

AN UNEQUAL WORLD

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I INTRODUCTION

This year marks the 20th anniversary of the Hawke Government's *Sex Discrimination Act 1984* (Cth) ('SDA'). When that historic piece of legislation was introduced, average weekly earnings for women were less than 70 per cent of those for men. Two out of three women workers were clustered in education, health, community care, clerical, sales and service jobs. Outside of hairdressing, women made up only two per cent of all apprentices. Despite their critical role in the very industries that continue to keep our society functioning, women were discriminated against and marginalised.

Australia was out of step with progressive nations in the world who were respectful of international law. During the 1950s, the International Labour Organisation had developed conventions on discrimination in employment and occupation,¹ and on equal pay for men and women workers,² which were ratified by Australia in 1974 and 1975 respectively. But it wasn't until 1983 when the Hawke Government ratified the United Nations' *Convention on the Elimination of All Forms of Discrimination against Women*³ that specific-purpose domestic legislation was considered.

The SDA was not universally welcomed.

The hysterical response it received demonstrated the plight women have traditionally faced when legal and cultural shifts have reflected some measure of justice concerning their lives. Liberal Senator, Noel Crichton-Browne, declared that the role of the legislation was to 'destroy the structure, fabric and intrinsic role of the family unit'.⁴ He went on to say that

[m]any married women ... undertake certain family duties ... which they believe are

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1 *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature on 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

2 *Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953).

3 Opened for signature on 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981).

4 Commonwealth, *Parliamentary Debates*, Senate, 9 December 1983, 3628.

best undertaken by a wife and mother. They are also perfectly happy and, in their minds, they believe they are perfectly equal.⁵

Current Queensland Senator, Ron Boswell, thought the outlawing of sexual discrimination amounted to a plot originating in 'the eastern [European] Soviet bloc countries'.⁶ Equality for women, and in particular the establishment of crèches and childcare centres, was part of a plot by international forces to gain control over the raising of our children. Anti-Bill propaganda included claims that the passage of the Bill would lead to the elimination of the family and the banning of the Bible. Placards at anti-Bill demonstrations claimed the 'Sex Bill Castrates Men'. The family and our Western style market economy were claimed to be under threat.

Needless to say, none of these, nor numerous other dire prophecies, resulted. On the contrary, we have become a very wealthy nation with our gross domestic product doubling since 1981. This is in good part due to the fact that the number of Australian women in the workforce has almost doubled and that we have had the benefit of a great reservoir of women's talent, energy and intellect.

II TWENTY YEARS OF THE SDA: REVIEW AND REFORM

The *SDA* not only set out the grounds for a complaint of discrimination, it established the Office of the Sex Discrimination Commissioner, which has a role of research, education and advocacy. In this context, the Australian Council of Trade Unions ('ACTU') pays tribute to the groundbreaking work and the vital profile each of the Sex Discrimination Commissioners have had on issues concerning the lives of working women.

Over the years, these women – Pam O Neil, Quentin Bryce, Sue Walpole, Moira Scollay (who acted in the position for two years), Susan Halliday and the current Commissioner, Pru Goward – have conducted a number of major public inquiries which have promoted policy initiatives, law reform and raised community understanding. They have been strong and articulate advocates for women and for equality in our community.

The national inquiries have focussed on discriminatory practices in workplaces. The 1992 report *Just Rewards*⁷ inquired into sex discrimination in over-award payments. Later research into the effects of enterprise bargaining on women's hours of work in the *Stretching Flexibility Report*⁸ in 1996 maintained an emphasis on the effect on women's lives under different wage fixing systems.

5 Ibid.

6 Commonwealth, *Parliamentary Debates*, Senate, 29 November 1983, 2963.

7 Human Rights and Equal Opportunity Commission, *Just Rewards: Report of the Inquiry into Sex Discrimination in Overaward Payments* (1992).

8 Human Rights and Equal Opportunity Commission, *Stretching Flexibility: Enterprise Bargaining and Women Workers* (1996), <http://www.hreoc.gov.au/pdf/sex_discrim/stretching_flexibility.pdf> at 25 October 2004.

The 1999 *Pregnant and Productive*⁹ inquiry and report, and the more recent national inquiry into paid maternity leave and the publication of the Commissioner's recommendations in *A Time To Value*¹⁰ in 2002, have contributed to broad community understanding, and some limited law reform and policy initiatives designed to reconcile women's reproductive role with equal opportunity to participate in paid employment. Research projects and educational campaigns and resources such as the 1998 *Equal Pay Handbook*,¹¹ and the more recent focus on sexual harassment, also illustrate the Commissioner's ability to campaign and advocate for safe, secure and fair workplaces.

III TWO DECADES ON: THE SITUATION TODAY

Despite these inquiries and the case law concerning discrimination established under the auspices of the *SDA*, the fact remains that women still participate in the labour force on an unequal footing.

The reality is that women's lives have in fact gotten harder.

It is true that Australia's workforce has experienced a revolution in women's participation in paid employment. When the *SDA* was introduced, women made up 38 per cent of employed persons; today women account for 44.6 per cent of people actively engaged in full-time or part-time work. Women's participation rates are closing on men's. In many ways women's participation in paid employment today more closely mirrors that of their male counterparts, with women joining the labour force after longer periods in education, and remaining in paid employment during their child-bearing and child-rearing years.

But in other ways women's labour force participation is still very different from that of men, in terms of the nature of the work available to women, especially women with family responsibilities. Australia still has a highly segmented labour force and, with notions of men's jobs and women's jobs entrenched, there are arguably two labour markets.

The gap between male and female average earnings narrowed over the first 10 years of the *SDA*'s existence, but progress has stalled in recent times, and to date there has been little use made of remedies provided by the *SDA* to address the undervaluation of 'women's work' that is at the core of the gender pay gap.

Women's employment is in others ways often associated with lack of job security, low access to standard conditions of employment, poor career and progression prospects and other indicators of poor quality work.

9 Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a Right not a Privilege to Work while Pregnant* (1999), <http://www.hreoc.gov.au/sex_discrimination/pregnancy/report.html> at 25 October 2004.

10 Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002), <http://www.hreoc.gov.au/sex_discrimination/pml2/> at 25 October 2004.

11 Human Rights and Equal Opportunity Commission, *Equal Pay Handbook* (1998), <http://www.hreoc.gov.au/pdf/sex_discrim/equal_pay.pdf> at 25 October 2004.

Unfortunately, the social and economic revolution which has led to more women being employed has not been matched with a cultural shift at the workplace or in the home which provides for the necessary flexibility to enable women and men to manage work and family. It is still women who shoulder the bulk of and the burden of family care, as revealed in recent research by the Australian Institute of Family Studies.

This means that many families, particularly those with intense caring responsibilities, are seeking more flexible working arrangements, including increased access to permanent part-time work, in order to balance their work and family responsibilities.

The choice of part-time employment has come at a price: 80 per cent of part-time work, being the overwhelming preference for women with caring responsibilities, is casual. Women are over-represented in casual work generally, with one third employed casually.

Add to this the pay gap – women take home almost \$300 less per week, on average, than men – and we start to unveil a workplace culture that has changed little in decades.

The fact is that Australian workplaces were designed for men, by men of another era. The industrial law is scattered with references to ‘our male breadwinner’. The pin-up boy of this era was Harvester Man, who, thanks to Justice Higgins, was awarded a rate of pay sufficient to raise a wife and three children.¹² In another case, annual leave was awarded partly ‘to provide ample need for the breadwinner to spend leisure time with his family’.¹³

We all know Harvester Man – our dad, uncle, grandad – who went to work, worked hard, came home to the comfort of slippers at the door, tea on the table and the expectation of a relaxing evening. There was, of course, every expectation that he would mow the lawn on the weekends! Officially Harvester Man is dead, though his ghost lurks in the structural foundations of most workplaces.

Competition by women to succeed in this cultural context has largely failed and Wonder Woman is tired. Having to leave caring responsibilities at the door of our workplaces has us rushing headlong into a work/care collision.

IV WHERE TO FROM HERE? POSSIBLE REFORMS

The ACTU has promoted a range of measures that provide choice for workers with family responsibilities, whether it be children, aging parents or other dependent family members. Building on the foundations of parental leave, including paid maternity leave, and supported by accessible and affordable childcare, workplace practice should ensure, as a minimum, that:

12 *Ex parte McKay* (1907) 2 CAR 1, 218 (‘*Harvester Case*’).

13 *Re Annual Leave* (1945) 55 CAR 595, 597.

- the current provision for unpaid maternity leave (and parental leave) is extended from 12 months to at least 24 months, to accommodate greater choice in relation to the care of infants and young children;
- full-time employees returning from parental leave have the right to return to their place of work on a part-time basis;
- employees be allowed to 'buy' up to six weeks a year extra annual leave through averaged salary adjustments – these could be used for school holidays;
- employees be allowed to request changes to start and finish times, and the way in which the working day, week or year is organised, in order to accommodate different family care responsibilities, including the school day and school year;
- employers should be obliged to give deep consideration to reorganising work to allow employees to meet their caring responsibilities and should only be able to refuse such requests – particularly to accommodate school and child care appointments – where there are sound business reasons which prohibit granting the employee's requests; and
- employees have the right to reasonable unpaid emergency leave for family responsibilities.

The ACTU is pursuing these minimum standards through its work and family test case in the Australian Industrial Relations Commission ('AIRC') during 2004.¹⁴ All of the standards are no-cost or low-cost items, and all are currently in practice, either internationally, through legislation or company practice, or in Australia, through bargaining or corporate practice.

Like the passage of the *SDA*, 20 years on, the test case application has drawn similar dire predictions, such as that:

- business would not employ women, or women aged 25–40, or workers with family responsibilities, or certain 'high-risk' individuals;
- small business would be sent bankrupt; and
- the doubling of parental leave would be 'catastrophic', 'disastrous' and 'unworkable', even though business owners have experienced, on average, one application for parental leave per one hundred employees.

During the AIRC's hearings, when asked whether they costed the applications, business owners have admitted they 'relied on a gut feeling'.¹⁵

14 See generally *Family Provisions*, Australian Industrial Relations Commission (2004) <<http://www.e-airc.gov.au/familyprovisions/>> at 25 October 2004.

15 Transcript of Proceedings, *Family Provisions Case* (Australian Industrial Relations Commission, Giudice J, Ross V-P, Senior Deputy President Cartwright, Deputy President Ives, Commissioner Cribb, 29 September 2004), <<http://www.airc.gov.au/documents/Transcripts/290904c20034198.htm>> at 25 October 2004.

V THE POTENTIAL OF THE SDA: RECENT CASE LAW

In the area of work and family, complaints of discrimination brought under the SDA, and its similar complementary legislation in State jurisdictions, have paved the way for the general applications made by the ACTU in the industrial arena. The issue of returning to work after parental leave is illustrative of the relationship between anti-discrimination jurisdictions and industrial developments.

Over the past decade, a body of precedent has developed in which courts and tribunals have considered whether a failure by an employer to accommodate a mother's request to return to work part-time after parental leave constitutes unlawful discrimination. The cases have variously considered whether the discrimination is indirect sex discrimination or discrimination on grounds of parental or carer's responsibilities.

The landmark decision is the 1998 case of *Hickie v Hunt and Hunt*¹⁶ ('*Hickie*'). In that case, Commissioner Evatt found that the imposition of the requirement to work full-time was a requirement with which fewer women than men could comply. Similar reasoning was adopted by the Western Australia Equal Opportunity Tribunal under the *Equal Opportunity Act 1984* (WA) in the case of *Bogle v Metropolitan Health Service Board*.¹⁷ In that case the employer unsuccessfully argued that part-time employment could not be performed at supervisory levels and thus the requirement for full-time attendance was reasonable. The tribunal found that the refusal to allow part-time employment was unreasonable and constituted indirect sex discrimination and discrimination on the grounds of family responsibilities and marital status.

Hickie was followed by the Federal Magistrates Court in 2002 in *Escobar v Rainbow Printing Pty Ltd (No 2)*,¹⁸ where a refusal to provide part-time employment and subsequent dismissal was held to be indirect sex discrimination and unlawful discrimination on grounds of family responsibilities. In 2003, the Federal Magistrates Court held that although an employer's refusal of part-time employment as a manager was reasonable, and thus not indirect discrimination, the failure to provide alternative part-time employment constituted indirect discrimination on the grounds of sex.¹⁹ Just recently, the New South Wales Administrative Decisions Tribunal held that a failure to provide part-time work to a cargo manager constituted indirect discrimination on the grounds of carer's responsibilities.²⁰

However, the case law is still evolving and there are some contrary decisions. In *Kelly v TPG Internet Pty Ltd*²¹ ('*Kelly*') the Federal Magistrates Court held that a failure to provide part-time employment did not constitute the imposition

16 [1998] HREOCA 8 (Commissioner Evatt, 9 March 1998).

17 (2000) EOC ¶93-069.

18 (2002) 120 IR 84.

19 *Mayer v Australian Nuclear Science and Technology Organisation* (2003) EOC ¶93-285.

20 *Reddy v International Cargo Express* [2004] NSWADT 218 (Unreported, Members Britton, Bolt and Nemeth de Bikal, 30 September 2004).

21 (2003) 176 FLR 214.

of a discriminatory requirement, but rather the refusal of an advantage. In distinguishing *Mayer v Australian Nuclear Science and Technology Organisation*,²² the Court inferred that employers who impose inflexible work practices upon all employees were better protected from claims of discrimination than those where some flexibility was in place.

Similarly, the issue of flexibility in the arrangement of work has been litigated, most famously by Debra Schou under the Victorian Equal Employment Opportunity legislation,²³ who alleged her employer's insistence that she attend work full-time, when work from home for part of the week was feasible, constituted discrimination on the grounds of her parenting responsibilities. After six years of litigation, Ms Schou was successful twice at the Victorian Civil and Administrative Tribunal, and unsuccessful twice in the Supreme Court of Victoria.²⁴

Similarly, in *Gardiner v New South Wales WorkCover Authority*²⁵ the New South Wales Administrative Decisions Tribunal held that an employer could reasonably insist on relocation to a remote office, despite the impact the additional travel had on the employee's ability to prepare her children for school. The case is useful, however, in that the Tribunal took a broad definition of what constituted caring responsibilities, including emotional care of school-aged children. It is also worth noting that the employer had explored a number of changes, including shorter working days and some work closer to home in an effort to ameliorate the impact of the relocation on the employee's capacity to provide care to her family.

More positively, in *Song v Ainsworth Game Technology Pty Ltd*²⁶ ('*Song*'), the Federal Magistrates Court held that an employer who sought to impose shorter hours, rather than accommodate a rearrangement in hours of work, amounted to discrimination on the basis of family responsibilities.

VI CONCLUSION

These cases are largely a cause for celebration but they also demonstrate both the strength and the weakness of the *SDA*. In their favour we now have a body of case law in which it has been accepted that mothers bear the overwhelming burden of the care of children, and it is no longer incumbent upon applicants to prove this before the tribunals. But the cases rely on the complainant being able to prove discrimination in the context of the particular workplace. Thus in *Kelly* an employer who would not countenance part-time work at all was not discriminating, regardless of how unreasonable that position was, because the comparator was a male employee subject to the same inflexibility. In *Song*, the

22 (2003) EOC ¶93-285.

23 *Equal Opportunity Act 1995* (Vic).

24 *Schou v Victoria* (2000) EOC ¶93-100; rev'd (2001) 3 VR 655; *Schou v Victoria* (2002) EOC ¶93-217; rev'd (2004) EOC ¶93-328.

25 (2002) EOC ¶93-291.

26 (2002) EOC ¶93-194.

complainant had to prove constructive dismissal in order to fall within the scope of the family responsibility ground of discrimination. Although complaints may be brought by groups of women suffering discrimination at the hands of their individual employer, the narrow approach taken by the courts makes it difficult to see the *SDA* being used as a vehicle for wider-ranging complaints of systemic discrimination in the labour market.

The cases also rely on employees being prepared to risk exposure to costs. This means that only those employees who have significant means, or are assisted by already stretched organisations such as unions, are able to pursue their claims in the courts. And while conciliation is to be encouraged, the strongest cases are settled, usually in confidence, thus ensuring that the judiciary and the public are not exposed to the many instances of discrimination.

This points to possibilities for future reform, reform that seems essential if we are to arrest the decline in the status of women at work and promote the required cultural shift essential for the full participation of women, and increasingly men, with caring responsibilities in the workforce.

Beyond the injustice of discrimination, Australia faces the further challenge of a shrinking workforce as a result of our aging population. We don't have to be victims of our own demography. Workplace practice that functions properly enables a balance between work and family that will maximise participation of women and men with caring responsibilities: this is good for employees, good for employers and good for the economy.

Anne Summers claims that we have lived through the death of equality.²⁷ A government that was genuinely interested in the status of women might consider a provision for group or class actions that could serve to drive reform more broadly. Equally, some greater integration of the Human Rights and Equal Opportunity Commission inquiry process and the powers of the AIRC where workplace behaviour and discrimination is involved might serve us well. A more radical approach might look to a tribunal with powers covering industrial relations and human rights, thus ensuring that the area between discrimination and unfair conduct is comprehensively covered. While the *SDA* has served us well, we need to debate and develop further reforms that will resuscitate human rights and equal opportunity guarantees across the workforce.

27 Anne Summers, *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia* (2003).