

**AUDITING THE SEX DISCRIMINATION ACT\***  
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**ABSTRACT**

This presentation cautions against a too ready acceptance of progressivism in which the passage of time is automatically equated with improvement. Instead, it argues that the fragility of sex discrimination legislation renders the Act exceptionally sensitive to the prevailing socio-political climate. As a creature of social liberalism, its passage was animated by notions of collective good and redistributive justice. Now that neoliberalism is in the ascendancy, we have seen a resiling from these values in favour of private good and individualism. Against the swing of the political pendulum, the presentation exposes and analyses the underlying presuppositions associated with the policies, practices and jurisprudence of the Sex Discrimination Act.

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I congratulate the Castan Centre for devoting a substantial segment of its annual conference to a consideration of sex discrimination. For a long time, it was firmly held that sex discrimination was not the province of human rights. Human rights violations were what occurred to men in foreign countries; what happened to women in Australia was simply normal life! I thank the Castan Centre for inviting me to speak on the 20<sup>th</sup> anniversary of the Sex Discrimination Act.

**Introduction**

Institutional anniversaries are inevitably a cause for celebration. There is a desire to focus on the positive achievements including the triumph over adversity. The official story conforms to the liberal idea of progress – that things are always getting better. While the progressivist rhetoric is seductive, we need to interrogate it.

Has the status of women changed since 1984? I could embark on a numerical exercise and point out that more women are Parliamentarians today, as well as judges, professors and other professionals. They have also been leaders of a minor political party (the Democrats) and premiers of two States (Victoria and WA). But these advances cannot be evaluated acontextually. They must be assessed as one strand of what Robert Cover refers to as the *nomos*, or normative universe that we inhabit.<sup>1</sup> The *nomos* encompasses the customs, practices and informal rules of the everyday world, which give meaning to the SDA. I will consider briefly the gendered social script, the

neoliberal turn and legal form.

In addition to a social norm of equal opportunity, in which merit averredly floats free of gender, the privileging of the masculine in all spheres remains powerful. Thus, however well qualified, doubts remain about the fitness of women for high office. For example, when several women were appointed as judges in Victoria in 2003, Robert Richter QC is reported to have said that it was an advantage for an appointee *not* to have testicles.<sup>2</sup> By a stroke of the pen, the ability of the women to judge was undermined in the public eye by implying that sex, not merit, was the key factor in their appointment. Of course, Mr Richter did not acknowledge that testicles had contributed a singular advantage for appointment to judicial office since time immemorial. The overwhelming preponderance of our parliamentary, business and university leaders is male, as is every member of the High Court. These appointments go unremarked, however mediocre the incumbent, because the conjunction of masculinity and authority is accepted as a dimension of our normative universe.

Furthermore, testosterone figures literally, not just metaphorically, in the high incidence of sexual assault against women. The avalanche of allegations of footballer rapes early in 2004 was striking as it involved a significant number of players in at least nine clubs. Nevertheless, not a single case went to trial. The women's voices were silenced by the police decisions not to lay charges so that they were prevented from ever formally testifying against their assailants.

I could continue with a catalogue of examples from the media and advertising, as well as from public life, where women are trivialised, eroticised and denied a speaking voice. What these acts of diminution and corporealisation do is construct women time and time again as Other to the normative comparator – Benchmark Man. Not only is he Anglo-Celtic, heterosexual, able-bodied and middle class, but he epitomises reason and rationality. Each instance of the conjunction of the feminine and corporeality serves to reaffirm the normative linkage between the masculine and rationality. Thus, even though it is the *body* of the footballer that is central to the game of football, he is instantaneously transformed into the 'man of reason' when challenged by a woman complainant so that her story becomes ineffable within the legal system. The gendering of the persona of the rational actor and the non-rational complainant, or person acted upon, is mirrored within the handling of sex discrimination complaints and impedes their just resolution, as I will show.

We are not looking at sex discrimination as though it were a dark and aberrant hangover from the 19<sup>th</sup> century, which will be eventually eradicated by the ripples eddying out from multifarious complaints of sex discrimination. Rather, we are looking at a phenomenon that is replicated on a daily basis so that it saturates normal life; it is a dynamic, not a static, phenomenon. Indeed, I suggest that the references in the objects clause of the SDA to the *elimination* of discrimination and sexual harassment, which are taken directly from the Convention for the *Elimination* of Discrimination against Women (CEDAW), are based on a flawed premise. It is naïve to think that we might *eliminate* activity that is ongoing.

I'm not suggesting that the task of addressing sex discrimination through a legislative instrument is misconceived, but that it is far more challenging than many proponents of the SDA originally thought.

## ***From Social Liberalism to Neo-Liberalism***

For most of the 20<sup>th</sup> century, social liberalism, with its rhetoric of common good, was the dominant ideology throughout the Western world. There was broad acceptance of the idea that it was the responsibility of government to support at least minimalist policies of redistributive justice in accordance with its commitment to the welfare state.

Neoliberalism has seen the ideal of common good replaced with that of individual good and promotion of the self within a market setting. Government has effected an intimate liaison with the market, where individuals are expected to compete with one another and assume responsibility for their own success. In concentrating on the support of market activity, governments have diluted or abandoned altogether their commitment to social justice. Centralised wage fixing, equal pay, maternity leave (albeit largely unpaid), occupational health and safety and anti-discrimination legislation are all examples of state initiatives effected under social liberalism that have benefited women.

The language of economic efficiency and rational choice has facilitated the major cultural shifts to enterprise bargaining and casualisation, which disproportionately impact on women. They represent further factors that contribute to a normative universe in which discrimination flourishes. Once embedded within the social fabric and accorded the neoliberal stamp of approval, it is immediately immunised against an allegation of discrimination. There is then no identifiable *act* about which an individual can complain. The normative universe becomes infused with the irrefutable logic of the market, a logic in which competition and *in*-equality are its basic tenets. What does the norm of equal opportunity mean in this environment – to be treated equally as badly as everyone else?

The final important point to make about neoliberalism is that it invariably goes hand-in-glove with moral conservatism, which is likely to support regressive policies on race and sexuality, as well as gender. Contemporary neo-conservatism is still concerned with the ambit of women's freedom. Thus, issues of abortion and access to IVF by single women (both heterosexual and lesbian) have already emerged. The influence of the conservative Family First Party is likely to continue this trend, which could well result in further exceptions being effected to the SDA.

Indeed, neoliberalism and neoconservatism have colluded in the development of an anti-feminist agenda that has seen a sharp turn away from the social liberalism. Ann Summers' book, *The End of Equality* (2003), shows most graphically how social liberal policies designed to benefit women have been rapidly unravelled. One could note the collapse of the measures to secure paid maternity leave, budget cuts and downgrading of the Office of the Status of Women, and increased child care costs. Indeed, it could be said that gender justice has been rendered ineffable by neoliberal discourses.

## **The Form of the SDA**

Conciliation is the primary mode of dispute resolution. The aim of conciliation is to

effect a settlement between the parties informally. The tiny percentage of complaints that proceed to hearing are dealt with in public & the existence of written reasons provide a window onto the jurisdiction, which conciliation does not permit. The CCH Reporter has reported 178 decisions over the 20-year life of the SDA.

*(i) Adversarialism*

The adversarialism favoured by the Anglo-Australian legal culture is an important strand of the *nomos* that cannot be gainsaid, despite the claims made to neutrality, objectivity and fairness. From the moment the individual complainant lodges a complaint against an identifiable respondent, the parties are locked into an adversarial relationship, despite attempts to downplay this relationship through conciliation.

The basic elements of the adversarial system entail the complainant assuming the burden of proving her case, regardless of the fact that the respondent may be a powerful corporation with control over the evidence, including potential witnesses for the complainant. Adversarialism is assumed to facilitate the production of ‘truth’ in a way that is fair, despite the disparity in access to the evidence in most situations. Underpinning what may be the skewed relationship between complainant and respondent is the fact that adversarialism chooses to ignore what may be the vastly different financial resources available to the parties. The complainant may have lost her job as a result of the discrimination, a not unusual occurrence, whereas the respondent may be a corporate entity that is able to pass on any costs to the consumer.

Complainants do not have to be legally represented at a hearing but may find that they are disadvantaged without representation. A favourite tactic of adversarialism in discrediting the complainant’s case is to devise abstruse arguments based on jurisdiction and procedure in order to deflect attention away from the merits of the case. Such legal games may be incomprehensible to complainants, concerned only with securing justice. Perhaps most devastating to the complainant is to find that not only does the respondent’s technocratic argument succeed, but that the complainant is then faced with a bill for the cost of the respondent’s representation, as well as her own.

The reported decisions show how the SDA is not a text that can be literally interpreted, for the legislature has deliberately left too much left unsaid. Instead, it has charged the Commissioners, judges and magistrates with the crucial hermeneutic role of endowing a trailblazing text with meaning. To do this, they must draw on the *nomos*, or normative universe, in which the Act is located. They must engage in Cover’s idea of ‘jurisgenesis’ or the creation of meaning.<sup>3</sup> Where do they look for guidance if there are no precedents? From their own normative universe, of course. Cover identifies two patterns within the jurisgenerative role: the ‘paideic’ and the ‘imperial’. He defines the paideic, from the same root as pedagogical, as ‘world creating’, and the imperial as ‘world maintaining’.<sup>4</sup> This distinction is useful when applied to the SDA. Because of the novelty of the legislation and its important educative role, the paideic approach can be understood as encompassing those trailblazing decisions where decision-makers and judges are wrestling with the Act. In contrast, the imperial, or world maintaining strand, with its negative connotations, suggests a resistance to change and an attempt to uphold the age-old norms of masculinity within the social script.

*(ii) Individual complaint-based model of legislation*

The individual complaint-based model plays down the systemic nature of sex discrimination in which the individual instance is necessarily embedded. It also heightens the burden of proof which resides with the complainant. This is particularly the case in employment complaints, the dominant source of complaints, because the idea of employer prerogative remains a powerful social norm. If the complainant alleged sex discrimination at work, which may have resulted in dismissal, the respondent frequently endeavours to counter the allegation by averring that her work was unsatisfactory, a justifiable explanation for dismissal, but how does the decision-maker charged with hearing the case know that it is not merely a pretext? In making a judgment about the facts, she or he (usually he) relates it to their gendered world view, which may include misogynistic myths about women, including the questionable reliability of their testimony, counterposed against the rationality of the male respondent, the hierarchical relationship between the invariably junior positions of the complainant and the authoritative male boss.

In *Fenwick v Beveridge Bldg Products Pty Ltd*,<sup>5</sup> the complainant worked part-time in a hardware store but was dismissed. HREOC held that the complainant failed to discharge the burden of proof that the dismissal occurred because she was a woman than because of a personality clash with her supervisor. The observation made by the Commissioner is illuminating: ‘He was probably not adept at getting on with women employees in roles which he considered to be non-traditional, especially if they were not quiescent.’ This is a classic statement in which animus against women at work is embedded but is deemed not to constitute sex discrimination. When merit becomes imbricated with the personality failings of the woman employee, that is, she declines to occupy the docile subject position for women within the imperial social script, it is very difficult for her to shift the focus to a paideic interpretation.

Affirmative action is designed to foreclose the lodgment of individual complaints and their ancillary problems. A weak form of AA was included in Senator Ryan’s original SD Bill. At the time, feminist lobbyists were extremely disappointed by the removal of the AA provisions from the Act. The history of AA for women underscores the latent fear of the feminine that has encouraged the masculinist liberal state to adopt a timid individualist approach towards the amelioration of gender inequality – which accords with dominant norms.

*(iii) Comparability*

The essence of any complaint of direct sex discrimination (the most familiar form) is that the complainant has to prove that she or he (the Act is cast in sex-neutral terms) was treated less favourably than a person of the other sex in the same or similar circumstances. Even though the comparator may be a hypothetical rather than a real person, this requirement can constitute a significant obstacle for those engaged in sexually-segmented work, for example.

A good example of the problem posed by comparability, albeit under the Victorian Equal Opportunity Act, was that of *Curtis v T & G Mutual Life Society Ltd*.<sup>6</sup> Ms Curtis was secretary to the State general manager of the respondent company who

was expected to clean the silver and make coffee. However, she was unable to make her case that she was expected to perform these tasks because of her sex rather than because they were part of the secretarial role. Complaints such as this show how the individual instance of sex discrimination is imbricated within the social script so that it is virtually impossible to untangle them. In this case, the heterosexed pattern of dominant male and subordinate female assistant reflects what has long been the domestic norm. Not only has it been unproblematically transposed into the workplace, but we see it constantly reproduced.

Sex segregation continues to be a notable characteristic of the Australian workforce in which women have been confined to relatively few occupations. While the higher university completion rate for women is reflected in the changing gender profile of the professions, Census data reveals that the Australian labour market retains a high degree of sex segregation. Secretaries and personal assistants, for example, are still more than 98 per cent female. In contrast, blue collar work and a wide range of trades remain irredeemably masculinist. Not only has there been virtually no change over the 20-year period, but the SDA also precludes challenge. The imperial world must be safeguarded while creating an illusion of change.

(iv) *The Public/Private Dichotomy: Corporeality and Care*

A separation between public and private life has been historically central to liberal philosophy, a distinction that is also mirrored in our legal system. The classical position was that law regulates public life, while the domestic sphere was a realm of affectivity and desire ‘where the King’s writ does not run’. The spheres have been respectively marked as masculine and feminine. The SDA proscribes discrimination only in the public sphere qua government, qua civil society and qua market in the areas of employment, education, goods and services, accommodation, clubs and administration of Commonwealth laws and programs. The cordoning off of the domestic sphere marks it as beyond scrutiny even though it is a significant site of gender *in*-equality. Women are still expected to undertake the preponderance of work involving caring for others – ie, not just children, sick family members and aged relatives, but also those who are perfectly capable of looking after themselves – partners and grown up children. A large sign positioned on the boundary warns that ‘Trespassers will be prosecuted’. If ‘private’ issues crystallise into complaints under the SDA, they are mediated through an area of operation outside the domestic sphere, such as employment

(a) Sexual Harassment

Sexual harassment is one of the most common manifestations of sex discrimination complaints and one of the most problematic. One-third of the reported decisions over the life of the SDA deal with sexual harassment, many of which emerge from small workplaces. Complainants still face the hurdle posed by the burden of proof, which may be heightened by the absence of witnesses or because the woman delayed in complaining.<sup>7</sup> ‘She consented’ or ‘She lied’ are the most common responses.

To emphasise the non-rational and unreliable nature of the complainant’s evidence *vis-à-vis* that of the authoritative male employer is the suggestion that not only did she imagine the harassment, but she is psychotic. The recent case of *Ho v Regulator*

*Australia Pty Ltd*,<sup>8</sup> which involved an accounts clerk alleging sexual harassment by her employer, the manager of the organisation, illustrates the point. While her psychiatrist testified to her depression and post-traumatic stress disorder as a result of her employment experience, the evidence of another ‘expert’ found that the fault lay in her personality, which showed elements of narcissism and hysteria – shades of the 19<sup>th</sup> century! According to Driver FM, who accepted the second report, the complaint’s condition had caused her to develop a romantic fantasy around her employer’s interest in her. The image of the narcissistic and hysterical woman complainant clearly connects with the raped women whose voices were silenced.

The personality flaws and work-related deficiencies of the complainant are also inflated within prestigious workplaces so as to make it impossible for her to meet the burden of proof. The organisation will be outraged that the complainant has besmirched its integrity and its ‘brand name’, which must be protected at all costs. In these cases, the complainant is likely to be scapegoated and reviled from the outset. In *A v B & Anor*,<sup>9</sup> the complainant was the matron in a prestigious boys’ school. (Cf Tara Girls’ School rape case). She was harassed by a resident master, but when she sought to complain, she was dismissed – for allegedly failing to do her job properly. She was unable to prove that the housemaster had pressured the headmaster to dismiss her, but look at the power imbalance in the Commission. The School was represented by two barristers, including a QC; the alleged harasser, who was joined as a respondent, had his own barrister, and HREOC had a barrister. The complainant, by now unemployed, was unrepresented and had to confront this barrage of barristers alone. The dice was loaded against her. She subsequently endeavoured to have the decision reviewed but without success.

#### (b) Pregnancy

Pregnancy was included in the SDA from the outset. Incontrovertibly a function of sex, it was nevertheless argued under SD legislation in the United States in the 1970s that the distinction was one between pregnant and non-pregnant persons, not sex. Therefore, to bring differential treatment based on pregnancy within the rubric of sex discrimination, it was necessary in a medical insurance in employment case to have recourse to male-specific medical conditions, such as hair transplant, prostatectomy, circumcision, haemophilia and gout!<sup>10</sup> In 1995, the SDA was amended to include ‘potential pregnancy’. Again, the discrimination appears to be unproblematically based on sex, thereby foreclosing the possibility of gender-neutral arguments based on immaculate conception!

Pregnancy remains a common source of discrimination at work. Pregnant women may suddenly find that they are redundant because of a downturn in the industry, or some pretext will be adduced as to their work performance. It is notable that HREOC accepted the respondent’s reasons for dismissal as bona fide in one-third of the reported decisions – usually poor work performance which, surprisingly, usually came to light only when the pregnancy was made known.<sup>11</sup> In *Mullins*, not only were the complaint’s bookkeeping skills inadequate and her typing inaccurate, her demeanour, her behaviour and even her standard of dress were attacked. Commissioner Wilson, with a somewhat better record on race than sex, stressed that the complainant had failed to prove that pregnancy was *one* of the numerous reasons for her dismissal. The imperial world maintaining interpretation would prefer to uphold employer

prerogative and oust the pregnant woman from the workplace. Not only are there fears about securing a position for a woman who takes maternity leave, there is also the psychoanalytic idea of abjection, with its overtones of defilement and disgust for bodily functions.<sup>12</sup> The pregnant body, with all its uncontrolled flows and unpredictability would be better off out of sight in the home.

### (c) Family Responsibilities

The ground of family responsibilities was included in 1992 following ratification of ILO 156 (Workers with Family Responsibilities). On its face, this might appear to be a radical development and, in one sense, it is because it recognises that a worker (the ground is limited to employment) is not necessarily an autonomous monad who leaves domestic responsibilities behind as soon as the front door is closed, according to the masculinist model. It must be understood, however, that the provisions do not apply in the domestic sphere itself. As with other grounds covered by the SDA, the relevant site of the conduct is still the quasi-public site of the workplace. A complainant with caring responsibilities has to be shown to have been treated less favourably than a person without family responsibilities. The prohibition is limited, applying only to dismissal (SDA s14(3A)).<sup>13</sup> While the complaint of discrimination on the ground of pregnancy was upheld in *Kelly v TPG Internet P/L*,<sup>14</sup> the court found that there was no obligation on the part of the employer to provide part-time work to meet the complainant's needs on her return from maternity leave. We see here the ambivalence surrounding the inclusion of the discomfiting new norms as they are trumped by the centripetal pull of the imperial.

### Conclusion

Pursuing a complainant under the SDA is imbued with risk. The extent of this risk has increased significantly as a result of a constitutional challenge that prevents HREOC from conducting inquiries. Since 2000, they have been conducted by the Federal Court or the Federal Magistrates' Court. Although these courts are not bound by the strict rules of evidence (HREOCA 1986, s 46PR) and a party may appear in person (HREOCA s 46PQ(1)), an unrepresented complainant may be disadvantaged, as raised in regard to the case of *A v B*. HREOC does not provide legal assistance, although application can be made to the Attorney-General in the case of hardship (HREOCA s 46PU(2)). No examples of aid having been granted have come to light.

The effect of the *Brandy* case is devastating for the future of the SDA. More than any other issue, including changes of government and the vagaries of the economy, *Brandy* has exerted a chilling effect on the lodgment of complaints. Legal practitioners have commented informally that they are advising their clients to lodge complaints under the relevant State Act, because a loss before a tribunal is likely to be far less financially catastrophic, as parties usually pay their own costs.

I have identified the various strands of the *nomos* in which the SDA is situated in an endeavour to explain the limitations associated with a 20 year audit of the SDA – a culture that corporealises and eroticises women, a neoliberal culture that has discarded social justice as a basic norm, and a legal culture in which the basic tenets of adversarialism, individualism and formalism favour the imperial, or world maintaining, values of the past at the expense of the world creating values more

appropriate for a 21<sup>st</sup> century normative order.

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## References

\* Warm thanks to Rosa Raco for research assistance.

<sup>1</sup> Robert M Cover, 'Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Rev* 4.

<sup>2</sup> *The Age*, 28 November 2003.

<sup>3</sup> Cover, 'Nomos and Narrative' 11.

<sup>4</sup> Cover, 'Nomos and Narrative' 12-13.

<sup>5</sup> (1986) EOC ¶92-147 (HREOC).

<sup>6</sup> Unreported. Victorian Equal Opportunity Board, 3 July 1981. The complaint was lodged under the *Equal Opportunity Act 1984* (Vic) which was replaced by a new Act in 1995.

<sup>7</sup> *Liddle v Morley* (1994) EOC ¶92-583 (HREOC); *Straney v Brady* (1994) EOC ¶92-584 (HREOC).

<sup>8</sup> (2004) ¶EOC 93-332 (FMC).

<sup>9</sup> (1991) ¶EOC 92-367 (HREOC).

<sup>10</sup> Eg, *Geduldig v Aiello* 417 US 48 (1974) per Brennan J.

<sup>11</sup> Eg, *Mullins v National Association for training for Disabled in Office Work* (1990) EOC ¶92-318 (HREOC); *Chilcott v HPH Investments* (1990) EOC ¶92-353 (HREOC); *Kelly v De Mestre* (1993) EOC ¶92-506 (HREOC); *Hancock v TP & PM Caravan P/L* (1993) EOC ¶92-539 (HREOC); *Milevski v Boral Building Sys P/L* (1995) EOC ¶92-645 (HREOC); *Manley v East West Holdings P/L* (1995) EOC ¶92-645 (HREOC).

<sup>12</sup> Julia Kristeva, *Powers of Horror: An Essay on Abjection*, trans Leon S Rondiez, Columbia University Press, New York, 1982.

<sup>13</sup> *Commonwealth of Australia v Evans* (2004) EOC ¶93-335 (FCA).

<sup>14</sup> (2004) ¶93-315 (FMCA).