

LITIGATING FOR GENDER EQUALITY: THE AMICUS CURIAE ROLE OF THE SEX DISCRIMINATION COMMISSIONER

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I THE LIMITS OF LITIGATION

Litigation, by its individualised and ad hoc nature, can only have a limited role in securing equality for women. Anti-discrimination legislation, by establishing a complaints-based mechanism for redress of individual grievances, is subject to the same critique. Complainants are responsible for the formulation and carriage of their own cases and, while issues of broad public importance do arise, these issues are not necessarily of primary concern to the individual litigant.

There are a number of avenues that may be suggested as having the potential to produce greater systemic change. One is the industrial relations system which, at least historically in Australia, has been an important mechanism for extending change throughout the labour market, particularly regarding pay equity and leave entitlements. Another is the development of statutory affirmative action schemes covering employment in public sector agencies and large private corporations. These systems adopt proactive approaches which do not depend on the incrementalism of individual claims.

Despite the limitations of litigation in producing systemic change, courts and tribunals are important sites of power. There, arguments and narratives are listened to, accorded authority, transcribed and deliberated on. There, women can have a voice. But it is not always easy for this voice to be heard. Litigation is generally costly, lengthy and difficult and the burdens – financial and personal – it places on the individual are often so great that only the most well-resourced and tenacious will be able to assume them.

These burdens on the individual limit the capacity of litigation as a mechanism for systemic change. However, moves in recent years in relation to third party intervention suggest that the traditional adversarial model might be open to some re-evaluation and that courts may be receptive to consideration of broad, public interest criteria which are brought to their attention by non-parties.¹ In this paper

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1 See, eg, Jason Pierce, 'The Road Less Travelled: Non-Party Intervention and the Public Litigation Model in the High Court' (2003) 28 *Alternative Law Journal* 69.

I consider one such advocacy mechanism for women's equality within the court system. Under the changes to the federal human rights system brought about by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth), which transferred the hearing function of the Human Rights and Equal Opportunity Commission ('HREOC') to the Federal Court and the Federal Magistrates Court, the Sex Discrimination Commissioner has been given a specific *amicus curiae* role in relation to sex discrimination complaints. I examine the potential and limitations of that role and suggest that the 20th anniversary of the *Sex Discrimination Act 1984* (Cth) ('SDA') presents an opportunity to revisit the enforcement mechanisms of the Act and litigation strategies for women's equality.

II AMICUS CURIAE UNDER THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION ACT

Legislative changes involving the transfer of the hearing function have their origin in the case of *Brandy v Human Rights and Equal Opportunity Commission*² in which the High Court found the statutory scheme for the registration of HREOC decisions to be unconstitutional. The amending Act also reorganised HREOC, vesting responsibility for complaint handling in the President. The portfolio Commissioners were left with policy and educative functions,³ as well as a new function in relation to Federal Court/Federal Magistrates Court litigation. This new function, contained in s 46PV(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), gives the Commissioners the function of assisting the Court as *amicus in*:

- (a) proceedings in which the special-purpose Commissioner thinks that the orders sought, or likely to be sought, may affect to a significant extent the human rights of persons who are not parties to the proceedings;
- (b) proceedings that, in the opinion of the special-purpose Commissioner, have significant implications for the administration of the relevant Act or Acts;
- (c) proceedings that involve special circumstances that satisfy the special-purpose Commissioner that it would be in the public interest for the special-purpose Commissioner to assist the court concerned as *amicus curiae*.

The Second Reading Speech for the legislation noted that the *amicus* function had been given to the Commissioners to argue the policy implications of the legislation they administer.⁴ Although I focus on the Sex Discrimination Commissioner's *amicus* role, s 46PV applies to all Commissioners and all pieces of legislation administered by HREOC.⁵

2 (1995) 183 CLR 245.

3 See, eg, *Sex Discrimination Act 1984* (Cth) ss 48 (1)(d), (e), (g), (ga). These sections outline the functions of the Commission which are performed by the Commissioner.

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1998, 1276 (Daryl Williams, Attorney-General).

5 The drafting of s 46PV also suggests that the Sex Discrimination Commissioner could seek to appear as *amicus* in a case arising under the *Racial Discrimination Act 1975* (Cth) or the *Disability Discrimination Act 1992* (Cth). This is pertinent in light of the 'intersectional' nature of many complaints.

At common law, an *amicus curiae* – a friend of the court – is a third party who is given leave to appear where the court considers that it would be assisted by their appearance. Amici generally assist the court on points of law, but are not parties to the proceedings, and may not file pleadings, adduce evidence or lodge an appeal.⁶ The common law position was described by Brennan CJ in *Levy v Victoria*:

The footing on which an *amicus curiae* is heard is that that person is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted. ...

[A]n *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the assistance that is expected.⁷

It is important to note that, as with amici at common law, applications by the Sex Discrimination Commissioner are subject to the leave of the court.⁸ It is arguable that in the context of the statutory scheme,⁹ an application by a Commissioner to appear as *amicus* should be subject to a less stringent test than that required at common law. This is because the Commissioner has, simply by virtue of her statutory role, information and a perspective that can assist the court.

In *Ferneley v Boxing Authority of New South Wales*¹⁰ ('*Ferneley*') the Commissioner argued that

the creation by the legislature of a special function of *amicus curiae* presumes that, subject to the Court's discretion to protect and control its own processes, the special-purpose Commissioner has a particular interest in the subject matter of the litigation and the Court will be assisted by and should hear from the special-purpose Commissioner where the special-purpose Commissioner has formed the relevant views and opinions.¹¹

In the event, the application was not opposed and leave was granted without comment on the Commissioner's submissions.

The Commissioners have issued guidelines for the use of s 46PV. They reiterate the section's broad public interest criteria and give an idea of circumstances in which the Commissioners will seek leave to appear as *amicus*.¹²

6 For a discussion of the *amicus* function at common law, see George Williams, 'The Amicus Curiae and Intervener in the High Court' (2000) 28 *Federal Law Review* 1; Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159.

7 (1997) 189 CLR 579, 604–5 (citations omitted).

8 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PV(2).

9 With objects to eliminate discrimination and promote equality (*Sex Discrimination Act 1984* (Cth) s 3) and as beneficially construed anti-discrimination legislation (see, eg, *IW v City of Perth* (1997) 191 CLR 1, 57–8; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 406–7).

10 (2001) 115 FCR 306.

11 HREOC, *Outline of the Submissions of the Sex Discrimination Commissioner in Support of an Application to Assist the Court as Amicus Curiae in Ferneley Case* (2001) [15] <http://www.humanrights.gov.au/legal/guidelines/amicus_ferneley_case.html#f10> at 16 August 2004.

12 HREOC, *Commission Guidelines for the Exercise of the Amicus Curiae Function under the Human Rights and Equal Opportunity Commission Act* (2001) <http://www.humanrights.gov.au/about_the_commission/functions/amicus_guidelines.html> at 16 August 2004.

III THE SEX DISCRIMINATION COMMISSIONER AS AMICUS

The Sex Discrimination Commissioner has appeared as amicus in three cases since April 2000: *Ferneley, Gardener v All Australia Netball Association Ltd*¹³ ('Gardener') and *Jacomb v Australian Municipal Administrative Clerical and Services Union*¹⁴ ('Jacomb').

Ferneley involved New South Wales legislation which only allowed men to register as boxers or kickboxers. Section 42 of the *SDA* exempts sporting activities requiring strength, stamina and physique. The Commissioner argued that s 42 applied only to sporting contests as between the sexes and not to single sex activities. In the result the interpretation of s 42 was not critical to the outcome, but Wilcox J was of the view that the Commissioner's interpretation was to be favoured.

In *Gardener*, a netball player had been prevented from participating in contests due to her pregnancy. The Commissioner argued that s 39 (which exempts the activities of 'voluntary bodies') should be strictly construed so as not to apply to Ms Gardener. Interestingly, Raphael FM commented that the Commissioner's construction of the scope of the exemption was too broad.

Of the three cases, *Jacomb* has greatest implications for the construction of the *SDA* and demonstrates the most significant use of the Commissioner's amicus role. The case involved the setting aside of positions for female members on the executive of a trade union. The Commissioner made submissions on the scope of s 7D, the 'special measures' provision of the Act. In so doing, she commented on the underlying theory of equality on which the Act is based. In addition, the Commissioner's lengthy submissions brought together international and overseas jurisprudence on special measures to enable the Court to contextualise s 7D. This contextualisation is a very important part of the role of the amicus and the case is a good demonstration of the use of the Commissioner's expertise in the *SDA*, and in overseas and international developments. Indeed, the Court explicitly noted that the Commissioner's submissions had been of considerable assistance to it.¹⁵

IV THE TRIALS OF AMICUS

The Sex Discrimination Commissioner is advised of all applications made to the Federal Court/Federal Magistrates Court involving complaints under the *SDA*. Nevertheless, it has been pointed out that Commissioners do not have a 'watching brief' over all matters and that, even where the initiating application and affidavit are provided, 'it is often difficult to ascertain the full range of issues

13 (2003) 174 FCR 452.

14 [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004).

15 Ibid [11].

raised in a case from these materials'.¹⁶ Other practical problems, such as the propensity of strong cases of discrimination to settle, the fact that important issues may only arise at a late stage of the proceedings, and resource constraints, hinder the utilisation of the amicus function.

And indeed the very small number of cases involving the Sex Discrimination Commissioner as amicus is disappointing. Further, two of the three cases discussed above deal with relatively narrow points of construction. Only *Jacomb* can be said to fulfil the amicus promise both by having far-reaching implications for the construction of the SDA and the meaning of 'equality', as well as by drawing on the particular resources and expertise of the Commissioner to add a distinctive perspective to the litigation.

It is interesting to note the limited use of the amicus role against a string of cases in the Federal Court and Federal Magistrates Court broadly dealing with pregnancy discrimination and discrimination involving workers with family responsibilities.¹⁷ These cases debate current issues which are critical to the contemporary workforce and regarding which the SDA should play a major role,¹⁸ yet in none of these cases was the Commissioner involved as amicus.

However, reported cases do not reveal the substratum of matters which do not reach trial. The Commissioner has sought to be involved as amicus in a relatively large number of employment cases which did not reach the trial stage, being settled or discontinued prior to hearing.¹⁹ One might speculate that respondents may be more inclined to settle if they perceive the Commissioner's involvement as indicating a strong case of discrimination, but whatever the reason, it is problematic that the statutory equality litigator has not been involved in what has been a critical set of cases for working women.

It should be noted that HREOC²⁰ also has an intervention function which is different to and broader than the amicus role described above.²¹ This function does not arise simply in relation to proceedings in the Federal Court/Federal

16 Christine Fougere, 'The Intervention and Amicus Curiae Functions of the Human Rights and Equal Opportunity Commission and its Commissioners' (Paper presented at the National Conference of Community Legal Centres, Fremantle, 2-5 September 2001) [2.7], <http://www.humanrights.gov.au/legal/amicus_discussion.html> at 9 November 2004.

17 *Thompson v Orica Australia Pty Ltd* (2002) 116 IR 186; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* (2003) EOC ¶93-304; *Mayer v Australian Nuclear Science and Technology Organisation* (2003) EOC ¶93-285; *Song v Ainsworth Game Technology Pty Ltd* (2002) EOC ¶93-194; *Escobar v Rainbow Printing Pty Ltd (No 2)* (2002) EOC ¶93-229; *Evans v National Crime Authority* (2003) EOC ¶93-298; *Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214. These cases are summarised and discussed in HREOC, *Federal Discrimination Law 2004* (2004) [3.4], [3.5], [3.6] <http://www.hreoc.gov.au/legal/fed_discrimination_law_04/pdf/fed_discrim_law.pdf> at 20 September 2004.

18 In 2002-03, 35 per cent of complaints under the *Sex Discrimination Act 1984* (Cth) alleged pregnancy discrimination: HREOC, *Annual Report 2002-2003* (2003), <http://www.hreoc.gov.au/annrep02_03/> at 20 September 2004.

19 Interview with Sally Moyle, Director, Sex Discrimination Unit, HREOC (Telephone interview, 18 August 2004). See also Fougere, above n 16, [2.4], discussing an application by the Commissioner to appear as amicus in a matter involving indirect sex discrimination in respect of a policy prohibiting part-time work. The matter settled prior to the Court determining the amicus application.

20 As opposed to the special-purpose Commissioners.

21 See, eg, *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(o); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb).

Magistrates Court concerning unlawful discrimination but extends to virtually any court or tribunal proceeding which involves issues of human rights or discrimination. This intervention function is another potential avenue for litigation regarding women's rights.²² Over the years, HREOC has been involved in cases concerning the sterilisation of intellectually disabled girls,²³ the availability of in vitro fertilisation services,²⁴ sex-based insults and sexual harassment,²⁵ and the interaction between the *SDA* and occupational health and safety legislation.²⁶ Additionally, HREOC has played an important role in test cases in the industrial relations arena.²⁷ In 2002, the Federal Government sought to restrict HREOC's intervention function by making its exercise subject to approval from the Attorney-General.²⁸ The Senate Committee inquiry into the Bill was highly critical of this move, regarding it as a significant interference in the independence of HREOC.²⁹

Notwithstanding the availability of interventions and amicus applications in respect of equality litigation, it is clear that this potential has not been fully exploited. There are pragmatic reasons for this – for example, the fact that litigation resources are limited – but more fundamental is the difficulty in identifying and participating in a case which is within the control of others. At the heart of any third party role in litigation is precisely that 'outsider' status: the intervener, or amicus, does not commence the litigation, determine its shape and form, or decide if it may end through settlement. The amicus can have input into which issues will be relevant and how they are to be framed, but the parties hold the reins of the litigation and this limits the 'public interest' arguments that can be made. The participation of an amicus also does very little to shift the burden of litigation from the individual litigant.

22 For a table of all interventions made by HREOC since 1988, see HREOC, *Summary of Commission Interventions* <http://www.humanrights.gov.au/legal/guidelines/table_interventions.pdf> at 20 September 2004.

23 *Re a Teenager* (1988) 94 FLR 181; *Re Marion (No 2)* (1992) 17 Fam LR 336; *P v P*; *Re Legal Aid Commissioner of New South Wales* (1995) 126 FLR 245; *Re Katie* (1995) 128 FLR 194; *Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218 ('*Marion's Case*'). For a discussion of the cases in which HREOC has intervened, see Fougere, above n 16, [3.3].

24 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

25 *Graincorp Operations Ltd v Markham* (2003) EOC ¶93-250.

26 *Mount Isa Mines Ltd v Marks* (1992) 35 FCR 96.

27 See, eg, *Automotive, Food, Metals, Engineers, Printing and Kindred Industries Union v Gunn & Taylor (Australia) Pty Ltd* (2002) EOC ¶93-225; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (Unreported, Australian Industrial Relations Commission, Munro J, Deputy President Polites and Commissioner Lawson, 29 December 2000) ('*AMWU Casuals and Part-Time Case*'); *Federated Workers' Union of Australia v Angus Nugent & Son Pty Ltd* [1990] 773 IRCommA (Unreported, Australian Industrial Relations Commission, Cohen J, Deputy President Moore, Deputy President Polites, Commissioner Griffin and Commissioner Turbet, 26 July 1990) ('*Parental Leave Test Case*').

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

29 See Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Human Rights Commission Legislation Bill 2003* (2003) [3.81]. For an examination of the provisions of the proposed amendments, see Ronnit Redman and George Williams, 'Guarding Human Rights' (2003) *Law Institute Journal* 57.

V ENFORCING ANTI-DISCRIMINATION PRINCIPLES

The Women's Legal Education and Action Fund in Canada has described legal advocacy on behalf of women as a process of bringing details of women's lives and women's ways of thinking to a predominantly male judiciary. A women's litigation strategy is about getting judges to examine critically unstated assumptions about women.³⁰ This is certainly something that the Sex Discrimination Commissioner can and does do, but her institutional position ought to be even more powerful than it currently is. If anti-discrimination litigation is to achieve more than the provision of individual redress for women who have suffered discrimination, then the public interest in the enforcement of equality principles must be recognised.

The Commissioner needs to be able to identify issues of inequality and locate patterns of discrimination in order to effect structural change. She needs to be able to take action on behalf of classes of complainants, complainants in work situations where discriminatory patterns are entrenched, and complainants whose cases raise critically important issues for the way in which discrimination against women is articulated. To this end, the Commissioner needs greater powers which will allow her to adopt a more central position than the relatively peripheral amicus role.³¹

Such powers would require overall reform of the enforcement mechanisms of the legislation, but this should not make us resile from change. By way of comparison I will mention just two examples: Canada and the United States.³² In Canada, the Canadian Human Rights Commission accepts complaints of discrimination under the *Canadian Human Rights Act*, RSC 1985, c 6.³³ At any stage after a person files a complaint with the Commission, the Commission may request the Canadian Human Rights Tribunal to institute an inquiry. The Commission has a right to appear before the Tribunal and the legislation is specific about its role and mandate: s 51 provides that 'in appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as in its opinion is in the public interest having regard to the nature of the complaint'. The Commission is described as a party to the proceedings; it can present evidence and propose remedies.³⁴

30 Sherene H Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (1991) 69–71.

31 In addition to other 'systemic' functions such as education, research and the publication of guidelines: see *Sex Discrimination Act 1984* (Cth) s 48.

32 See also other domestic models, eg, *Equal Opportunity Act 1984* (WA) s 93, which gives the Western Australian Commissioner for Equal Opportunity powers to assist complainants before the Equal Opportunity Tribunal. See also the powers of the United Kingdom and New Zealand bodies: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999) [8.195]–[8.198].

33 This Act essentially covers federally regulated entities and consequently the Canadian Commission's jurisdiction is narrower than that of its Australian counterpart.

34 See Canadian Human Rights Tribunal, *What Happens Next? A Guide to Tribunal Process* (2002) <http://www.chrt-tcdp.gc.ca/about/download/lay_guide-e.htm> at 26 August 2004.

The United States Equal Employment Opportunity Commission³⁵ ('EEOC') has played a litigation role in a dual private–public enforcement system since 1972. If the EEOC is unable successfully to conciliate a charge of discrimination, it can decide to sue itself, or to give the charging party the opportunity to bring the suit on its own behalf. In 2003, for example, the EEOC brought 393 lawsuits.³⁶ In *Equal Employment and Opportunity Commission v Waffle House Inc.*,³⁷ the United States Supreme Court observed that the dual system was intended to lay the 'primary burden of litigation' on the EEOC³⁸ and to put the Commission 'in command of the process',³⁹ making it the 'master of its own case'.⁴⁰ The role of the EEOC has recently been given publicity due to its US\$74 million settlement with brokerage firm Morgan Stanley.⁴¹ In that case, the EEOC, on behalf of over 300 women, alleged that Morgan Stanley had engaged in a pattern of discrimination which denied promotions to women and paid them less than less productive men.

VI TWENTY YEARS ON: AN OPPORTUNITY FOR CHANGE

Two brief examples do not constitute a comparative study: they are presented to indicate that there are different regulatory models available,⁴² models which give the statutory discrimination regulator a much more powerful role than is currently available to the Sex Discrimination Commissioner or HREOC. The amicus function is an important one in the current legislative scheme but additional powers *and additional resources to exercise those powers* are clearly required. The precise nature and extent of such powers in the context of the Australian legislation is something that bears further close investigation.

In its review of the New South Wales legislation, the New South Wales Law Reform Commission noted that the public enforcement of discrimination complaints is

an acknowledgment, in particular, that systemic discrimination issues are unlikely to surface or be adequately addressed in private actions by individuals and that

35 The EEOC is responsible for enforcing the United States federal statutes which prohibit employment discrimination: *Civil Rights Act of 1964*, tit VII, 42 USC §§ 2000e–2000e-17 (2002); *Americans with Disabilities Act of 1990*, 42 USC §§ 12101–213 (2002); *Age Discrimination in Employment Act of 1967*, 29 USC §§ 621–34 (2003); *Equal Pay Act of 1963*, 29 USC §§ 206(d)–262 (2003).

36 See EEOC, *EEOC Litigation Statistics, FY 1992 through FY 2003* <<http://www.eeoc.gov/stats/litigation.html>> at 27 August 2004.

37 534 US 279 (2002).

38 Ibid 286, citing *General Telephone Co of Northwest v Equal Employment Opportunity Commission*, 446 US 318, 325 (1980).

39 Ibid 291.

40 Ibid.

41 See, eg, 'NY Bankers Settle Sexism Case for \$74M', *Sydney Morning Herald* (Sydney), 14 July 2004, 19; 'Payout Lowers the Boom-Boom on Wall Street', *Sydney Morning Herald* (Sydney), 14 July 2004, 20.

42 There are, of course, regulatory models in other areas (trade practices, environmental protection) which give the regulator extensive enforcement powers: see New South Wales Law Reform Commission, above n 32, [8.194].

adherence to anti-discrimination principles is a matter of public interest.⁴³

The 20th anniversary of the *SDA* is an opportunity to revisit the enforcement mechanisms of the Act and to craft a procedure through which the systemic benefits of equality litigation in the public interest can be fostered.

43 Ibid [8.198] (citations omitted).