

## **THE *SEX DISCRIMINATION ACT* AFTER TWENTY YEARS: ACHIEVEMENTS, DISAPPOINTMENTS, DISILLUSIONMENT AND ALTERNATIVES**

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### **I INTRODUCTION**

Australian women have much reason to be grateful to Senator Susan Ryan and the other women who worked to draft the *Sex Discrimination Act 1984* (Cth) ('*SDA*') and get it passed by the Commonwealth Parliament in 1984. This was a vital commitment, by the Parliament on behalf of the people of Australia, that sex discrimination was unacceptable and should be prohibited by law.

However, this commitment was made 20 years after the United States had first adopted federal sex discrimination law, and seven years after Victoria and New South Wales had adopted sex discrimination laws. Parliament's commitment was, therefore, hesitant and rather ambivalent, and since then progress has been slow and uneven under the law.

Women are still far from equal in Australia – on income, employment position, or any other measure. Poverty, particularly in old age, still primarily affects women. Women are still inadequately protected from sexual assault and domestic violence.

Women's position in employment is vital because when women have equal access to economic resources, many other changes in their lives will follow. Girls and women in Australia are in a double bind. They are told that they have equality and can pursue a career and opportunities equally with boys, but when they get into the workforce they face unequal pay, discrimination in access to good jobs and advancing in the workforce, and they are still assigned primary responsibility for child care by a society which devalues both motherhood and children. On the one hand, girls are told that they are equal and can have what boys have. On the other, they are told that there are natural differences between men and women, and that they must accept the feminine role of altruistic domestic caregiver, even if they want to maintain a workforce role. Effective change in the public sphere of employment cannot occur without change in the gendered division of labour in the private sphere of the family. But the strength

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of the ideology of natural differences in Australia limits progress towards sex equality.

The *SDA* was never going to reform the whole world for women, and perhaps too much was expected of it. In the optimism of the 1970s and 1980s, it was assumed that laws could change social practices in the areas of race and sex discrimination. Experience has since shown that it can be very difficult to change entrenched practices and the understandings on which they rest. Having lived for 20 years with sex discrimination outlawed, it can be easier to see the Act's current limitations than the changes it has wrought.

## II ASSESSING THE ACHIEVEMENTS

To assess the achievements of the *SDA*, we must begin by asking: what was the Act intended to achieve? What was hoped for? And what could it realistically achieve?

The objects of the *SDA* as expressed in s 3 include 'to eliminate, *so far as is possible*', various forms of discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, etc.<sup>1</sup> Like equality, eliminating discrimination is one of those motherhood ideas that attract universal approval. However, actually eliminating discrimination entails transferring resources or power from some people to others, and will not occur without a struggle.

Eliminating discrimination is a limited concept: it aims to give everyone an equal chance to run the race, an equal chance to achieve, but does not aim to ensure any reasonable degree of actual equality in outcomes or resources. It would only give women the chance to be treated the same as men in the current workforce, where all are increasingly exposed to insecure employment in a culture of long hours, under the pressures of work intensification. The current liberal legal system is not designed to change social structures.

The *SDA*'s coverage is limited to selected areas of public activity and even within those areas it contains many exclusions. Within this limited scope, the Act is directed only to equality of opportunity through the elimination of discrimination as defined in the Act, not to achieving substantive equality. It is based on a model of equality as same treatment of men and women, although the prohibition of indirect discrimination provides an opening for accepting that different treatment can sometimes be required to achieve equality, and thereby some movement towards equality in substance. Discrimination as defined in the Act does not cover all forms of systemic discrimination which exist in our society, and the Act's definitions have been further limited by technical interpretations by courts.

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1 *Sex Discrimination Act 1984* (Cth) s 3(1) (emphasis added).

## A Impact of the SDA

The social significance of the *SDA* is as a public national expression of condemnation of discrimination against women. This has a significant impact on our understandings of the world in which we live, by creating a space and vocabulary for a different understanding of sex discrimination, not just as something that happens, but as something unlawful. At the simplest level, there is now a law against it.

Assessing the *SDA*'s concrete achievements in reducing women's inequality is difficult, as so many factors influence women's position in the workforce and it is therefore almost impossible to identify any particular cause of identified progress. The *SDA*, along with State sex discrimination laws, has removed most formal legal barriers to women choosing what they want to do, although some barriers remain, such as the limitations on women in combat-related positions in the defence forces and in sport, through exemptions in the *SDA*. The removal of legal barriers has ensured women greater access to employment, and women have moved into the workforce in such great numbers that we now take for granted many basic rights that did not exist before sex discrimination laws.

However, while the *SDA* has helped women, other changes have undermined their position. The de- (or re-) regulation of the workplace, with its consequent ballooning casualisation of work and increasing exposure of workers to employer flexibility requirements with little protection, makes the workplace a very different environment now to what it was in 1984 when the *SDA* was passed. Hunter has pointed out that the Act has been outflanked by those changes, which have made it even more difficult for women to thrive in the workforce, and, as a result, the Act has had quite limited purchase in eliminating women's disadvantage in employment.<sup>2</sup>

## B Legal Meaning

Additionally, we should look at the state of legal precedents and enforcement of the law. Has the legislation been understood, and been given its intended effect, by the (male-dominated) courts? Have individuals been able to use it to seek redress for unfair treatment?

The disappearance of overt or explicit discrimination in Australia has been followed by more covert and subtle forms of discrimination which are more difficult to prove in court. Direct discrimination, where a woman is treated less favourably than a man would have been, depends on her proving that the reason for the respondent's decision was a discriminatory one. This is very hard in the absence of clear evidence of the employer's reason for acting, which is rare. Nevertheless, there have been cases establishing important rights in relation to employment interviewing and selection, employment benefits, and the rights of women to return to the same job after maternity leave.<sup>3</sup>

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2 See Rosemary Hunter, 'The Mirage of Justice: Women and the Shrinking State' (2002) 16 *Australian Feminist Law Journal* 53.

3 See, eg. *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186.

The prohibition of sexual harassment has been more successful,<sup>4</sup> perhaps because it does not depend on showing a reason for acting, but merely on establishing that unacceptable conduct took place and had a particular effect. But even if the *SDA* has provided women with a remedy for sexual harassment, there is no indication that it has made real changes in the power structures that expose women to sexual harassment. Anti-discrimination legislation has not been sufficient to get women into higher-level jobs in reasonable numbers.

As a result of the difficulty in showing direct discrimination, attention turned to indirect discrimination, which allows practices to be challenged on the basis that they disadvantage women, or other protected groups, as a class. This could be an extremely important avenue for challenging systemic practices of disadvantage. However, such practices are not necessarily unlawful, even if they disadvantage women. If the practices are (in the court's view) 'reasonable', then they will be acceptable under the Act.<sup>5</sup> This seriously blunts the Act's challenge to systemic discrimination. Courts have also handed down decisions which have interpreted the law narrowly and technically, in order to limit the impact of indirect discrimination.<sup>6</sup> When courts engage in technical and narrow readings of these provisions, the scope for the *SDA* to remedy women's workforce disadvantage is seriously affected.

The role of the Sex Discrimination Commissioner must not be overlooked. Even without the previous role in conciliation and dispute resolution, the Commissioner has powers to carry out research, policy development and advocacy in public and political debate. Sex Discrimination Commissioners have done excellent work challenging unequal pay, systemic discrimination and sexual harassment at work, pregnancy discrimination and, most recently, the case for government funded maternity leave.<sup>7</sup> They have provided an authoritative voice for women's interests in policy debates and agenda-setting which is absolutely vital. The importance of having a public and courageous advocate for women's claims cannot be underestimated.

### C Legislative Change

The *SDA* has been strengthened by Parliament at various times. Exemptions in the law have been reduced since it was adopted, for example, exemptions for

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4 See, eg, *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217; *Horne v Press Clough Joint Venture* (1994) EOC ¶92-591; *Hopper v Mount Isa Mines Ltd* (1997) EOC ¶92-879; aff'd [1999] 2 Qd R 496.

5 *Sex Discrimination Act 1984* (Cth) s 7B.

6 Indirect discrimination law has in recent years given women returning from maternity leave a right to be taken seriously by their employers when they seek part-time work to accommodate conflicting work and family obligations: see, eg, *Hickie v Hunt and Hunt* [1998] HREOCA 8 (Commissioner Evatt, 9 March 1988); *Mayer v Australian Nuclear Science and Technology Organisation* (2003) EOC ¶93-205. But there are contrary decisions, and one court has held that a contractual requirement to work full-time was not a 'condition requirement or practice' which could be challenged within the legislation. Hence, there was no right to have the employer even consider whether part-time work could actually be made available. Because the employer did not offer flexible work generally to its staff, it could be refused outright to new mothers in its workforce: *Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214.

7 See generally Human Right and Equal Opportunity Commission, *Sex Discrimination* <[http://www.hreoc.gov.au/sex\\_discrimination/index.html](http://www.hreoc.gov.au/sex_discrimination/index.html)> at 8 November 2004.

superannuation and insurance, and for other Commonwealth laws such as workplace relations, as well as the combat duties exemption. The indirect discrimination provisions have been strengthened by requiring the *respondent* to show that a practice which has a disproportionate impact on women is reasonable, instead of the *complainant* being required to prove that it is not reasonable.<sup>8</sup> Proving a negative has never been an easy task, and this change makes the law workable. However, recent government attempts to amend the Act have all sought to reduce the extent of its protection, for example, the response to *McBain v Victoria*<sup>9</sup> concerning access to infertility treatment, the 2004 debate over scholarships for male teacher training, and the reintroduced Bill to remove the specialist commissioners of the Human Rights and Equal Opportunities Commission ('HREOC').<sup>10</sup> These have not so far been successful.

### III DISAPPOINTMENTS

Among the reasons for disappointment with the scope and operation of the *SDA*, are several major problems relating to its design and enforcement mechanisms.

First, the Act's substantive provisions are relatively weak. The test for the acceptability of apparently neutral practices which have a disadvantageous effect on women is whether the practice is 'reasonable'.<sup>11</sup> The comparable countries on whose legislation this is based have stronger laws: the United Kingdom requires it to be 'justified', and the American test is based on 'business necessity'. The meaning of the reasonableness test has been an ongoing battleground, and appellate judges have not been able to clarify the test and how it is to be applied so as to provide adequate guidance for subsequent courts and tribunals. Because of its open texture, the test of reasonableness can be a vehicle for the transmission of traditional views of social practices, and the rejection of any requirement for change.<sup>12</sup>

The *SDA* also fails to acknowledge diversity among women, and the fact that sex may be combined with attributes like race, disability or sexuality to produce quite specific forms of disadvantage which need to be addressed in their own terms. All women cannot be understood to face similar problems, modelled on the concerns of white middle-class women. This denies the specific experiences of other women and fails to remedy their disadvantage.

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8 *Sex Discrimination Act 1984* (Cth) s 7C.

9 (2000) 99 FCR 116; aff'd *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

10 Australian Human Rights Commission Legislation Bill 2003 (Cth).

11 *Sex Discrimination Act 1984* (Cth) s 7B.

12 See, eg, *Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214; *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78. See also the cases under the *Equal Opportunity Act 1995* (Vic): *Schou v Victoria* (2000) EOC ¶93-100; rev'd (2001) 3 VR 655; *Schou v Victoria* (2002) EOC ¶93-217; rev'd (2004) EOC ¶93-328.

The enforcement mechanism in the *SDA* has structural problems. The Act relies for its enforcement solely on complaints and legal action being initiated by individuals or groups of women affected by discrimination. This has not proved adequate. By contrast, Australia's equal employment opportunity legislation acknowledges that the elimination of discrimination will be most effective when it is enforced pro-actively at the systemic level, rather than relying on individual victims to enforce the law.<sup>13</sup> However, the equal employment opportunity laws have virtually no teeth, and the agencies that supervise them have few resources and have had to rely on persuasion and encouragement for the laws' implementation. As a result their impact has been muted and patchy.

Complainants are given very little assistance in bringing cases: discrimination cases at the federal level have virtually no access to legal aid for representation. Complainants are left to their own efforts to obtain advice and representation, which many feel is essential in such a technical area of law. This approach is completely inadequate in an area where individuals are often opposed by large and well-resourced corporate repeat-players or governments.<sup>14</sup> Litigation has operated in the interests of these respondents, who are able to afford teams of the best lawyers – lawyers who have developed technical readings of the legislation which advantage respondents. The acceptance of these arguments by the courts has made the law complex and difficult for complainants to use, especially given their relative lack of resources and access to expert legal help.

Because Australian equal opportunity agencies have the role of conciliating disputes, they are required to act impartially and cannot provide assistance to complainants to counterbalance the size and experience which the often large corporate or government respondents possess. By contrast, in the United Kingdom, conciliation is conducted by a separate organisation and, as in Canada and the United States, the equality agencies are empowered to resource the bringing of litigation in a strategic way in order to develop the case law effectively in the interests of the disadvantaged. In Australia, legislation permits this only in Western Australia and South Australia, although resourcing has not been adequate. Counterbalancing the disproportionate power of most respondents is essential for advancing equality.

Even where a complainant succeeds, the damages available have been relatively low. The full compensation awarded to a woman partner in a law firm, who lost her career, and would have been marked in the legal community thereafter, was \$160 000 in total compensation.<sup>15</sup> This is the largest award under the *SDA* in 20 years, but it is hard to see how it can compensate for the loss of a career as a law firm partner, and it is completely outweighed by damages men are awarded for much less tangible damage in defamation proceedings. Most awards for someone who loses a job through sexual harassment are well under \$10 000.

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13 See *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

14 See Marc Galanter 'Why the "Haves" Come out Ahead' (1974) 9 *Law and Society Review* 95.

15 *Hickie v Hunt and Hunt* [1998] HREOCA 8 (Commissioner Evatt, 9 March 1988).

This is not enough to give individuals a sufficient incentive to undergo the stress of complaining and the pressures and risks of litigating.<sup>16</sup>

#### IV DISILLUSIONMENT?

Given the limitations of the system outlined above, is the existence of rights against sex discrimination an illusion?<sup>17</sup> I think we should have serious doubts about how adequately this system protects working women's rights and, in particular, about how effectively it is helping systematically to change practices in the workforce that limit women's ability to participate on an equal basis.

Sex discrimination law is not the only avenue for progressing women's rights. Other important areas include the industrial relations system, campaigns for reform of sexual assault and family violence laws as well as child support and family law, and the policies embodied in tax and social security law. But the *SDA* remains the major vehicle available to individuals for establishing their own rights in the workforce. It must be effective in bringing about progress, and if workforce change and court interpretations have undermined its effectiveness, it may need to be strengthened and other changes considered.

After 20 years of the *SDA*, it is time for a review of its effectiveness and the need for change, perhaps along the lines of the Productivity Commission's review of the *Disability Discrimination Act 1992* (Cth) which has recently been published,<sup>18</sup> or a review by HREOC of progress in reducing sex discrimination in comparable countries with recommendations for reform. Any review should focus on the need to improve the substantive provisions of the law and clarify the basic issues, such as proof of and tests for direct and indirect discrimination, as well as the workability and effectiveness of its enforcement mechanisms given power and resource disparities between complainants and respondents. Alternative models are available in the changes brought about in the United Kingdom over the last eight years or so, partly in response to pressure in the form of directives from the European Union.

#### V ALTERNATIVES

As I have noted, the *SDA* deals with rights against sex discrimination in a limited area of activity. It does not protect women from discriminatory legislation – that is the function of a bill of rights. However, any bill that entrenched the power of the judiciary to interpret rights risks entrenching stereotypes and

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16 The courts' attraction to technical arguments makes it very difficult to predict outcomes in this area, and the loser will have to pay the legal costs of the winner, including, perhaps, a senior counsel's fee. This increases the pressure on complainants not to litigate or to accept a low settlement in conciliation.

17 See Archana Parachar, 'The Anti-Discrimination Laws and the Illusory Promise of Sex Equality' (1994) 13 *University of Tasmania Law Review* 83.

18 Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004), <<http://www.pc.gov.au/inquiry/dda/finalreport/index.html>> at 2 November 2004.

assumptions about women and their 'natural' roles which are likely to be reflected in judicial decisions. A better alternative would be a legislative Bill, perhaps modelled on the Equality Act proposed by the Australian Law Reform Commission in its 1994 report, *Equality before the Law*.<sup>19</sup>

The deterioration of working conditions over recent years in the name of flexibility and productivity makes equality of opportunity for women more remote. In a workforce founded on casual, insecure employment and pressure to work long, unpaid hours, it is almost impossible to obtain the sort of flexibility which is necessary to really reconcile work with an authentic parental role. Instead of allowing women to bear the costs of economic reform, the government must act on the discriminatory gender effects of workplace deregulation.

Sex discrimination laws are not the full answer to women's disadvantage in the workforce. Some reshaping of social institutions to suit women as well as men is needed. The United Kingdom is leading the way in this area at present under the influence of European Union directives, having set up a right for parents of young children to request flexible work and be given a serious response by their employers, as well as improved provision for maternity and paternity leave, and regulations to facilitate access to information in equal pay claims.<sup>20</sup> The United Kingdom is also setting up a Women and Work Commission to identify the causes of women's disadvantage at work and make recommendations for change.<sup>21</sup>

In conclusion, while I wouldn't want to be without the *SDA*, it has aged over the 20 years since enactment. Although it has fundamentally changed our legal and social environment, other changes have undermined some of the gains. It needs revitalising to continue to drive the case for women's equality in the modern context. Its limitations must be acknowledged, and efforts put into remedying them as well as developing other measures to end women's disadvantage.

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19 Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69, pt II (1994) [4.1]–[4.51].

20 The Australian Council of Trade Unions' work and family test cases are seeking some of these benefits for Australian employees: see generally Australian Council of Trade Unions, *Work and Family* <<http://www.actu.asn.au/public/campaigns/workandfamily.html>> at 8 November 2004.

21 See *New Commission to Champion Women in Work* (2004) GovNet Communications <<http://www.govnet.co.uk/newsfeed.php?ID=3248>> at 8 November 2004; *Women and Work Commission* (2004) Working Balance <[http://www.workingbalance.co.uk/sections/print\\_version.php?id=1501](http://www.workingbalance.co.uk/sections/print_version.php?id=1501)> at 8 November 2004.