Shipley welcomed the rule but said it was a missed opportunity to match Australia's progress, and New Zealand Council of Women president Elizabeth Bang called the NZX rule a 'half step'."

²²¹ New Zealand X Limited "Main Board/Debt Market Listing Rules" (2013) New Zealand X, rule 10.5.5(j) <www.NewZealandx.com/market-regulation/rules/NewZealandsx-and-NewZealanddx-listing-rules>. Rule 10.5.5(j) – At the end of 2012 the NZX introduced a requirement for listed companies to include in their annual report a gender breakdown of their directors and officers

²²² Chapman Tripp "Corporate & Commercial brief counsel: New Zealand X Diversity Rule – could have been stronger but may still do the job" (July, 2012) <www.chapmantripp.com/publications/Pages/NZX-Diversity-Rule---could-have-been-stronger-but-may-still-do-the-job.aspx> at 2.

Based on the evidence available, targets can be expected to have some supportive backing, whereas quotas appear to mainly be opposed in New Zealand. Taking this into account, targets are the more suitable gender strategy for New Zealand.

F. Scope of targets in New Zealand

Not only do targets have more support, they can also have a broader scope and interfere less with the autonomy of business owners. As they are voluntary, in the sense that they are internally set by the organisation, targets do not interfere with autonomy of business owners to the same extent as quotas. They allow organisations to choose their own path for achieving gender equality, and as such, respect the differences in structures and industries between organisations. Due to the inherent flexibility of targets they can be used at different levels of organisations and be aimed at multiple roles – both at leadership level and on the roles leading up to these positions.

As the ASX only has authority over listed companies, the scope of targets in Australia is limited. As was established earlier, the NZSX only employs 6 per cent of New Zealand's employees. By introducing targets through legislation the scope of targets can be extended beyond listed entities and therefore benefit a much larger proportion of women in employment.

G. Recommendation - Targets

The introduction of target setting, by the ASX Corporate Governance Council, for publically listed companies in Australia has increased women's representation on boards by 8 per cent over four years, between 2010 and 2014. Whilst there are not statistics available for women representation on the boards of companies listed on the NZSX post 2012, the increase in women's representation over the four-year period between 2008 and 2012 was 6 per cent. Accordingly the progress of women's representation on boards in New Zealand, without targets, is not significantly slower than the progress that has occurred since targets were introduced in Australia. Therefore, targets may not bring about change any quicker than is currently occurring. Targets have only been required for four years; perhaps substantial

increases in the representation of women are still to come. It may be best for New Zealand to wait for more compelling evidence as to whether targets can improve gender equality in the top positions before taking action. However, targets are not legally enforced in Australia and are only applied to listed companies. As such, it is possible that if targets were introduced through legislation and were applied to a wider scope they would have a more substantial impact on gender equality in top-level positions. The potential, but unproven benefits, targets could have must be balanced with the potential costs of introducing targets.

If targets were to be introduced, a governmental body would need to be created or assigned for monitoring the implementation and progress of the organisations required to comply. This body would need to have sufficient funding and resources to ensure that they could effectively fulfill their function. The need for a body to track compliance is evident under the SSA. The EEO plans that are reported in compliance with the SSA are not being utilised due to limited resources being allocated for monitoring and assessing these plans.²²³ Mintrom and True, referring to reporting under the SSA, state that “the current situation in New Zealand provides clear evidence that legislative intent will not be fulfilled unless it is backed up with appropriate support structures and resources.”²²⁴ New Zealand currently has two governmental bodies that promote gender equality: the Human Rights Commission and EEO Trust. These two bodies could possibly be merged or share the workload of monitoring targets.

Targets would also create costs for the organisations required to comply. Collecting statistics on the gender make up of the workforce, setting targets, monitoring their progress and disclosing such information will take considerable time, and come at a cost to organisations. There is evidence that high compliance costs “stifle innovation, hinder competitiveness, deter compliance and discourage firms from growing and taking on more staff”.²²⁵

²²³ Mintrom and True, above n 10, at 114.

²²⁴ At 114.

²²⁵ Ministerial Panel on Business Compliance Costs “Finding the Balance. Maximising Compliance at Minimum Cost” (2001) in Business NZ “Submission by Business NZ to the Transport and Industrial Relations Select Committee on the Employment Relations Law

Any potential costs to the government and organisations, associated with implementing targets, must be considered alongside New Zealand's international law obligations. These obligations require New Zealand to ensure that women have equal opportunities in their employment and that discrimination is actively prevented. It would be impossible to fulfill this obligation without some compliance costs arising. To ensure that compliance costs for organisations are not excessive small businesses could be exempt from setting targets. The very reason that Norway did not extend quotas to private companies was due to concerns of interfering with the autonomy of private ownership in small to medium sized businesses.²²⁶ Accordingly, to prevent excessive compliance costs it would be appropriate that only employers with 50 or more employees would be required to set targets. This would still require organisations which employ 49.3 per cent of private sector employees to set targets.²²⁷

Targets are a more advantageous gender equality strategy than quotas; they have more potential benefits and are less likely to create negative reactions towards women who are appointed into top-level roles. Further to this, there is evidence of support for targets in New Zealand. Targets may bring with them compliance costs, but as long as these costs are not excessive, they can be outweighed by the need to fulfill New Zealand's international law obligations. Targets may not increase women representation much more than is already occurring in New Zealand; however, targets ensure that employers become aware of gender inequality and ensure that they engage with the issue. Employers need to take a more active role in ensuring that women have opportunities equal to men in their careers. It is not possible for women to overcome the influences of discrimination, informal networks and unconscious bias without employers changing the way they make employment decisions. This requires organisational and cultural change, which positive obligations on employers can promote. Without such positive obligations, organisational and cultural change may occur but it will take a considerably longer period of time. To comply with international law obligations and uphold women's rights it is paramount that action is

Reform Bill (2004) <www.businessnz.org.nz/_data/assets/pdf_file/0005/68135/040227-Employment-Relations-Law-Reform.pdf> at 6.

²²⁶ Teigen, above n 111, at 5.

²²⁷ Statistics New Zealand "Employment size group by business type 2000-13" (2014) <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7609#>>.

taken as soon as possible. Accordingly, New Zealand should consider legislating targets as a temporary special measure to comply with international law obligations. Targets are an effective way of introducing positive duties – they place obligations on employers, but also recognise the desire for autonomy in business by allowing employers to set targets themselves.

III. Introducing Targets in New Zealand

By including specific criteria that organisations must consider, precise targets can be created. This can prevent ineffective, aspirational, blanket cover targets arising, as was observed under the ASX Corporate Governance Principles and Recommendations (CGPR) in Australia.²²⁸ Further to this, it is not enough for organisations to set targets; they must also be committed to achieving them.²²⁹ To ensure that organisations are incentivized to meet their targets it is appropriate that there be sanctions for non-compliance.

A. Draft legislative provisions for implementing targets

Making use of the ASX CGPR and the Workplace Gender Equality Act 2012²³⁰ I have drafted legislative provisions for the purpose of showing how specific criteria and sanctions could be used in legislation to increase the likelihood that targets would be complied with. This is not the provision I would recommend to be included in legislation; rather it is included to advance discussion on what the legislation should look like.

Interpretation

‘Candidate’ means any person who applies for a vacant role within the organization.

‘Leadership Role’ means any person, however designated, who is concerned or takes part in management of the Organisation.²³¹

- a) Management includes, but is not limited to: planning, controlling, organizing, supervising, governing or reviewing the operations of the company.

²²⁸ KMPG, above n 119, at 3.

²²⁹ Whelan and Wood, above n 64, at 25.

²³⁰ Workplace Gender Equality Act 2012 (Aus).

²³¹ Derived from meaning of Officer, s2 of Securities Markets Act 1998.

- b) Leadership Roles include, but are not limited to:
 - I. Directors of companies
 - II. Chief executive officers/Chief financial officers/Chief operating officers
 - III. Partners, for example; Partners in law/accounting firms.

‘Organisaiton’ means any employer, entity, business, company, partnership or other business structure that employs 50 or more employees and is not required to comply with the State Sector Act 1988.

‘Target’ refers to specific measurable objectives, with discrete timeframes in which they are to be achieved.

Section ‘X’

Every Organisation must:

- 1) Report annually on the following gender equality indicators:²³²
 - a) Gender composition of the workforce;
 - b) Gender composition within leadership role(s);
 - c) Equal remuneration between women and men;
 - d) Availability and utility of employment terms, conditions, and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities.

The report is to be made on or before the 31 of December of each year, to the agency, and be made publically available.

- 2) Implement a gender policy, which is written and approved by either human resources or management, to specifically provide for gender equality.
- 3) Set targets, for achieving gender equality, to be disclosed in the gender policy under (2).
 - a) Targets under (3) should specifically be made for the purpose of achieving gender equality in the:

²³² Gender equality indicators derived from the Workplace Gender Equality Act 2012 (Aus), s3.

- i) Composition of the organisation's workforce; and
 - ii) Leadership roles of the organisation; and
 - iii) Remuneration of the organisations employees; and
 - iv) Any other purpose specified by the Agency.
 - b) Targets set for the purpose of achieving gender equality in the Leadership Roles of the Organisation should aim to provide:
 - i) Women and men with equal opportunities for development, promotion and selection within the Organisation; and
 - ii) Formal processes for evaluating candidates, which prevent selections from being gender biased, either consciously or unconsciously.
 - c) Targets, and the Organisations progress toward achieving them, must be assessed annually.
 - d) Organisations, which under 1(b), can show that female and male representation in Leadership Roles is 40 per cent or over are not required to set targets.
- 4) Identify, in their gender policy, an individual or individuals, who are to be responsible for implementing targets and monitoring progress towards achieving them.
- 5) Disclose that policy or a summary of it, to the Agency and to the general public.
- 6) Disclose to the Agency, and to the general public, at the end of each reporting period, the targets for achieving gender equality, set in accordance with the Organisation's gender policy and its progress towards achieving them.

Section 'Y'

- 1) An Organisation can be found non-compliant with section 'X' if the Organisation:
- a) Fails to report on gender equality indicators;
 - b) Gives false or misleading information;
 - c) Fails to disclose a policy to the Agency and/or fails to set targets in the policy;
 - d) Fails to identify accountable individual(s);
 - e) Fails to show any progress towards achieving their targets in the two years after the targets were created.

- 2) Where an Organisation is deemed to be non-compliant under Section Y (1) (a),(b), (c) or (d) the Organisation will be fined \$100,000 each year it fails to comply, and may also be:
 - a) Named non-complaint by the Agency in parliament and/or named as non-compliant publically; and/or
 - b) Prevented from tendering certain government contracts or receiving certain financial assistance from the government.
- 3) Where an Organisation is deemed to be non-compliant under Section Y (1) (e) the Agency will consider whether the Organisation took all reasonable steps towards achieving the targets. In doing so the agency, may consider:
 - a) The industry the Organisation operates in;
 - b) The size of the Organisation;
 - c) The gender composition of the Organisation's workforce as a whole;
 - d) The number of vacant leadership roles that arose during the relevant period;
 - e) The number of women that applied for vacant leadership roles;
 - f) The selection processes used to fill vacant roles;
 - g) Any other factor the 'Agency' considers relevant.
- 4) If the Agency considers that not all reasonable steps were taken towards achieving the targets:
 - a) Those individuals identified by the company as responsible for implementing and monitoring the targets will each be fined \$10,000; and
 - b) The Organisation will be fined \$100,000 each year it fails to comply and may also be
 - i) Named non-complaint by the 'Agency' in parliament and/or named as non-compliant publically; and/or
 - ii) Prevented from tendering certain government contracts or receiving certain financial assistance from the government

B. Negative treatment of women who obtain leadership positions

A potential issue, which may limit the realisation of targets, is the way women may be treated when they reach the top. Chapter 4 established that it is possible women may be treated as tokens, or may face backlash as they increasingly fill leadership positions. This is something that targets cannot prevent occurring, rather is a broader societal issue that will need to be remedied through education and/or other social institutions. This is a limitation of the legal framework of targets that needs to be recognised. However, this limitation does not justify taking no action. Without gender equality strategies being put in place, discriminatory attitudes and behaviours will be slow to change. The first generation of women in top-level roles may face some difficulties but the negative reactions should be minimized once women in leadership become the norm.

C. Introducing legislation – amending current statutes vs new statute

If New Zealand was to introduce targets into legislation it could be done through a comprehensive new act aimed specifically at gender equality in New Zealand, or alternatively the ERA or HRA could be amended. A new act, specifically created to improve gender equality in New Zealand, would be a recommendable option. This would allow a framework for targets to be set up which could apply to both the public and private sector. Further to this, the issues of gender pay gaps and overrepresentation of women in low status roles could also be dealt with. Whilst a comprehensive statute would be desirable, the processes involved would be extremely time-consuming, due to the complexity and contentiousness of the issues involved. New Zealand is under international law obligation to take “all appropriate measures”, “without delay”, to prevent discrimination against women.²³³ Taking this into consideration, amending the ERA or HRA to introduce a framework for targets is the more desirable option, as it would enable changes to be made in a shorter timeframe. Of the two statutes the HRA would be the more appropriate legislation to incorporate target provisions into. By introducing targets as temporary special measures New Zealand would be furthering its international law obligations, which are specifically

²³³ CEDAW, above n 89, art 3.

identified in the purpose of the HRA. Further to this, the HRA provides that special temporary special measures are legal.²³⁴ Accordingly, targets would be consistent with the content and spirit of the HRA.

Whilst not under consideration here, it may be appropriate to consider streamlining the employment obligations of public and private sector so that targets and reports are assessed by the same body, to gain a better idea of the progression of gender equality in New Zealand. It may also be appropriate to assess whether targets are a mechanism that should also be applied to the public sector.

IV. Chapter Summary

In considering whether targets or quotas would be appropriate for New Zealand it is clear targets have more associated benefits and less problems than quotas. Further to this, New Zealand show signs of support for targets, whereas quotas were vehemently opposed. Targets can be implemented to improve gender equality for organisations employing nearly 50 per cent of New Zealand private sector employees; far superior to the 6 per cent of New Zealand private sector employees that would be employed by publically listed companies required to comply with the quota. Based on these factors and the problems identified with quotas in Chapter 4, quotas are not a suitable option for New Zealand to introduce as a TSM.

Targets, however, are a suitable option if implemented under a strong legal framework with sanctions to encourage performance. For targets to be as effective as possible, a governmental body will need to be established to monitor the targets set and, where appropriate, follow up enforcing sanctions. This is a possible limitation to introducing targets, as to ensure this body can fulfill its role, substantial cost would likely be involved. Organisations will also face compliance costs. The implementation of targets could be carried out through a new comprehensive act aimed at achieving gender equality in employment, or new provisions could be entered into existing legislation. Both of these options have advantages; but, in considering the need for New Zealand to comply with its international obligations, in a timely manner, it is

²³⁴ Human Rights Act, s73.

better for targets to be implemented as an amendment to the HRA at this stage. Further down the track a comprehensive act could, and should, be introduced.

Conclusion

This dissertation has assessed a one of the many gender inequality issues that continue to plague global society. Gender inequality is widespread and complicated. Due to this, it is necessary to break the issues down and identify possible strategies that can enable the equal treatment of men and women in society. This piece of work has focused on how legal reform could be used to improve women's employment opportunities so that women can compete for top jobs on an equal footing with men. Ensuring these equal opportunities exist is extremely important, but alone, will not lead to equal representation of women at the top-level. This is due to the double burden on workingwomen who are expected to fulfill the role of rearing children, alongside developing their career.²³⁵ If this burden is not reduced then women will struggle to have the time and resources available to commit to high-level roles. Therefore, it is important other barriers to women's advancement in their careers are recognised and altered. Legal reform can assist in this, for example, by improving the childcare available and introducing exclusive paternity leave.²³⁶ To ensure targets are effective as possible it is paramount that they are complemented with further gender equality policies, such as those mentioned above.

²³⁵ OECD "Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM 2012" (2012) <<http://www.oecd.org/social/family/50423364.pdf>> at 106.

²³⁶ At 112-113.

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<www.wob.org.nz/downloads/WOBNZ_NZX%20Diversity%20Submission.pdf>

Appendices

Appendix 1: An example of an assessment of progress towards measurable objectives (targets)

Issue	Objectives	Target	Progress
Gender diversity	Increase the percentage of women in management roles.	Achieve 40 percent rate by 2015.	Increased the percentage of women in management roles from 37 percent to 43 percent by 30 June 2013.
	Increase female participation rates.	Appoint at least two female directors to the board by June 2016.	Appointed one female NED and appointed female Chairman of the Audit committee and member of the Remuneration and Nominations Committee.
	Increase the number of women each year participating in any company Executive Leadership Development program.	Target of reaching 50 percent of women being sponsored by 2015.	Women constitute approximately 22 percent of senior management within the group.
Diverse workforce	Maintaining 'keep in touch' initiative for employees on parental leave.	Aim to maintain connection to the workplace and improving the return to work experience.	"Keep in touch" initiative was maintained to ensure employees on extended leave continue to feel connected to the workplace. Under the initiative, employees on extended leave were invited to participate in staff updates, diversity networking series, and the 2013 engagement survey. The engagement score for employees who had taken leave parental leave increased by 15 points from the 2011 survey to the 2013 survey.