

Preface

A Silver Anniversary

Anti-discrimination legislation in Australia has had a chequered history since its inception 40 years ago. Discrimination on the ground of sex, race, sexuality, disability, age or other characteristic of identity was not recognised by the common law. Its proscription was entirely a statutory creation and the legislation has been beset with uncertainty and timorousness, which have contributed to its volatility. This is clearly apparent in regard to sex discrimination, as differential treatment between the sexes was historically and philosophically viewed as 'natural'. The anxiety underpinning the legal proscription of discrimination is in evidence in the parliamentary debates on the *Sex Discrimination Act 1984* (Cth) (*SDA*). While some of the views of the opponents can appear quaint in the twenty-first century—albeit only 25 years after they were articulated—the commitment by the state to anything other than formal equality continues to be contentious.

Indeed, the years since the enactment of the *SDA* have been marked by struggles for substantive equality (equality of outcome) for women and for members of minority groups still consigned to otherness within the polity. Such struggles have sometimes succeeded in eliciting official responses, usually in the form of inquiries and reports rather than legislative change, and the small gains attained have all too often resulted in a backlash.

Recent government activity includes a review of the *SDA* in 2008,¹ the *National Human Rights Consultation Report* in 2009² and the workplace reforms incorporated in the *Fair Work Act 2009* (Cth). The review of the *SDA* raised the possibility of an Equality Act—an avenue that has been followed in the United Kingdom³—which poses complex questions regarding the interaction between the *SDA* and other federal anti-discrimination legislation, as well as State and Territory legislation. In 2010, the federal government announced that the Commonwealth anti-discrimination laws, including the *SDA*,⁴ would be

1 Australian Senate Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Commonwealth of Australia, Canberra, 2008.

2 Commonwealth of Australia, *National Human Rights Consultation Report*, Attorney-General's Department, Canberra, 2009 [Brennan Report].

3 *Equality Act 2010* (UK).

4 The other Acts are the *Racial Discrimination Act 1975* (Cth) (*RDA*), the *Disability Discrimination Act 1992* (Cth) (*DDA*) and the *Age Discrimination Act 2004* (Cth) (*ADA*).

incorporated into ‘one single comprehensive law’.⁵ The prospect of a federal Human Rights Act was also temporarily on the agenda, although the Attorney-General announced in 2010 that the idea of a national charter of human rights had been shelved.⁶

This collection of essays traces the life of the *SDA*, paying particular attention to the socio-political context in which the *SDA* was conceived and debated. While South Australia, Victoria and New South Wales all proscribed sex discrimination earlier than the Commonwealth through the enactment of omnibus anti-discrimination Acts in the 1970s, with other States and Territories following in the 1990s, the special status attaching to national legislation within a federal compact inevitably becomes the primary focus of attention. Nevertheless, many of the observations made about the *SDA* apply also to State and Territory legislation. While there is an absence of harmonisation between jurisdictions, the same compensatory model is utilised, together with a similar ambit of operation and procedure. The individual complaint-based model of anti-discrimination is now showing signs of stress.⁷ This is due partly to age but, more specifically, to contextual factors, including changes in the political climate, which have induced a move away from workers’ rights to employer prerogative. Anti-discrimination legislation is extraordinarily sensitive to the political pulse of the time, a proposition I illustrate by reference to the area of employment from where the overwhelming preponderance of complaints under the *SDA*—91 per cent in 2008–09—emanate.⁸

The Market as the Measure of all Things

Neo-liberalism, which has become the dominant political philosophy of our time, has exerted a profound effect on the culture and practice of anti-discrimination law. Social liberalism, in which the legislation had its genesis and which reached its high point in Australia in the 1970s, evinced a concern for collective good, distributive justice and other egalitarian values associated with the welfare state. While this incarnation of liberalism was not opposed to the operation of the free market, its excesses were tempered by state regulation in the interests of the greater good.

5 Attorney-General Hon. Robert McClelland MP and Minister for Finance and Deregulation Hon. Lindsay Tanner MP, Reform of anti-discrimination legislation, Media release, 21 April 2010, Parliament House, Canberra. The Government Response to the Senate Report was tabled on 4 May 2010: <<http://www.ag.gov.au>>

6 Chris Merrit, ‘A-G pulls plug on charter of rights’, *The Australian*, 21 April 2010, p. 7.

7 It is notable that updated legislation was enacted in Victoria in 2010. See *Equal Opportunity Act 2010* (Vic.).

8 Australian Human Rights Commission, *Annual Report 2008–09*, s4.4.5, Australian Human Rights Commission, Sydney, 2009, <http://www.humanrights.gov.au/about/publications/annual_reports/2008_2009/chap4.html#s4_4>

The state is therefore central to the realisation of equality for women despite its fickleness, which is clearly evident when the political pendulum swings rightwards. The neo-liberal state is not in fact concerned with equality at all, but with its liberal twin—freedom—particularly the ‘free’ market and the freedom to maximise wealth. The inevitable result of untrammelled freedom and competition within the market is *inequality*, not equality.

Despite all the talk of deregulation and the privatisation of public goods associated with neo-liberalism, the state has not resiled altogether from its regulatory role but has transformed and adapted it. Instead of sustaining and promoting the common good associated with civil society, it has formed an intimate association with the market. Productivity and the maximisation of wealth, not just nationally, but globally, have become the primary aims of the neo-liberal state. Government has therefore been busy removing obstacles to facilitate the untrammelled operation of the market—such as centralised wage fixing and worker protections. Work intensification, casualisation and flexibility became the new norms during the period of the Howard Government in the 1990s. In contradistinction, egalitarianism, social justice and equity—the hallmarks of social liberalism—were treated as dispensable.

While neo-liberalism is thought of primarily in terms of the economy and the market, it has also exercised a profound effect on the social fabric of our society, to the extent that it has entered the very soul of the citizen.⁹ Neo-liberal subjects are expected to promote themselves and take responsibility for their own lives. If they do not succeed, it is deemed to be their fault. This individualised focus deflects attention away from the collective harms of sexism, as well as racism, homophobia, ageism and ableism. As rational choice is the leitmotif of neo-liberalism and the social has been whittled away, there is an ever-contracting space within public discourses to accommodate critiques of discrimination. The history of inequality and the abuse of power are not only discomfiting within a neo-liberal milieu; critique has no use value in the market. The assumption is that it should be sloughed off in favour of applied knowledge. Indeed, feminism—with its critical eye always directed to the way things might be—was conveniently described by former Prime Minister John Howard as *passé*.¹⁰ The social-liberal concern with anti-discrimination and equal employment opportunity (EEO) has also been depicted as cumbrous and old-fashioned. As a result, discourses involving the ‘woman question’ became de-gendered, desexualised and depoliticised.

9 Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics*, Princeton University Press, NJ, 2005, p. 39.

10 Anne Summers, *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia*, Random House, Sydney, 2003, p. 21.

While the Rudd Labor Government replaced the Howard Coalition Government at the end of 2007 and promised an end to the hardline policies of the Howard years, the political pendulum did not swing back to the social-liberal position, although a softening of some of neo-liberalism's more egregious manifestations could be detected. Even the global financial crisis of 2008–09 did not seriously challenge the love affair of the Australian state with the values of neo-liberalism. One must therefore ask what space is there within a neo-liberal climate for a critical sex discrimination discourse committed to equality and egalitarianism?

As testament to neo-liberalism's cynicism for anti-discrimination legislation, it is notable that a decline in the lodgment of complaints occurred during the Howard years. While the percentage of formal hearings was always low, the figure dropped to approximately 1 per cent of complaints, with a minuscule number of appeals having little chance of success for complainants, as Beth Gaze shows in her chapter. The High Court picture regarding sex discrimination is also dispiriting. After the initial trailblazing successes of *Wardley v Ansett*¹¹ and *Australian Iron & Steel*,¹² every anti-discrimination decision since *Wik*¹³ has favoured the corporate respondent, supported by a narrow legalism.¹⁴ *Amery*,¹⁵ a representative complaint based on indirect sex discrimination, is a case in point. The shift away from the beneficent aims of anti-discrimination legislation has affected all grounds.¹⁶

The interpretative role of the courts during these years is a salutary reminder of the fact that all three branches of government—the legislature, the executive and the judiciary—are important sites for the constitution and reconstitution of sex discrimination. Hence, as I argued on the twentieth anniversary of the *SDA*,¹⁷ we are not dealing with a finite variable that can be *eliminated* over time, as suggested by the wording of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Sex discrimination is a slippery concept, tolerance for which depends on the socio-political mood of the moment. As long as 'the good of the economy' is permitted to trump the idea of gender justice, change will not occur. These essays seek to challenge what has become the prevailing orthodoxy.

11 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

12 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

13 *Wik Peoples & Thayorre People v Queensland* (1996) 141 ALR 129.

14 Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31.

15 *New South Wales v Amery* (2006) 226 ALR 196.

16 For example: *IW v City of Perth* (1997) 191 CLR 1; *Qantas Airways Limited v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

17 Margaret Thornton, 'Auditing the Sex Discrimination Act' in Marius Smith (ed.), *Human Rights 2004: The Year in Review*, Castan Centre for Human Rights Law, Monash University, Melbourne, 2005.

The Collection

Part One: A Silver Anniversary

The addresses by Watchirs, Ryan and Ronalds at the launch of the conference throw light on the genesis of the *SDA* and subsequent chapters. They also give voice to all those (mainly women) who played a prominent role in the struggle for gender equality, ensuring that their voices are not entombed in silence.

Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, pays tribute to the contribution of a line of federal sex discrimination commissioners over 25 years, as well as presenting an overview of the state of play in regard to sex discrimination. In addition to summarising the main points of the Senate Report on the *SDA*, she draws attention to the roller-coaster ride of gender equality, for just as one issue is addressed, another problem emerges on the scene.

The Hon. Susan Ryan was the major political force behind the *SDA*. As a senator in 1981, she introduced the first Private Member's Bill, which lapsed. When Labor came into power in 1983, she was able to introduce a revised bill. While the *SDA* has often been criticised for being weak and wimpish, Susan Ryan's comment succinctly exemplifies the adage that 'politics is the art of the possible'. Her view—a salutary one in difficult times—is that law reform should not be deferred indefinitely until the ideal legislative instrument has been attained.

Chris Ronalds SC, who drafted the Sex Discrimination Bill, echoes Ryan's view that a pragmatic incremental approach to legislation is the appropriate way to proceed. Ronalds also acknowledges the contribution of another distinct group of women pioneers within the annals of the *SDA*—namely, those who gave their names to the landmark test cases that validated the passage of the Act.

Margaret Thornton and Trish Luker's chapter focuses on the rhetoric of the parliamentary debates of 1983–84, which highlights the deep anxiety concerning sex roles and the patriarchal family that surrounded the passage of the *SDA*. They suggest that the progressive legislative initiative induced a backlash or sense of *ressentiment* (to use Nietzsche's term) on the part of conservatives, which manifested itself in the neo-liberal swing in favour of conservatism that occurred soon afterwards.

Part Two: Then and Now

Ann Genovese presents a prehistory of the *SDA* through an examination of the genesis of gendered law reform. She argues that early 1970s feminism, in the

main, was not intellectually or politically centred on questions of the law and legislative reform but on praxis. She shows how feminist engagement with the state evolved from practical movements and New Left politics, such as Women Behind Bars. The chapter raises questions about the way contemporary feminist legal thinking could have become overly concerned with the lego-centric at the expense of the grassroots.

Marian Sawyer shows that women's struggle for equality did not end with the passage of the *SDA*. Rather, the Act presaged a continuing struggle to retain the status quo, despite the appearance of progress. Sawyer shows how political shifts, including budget cuts and changes in industrial relations, have effected new manifestations of inequality, which are salutary reminders of the fact that any semblance of equality for women is tentative and contingent. Her text is illuminated by graphic images.

Susan Magarey similarly stands back to take a bird's-eye view of the trajectory of the *SDA*. In highlighting the significance of context, she alludes to the feminist discourses of the 1980s—women's liberation, the women's peace movement, women's studies and Indigeneity—to highlight the way the notion of the collective good has been eviscerated and replaced by individualism. The economic and environmental disasters of today are salutary reminders of the continuing relevance of the women's movement, not just as a question of justice for women, but for society as a whole.

Part Three: Critiquing the *SDA*

Beth Gaze overviews the experience of sex discrimination in the courts, where judges have tended to undervalue discriminatory harms. Drawing on the insights of social psychology, she argues that litigation is a limited mechanism for dealing with pervasive discrimination. She recommends that we move beyond the remedial model to pay attention to proactive measures, although she acknowledges that monitoring such schemes could prove difficult and expensive.

Sara Charlesworth identifies three distinct regulatory frameworks for dealing with sex discrimination at the federal level—the *SDA*, affirmative action and industrial relations—drawing attention to their weaknesses and limitations. She recommends, as an alternative to these modes, the decent work agenda proposed by the International Labour Organisation (ILO) as the basis of an integrated legislative framework. While gender equality necessarily lies at the heart of decent work for women, it has not received the attention it deserves. She argues that it be brought into the mainstream work agenda rather than being allowed to languish at the margins.

Caroline Lambert shows how the figures of the ‘ideal worker’ and the ‘domestic care giver’ are inscribed and reinscribed in gendered ways on the bodies of workers by virtue of the limitations of the *SDA* in addressing caring work. She focuses on the notion of the comparator, indirect discrimination and the concept of reasonableness to highlight the way a formalistic rather than a substantive approach to equality is perennially favoured, despite CEDAW’s recognition of the importance of reproductive labour.

Part Four: Equivocations of Equality

Reg Graycar and Jenny Morgan examine a recent suggestion by the Senate Standing Committee on Legal and Constitutional Affairs that it might be timely to consider an Equality Act. They consider a number of questions: whether this proposal has any potential to enhance women’s equality in Australia; whether it more readily addresses problems of intersectionality—the fact that women have a race, a sexuality or a multiplicity of identities that operate differently at different times and in different contexts; and whether such an approach would encourage a move beyond the complaint-based focus of traditional discrimination laws. They conclude by raising questions about the processes, the fora and the identity of the personnel engaged in the debate of these issues.

Simon Rice also considers the idea of an Equality Act, which was first raised by the Australian Law Reform Commission in its report that coincided with the tenth anniversary of the *SDA* and, again, in the Senate Committee Report on the *SDA* in 2008. Rice examines the law reform process underpinning the *Equality Act 2010* (UK) to consider what lessons Australia might learn from it. While there is much to be said for the positive duty in the UK Act, Rice emphasises that the enactment of an Equality Act ultimately depends on political will.

Belinda Smith turns to the Canadian equality jurisprudence to consider why the judicial approaches appear to be more robust than those favoured by Australian courts. Through a comparative analysis, she argues that the prescriptive wording of the Australian statutes has induced a technical and formalistic approach towards equality and discrimination. Leaving aside the fact that there is a constitutional guarantee of equality in Canada, Smith suggests that Australian reformist bodies could learn much from the Canadian approach.

Archana Parashar also focuses on the judicial role but her approach contrasts with that of Smith. Parashar is most concerned with the interpretative dilemmas that beset equality jurisprudence. She takes her cue from the post-structural insight that knowledge is always historically contingent. She argues that the attribution of meaning is not dependent on the words of the text alone but is informed by context, judicial subjectivity and responsibility, which involve choice. Parashar concludes by arguing that the interpretative role of judges should be linked to the critical and ethical education of law students.

Part Five: Women's Rights as Human Rights

The springboard for Susan Harris Rimmer's chapter is a speech made by Elizabeth Evatt on the twentieth anniversary of the *SDA*. Evatt argued that Australian law falls short of its obligations under CEDAW and other international instruments to provide equality rights and non-discrimination in regard to women. Harris Rimmer reviews progress in Australia in the past five years according to Evatt's criteria. She also celebrates the role of key figures—Evatt, Jane Connors, Andrew Byrnes and Helen L'Orange—who contributed to the creation of multilevel strategies to raise up Australian women and realise their rights.

Margaret Thornton considers whether a domestic human rights charter might assist in the realisation of substantive gender equality despite the fact that the discourse of human rights poses both a political and an epistemological dilemma for women. Although there has been a rhetorical shift from discrimination to human rights, it is apparent that there is still timidity about human rights at the domestic level. This does not bode well for the prospects of a charter addressing intersectionality challenges, such as sex plus race or sex plus sexuality. Thornton considers the Australian initiatives of the twenty-first century and illustrates her concerns with some examples from the United Kingdom.

Irene Watson and Sharon Venne acknowledge that all people are accorded the same right not to be discriminated against on the grounds of sex, but argue that this right is experienced differently by different people, and that the difference could be measured and scaled according to how close one's life is located to the centre of white privilege. They argue that the experience of discrimination by Aboriginal people means that the primary focus must be directed to the issue of race. Watson and Venne present a critique of the recent UN Declaration on the Rights of Indigenous Peoples as the key international human rights instrument. Their prognosis as to how valuable it might be is, however, not propitious in light of a return to assimilationist policies in Australia.

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