

NEW DEVELOPMENTS IN EQUAL OPPORTUNITY
14th WOMEN, MANAGEMENT AND EMPLOYMENT RELATIONS
CONFERENCE
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It would be a strange start to a conference on new developments for women in the workplace not to focus on the political issues of the moment that most deeply affect Australian women.

1. Pillory Talk

I refer firstly to the public humiliation of Cheryl Kernot. Her political achievements as a former leader of the Australian Democrats have been disparaged because of the revelation, after she left politics, that she had had an affair with a fellow political leader. Sadly this was not revealed in her own words or her new autobiography or at her choice but through the ‘reluctant’ revelation of one of the powerful men she offended in that autobiography, Mr. Laurie Oakes.

For me there is poignancy in her being humiliated electronically. Mr. Oakes possession of evidence that Kernot’s former ALP lover ‘broke it off’ by email – perhaps one of the cheapest acts of any man – was disclosed on crikey.com. The former Attorney General and ‘honest politician’ justified the termination of the affair on his inability to live with his having lied to Parliament about that relationship; though he has since admitted he was simply protecting his family relationships. Of course, Mr. Evans should never have been required to ‘lie about it’ in Parliament. The Speaker allowed scandalous allegations to be made of Ms Kernot’s sexual morality in grossly offensive terms: we would not have seen a male political leader attacked on the basis that he had the morals of a randy old Billy goat.

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What has this taught women, seeing what happens to powerful women? Speak softly and carry a virginity certificate? I hope not. I hope that it is teaching women that power is achievable, but their best chance of getting and keeping it lies in the support and understanding of other women that crosses all edges. It is as hard for an outsider to manage in a hostile political environment as it is for a goldfish to swim in seawater.

2. Mother-money

I refer secondly to the extraordinary ideological battle to keep women in the home, I hesitate to say 'barefoot and pregnant' but the words come out anyway, represented by Minister Abbott's unilateral dismissal of a compulsory, employer-funded scheme for paid maternity leave after Nick Minchin, equally unilaterally, dismissed a government-funded one, and while the Prime Minister continues to speak supportively of 'policies' to come. These are just two of Pru Goward, the Sex Discrimination Commissioner's proposals for a universal scheme for paid maternity leave, on which she is consulting with business and industry and community groups and I am sure you will hear a lot more of them in the next two days.

My question is, what is it that provokes perceptions that paid maternity leave is either a rort or a burden? Without children, the economy will collapse. Though some employer groups have been particularly supportive – the Australian Industry Group, for example, would support a government-funded scheme that is part of a general review of workplace regulation² others are less so. I recently took part in a couple of Pru Goward's consultations in my role as acting Commissioner for Equal Opportunity in Western Australia, and heard one business sector leader agree that he would prefer that women employees who became pregnant resigned, because of the inconvenience and cost of enabling their return after even unpaid maternity leave. I do not think he is an orphan.

² [AiG leads push for PML](#).Discrimination Alert Issue 163 July 16 2002 P 1.

If Australians are to have more children, our society needs to become child-friendly on every level. Educated, affluent women are choosing to have fewer children each year, while Indigenous and impoverished families are the largest, and most disadvantaged. Rather than allow women without male partners to access IVF services the federal government has chosen to water down the universality of our sex discrimination legislation. On 27 June 2002 the Attorney General reintroduced his amendments to the Sex Discrimination Act to attempt to reverse the effect of the High Court's decision in Re McBain; Ex Parte Catholic Bishops Conference, which effectively upheld the right of such women to access state IVF treatment, by allowing State and Territory governments to enact discriminatory legislation, a slippery slope.

On the positive side, I note with pleasure as a New Zealander by birth, that my native land has introduced 12 weeks' paid parental leave for mothers who have been in the same job for 12 months working at least 10 hours a week, taxpayer-funded. I cheered when employees at the Australian Catholic University were enabled to claim 12 months paid maternity leave. I consider that family friendly leave arrangements are the right of a child, not just the right of mothers.

Flexible working arrangements for mothers – and fathers – have not been satisfactorily achieved through the present equal opportunity regime. Flexible working arrangements are important for all working parents, especially those who deliver the primary care. But working parents need more than paid maternity leave. Children have a right to a bond with and care from their parents for the whole of their lives, rights that are readily overlooked if we focus on the rights and conveniences of the adults and institutions instead of theirs.

This remains a difficult issue, to be negotiated in workplace and enterprise agreements bargains and contracts. EO laws have been an occasional 'Zen stick' reminding employers that it may be discriminatory and unlawful not to. The Federal Magistrates Court recently punished an employer who refused to let a female payroll worker come back to work part time after six months'

maternity leave, even though she had not negotiated part-time work before she took her leave, including the award of exemplary damages³. The Victorian Civil and Administrative Tribunal has recently found, on a rehearing ordered by the State Supreme Court, that the Department of Parliamentary Debates had discriminated against a female sub-editor, Deborah Schou, by not allowing her to work part-time from home to care for her children.⁴ The requirement that she attend full-time in the office was, in the circumstances, unreasonable. This had followed the Victorian Supreme Court's decision in State of Victoria v Schou⁵ that it was not appropriate for the tribunal to focus on the 'discriminatory' aspects of the employer refusing to provide a modem so Ms Schou could work from home part-time, saying that the real question should have been whether or not it was reasonable to allow her work part-time from home. Well, it was.

Harper J had reinforced the High Court's warning in the Waters⁶ case that 'Anti-discrimination legislation cannot carry a traffic it was not designed to bear. The beneficial operation of such legislation is prejudiced by invoking its assistance to achieve remedies which can be achieved only by straining the legislative language.' Equal opportunity laws are not meant to be used to force employers or providers to provide a positive benefit not available to other employees, per se. But it may be indirectly discriminatory to require working women to negotiate personal arrangements with a resistant employer. It may be so hard that they leave the workforce, finding the double burden of family responsibilities and employment unmanageable. Leaving flexible working arrangements and accommodation of the needs of pregnant women and young parents to the discretion of individual employers is only helpful to the majority of working women who are confident and capable of making choices in their 'mix' of work and family life. What we should be

³ Escobar v Rainbow Printing Pty Ltd [2002] FMCA 122 No. 2. 5 July 2002. Discrimination Alert Issue 163.

⁴ Schou v State of Victoria Melbourne (Dept of Parliamentary Debates) [2002]VCAT 375, 24 May 2002. Discrimination Alert Issue 160 June 4 2002. Schou v State of Victoria Melbourne (Dept of Parliamentary Debates) [2002] VCAT 375, 24 May 2002.

⁵ [2001] VSC 321, 31 August 2001

⁶ Waters v Public Transport Corporation [1991] EOC 92-390

aiming for is a culture of the workplace so this is seen as a legitimate and standard business practice, not acts of individual kindness.

3. The Law

What is the role of EEO law? In two recent cases I have observed a possibly significant return to a judicial approach to the more subtle kinds of discrimination that was a feature of the early operation of anti discrimination law. These involve interpretations that focus on the causal connection between a respondent's supposedly less favourable treatment of another person and a ground of discrimination such as sex, race or disability, and find a lawful interpretation based on the individual's conduct or bearing or performance.

Let me give you two examples. Neither case is about sex discrimination, but that doesn't matter. All discrimination claims are rooted in Australia's obligations to the international community to respect the fundamental human right to enjoy the same level of rights protection under the law, without discrimination. Any 'equal opportunity' case affects the judicial culture.

Kapoor v Monash University⁷ (Victorian Supreme Court, 21 December 2001) was a case of race discrimination. An academic employed by the University objected when the University did not renew her three-year contract to teach in an Aboriginal Orientation Scheme. The University thought she was unsuitable for the position, due to, in part, her 'reserved disposition.' Dr Kapoor complained that she had been discriminated against because her 'disposition' was a characteristic of her race and religion – she was of Brahman caste in the Hindu religion. VCAT found that the University was wrong in its assumption of her unsuitability.

The Full Bench of the Victorian Court of Appeal dismissed Dr Kapoor's appeal, on the ground that at the time the decision was made the University did not know that her disposition was a characteristic of her race and so the

⁷ (2002) EOC 93-188

‘reason’ for her less favourable treatment was not linked to her race, either. The real reason was the respondents’ view – albeit ‘mistaken’, as VCAT had found – that she was unsuitable for teaching the program. To win her case Dr Kapoor would have had to prove both that the socially reserved disposition was a characteristic that was race or religion related, and was generally a feature of persons of her race or religion, and that this was a substantial reason for the decision. VCAT had not made a finding to this effect: the Supreme Court found that the decision not to renew her contract was not unlawful because it was not made on the basis of race or religion at all, in the absence of knowledge of the race/religion link to that reserved disposition which the decision-maker (wrongly) thought meant she should not continue to be employed.

In Purvis v. NSW (Department of Education and Training) (24 April 2002) the full Court of the Federal Court overturned a finding of HREOC’s Deputy Disability Discrimination Commissioner that the expulsion of a boy from school because of his anti social and violent behaviour was an act of disability discrimination by that school. The boy’s intellectual disability had affected his school behaviour and discipline. Earlier decisions of HREOC such as Y v Australia Post⁸ had suggested that "To discriminate against a person suffering a mental disorder because of the behaviour of that person which directly results from that mental disorder, is to discriminate against that person because of the mental disorder."

On appeal the Federal Court stated, “It is only a disorder or malfunction or disorder, illness or disease that is manifested in certain symptoms that will constitute a disability. Thus, it is the disorder or malfunction or the disorder, illness or disease that is the disability. It is not the symptom of that condition that is the disability.” Since the Principal made his decision because of the Complainant's behaviour and not "because of" his disability, albeit that the behaviour was **caused by** the disability, because it was not **necessarily** a manifestation of his disability, he had not acted unlawfully. The proper test was to compare the treatment that **would have been** accorded to a Year 7

⁸ (1997) EOC 92-865

student of the School in 1997 who had engaged in behaviour similar to that of the Complainant and who did not have the Complainant's disability. If such a hypothetical student would not have been suspended and would not have been excluded from the School, then the Complainant was treated less favourably. If they would have been treated in the same way, there was no discrimination. The Federal Court found that the complainant's repetitive anti-social and violent conduct towards other students and staff was plainly unacceptable but that if the school were not allowed to take disciplinary action it would be, "hamstrung by the law in adopting normal measures of control." Even though in this case it would result in the child's suspension because of symptoms of his condition.

This decision is important, though may not have the same impact on the application of some state equal opportunity laws.⁹ It enables the connection between an alleged discriminator's acts and the 'ground' to be broken or distinguished. A 'reserved' woman may be treated less favourably because the respondent did not know that her culture made her so. A disturbed child may have no special provision made for his condition because his behaviour though caused by his disability is not 'the disability' itself. These are fine distinctions.

Both cases – unsatisfactory for both the complainants, who ultimately 'lost', and for the respondents who expended a lot of time and money on litigation - could have been avoided with some thought. In the one case, consideration of possible cultural assumptions or justifications for behaviours complained of at an early stage could have happened long before the decision not to renew Dr Kapoor's contract, and talked through, perhaps to everyone's satisfaction. In the latter, much of the stress could have been avoided if the school had listened to the suggestions of the boy's parents, and he would not have been excluded from mainstream education or the subject of years of litigation.

⁹ For example, the WA Equal Opportunity Act includes an extended definition of discrimination on the ground of a characteristic that is generally imputed to persons because of their membership of a group defined by a ground of discrimination such as impairment or sex

4 EEO as ethics

These cases are an early indication that appeal courts are willing to pare down the scope of anti discrimination law. That leads me to the next point about EEO in the 21st century. Employers will often look for a technical defence to a possible discrimination claim, and they may find it. They might characterise a refusal to provide flexible working arrangements as not so much ‘less favourable treatment’ of a working parent than a legitimate denial of a demand for a favour or special benefit not available to other staff (Schou). It may be easier to say that women’s requests for part-time work, or family-friendly hours, or the elimination of ‘blokey’ hours, conditions or cultures are not linked to their sex: after all, quite a lot of career women are not having children these days, or having them later, because they are adopting ‘masculine’ models of career development and socialisation.

I’ve built a career around working with employers to realize the benefits of a workplace culture that respects the rights of minority groups and the operation of Australia’s domestic anti discrimination laws that help to protect them. In my experience, ‘rights’ are only realized when they become mainstreamed and ‘normalised’, when the moral claims become internalized.

In London I established a non-statutory Children’s Rights Commissioner for Greater London and worked directly with children and with its new regional government developing a Children’s Strategy for the Mayor. The premise was that the only way to improve the quality of London children’s lives was to change the political culture: if children are routinely consulted and reported to, and if the effect upon them of public decision making was considered, and measured, as a matter of course, better decisions are made. They are seen as what they are: stakeholders

After more than 25 years of equal opportunity debates and policy I think it may be time to find a different way to talk about changing workplace culture and ‘normalising’ EEO. Perhaps we could drop the term. We have developed a whole new vocabulary about civil society and social capital, ‘corporate

citizenship', and ethical organizations. I believe this might be a new take on the continuing problem of discrimination.

What I propose is a philosophical shift. Let us build ethical workplace cultures. Equal Opportunity is part of an ethical framework. Ethical organizations would be, by definition, responsive to discrimination issues, so it would be unethical to fail to take them into account. Given the many corporate failures and their dramatic effect on trust and confidence – and thus the stock market and the economic life of the developed world – we have to build ethical workplaces. Look upon the corporate collapses in Australia and the US, the ethical failures of the law firm that advised the British Tobacco Company, and the moralistic judgments we still make of our public figures, at least the female variety. My shareholdings are but a shadow of their former glory because of it, and my Professional Indemnity insurance an ogre of ten times its size last year. I am diminished as a woman by the harassment of Kernot and other powerful women, and the impoverishment of public ethical discourse.

If we had ethical workplace policies, it would be unethical to force women out of work, fail to provide the necessities of a decent life for children and relatives. It would be unethical to consider a worker as less than a human being with relationships and a life beyond your particular workplace.

As well as talking about EEO, let us talk about ethical employment practices. This way we move the debate from an emphasis on the rights of specific groups to be included at the levels of other more privileged groups, to asserting that there is a duty to consider the effect of what we say and do on 'stakeholders' and that this includes giving attention to those stakeholders who have not had sufficient opportunities to articulate their claims and interests – and who thus cannot achieve comparable outcomes.

An ethical organization tries to improve how it does things by considering how its policies and processes might affect stakeholder needs and conscientiously seeking out the information to find better solutions. Ethical

processes mean making decisions, encouraging relationships and taking actions that can both achieve the purposes of the organization, and take into consideration the sometimes conflicting needs of stakeholders, their differential access to and hold on power, and the common good of society. There are always conflicting interests, but if processes are ethical in the sense I use the word, winning and losing should cause less damage because the risks and effects can be tested against standards of fairness. EEO is one of those standards. Let us find ways of measuring the rest of them. Eva Cox of Sydney University of Technology has done a lot of work on developing an audit tool for ethical organizations and what I say here today is largely the result of what I have learned from Eva. Invite her to run a workshop next time.

There has been only limited change to the cultures of senior management and other organisational practices over the last quarter century. We have used the language of equal opportunity and diversity and inclusion. At the same time the old competitive individualism and career advancement has continued to flourish.

Once it was thought that a ‘critical mass’ of women in senior positions would change the culture of organizations. We now know that the very process of advancement removes the ethical edge from the women who made it to the top. The ‘flavour’ of difference is eroded or chipped away. As High Court Justice Mary Gaudron pointed out when she launched the Australian Association of Women Lawyers some years ago, the first women lawyers who succeeded, ended up practising law in exactly the same way as the men had. We owe it to ourselves not to lose that edginess and the energy it creates.

What does it take to change a culture? World-renowned psychologist Edgar Schein said, in an interview published in BOSS magazine¹⁰ that organizations cannot change and learn – at least in the short term – unless

¹⁰ April 2002, P 25). Professor Schein is an expert in organisational learning, author of *Organisational Psychology*, (1965) and began his career by brainwashing US prisoners of War released after the Korean war.

there is guilt and anxiety (sounds like a recipe for seventies feminism) because, he says, it is painful to replace something that you already have with something new. As he describes the phenomenon, learning and cultural development typically doesn't start at the top, but with a small group, and gradually spread across the organization, and then up. When these individuals begin to innovate, the organism responds with anxiety and rejection.

What we need is a business culture that does not stifle creativity and innovation: "Corporate culture can be changed. A new charismatic leader, for example, can sometimes come in with a message that change the culture very quickly. But major cultural change usually takes a long time - - an imposed cultural change either needs to start with whole new populations of people who already hold the desired new assumptions or it will require painful periods of coercive persuasion.'

We have tried the 'stick' of equal opportunity law, and the carrot of diversity and awards. We now know that compliance with anti discrimination law or equal opportunity rhetoric is a dangerous waste of time. It goes through the motions and diminishes its own ethical heart. It encourages hypocrisy and symbolic compliance while reinforcing another set of values and rewarding silence. Discrimination thrives in organisations where conformity is the unspoken norm, where difference is not valued, the 'social glue' is based on exclusion of others, and where disagreement dissent or complaint is regarded as non-collegiate, disloyal, or dangerous. An unethical organisation covers up complaints, excludes the 'other' and dissipates the energy that creative, innovative and different opinions and experiences bring.

Equal Opportunity law has simply drawn our attention to fundamental ethical issues. It does not diminish them. As Rosemary Hunter ¹¹ argues, the right to complain is not an efficient way to change compliant or discriminatory practices, or take down the barriers to 'equal treatment': it is 'victim'-driven,

¹¹ Indirect Discrimination in the Workplace, Rosemary Hunter. The Federation Press (1992) p.242

individualistic, private and personal. Our hope that discrimination law can protect rights and change the way society operates has not been fully borne out.

The gulf between the rhetoric of equal opportunity, and management practice is pretty obvious to those of us who work with business. I am, today, watching watched three good women drift away from a firm, not because they are being bullied, not because they have been sacked, but because the workplace culture simply does not have a device to plug into the energy and ideas they have to offer. One is over 40, another works part-time and a third has recently had another child – they were not perceived as central to the firm's 'core business'. They are allowed to work. They are deciding to take their reservoir of talent somewhere else.

I think this firm is not acting ethically. An ethical organisation exploits 'difference' in constructive ways. It respects its workers, and their perhaps unusual ideas. It encourages and creates innovation, not grudgingly conceding 'equal opportunity' to avoid punishment or as a token.

5. An Action Plan?

If we are make sure that women make their proper contribution to Australia we have to make a great leap forward.

1. Commit to change – from the top, and from the heart and without hypocrisy. Look at what is done, not what we say. If we use the language of equality of opportunity do we actually treat other people decently? Consult before making decisions? Report back on what we did or didn't change as a result of consultation?
Actually promote women, rather than plan to?
2. Allow outsiders to review our behaviours and attitudes. That is why the HREOC inquiry into children in detention centres and the UN inspection committees are so valuable. They make us think. It is easy to be satisfied with what we have created. We are easily persuaded that what is legal is therefore 'right'. An objective

evaluation of the ethics of our behaviours and practices requires us not to be defensive about hearing what we do not wish to hear.

3. Join up the links. An ethical business thinks of all of its stakeholders. It sees that what it does in one sphere affects another. An equal opportunity policy that does not influence or is not reflected in the other mainstream policies – occupational health and safety; risk management; workers compensation and return to work; performance evaluation; discipline and codes of conduct – won't work, because the workplace treats one as more important than the other. We should mainstream our ethical concerns. They should be 'core business'.
4. Communicate. We need to be sure that we get honest and if necessary anonymous commentary on what's really happening even if we don't really like what we hear. Someone who makes a complaint needs to be taken seriously, without having to launch a court case. The best and most productive and most ethical response to the risk of discrimination, is an utterly honest self-evaluation and audit process – and a willingness to admit it when things are not done exactly right.
5. Be accountable. People in leadership and decision-making positions need to be accountable for their ethical standards with standards, benchmarks and report cards.
6. We must be thoughtful. An ethical organisation is a work in progress. It can never afford to be comfortable about itself.

It's time to take equality of opportunity seriously. We can only do it by taking our duty to act ethically, seriously too.