

# CONFERENCE SEX DISCRIMINATION ACT SILVER ANNIVERSARY

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Critically Evaluating the Sex  
Discrimination Act: what is its role in  
redressing gender inequality in Australia?

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**Beth Gaze: Critically evaluating the Sex Discrimination Act: what is its role in redressing gender inequality in Australia?**

**Abstract**

The SDA was adopted against strident opposition in 1984. This paper critically analyses its effect after twenty five years. The symbolic impact of prohibiting sex discrimination is clear, but the actual impact of the Act on practices in the workforce and elsewhere appears more limited. This paper will consider a range of factors that limit what the law can achieve, and ask whether reforming the Act would move us closer to its avowed objective of 'eliminating discrimination against persons on the ground of sex ...' and 'promot[ing] recognition and acceptance within the community of the principle of the equality of men and women'.

I would like to thank Professor Margaret Thornton very much both for organising this conference and for inviting me to speak to you today on Evaluating the Sex Discrimination Act.

There is no doubt that the Sex Discrimination Act has been a vitally important legislative milestone in Australia. Although South Australia, Victoria and NSW had prohibited sex discrimination in 1975 and 1977, and Western Australia did so in 1984, the SDA was vital in those states and territories that had not legislated. It was also a national proclamation that sex discrimination was unacceptable anywhere in Australia. Women could no longer be excluded from promotion simply because they were female, or dismissed from their jobs simply because they married. The SDA was also a crowning achievement of the social changes brought about by the hard work of second wave feminist activists, to whom we owe a very substantial debt. This achievement was reflected in the early case of *Wardley v Ansett*, in which the High Court upheld the law's prohibition on excluding women because they were women. Deborah Wardley was not recruited as a pilot because Reg Ansett did not want women flying his planes, asserting that passengers would not feel safe. The High Court in that case upheld the decision of Victoria's Equal Opportunity Board that this was prohibited discrimination.

This early case illustrates both the achievements of sex discrimination law, and two of the major barriers to women's equality at work that are still in operation: managerial prerogative, and the market defence - that is what the market or the customers

demand). It was not actually an SDA case, but was brought under the Victorian EO Act.

I also want to say at this stage, that one of the most important achievements of the SDA was the creation of the office of the Sex Discrimination Commissioner, and that we have been lucky to have a series of courageous articulate commissioners who have been prepared to get into a sometimes hostile public debate to raise issues that need attention and seek reforms. The rest of my talk focuses on enforcement of the law of sex discrimination.

Not surprisingly, the law's initial approach to dealing with discrimination was relatively unsophisticated, just as social understanding of discrimination was also relatively unsophisticated. Often we cannot predict the effect of a change, and it was not until explicit formal discrimination was largely eliminated that it became clear that the problem was not solved. Traditional attitudes had not gone away, but found other avenues of expression. The social structures of gender, race, sexuality and ability all combined to continue the impact of discrimination and disadvantage quite effectively enough, while at the same time the target became less overt, and hence more difficult to unambiguously identify and oppose.

These social structures were identifiable as apparently neutral requirements or practices that operated to prevent women's advancing in the workforce. Their persistence made it clear that discrimination was a more subtle phenomenon than the law had anticipated. Sex discrimination law needed the tools to better tackle these more covert practices, and indirect discrimination law appeared to provide the best possibility. However, in the *Banovic* case, the High Court treated indirect discrimination as a matter of working out technical statistical ratios rather than assessing the discriminatory impact of a practice.

In the early 1990s the SDA was reviewed by the House of Representatives Legal and Const Committee, whose report *Half Way to Equal* (1992) identified a number of important changes to strengthen the law. The ALRC's *Review of Equality before the Law* followed in 1994, providing further ideas for strengthening the law. Some of

these ideas were implemented in reforms to the Act in 1992 and 1995, which rendered it the most advanced anti-discrimination law in Australia. Of particular importance were the exclusion of special measures from discrimination, changing the definition of indirect discrimination to focus on practices that disadvantage members of one sex, rather than technical assessments of disproportionate impact and inability to comply, and reversing the onus of proof of unreasonableness in indirect discrimination, so that the respondent had to prove that its requirement or practice was reasonable. However, these changes have received remarkably little attention in the courts, and we need to consider whether or not this is a problem and why it has happened.

The narrative so far reflects the ongoing process of adopting legislation, seeing how it operates, and seeking to reform it to deal with areas in which it has proven ineffective or inadequate to overcome impediments to moving towards a more gender equal society. The assumption is that stronger, or re-oriented law will bring about the necessary change. I want to question this belief, or rather approach it from a different direction. My argument is that unless we develop a clearer understanding of the basis of the problems that we are dealing with, in terms of human understanding and motivations for behaviour, as well as the broader social context, we will not be able to craft laws that respond adequately. In terms of effort needed for change, far too much emphasis has been put on the substance of the law, and far too little on how accessible it is and how effectively it is enforced.

I will touch briefly on three areas in this argument. First, I look at the history of the SDA in the courts and ask whether it has been effectively enforced. Second, I look very briefly at the changing circumstances of the workforce and the deterioration of women's position, and ask whether sex discrimination law can respond to this. Thirdly, I look to understandings about the sources of discrimination and prejudice, and the need for discrimination law reform and enforcement to take this into account if progress towards equality is to be made.

## **1. The SDA in the Courts**

First, how has the SDA fared in the Courts? It has been litigated in surprisingly few cases given the range of areas covered and the number of people and workplaces it affects. For example, in well over a decade, there has been virtually no discussion in the courts about the meaning of the 1995 legislative reforms.

Consider what advances have been made though indirect discrimination law. Women need law's help to challenge widely accepted and facially neutral workforce practices that were not necessarily imposed intentionally to harm women, even though this was their effect. But the law was developed from the American disparate impact principle adopted by the Supreme Court in *Griggs v Duke Power Company* to deal with a test imposed by an employer whose covert aim was to continue the racial segregation of its workforce. While this was a vitally important area, it was not really adequate to deal with the much more structural and widespread issues facing women at work.

The decision of Elizabeth Evatt in the HREOC case *Hickie v Hunt and Hunt* showed that indirect discrimination law could sometimes provide an avenue to deal with some of these practices, where the decision was made by a sympathetic decision-maker who understood the equality issues involved. In that case HREOC held that failure to support a law firm partner in undertaking part time work as agreed following her return from maternity leave amounted to indirect discrimination. This was based on accepting that a requirement to work full time disadvantaged women on the basis of sex, because their gender-associated primary caring responsibilities made it more difficult for them to comply.

A review of cases decided since 2000 in the Federal Court and Federal Magistrates Court showed that there have been respectively 16 and 46 substantive sex discrimination matters heard, of which 5 and 34 respectively were successful. But the damages awarded were only around 20-24,000 in the Federal Court, and around a median of 12,000 in the FMC with only 4 awards out of 34 over 25,000. Damages at these levels reflect both an assessment that discrimination against women is not a very serious matter, and provide almost no incentive for individuals to undertake the risks and costs of litigation. Since the enforcement of the Act rests on private litigation, there is a serious problem with incentives for enforcement. While larger amounts

may be obtained in private or conciliated settlements, the lack of publicity and precedent means that these processes do not assist the elimination of sex discrimination on a wider basis. The public interest is not served.

After 25 years the SDA has still not been the subject of High Court consideration. All the sex discrimination cases that have gone to the High Court have been appeals under state sex discrimination law: *Wardley* from Victoria, and from NSW, *Dao v Australia Post*, *Banovic v AIS* and *Amery v NSW*. Only *Re McBain* involved the SDA itself, which in the Federal Court had been held to be inconsistent with the *Infertility Treatment Act Vic*, but in the High Court, the SDA was not even considered as the case was decided on different grounds relating to the prerogative remedy of certiorari.

Since 2000, the Federal Court has heard 16 substantive matters under the SDA and upheld 5 of them, awarding damages of \$20-24000 in three cases. In one case, damages of \$466,000 were awarded, but that case is currently on appeal to the Full Federal court and due back in court in November. Damages at these lower levels reflect a low valuation of the harms that women suffer in discrimination and provide no incentive to undertake the risks of litigation.

In that time there have been 14 appeals in the Federal Court, mainly against Federal Magistrates Court (FMC) decisions, two thirds from complainants, but only three complainants and two respondents were successful.

Things look better in the FMC, which has heard 46 substantive sex discrimination matters in its jurisdiction since 2000, an average of 5 cases each year. Of these, 12 were unsuccessful while 34 have been successful, almost all in employment discrimination. In virtually all these cases after 2001, costs have been awarded to the successful party. The damages awards have ranged from \$750 to \$100,000 but in only 4 cases was more than \$25,000 compensation awarded, with the maximum of \$100,000 being awarded in *Lee v Smith*, a case in which a female civilian employee at a naval base was sexually harassed including rape.

The median award in the FMC was \$12,000 damages and several cases had damages around \$1-2000. This again reflects a conclusion that discrimination against women is of little value, and provides little incentive for private enforcement of the law.

Experience has now shown that indirect discrimination law has proved insufficient to bring about the changes needed to help women make progress towards equality at work. The trend in state jurisdictions is now to introduce specific provisions requiring employers to provide flexible work to working parents, and the quickly abolished nationwide rights that were granted in the AIRC's *Family Provision test case* of 2005 have now been reintroduced in the *Fair Work Act 2009 (Cth)*. The SDA still awaits amendment, which has been recommended by the Senate Legal And Constitutional Committee in its December 2008 Report. The fact that as passed the SDA did not fully implement Australia's already existing obligations in relation to sex discrimination in international law reflects the political climate at the time. But has that climate changed?

## **2. The deterioration of women's position**

If we compare things with the days before the SDA, there have been major advances in women's position. But if we compare them with more recent times and comparable developed countries, things don't look so good. Indicators such as pay equity measures and women's presence at the top levels of organisations have worsened. Almost daily media reports highlight problems in many areas. But the recent report by the AHRC on *Accumulating Poverty? Women's experiences of inequality over the lifecycle* (Sept 09), and the NGO *Report on the implementation of the CEDAW convention in Australia* (July 2009) are sufficient to establish the point, along with the large amount of data on women's workforce position that was created during the WorkChoices experience. What does this say about the success of the SDA? Could law impede this process?

We still have a workforce where the most common paradigm for child care in the family is a woman working part time while a man works full time, at least while

children are young. Virtually all quality jobs are advertised and interviewed for full time, so even if a woman can do her job part time, it can be difficult to change jobs or advance because of expectations that quality jobs can only be undertaken full time. However there is plenty of low paid work around for mothers in community services, health, retail and clerical work that will fit in with caring work for children, the elderly, or the disabled. Women may in fact be forced into these areas by the process of work intensification and the move to long hours, or by the casualisation and deterioration of pay and working conditions for the low paid that occurred in the last decade, especially in the WorkChoices era.

We still have a political environment where these practices are not questioned, or at least not if it would increase the budget deficit. The neo-liberal ideological context identified so clearly by Professor Thornton still precludes adequate public funding for childcare, or even paid paternity leave so that men could take paid leave to care for their children. Without it, women have little choice; once they have access to paid leave, and will be expected to use it, and their role in infant care and subsequent child care will be indirectly reinforced by law.

Even among well meaning committed people, equality is disappearing. Equal opportunity has disappeared from the title of the AHRC, and the AHRC Act, and the Gardner Review of Victoria's EO Act recommended that the VEOHRC be renamed Human Rights Victoria. 'Human Rights' is in vogue, and it is supposed to include equality. Does this matter? I am concerned that it might reflect assumptions about the relative importance of equality in human rights, and some degree of policy fatigue, the idea that we have legislated, so we have fixed inequality and it need not concern us anymore.

What does all this say about the effect of the SDA? It leads at least to the conclusion that sex discrimination law based on private enforcement has failed. While it is necessary for individuals to have an avenue to seek compensation for harms they suffer, to leave this as the sole enforcement method suggests a lack of broader social commitment to ensuring that discrimination stops. Sex discrimination needs to be recognised as a broad social problem, not just a problem for the few individuals who

recognise it and are prepared to fight for their rights. It must be tackled at a systemic level in order to change practices on a society wide basis. The burden of enforcement has to be undertaken publicly, and be directed towards changing systemic practices rather than solely to redressing individual cases.

Comparable countries have placed much more emphasis on enforcement by public authorities, such as equality agencies, and on developing pro-active requirements such as the UK's equality duty on public sector bodies to consider women's equality issues in all policy development and service provision. However, these developments require substantial sums of public money and risk becoming bureaucratic exercises. There is another element to add in.

### **3. Understandings of discrimination and prejudice**

Social psychology research has provided some knowledge about discrimination and prejudice that is useful in considering the role of law. Professor Virginia Valian has sought to explain why women's disadvantage is so difficult to alter based on the social psychological theory of gender schemas in the cognitive processes of the individual.

This theory claims that schemas are sets of expectations and assumptions that we all use every day to save ourselves from having to work things out from the beginning. They are cognitive shortcuts, and include but are not limited to stereotypes, and they exist below our conscious awareness. Among the most powerful are the gender schemas, which are sets of expectations that were formed and learned from our environments from birth, and that are shaped by the world in which we live and the way things are done. In this realm, says Valian, gender schemas affect all of us, even those who consciously seek to end women's disadvantage. The effect of gender schemas is to create unconscious expectations that can lead to subtle and small differences in treatment of men and women that are repeated over and over, and that accumulate to result in large differences in overall outcomes. She argues that women's disadvantage is not necessarily the result of any large or significant injuries or barriers, but instead the result of repeated but pervasive small disadvantages.

I am not in any way trying to deny that there are egregious violations of women's rights in Australia and elsewhere, for example in relation to indigenous women, family violence etc. I am asking the different question of how the law can tackle the day to day gendering of society that disadvantages women, that we all live with.

Accepting this explanation makes it more difficult to see how law can successfully intervene. The role of law is usually to deal with harms that are sufficiently serious to justify the cost and formality of legal intervention. If it is the case that gendered differences in treatment are small but pervasive, then legal intervention is difficult to justify as each instance can be seen as trivial. A change of emphasis to systemic level processes is absolutely necessary, with a focus on recasting accepted ways of doing things to try to ensure that even the smallest forms of disadvantage are consciously recognised and redressed or avoided. This emphasises again the importance of systemic and public enforcement in discrimination law.

There are other lessons from social psychology. Criticising people and accusing them of discrimination is much more likely to get their backs up, and reinforce their denial. This is a phenomenon we have seen in response to litigation. Moving to pro-active duties takes the emphasis in enforcement away from individual cases, and puts it on the systems that need to change. However, it is not yet clear how effective broad based duties will be in changing social practices, and proper monitoring and enforcement of such duties could become very burdensome.

In conclusion, the SDA is vital to progress, but as it stands, it is not enough. Strengthening its substantive provisions without addressing enforcement is unlikely to produce actual social change on the wide basis needed. We need the best knowledge of the phenomena of discrimination and prejudice to inform the legislative response and to guide choice of strategies in the substance of the law and in enforcement.

Systemic enforcement that does not rely on the individual affected to take action offers the best way forward for broad based change. To maximise the chances of social change, a focus on positive duties and proactive measures that may help to

counteract gender schemas and stereotyping appears most promising. For example in the UK Equality Bill large employers will be required to report on pay equity in their workforces to provide the greatest chance of change. We need to really understand what we are trying to do with legislative reform in order for it to be effective. Ultimately, we have to move beyond (but not necessarily abandon) the lawyer's traditional focus on remedies for individuals. Later speakers will discuss different models by which this might be done, and I look forward to hearing their ideas.