

CONFERENCE SEX DISCRIMINATION ACT SILVER ANNIVERSARY

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SEX DISCRIMINATION ACT – 25TH ANNIVERSARY

SPEECH NOTES

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When I look back now to matters that were so controversial in 1983 – 84 I note with a tinge of satisfaction/ amusement/ curiosity that most are matters which attract little or no controversy at all these days. Those colourful and controversial debates of the 1980's were instrumental however in forming the ground on which so much important current legislation and freedoms for women has been built. It was a privilege to be engaged to work on issues which were truly "new ground" and which would serve to support future generations of Australians. That is not to say also, that there is no need for change going into the future.

To take you back briefly to those turbulent, historic and often exciting, early 80's –

The Hawke Government was elected on 5 March 1983 with a commitment to passing sex discrimination legislation. One of the first steps was the ratification of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women - CEDWA – on 28 July 1983 and it became operative one month later.

There were two reservations that caused controversy from the women's movement and others – 1) on paid maternity leave and 2) on women banned from combat and combat-related positions in the armed forces. Both continue to be controversial topics 25 years later.

That UN Convention was the basis for many false accusations and wonderful inventions about women at the time.....

You should have a copy of my all time favourite advertisement from October 1983 – "Stop Ryan – Australia's feminist dictator" – "Stop Ryan's ruthless juggernaut and anti-female Sex Bill".

The constitutional basis for the SD Act was in hot dispute in 1983. The Solicitor General – appointed by the previous government – held a strong view that international treaties could not be the basis for domestic legislation. The Attorney General (Senator Gareth Evans) and I held a

diametrically opposite view – our “side” won after some feisty debate with much mutterings and warnings of defeat in the High Court. In such matters there was no room for compromise or “middle” positions to be taken. I always thought it was worth the risk – and it was. There is now a raft of legislation relying on the foreign affairs powers and treaties to provide a constitutional basis but 25 years ago this was far from a settled debate.

Using the corporations power to cover the private sector was also then a novel approach to the use of the Constitution and much resisted by conservatives.

Curiously, great condemnation arose from the women’s movement in response to these discrimination initiatives – condemnation almost as big as the opposition from the conservatives. Obviously, this was hugely disappointing. There was a primary focus on the exemptions – particularly the genuine occupational qualification one in section 30. Much heat was generated. Some women contended that the Act should not be passed as the exemptions meant it was worse than nothing. I did not agree. I considered it was better to have it on the statute books and then improve it over time.

Once I arrived home in Sydney after a tumultuous week in Canberra to find a message from a woman – who identified herself and who I knew and who was a university lecturer and leftie – to say I should be ashamed of myself, resign immediately, that I was destroying women’s rights in Australia and various other robust character assessments. So it was pretty up-close and personal. While feeling extremely confronted and disappointed in such a display of “support” I and others working on these issues ploughed on. I hope (and believe) that we have been vindicated in our stance by history – since 1983 there has been no case under the SDA where an employer has relied on the GOQ exemption to avoid their liability. The exemption turned out to be a damp squid.

The proposed exemptions on superannuation and insurance were also seen as the Government giving into big business and a serious erosion of women’s rights. Time has shown that the problems with super arose from a raft of issues tied to women’s participation in the labour market etc and there has been a huge community shift since then and the idea of superannuation for all is now a commonly accepted part of the Australian wage packet. In terms of complaints and real issues for women – neither proved a major impediment to the effective implementation of the law.

It was the actual ambit of the legislation that I always considered important. The drafting of the SD bill presented some large problems. The bureaucracy were generally – but not universally – opposed to trying to put what many considered social policy into an inappropriate framework

of legislation. The Office of Parliamentary Counsel in 1983 were – to be polite – less than helpful. While there were legislative models operating in various states and overseas, the OPC decided to reinvent the wheel and with a lack of appreciation of the fundamental principles and the objectives, they prepared a draft bill that was not suitable. Getting them back to first principles involved more heated debates and having to drag Gareth into a conference at midnight as the only way to win.

The sexual harassment provisions were the tinderbox. I was determined that there would be specific provisions covering sexual harassment. This was the first legislation in the world to use the term “sexual harassment”. Gareth was initially unconvinced but Susan and I persuaded him.

Convincing the drafters was another issue until at 3.30 am one morning, they gave in while claiming that the judges would throw the provision out as being unworkable and unclear. This has never happened and the Federal Court has never had any difficulty in applying the provisions in an effective way.

The model of conciliation before litigation was also controversial and was criticised many times over the years by some academics as taking the power away from female complainants. I did not and do not agree at all. Many complaints have been settled with great outcomes for the complainant without the trauma of a litigated outcome. Now the federal Attorney-General and all the Chief Justices around Australia are pushing for alternate dispute resolution instead of litigation. This model of conciliation before litigation has held up well over the years and provides an effective model on which current dispute resolution practices can be built.

An important occasion such as this must necessarily represent a celebration of achievements as well as a milestone for future developments and progress. We should remember the real heroines – those courageous women who were represented in the first test cases and endured relentless, front page news and commentary which was often ill informed, vicious or just plain wrong.

- Deborah Wardley who Ansett dragged all the way to the High Court in 1980 under the Victorian discrimination laws to win a job as a pilot. This led to the first and only successful “girl-cot” – businesses were encouraged by women to transfer their travel accounts from Ansett to Qantas and in the first 6 months, Ansett lost over 50% of their business travel and a lot never returned. We all virtuously flew Qantas – who ironically had no women pilots and did not for many years. Ansett having fought and lost then continued to employ women and participate in the affirmative action pilot program until it went broke.

- Sue O’Callaghan brought the first case of sexual harassment in 1983 under the NSW law against the Commissioner of Main Roads, Bruce Loder. She was the driver of his personal lift. She lost on a technicality but did much to make the issue an area of hot debate and confirmed my view that we needed a specific provision addressing sexual harassment and not rely on using the sex discrimination provisions.
- Lynette Aldridge brought a complaint of sexual harassment against Grant Booth when working at “The Tasty Morsel” cake shop in Brisbane – which went all the way to the Federal Court in 1988.
- Three young women – Susan Hall, Dianne Oliver and Karyn Reid – all made remarkably similar allegations of sexual harassment against Dr Sheiban, a 65 year old medical practitioner. After a heavily publicised hearing before the Human Rights and Equal Opportunity Commission the then President, Marcus Einfeld, found the complaints of sexual harassment sustained and made no order for damages as he considered that “the public exposure of these complaints and the findings I have made are sufficient relief in these matters” and awarded no compensation, having dismissed their evidence of pain and suffering. There was a huge outcry. An appeal to the Federal Court was successful and his views were comprehensively trashed by his brother judges. Such a trade off was resoundingly rejected as an improper way of assessing damages.
- Helen Styles who unsuccessfully took on the Department of Foreign Affairs and Trade about a promotion to an overseas posting as a journalist in 1988.
- Marea Hickey was a partner in the law firm Hunt & Hunt and she successfully challenged the decisions made about her position on her return from maternity leave when she wanted to work part time. This was the first high profile case involving a professional woman and generated controversy within the legal profession and also other professions such as accountancy as suddenly they felt vulnerable to claims of sex discrimination when they had previously viewed this as unlikely.

There were many other women who pioneered their way through the courts – and we should remember them for their bravery in the face of an often hostile media and the joys of being torn apart by ill-informed shock jocks and misogynist callers.

Where now?

There are a few pressing areas that I consider need review.

One is the sexual harassment law and I am surprised that none of the papers tomorrow, by their extracts, appear to address this issue. In my view, there are very real issues that arise with the changes of technology especially in two important areas – social networking sites such as Facebook and MySpace and the readily accessible camera in every mobile phone which means no moment in life can now be assumed to be private. The distinction between work and outside work is no longer as clear as it was and otherwise private conduct now bleeds into the workplace. There is some confusion around the new rules of engagement in the workplace and what is and is not appropriate behaviour. Gen Y women have different expectations and the way they interact with society and recognise sexual power and seek to use it to their advantage creates new challenges. More women in more diverse workplaces present new issues or a new focus on the old ones. There needs to be a recognition that the limitations as well as the protections apply to all women. An objective assessment of conduct within the workplace and other environments is needed.

The second area is the level of damages awarded by the courts. To date, with few recent exceptions, they have been low and often not a proper recognition of the immense psychological damage a person may have suffered from, eg, a year of revolting sexual harassment. When compared with even the newly restricted areas of damages for say defamation at a maximum of \$250,000 – one nasty newspaper article is worth considerably more in compensation than a devastating life experience from which a woman may struggle to recover and return to work.

The third area is the capacity for businesses to provide part time work to parents, usually mothers, returning from parental leave. While large organisations with a number of people performing similar roles can readily make adjustments, the same cannot be said for small or medium companies with only one person performing a particular role. As a society, we must make an assessment of the way resources are to be provided in that situation and it will be interesting to see the way the new provisions in the Fair Work Act requiring flexible work arrangements around reasonable business grounds will work out over time.

Remember – when critically examining the operation of the SD Act, it is important to remember that it was always designed for individual rights and not collective rights. The Affirmative Action Act was intended to have a broader focus and develop a strategic approach. It provides important protections for women. Certainly it deserves, and indeed needs, active review and amendment, to strengthen it from the ravages of time - changing cultures and societal values. So as we move forward boldly into

a new world – let's not abandon the legislated principles that we have. Let's build on them.

In the words of Tom Keneally, referring to a conversation he had with Stephen Spielberg's mother about the film "Schindler's List".... "never forget to remember"....

So in closing, I leave you with this one thought:

Our girl has grown up and while she may need a new frock by Sass and Bide - her bone structure is still solid and a sturdy cloak made of supportive social policy and industrial muscle and funded child care will improve her health and well being. She has stood the test of time with ongoing changes and there should be more – but let's be cautious about throwing her away in our enthusiasm and indignation. Let's give her a little sister in an Equality Act – so she can grow up too.