

## Chapter 14

# On the Right Track, But Don't Lose Momentum

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**"E**quality is a meaningless abstraction unless it is founded in economic security and economic strength." Justice Mary Gaudron, High Court.

This paper will deal with three areas: Explaining the relevant provisions of the Sex Discrimination Act (SDA), dispelling some of the myths around affirmative action and contemplating the future in relation to these issues.

## Relevant Legislative Provisions The SDA

The direct discrimination provisions of the SDA make it unlawful to treat people less favourably on the basis of sex, marital status, pregnancy or potential pregnancy.

Behind these provisions is the idea that formal equality results where people in the same, or similar, circumstances, are treated the same.

The indirect-discrimination provisions make it unlawful to impose, or propose to impose, a rule or policy which is the same for everyone, where it has the effect of disadvantaging persons of one sex, or of a particular marital status, or pregnant or potentially pregnant women, if imposing that rule or policy is not reasonable in the circumstances.

These provisions recognise that identical treatment of people may produce unequal results and that consideration must sometimes be given to differences based on sex, marital status, pregnancy and potential pregnancy.

Indirect discrimination is concerned with the effect, not the form, of the treatment.

At the same time, the SDA protects voluntary actions taken to achieve equality for women, or between persons of a different marital status, or between women who are pregnant or potentially pregnant and persons who are not.

The voluntary actions, called "special measures", which the SDA protects, are measures which have the purpose of addressing disadvantages experienced by groups covered by the Act in areas where they have been, and continue to be, unequal. A special measure is a type of affirmative action.

## Principles of Justice in Action

Unlike the Civil Rights Act in the U.S., Australian anti-discrimination legislation does not mandate or require affirmative action to remedy inequality. The process of determining whether a sex-specific strategy is a lawful special measure, begins after a complaint of sex discrimination has been lodged by an individual who is opposed to it.

If the allegedly discriminatory act is found to be a special measure, the complainant has not discharged his or her burden of proving discrimination.

Australia has embraced mandatory affirmative action to a very limited degree. Generally, affirmative action programs in Australia are voluntary and may be subject to complaints of discrimination. For this reason, it is extremely important that we keep in mind the U.S. experience and are careful to avoid narrow interpretations of equality which allow dominant groups to challenge the gains of women and minority groups.

Initially, a special measure under the SDA was defined as an act, a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons. Its focus was removing discrimination at the point of access.

But it embraced a more conservative understanding of justice as well because its basis was formal equality. In accordance with the concept of compensatory justice, which sees any different treatment on prohibited grounds as discrimination, special measures were seen as discriminatory but exempt under the Act.

This produced the unsatisfactory result that measures aimed at redressing past discrimination, required exemption from an Act which aims to eliminate discrimination against them. Not surprisingly, the purpose of special measures was not well understood and narrow interpretations of the section by courts and tribunals inhibited initiatives to achieve equality for women.

The first such case *Re Australian Journalists Association* (the "AJA" case) arose under the then Conciliation and Arbitration Commission's power to disallow changes to union rules if they would be contrary to law. The AJA proposed a new rule which would have reserved for women a certain proportion of delegates' positions on the AJA's federal council, citing a number of structural reasons for the under-representation of

women on the council. The commission however found that the proposed rule would be contrary to the SDA in that it constituted sex discrimination against men by a registered organisation. It was not saved by the special measures provision. The commission ruled that as women and men were equally permitted to stand for election to the council, that is, there was formal equality, the opportunities for each sex were equal and no exception was required for equality of opportunity.

In 1991 three men, Dr Proudfoot, Mr Smith and Dr Henderson, challenged two Canberra Women's Health Centres under the SDA on the basis that the service discriminated against men, despite the fact that the male complainants suffered no disadvantage because the ACT Board of Health provided a generalist medical service at eight locations in the ACT. The women's services were part of a National Women's Health Program established by the Commonwealth Government precisely because generalist health services were not catering to women's health needs.

The president of the Human Rights and Equal Opportunity Commission hearing the case found that the women's health program did discriminate against men in that it resulted in the refusal of medical services on the basis of sex. However, the president also found that the measures were saved by the special measures provision because it was clear from the evidence that women had particular health needs which had not been met by the generalist services and the medical profession as a whole. It was not considered sufficient that women had equal opportunity to access the generalist services. The president looked at the nature and quality of the service they were receiving and found it was inadequate.

Proudfoot's complaint in particular set an important precedent, which highlighted the conceptual flaws underlying the narrow nature of the provision and the need for legislative change.

The Sex Discrimination Amendment Act 1995 amended the provision so that a special measure is now defined as a measure which is taken for the purpose of achieving substantive equality between men and women, persons of different marital status and between women who are pregnant or potentially pregnant and persons who are not. Substantive equality sees equality in terms of removing structural barriers which prevent particular groups from ever achieving equal outcomes with others in the competitive process.

Formal equality is concerned with equal treatment,

equal opportunity is concerned with differential treatment where it is necessary to level up the playing field but regardless of the outcomes of the game. Substantive equality is concerned with changing the rules of the game so that everyone has an equal chance of winning. The amendment also makes clear that these measures are properly understood as non-discriminatory. In doing so, it recognises the substantive difference between providing benefits for a dominant group (promoting discrimination) and redressing the inequality experienced by a disadvantaged one (eliminating discrimination).

So what difference does the amendment really make? Is it really all that significant? Certainly, it does not confer any positive obligation on people to redress disadvantage. It is still a protective measure, which

operates within narrow individual complaint-based legislation. And, it still refers to measures to redress inequality between men and women, not to redress the inequality of women per se. So that, for example, an education strategy specifically for Aboriginal women may have to be justified as a special measure under the Racial Discrimination Act as

well as the SDA. These are all significant limitations to its operation. But what the amendment does do, is increase the protection for initiatives to protect equality from attack by claiming these actions are discriminatory. It does so, by increasing the distance between special measures and discrimination.

## Dispelling the Myths

In the U.S. the debate around affirmative action has been resurfacing with escalating ferocity over the last 30 years. The divisions are deep as there is much at stake.

Business leaders in the U.S. have grown increasingly resentful of affirmative action policies.

While ignoring factors such as international competition and a long-term recession, they blame affirmative action for a decline in U.S. productivity, undermining the economy and adding to the cost of business because of being forced to hire "less competent" people. They claim that qualified, white, male workers are being displaced by incompetent minorities and women. These fears have intensified as the economy has deteriorated, unemployment has risen and competition for jobs and housing has increased. Since the beginning of the economic downturn in the mid-1970s, opposition has grown to distributive government policies that were more acceptable when the economy was booming.

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Perhaps the most popular myth about affirmative action is that it results through the imposition of quotas. Quotas focus on number, redressing statistical balance sometimes at the expense of the merit principle. Affirmative action programs can be "hard" or "soft". The former mandates particular results sometimes through the imposition of quotas. "Soft" affirmative action programs like special measures, specify targets and goals only and encourage and protect voluntary action to achieve them. While affirmative action has been a legislative requirement in the U.S., quotas are illegal in that country. Affirmative action is not synonymous with quotas.

Affirmative action usually accords to members of a particular group an advantage in an otherwise competitive process, while quotas remove certain provisions or privileges from competition altogether. Because that distinction is not well understood, opponents argue that affirmative action means giving preferences to less qualified, or even unqualified, applicants over qualified ones.

The backlash against affirmative action and EEO in Australia has been more limited and subdued. Reasons for this may include the fairly slow and gradual approach to developing and implementing legislation, strengthening it over time as a better climate for it is built.

Surveys do show that support for EEO and affirmative action is increasing, especially among women, younger men and better educated men.

If we want to learn from the U.S. experience, we need to understand what has prompted the growing resentment of affirmative action policies and why attacks on those policies have been successful in convincing the public that they are flawed and should be eliminated.

Over the last decade, Australia has seen some significant improvements in government support and public understanding of equality, sex discrimination and affirmative action. Much of that support has been translated into concrete legislative reforms of which the SDA is one example.

The first lesson from the U.S. experience is that to prevent public support for attacks on affirmative action, we must expose the myths which are put forward to justify them. That is, we must separate the facts from the furbies. We need to identify and clarify the narrowly defined concepts of equality, discrimination and affirmative action that are informing, or rather misinforming, the current debate in the U.S. and ensure that they do not become tools for turning public opinion against social justice initiatives in Australia.

Affirmative action in Australia is provided by legislation. Legislation can be amended.

## Contemplating the Future

I would now like to consider Justice Gaudron's statement:

Equality is a meaningless abstraction unless it is founded in economic security and economic strength.

And question how fair can an economic system be when, by every statistical measure, women and most disadvantaged groups lag behind men in pay and advancement?

Improving pay equity and eliminating discrimination from employment are important processes for improving economic opportunities for women, in which a relatively high degree of success has already been achieved in Australia. Australia ranks second to Sweden in terms of pay equity.

It is argued that over the last two decades of global shifts to labour market decentralism and deregulation, Australian women have fared relatively well.

Three fundamental reasons stand out:

- The protection of women's wages through a relatively centralised wage-fixing system.

- The growing understanding and incorporation of sex-discrimination principles into industrial relations legislation through the use of international conventions.

- Growing understanding of the complex and inter-related nature of women's economic inequality, and the structural barriers which maintain it.

Equality for women at work can only be maintained and improved by building on rather than dismantling the existing mechanisms to deal with discrimination, in terms of our international obligations, and our national industrial relations and human rights legislation.

At the core of successful future affirmative-action pursuits are the maintenance and improvement of industrial provisions that protect women workers from marginalisation.

Substantive equality cannot be achieved without economic equality and this can only be gained through enshrinement of appropriate protections in industrial relations law. For example, legislative provisions for sex equality do not, on their own, appear to produce the most equitable pay outcomes.

It has been demonstrated that while Canada has the most sophisticated sex-equality legislation, it had worse outcomes than Sweden and Australia and the U.K. with respect to equal pay. This particular study related achievement of equality to centralised labour

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market institutions, and points to the ability of Sweden and Australia to run income policies which have addressed the interest of the low-paid and so benefited women. In a later study (1992), it was found that a collective framework, centralised industrial relations and a high proportion of women employed in the public sector were related to higher earnings for women, while equal-pay and anti-discrimination legislation, in itself, was not.

Women's equality isn't a simple thing. An understanding as to what leads to the inequality of women throughout the world is essential for ongoing improvement.

Inequality has many layers, including:

- Historical denial of access to many forms of employment, then to equal pay and opportunity in employment.
- Undervaluation of work performed traditionally by women.
- Women's disproportionate share of family care which reduces workforce participation, interrupts progression and affects training investment by women and employers.

As you are aware the government is re-positioning industrial relations law in this country. I have some concern that this shift will not bode well for women's equality.

Although the government's intention may be to ensure the industrial protection of women workers, the current Workplace Relations Bill does not provide those adequate mechanisms to achieve equal remuneration between men and women. Evidence, such as found in *Just Rewards*, convincingly demonstrates that women have not been able to effectively bargain for overaward payments and that overaward payments are often paid in a discriminatory manner. Currently, in total, women earn only 35 percent of the overaward payments made to men; if managerial employees are excluded, adult women still only earn nearly 50 percent of the overawards paid to adult men. Management salaries, in general, show major pay differences on the basis of sex.

Women senior executives with the same level of experience, and of similar age, earn around 20 percent less than their male counterparts.

I am concerned that the Bill, as presented, will undermine its stated intention of better integrating work and family, by not providing a coherent framework for the regulation of different forms of employment such as part-time and casual employment. I fear that this may exacerbate further the problems faced by women, who are already concentrated in areas where there is inadequate award coverage, as casual and contract workers as well as outworkers, and little capacity to have their industrial rights enforced.

I am also concerned at the overall change in focus on the individual at the expense of representative groups, and have doubts about the ability of many individuals

to present an effective bargaining unit. Research by the Department of Industrial Relations on the current requirements for equity in the process and outcomes of bargaining demonstrates that while there are some areas that require greater attention (for example, consultative mechanisms), that women under new federal agreements were more likely than men to say that they were better off as a result of bargaining, even though the pay increases they received were less than men's.

## Conclusion

EEO and affirmative action go some of the way to make changes for women in the world of employment. Such policies are, however, vulnerable to the vagaries of economics, restraints and political conservatism. This has been best illustrated by the U.S. experience.

Industrial relations law which is sensitive to the needs of women workers is crucial to the achievement of substantive equality for women.

So what have we learnt from our own history in this area?

That we have been on the right track — with various adjustments we can continue to improve.

What is clear, is that we cannot lose any momentum. We should not limit our ability to address inequality and to achieve systemic change for women's substantive equality.