

# Twenty Years on: the Future is as far Away as Ever (Refereed paper)

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The twentieth anniversary of the *Sex Discrimination Act 1984* is great cause for celebration, and reflection. It was enacted three years after the Australian government became a signatory to the UN Convention on the Elimination of all forms of Discrimination Against Women, in 1981. It is one of the few pieces of legislation whose anniversary is regularly celebrated. Whether this is confirmation that the Act has still not achieved its purpose or merely recognition of the heroics involved, is unclear.

The bill was accompanied by a lengthy debate....and dire warnings of social disaster. Conspiracy theories emerged: Senator Noel Crichton-Browne argued that the *real* intention and purpose of this Act was “to destroy the structure, the fabric, the values and the intrinsic role of the family unit which for centuries has been the foundation of our orderly and disciplined society and culture”.<sup>1</sup> Should they be afforded equality by law, Australian women would have their human rights reduced. Senator Ron Boswell warned, “The clamour for equality originated in Eastern Soviet bloc countries... I am sure that Australian women do not want the same rights as women in Iran and India.”<sup>2</sup>

Recently I sat next to Senator Boswell, who I have known for many years, at a Country Women’s Association dinner. We were surrounded by Australian women enjoying many more rights than those in India and Iran, such as the right to go out at night without male escorts and have a good time. Senator Boswell did not seem to mind at all.

It was not only politicians who were concerned. A public petition handed to Parliament read “The Sex Discrimination Bill 1983 contains provisions inconsistent with principles of justice and equality which will be used to undermine civil liberties and religious freedom. It could also be a means of undermining the traditional family structure of our nation.”<sup>3</sup>

Rereading Hansard from that time reminds us all what a heroic job Susan Ryan, the minister responsible, did in driving the legislation through. It was hard enough to get the legislation through when the debate was about facts. In fact that debate was about overcoming community superstition and fear, a much more difficult challenge. Even appeals to that quaint old fashioned notion, the will of the people, fell on deaf ears. We should never forget this, the will of the people.

The *Sex Discrimination Act 1984* (“Act”) came into being twenty years after the contraceptive pill became widely available and fifteen years after the bar on married women working in the public service was lifted. The first industrial case granting women the right to equal pay was decided in 1969. Domestic violence shelters began in the 1970s and equal pay

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<sup>1</sup> Crichton-Browne, Noel Federal Parliament, 8 December 1983. Refer to Hansard at [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=166498&TABLE=HANSARDS](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=166498&TABLE=HANSARDS)

<sup>2</sup> Boswell, Senator Ron, Federal Parliament, 29 November 1983. Refer to Hansard at [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=570362&TABLE=HANSARDS](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=570362&TABLE=HANSARDS)

<sup>3</sup> *Petition: Sex Discrimination Act (from 10 citizens)*, tabled in Federal Parliament by Senator Edward Robertson, 8 December 1983. Refer to Hansard ([http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=144654&TABLE=HANSARDS](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=144654&TABLE=HANSARDS))

legislation was passed in 1974. By 1984, women were entering universities in about equal numbers to men and the will of the people – their desire for and expectation of equality – was, you would have thought, already pretty clear. The will of the people is especially important in legislation which reflects social change, and in democracies it is important that aspirational legislation such as the Act precedes, rather than follows, social change.

Having said that, although the Act is twenty years old, it is still a girl. It is the hard, not the soft end, of the law. Nobody ever said concepts of discrimination were easy to define. Comparators are everything, motivation or intent need not be relevant. There are objective and subjective tests involved. The case law which underpins the Act has really only started to take off in the last few years, since the courts started to hear cases involving the Act. Although commissioners in the Human Rights and Equal Opportunity Commission (“Commission”), many of them eminent jurists, had been hearing cases for years, the status of their judgements was not well entrenched and appeals from their decisions were patchy.

Progress, or indeed even clarification, is frustratingly slow. Some would say the jurisprudence today, is still limited. Twenty years later, for example, it is still not clear whether, legally, the absence of part-time work opportunities for women with children is discrimination or not. While Commissioner Elizabeth Evatt’s judgement in *Hickie v Hunt and Hunt*<sup>4</sup> seemed to establish a precedent for part-time work which has subsequently been followed in the Federal Magistrates Court, the recent case of *Kelly v TPG Internet Pty Ltd*<sup>5</sup> suggests this issue is still not settled.

There tends to be a reliance on the sex discrimination provisions of the Act instead of the family responsibilities provisions when it comes to cases of dismissal on the basis of those responsibilities. The concept of special measures as a means of addressing historic disadvantage is again not clear, and the current legislative amendments before the Parliament to provide for male-only teaching scholarships demonstrates how badly case law is needed in this area. It is very easy to confuse good intentions with special measures. Nobody can deny, for example, that male literacy standards, particularly in low socio-economic status families, lag significantly behind girls of similar status. It is a problem with undeniably profound consequences for those boys affected. But that does not always mean the answer is “anything which favours boys, or may favour boys, or for that matter, anything which favours girls, or may favour girls”.

In fact, the law must be a more precise instrument and the special measures provisions of the Act, which were drawn up with such caution, certainly suggest that quotas and preferential financial treatment are to be used only with clear evidence of historical disadvantage and as a measure, almost, of last resort. The record of the Commission is that these measures are only granted in exceptional circumstances and again, after all other remedies have been tried.

Again the reasoning of the Parliament and its keen eye to the electorate it serves is apparent; our democracy is only as strong as our respect for its laws. Any breach of the Aussie concept of a “fair go” is looked at pretty dimly by Australians – any special measure has to be well justified. That is not to say we have not seen good developments in case law and, for that reason, it is crucial that the Sex Discrimination Commissioner seek every opportunity to be *amicus curiae* in cases involving the Act, as well as to intervene in appropriate or significant court cases wherever possible. Sometimes the Commissioner’s arguments are accepted, sometimes the judge finds the case to hang on quite different arguments, but, despite its drawbacks, it remains the only means of developing the meaning of the Act for the benefit of us all.

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<sup>4</sup> [1998] HREOCA 8 (9 March 1998).

<sup>5</sup> [2003] FMCA 584 (15 December 2003).

Because the Act addresses one of the fundamental aspects of any society – gender relations – unsurprisingly it is often challenged, under attack or under reform. Interestingly this is reflected at the United Nations meetings of the Commission for the Status of Women. Each March, government delegations gather in New York to negotiate future plans for gender equality. Western countries tend only to support propositions which are already implemented domestically, developing countries are constantly concerned by the cost of the measures proposed and a large number of countries each year voice their concerns about the need to preserve their own traditional cultural values. More recently this has included the United States.

Often a country's text negotiations are led by their professional diplomats based in New York who negotiate UN-language texts full time. One week they are negotiating at the Commission for the Status of Women, the next week they may be negotiating environmental protocols. Those I have come to know over the years have frequently observed that negotiations at the Women's Commission are always the fiercest, the hardest. Countries fight very hard to preserve their traditional roles for women, even roles that are clearly subordinate and may be life-endangering. They do not see this as discrimination and are offended at any suggestion that this is damaging to women. They believe their traditions and customary practices are right, not unfair or discriminatory. Tradition runs very deep.

We should not be surprised that our own country also feels deeply about these issues, and that all sides are prepared to fight and defend to the death. That is why it is so important that Australian women, especially young women, appreciate what has gone before and the fact that the battle is never won, can never be won. It will never be over. Be alert and alarmed and report any suspicious activity.

The Act however, is about more than jurisprudence and legal interventions. Under section 46P of the *Human Rights and Equal Opportunity Commission Act 1986*, complaints of sex discrimination can be made to the Commission by individuals. In twenty years, there have been thirteen thousand. We cannot underestimate the importance of complaints and the impact they have had on individual lives, on workplaces and, through discussion in the media, on public perceptions and cultural change.

We also cannot underestimate the role of vicarious liability in changing the behaviour of employers and employees. Section 106 of the Act makes employers liable and, even in cases of sexual harassment, employers may be found to be vicariously liable. Every time a court case becomes public, every time the Commission releases details of complaints or outcomes, you can be sure that employers around Australia check through their programmes and policies to ensure they have adequate preventive measures as well as grievance procedures in place. It is this, particularly in conjunction with the public advocacy of successive Sex Discrimination Commissioners and fellow travellers, which has driven cultural change. This has surely been the Act's greatest achievement.

The role of Commissioners in pushing the public policy envelope through its national enquiries and policy debate interventions also cannot be underestimated. I would like to spend the remainder of this paper reflecting on two of the significant challenges facing Australian women today.

The struggle which remains of utmost importance to women is that of equal pay. Like everything else, equal pay is connected with other issues, such as the role of men in the home. It might even prove impossible to finally close the gap without enabling the roles and responsibilities of men to change. Nobody should think there are easy answers. But equal pay, including for our high achievers pouring out of university law and medical courses, remains a very live issue. For medicine graduates, for example, one year out from graduation sees females already earning \$5,000 less than their male counterparts. In

information technology, female graduates are earning \$1,000 less after one year. And that is well before children are on the scene. Although Australia enjoys one of the smallest gender pay gaps in the world, 84.9 cents in the male dollar for full-time ordinary workers, when overtime, part-timers and casuals are included, this gap widens to 66 cents in the male dollar. Progress on closing these gaps appears to have stalled.

The consequences of this for female poverty, especially in an era of lengthening aged-retirement and privatised retirement funds, are clear. Women are already two and a half times more likely to live in poverty during retirement than men, and are expected to have, by 2019, only half the superannuation accumulated by men. They are expected to live an average of five years longer on this money.

Irrespective of the human rights dimensions of gender pay gaps, all disadvantage and discrimination leads to this point. Poverty in the final, most vulnerable years. It is not much of a reward for the nation's mothers, care givers and double-shift workers to end up like this. This is one of the most fundamental challenges of social policy, and for the women's movement, including the young women's movement. We need to ensure women know the risks they are running. It is they who need to take action. This is the continuing responsibility of the women's movement. The widespread assumption of young women that gender equality is a given, that topping university or starting their own herbal beauty clinic at twenty-three means life will be different for them, must be challenged.

Undeniably, women activists get bad press. Running a social change movement is often not much fun. Celebrity feminists like Germaine Greer, Betty Friedan or Naomi Wolf tend to be the exception. There are many others in the women's movement, for example, who have suffered jail terms, no jobs, broken marriages, endless letter writing over nights in other people's kitchens on battered typewriters, all as part of a pitifully under-financed struggle taking up infinite amounts of available leisure time over many years.

The public thanks you get for this is to be called a man-hater, hairy legged, bitter and twisted; to be attacked by the Pope and told that you have no sense of fun and that it is no wonder your kids have turned out badly. Understandably young women don't want much of that, but they need to be comforted with the knowledge that that may be the price of doing what is right. They need to be told that when a personal attack particularly hurts, it has been particularly effective.

It is about time that all women know just how much more at risk they are of living in poverty during their old age because they are women – mothers, carers, dependents themselves or unpaid housekeepers. They need to know these fundamental responsibilities mean women have effectively half the working lives of men, half the income and half the opportunity to save for retirement. Living on a superannuation income designed to support one person, or as a widow living as a residual beneficiary on a fraction of that income, is no way to spend the most vulnerable and – because of health costs, the most expensive – years of our lives. There is nothing charming about being an old lady on a public hospital waiting list, for so-called elective surgery, to have a shoulder joint repaired. Living with daily excruciating pain for years because it is not life threatening; unable to make your bed, reach the cupboard shelves or dress properly; unable to lift your arm to shower, so that after a while you do not shower every day.

That is the daily indignity of poor old age for Australia's poor old ladies. It is time women decided it need not be that way. It is time they recognised it could happen to them, not just to other people. And that it starts with issues like pay equity and a shortage of child care places, which compound into financial disadvantage. All roads lead to this sad and shabby Rome. Young women need to know that is their future too, unless they work to change it.

But the perennial struggle for equal pay has now been joined by a second, new struggle, the struggle for motherhood. Today more than a quarter of Australian women will not have children. The better educated you are, the more likely you are to be childless. Those in full time work are also the most likely to be childless. Poignantly, only fourteen percent of these women will do so by choice. In other words, those women who succeed in the world of work will be punished.

A recent survey of childlessness in the United States found the same thing happening there. Sylvia Hewlett's shock book, *Baby Hunger: The New Battle for Motherhood*<sup>6</sup>, reports that 49 percent of ultra high-achieving women are likely to be childless at age 40, compared with 10 percent of high achieving males. Similarly the most recent British Census found that 59 percent of female managers do not have children compared with 29 percent of male managers.<sup>7</sup>

In fact Australian data demonstrates, in contrast, that men with tertiary or higher qualifications have the highest fertility rate of any male group by educational status or by achievement. High achieving males are also more likely to have married two or three times. The reverse is true for successful women. Explain how that means men and women are equal! It should not, it must not, be so.

The reasons for this lower fertility rate are often medical. Fertility begins to drop at age 27. At age 40, 50 percent of a woman's eggs are no longer viable. In-vitro fertilisation cannot always help. Remember, the average age at which Australian women have their first child is now thirty. Bearing in mind that rural women, unemployed women, some ethnic women and indigenous women have their first child much earlier, the real average for urban women is actually higher. Female lawyers are reported to have their first child, on average, at 39 years of age.

Older mothers are in the high risk category for giving birth by caesarean-sections – 40 percent of women giving birth over the age of 35 have a caesarean. The lucky ones who can bear one child might well choose not to do so again.

That is why you can walk into any primary school in Melbourne or Sydney and find half the children in the class are only children. Twenty years ago, one in five Australian families was an only child family. Today it is one in three, even more in the cities.

That is a big change in a generation: no brothers or sisters to argue with, share with, come second to. No cousins, aunts or uncles. No wonder the Chinese are relenting on their one child policy and allowing the only children of only children to have more than one child. Why is this happening? Simple: motherhood has become too hard. Being a committed parent is a big job and women who also have paid jobs, for any number of reasons, cut corners, sleep and whatever else they can in the mad juggle to do both. And a lot of women, perhaps wisely, decide it is too hard, and withdraw from the fray of fighting their way up the career ladder.

Once the problem was how to stop having babies. Today we have the opposite problem. It is clear that this new fertility dilemma is the result of the difficulty of combining work and family. Wherever you look in the western world, countries which do not provide support for working motherhood, countries like Spain, Italy, Germany and Portugal, have low fertility rates. It is for this reason that the Pope and the official Catholic Church recently declared its support for working motherhood, for the right and importance of women to play a role in public life, as well as to answer their calling of motherhood. The Catholic Church has had

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<sup>6</sup> Hewlett, Sylvia Ann *Baby Hunger: The New Battle for Motherhood*, Atlantic Books, May 2002

<sup>7</sup> United Kingdom Census 2001 – see [www.statistics.gov.uk/census2001](http://www.statistics.gov.uk/census2001)

no choice: its heartland states are rapidly diminishing. Australia's fertility rate is predicted to decline to the same level of the above-mentioned countries if nothing is done to reverse the decline. By contrast, countries, such as Iceland and France, which do provide support for working motherhood enjoy higher fertility rates.<sup>8</sup>

To say that childlessness or low fertility is the result of poor work and family policies is of course to over-simplify it. Poor family policies are just one aspect of women seeking to achieve professionally in a culture that persists in taking for granted that women will do the bulk of the mothering. Take partnering. A significant proportion of men of equivalent socio-economic status to women in full-time work want to marry women who will be secondary income earners and focus primarily on motherhood. Sure, some young men want to marry their intellectual or socio-economic equals, some are even prepared to partner with women of higher status or achievement. But there are not enough men in this category to provide partners for all. Not surprisingly, lots of men want the traditional division of labour, especially when they are high income earners who can easily be the main provider.

It is also true that women who work, even with partners, continue to do the bulk of the child care and house-work. According to Australia's official time use surveys,<sup>9</sup> juggling work and motherhood means putting your makeup on in the car on your way to work, getting up an hour earlier and going to bed an hour later than non-working mums and even dads, having .006 minutes of child free leisure time a day with a child under five – compared with working dads of children under five, who have 2 and a half hours of child free leisure time a week.

And yes, there is still the absence of suitable workplace conditions for women who wish to combine work and motherhood, including inadequate or expensive child care, limited time flexibility, poor access to part-time work at senior levels and limited access to paid maternity leave. The upshot of this is that women, their marriages and in particular their children suffer the consequent stress of managing the juggle unassisted. No wonder they seek to minimise this distress with fewer children. No wonder the birth rate is down to 1.7 children per woman,<sup>10</sup> and predicted to decline further. Indeed we remain one of the few western countries with a birth rate that is still declining: other countries decided long ago that motherhood mattered.

Today's young women are as entitled to the calling of motherhood, to create life, love it and nurture it, to contribute to the future of the world, as older women were. Motherhood is under threat. Women will need to fight for the right to be mothers, I fear, just as we fought for the right to work and our great grandmothers fought for the vote. Do not underestimate this battle, do not think equality has been achieved. We have merely exchanged one set of problems for another, and you might well ask is that progress?

Be in no doubt, I am not saying that the answer is to walk away from careers and ambitions, and sacrifice on the pyre of the family. The answer is not to discover that knitting is a feminist issue and that housework is a joy. The answer is not to ban girls from universities because they use scarce educational resources which they will not use properly if they drop out to have children. The answer is for young women to demand two conditions be met. First, that governments and workplaces recognise their need for working conditions and

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<sup>8</sup> Sleebos, Joelle E. "Low Fertility Rates in OECD Countries: Facts and Policy Responses" 7 October 2003, p15 (see <http://www.oecd.org/dataoecd/13/38/16587241.pdf>)

<sup>9</sup> McLennan, W (Australian Statistician) "How Australians Use Their Time 1997", Australian Bureau Of Statistics 1998 pp1-13

<sup>10</sup> Sleebos, J *Supra* Note 8, p15

support which enhance, instead of damage, their family life as well as their capacity to contribute to the public world. Second, that men play their rightful role in the family.

Societies evolve along with science, technology, climate change and everything else. Progress makes different lives possible. We must not assume that motherhood cannot evolve, that we must be the same sort of mothers our mothers were or our grandmothers were. After all, fathers no longer teach their sons to hunt and shoot and I cannot remember any father being criticised for not doing so. Indeed some would say the last century has seen fathers almost entirely drop out of the family picture as nurturers and teachers. Sadly, nobody has objected.

You notice that fathers finally get a mention. A challenge young women face is one that mine failed miserably, the challenge of engaging men in their families. We need to demand of employers and governments that men are as able to access family-friendly work provisions as women, so that they may share family responsibilities. We need to support men who want to defy the dominant work culture and leave the office early in order to attend a parent-teacher afternoon, coach their son's soccer team or take the children to tennis lessons. Women need to demand this. Men will not do it alone. Frankly, I think the struggle to let men into the home might be even more difficult than the struggle to let mothers work. I hope to be proved wrong. As the young women of today go on to distinguished careers and leadership positions, they must never forget that motherhood cannot be left behind, that there are sisters behind them who will need their leadership and courage.

We fought for the right to work like men. The young women of this century must fight for the right to live like women. Every generation has a challenge. Motherhood is today's.