A REGULATORY ANALYSIS OF THE SEX DISCRIMINATION ACT 1984 (CTH): CAN IT EFFECT EQUALITY OR ONLY REDRESS HARM?

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INTRODUCTION

Work is an important source of economic citizenship and identity for many people in Australia. In this sphere, like possibly all others, access, opportunities and outcomes are shared unequally between men and women. My research focuses on the question of what role law can play in creating greater equality in work, by eliminating discriminatory behaviour, policies and practices. In particular I focus on how law might make workplaces more "family-friendly", as arguably this would enable women, who disproportionately bear domestic and caring responsibilities, to participate more equally in paid work (and simultaneously allow and encourage men to participate more fully in unpaid family work).

In this chapter I take a preliminary step in exploring how federal anti-discrimination law[1] can be used to effect greater family-friendliness in workplaces. Using a regulatory approach, I analyse the regulatory mechanisms available under anti-discrimination legislation, specifically the *Sex Discrimination Act* 1984 (Cth) ("*SDA*"), and consider the interaction of the formal or traditional legal mechanisms and the informal or indirect regulatory mechanisms it establishes to achieve the Act's objectives.

I have chosen a regulatory approach because, firstly, it provides a view of the various legal mechanisms that highlights their virtues and limitations in terms of effectiveness in achieving the legislation's objectives. Anti-discrimination legislation has multiple and to some extent competing objectives. These are: the explicit objective of eliminating discrimination (e.g., s.3, *SDA*) and the implicit objective of redressing

[1] There are four federal substantive anti-discrimination Acts – *Racial Discrimination Act* 1975, *Sex Discrimination Act* 1984, *Disability Discrimination Act* 1992, *Age Discrimination Act* 2004. *The Human Rights and Equal Opportunity Commission Act* 1986 (Cth) establishes the statutory agency responsible for administering the substantive Acts, the Human Rights and Equal Opportunity Commission (HREOC), and the processes for resolving claims made under the Acts.

the harm of discrimination that does occur. The Act establishes a prohibition on discrimination as the central regulatory feature to eliminate discrimination. However, breach of the prohibition is met only with a private enforcement mechanism and limited sanctions, suggesting that the legislation is designed only to achieve the implicit remedial dispute resolution goal of providing compensation to individual victims.

Second, to get a full regulatory picture and possibly to explain what normative change has occurred, we need to look beyond the legal rules and enforcement of rules. Other regulatory mechanisms – such as education and persuasion - appear to operate in conjunction with the direct legal regulation to bolster the state's normative impact on discrimination in workplaces. By including these mechanisms in the analysis I hope to explain how discrimination *is* regulated at the workplace, opening up questions for further research of how work *might be* regulated more effectively to achieve equality.

I begin by outlining a few ideas emerging from the regulatory literature that are useful for explaining how anti-discrimination laws operate and how other regulatory mechanisms operate in conjunction with them. Drawing on this literature, I analyse the formal or direct legal mechanisms established by the legislation before turning to consider the informal or soft regulatory mechanisms.

REGULATORY SCHOLARSHIP

The growing body of regulatory scholarship[2] does at least two things. It illuminates changes to the ways in which law is being structured and used to regulate behaviour – often referring to the evolution of a new regulatory state that does more steering and less rowing. Further it provides a new scholarly lens, looking beyond law as the only or even primary means of regulating behaviour – seeing regulation as something more akin to all mechanisms of social control or governance.

One of the central points made by many regulatory scholars is that the state has moved away from traditional command and control regulation to develop an array of apparently more sophisticated ways to use law. Command and control regulation is meant to achieve regulatory goals of behavioural change by deterrence - the threat of punishment for

[2] See e.g. Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, New York, 1992); Fisse B and Braithwaite J, *Corporations, Crime and Accountability*, (Cambridge University Press, Cambridge, 1993); Dorf M and Sabel C, "A Constitution of Democratic Experimentalism," (1998) 98 *Columbia Law Review* 267; Collins H, Davies P and Rideout R (eds) *Legal Regulation of the Employment Relation*, (Kluwer Law International, London, 2000); Sturm S, "Second Generation Employment Discrimination: A Structural Approach" (2001) 101 *Columbia Law Review* 458; Arup C, "Labour Law as Regulation: Promise and Pitfalls" 2001 *AJLL LEXIS* 23; Parker C, *The Open Corporation: Effective Self-Regulation and Democracy*, (Cambridge University Press, New York, 2002); Parker C, Scott C, Lacey N and Braithwaite J (eds), *Regulating Law*, (Oxford University Press, Oxford, 2004).

breach of a clearly defined rule enforced by the state post-facto. This form of regulation is critiqued as being blunt, inefficient, costly to the state and often bringing about perverse outcomes.[3] Command and control regulation is particularly inept at dealing with problems that defy precise definition appropriate for a wide variety of circumstances. The evolution of our occupational health and safety laws attest to this realisation.

Alternative regulatory approaches are characterised by their acknowledgement and use of a variety of regulatory *actors*, *enforcers* and *motivators*, transcending the old criminal-civil dichotomy. First, the state is not the only regulatory actor. Corporations also regulate, in that they perform a private ordering role which can sometimes be harnessed to achieve public goals. The new regulatory state is characterised by "'meta-regulation' – regulating the regulators".[4] Second, alternative regulatory approaches utilise a variety of enforcers, either replacing or adding to the public prosecutor with victim or third party enforcement of standards.

Third, alternative regulatory approaches recognise that a variety of motivators can be used – "education, persuasion and cooperation rather than [only] deterrence to persuade businesses to preventively comply with regulatory goals."[5] As Fisse and Braithwaite note in respect of corporate crime:

> [A]ctors are motivationally complex. Profit maximisation is an important motivation for many private corporate actors, but the maintenance of individual and corporate repute, dignity, self-image and the desire to be responsible citizens are also important in many contexts, as are various more idiosyncratic motivations. A good strategy will not be motivationally myopic.[6]

In respect of workplaces, the organisation that engages workers is a key regulatory actor, being the object of direct regulation but also thereby the one that translates those standards into practice by internal orderings. Parker acknowledges the private ordering role of corporations. She argues, in *The Open Corporation*,[7] that effective legal regulation for the promotion of more socially responsible corporations would act by enhancing each corporation's commitment and capacity to self-regulate, by which, in essence, she means internal but accountable regulation of the corporation by the corporation. Effective legal regulation would help the corporation to identify, effect and even improve upon state sanctioned behavioural norms (such as non-discrimination).

To regulate or modify behaviour the law must seek to establish a new standard of behaviour. There are various ways in which it can do this, including:

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3 See, e.g., Parker, above n.2, pp 8-12.

4 Id at 15.

5 Ibid.

6 Fisse and Braithwaite, above n.2, p 136.

7 Parker, above n.2.

- by specifying precisely the preventive measures that must be taken;
- by stating a broad principle or general duty (eg to ensure health, safety and welfare, or to not discriminate);
- by setting performance-based standards, which specify outcomes but not means; or
- by setting systematic process-based standards that identify a process or steps to be followed in pursuit of the goal (eg auditing, assessing risk, consulting, developing a plan, providing information or training, or keeping records).[8]

The virtue of general duties, the method used in anti-discrimination legislation, is their broad scope coupled with the flexibility they provide for innovative solutions. Firms are permitted and may be encouraged to develop internal policies - in effect their own tailored regulatory standards. And this can lead to a dynamic ratcheting up of standards with local and contextualised norm elaboration developed in response to a general norm, which in turn feeds back to influence or modify the general norm.[9]

However, compliance with general duties will be uncertain because of the very breadth and flexibility of the law. For this reason, to be effective general duties require amplification or elaboration through regulation, codes of practice or evidentiary standards. [10]

Whatever shape they take and however they are developed, standards need to be enforced. Ayres and Braithwaite have offered a now well tested assertion of effective regulation: for regulation to be effective, enforcement must be responsive. This means it is distinguishable "(from other strategies of market governance) both in what triggers a regulatory response and what the regulatory response will be."[11] Regulation must be responsive to the different motivations and objectives of regulated actors, as well as to industry structure, and formal regulation itself can affect all of these things. The regulatory response, rather than being command and control oriented, may "promote private market governance through enlightened [but not absolute] delegations of regulatory functions", including the monitoring of other delegations.[12]

A key part of Ayres and Braithwaite's "notion of responsiveness is the idea that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation."[13]

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8 Bluff E and Gunningham N, "Principle, Process, Performance or What? New Approaches to OHS Standards Setting" in Bluff E, Gunningham N and Johnstone R (*eds) OHS Regulation for a Changing World of Work*, (Federation Press, Sydney, 2004).

9 Dorf and Sabel, above n.2, at 398.

10 Bluff and Gunningham, above n.8, pp 20-22.

11 Ayres and Braithwaite, above n.2, p 4.

12 Ibid.

13 Ibid.

Under this "enforcement pyramid" the base represents low level or minimally intrusive forms of intervention with severity increasing right up to the pointy end. The least intrusive forms of intervention could be used effectively as the primary regulatory tools, *so long as* the regulator had access to more serious sanctions, i.e. a big stick. At a minimum, responsive regulation requires both an enforcement agency and a range of sanctions, including punitive sanctions.

Drawing on this very partial exploration of regulatory scholarship I turn now to explore the traditional legal or direct regulatory elements of Australian anti-discrimination laws.

THE FORMAL REGULATORY ELEMENTS

When it was established anti-discrimination law was seen as radical because it said employers could no longer unthinkingly or prejudicially use particular traits in business decision-making. Thus it significantly impinged upon managerial prerogative. However, while the prohibition on discrimination might have been threatening in nature, the regulatory approach chosen seemed designed to ensure that if it brought about any change whatsoever, it would be modest and incremental.

The legislation established a prohibition on employer discrimination, but there are critical, limiting aspects of the regulatory model:

- The standard is limited to a general proscriptive duty – that provides flexibility but creates compliance uncertainty;
- No enforcement agency - enforcement of non-compliance is limited to victims;
- A limited range of sanctions for breach - the sanctions are only compensatory, with no exemplary or punitive component; and
- An enforcement process that is largely private – commencing with compulsory, confidential conciliation that mostly keeps breaches out of public view.

Thus, while the stated objective of the Act is normative - "to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work" (s.3(b) *SDA*) – formal regulatory mechanisms seem designed to achieve only the implicit remedial objective of resolving discrimination claims as interpersonal disputes.

Standard

The central regulatory mechanism of the *SDA* is a general standard that prohibits discrimination.[14] The prohibition defines discrimination in

14 Sternlight notes that the US, UK and Australia have very similar anti-discrimination law prohibitions, but they differ significantly in their enforcement procedures. Sternlight J, "In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis" (2004) 78 *Tulane Law Review* 1401 at 1404.

respect of particular grounds, such as "sex," and this covers both direct discrimination (different treatment) and indirect discrimination (disparate impact). It then imposes a duty on persons in power, such as employers, not to discriminate in particular (public) spheres, such as work, covering various stages, such as recruitment, terms and conditions, promotion and dismissal (eg s.14). The prohibition on family responsibilities discrimination in the *SDA* is more limited, being confined to direct discrimination (s. 7A) and dismissal (s.14(3A)). Given these legislative limits of the family responsibilities protection under the *SDA*, applicants generally alternatively frame their claims as direct or indirect sex discrimination,[15] or, in some cases, pregnancy discrimination.[16] However, each of these actions are limited, as I have explored elsewhere.[17]

The non-discrimination prohibition of the *SDA* is a general duty; there are no prescriptive specification standards and no process or systems-based standards. One thing this means is that there is no positive duty imposed on employers to do anything under anti-discrimination legislation. Thus, there is no duty to identify potential or actual discrimination in the workplace, no duty to educate workplace participants about the prohibition, no duty to establish a policy against discrimination in order to translate the legislation into workplace regulation, and no duty to establish internal grievance procedures to assist anyone who feels they have experienced a breach of the legislation.

It is worth mentioning that the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) does impose a process duty - employers are required to analyse their workplaces and workforces and develop plans for the elimination of barriers to equality for women. However, the Act is very limited in scope – only applying to women, not other disadvantaged groups, and only applying to workplaces with more than 100 employees. It also has virtually no sanction for non-compliance – non-compliers can be named in Parliament! There is no formal link between this Act and the *SDA*, so the very limited (procedural) affirmative action measures that are prescribed by this Act for the achievement of gender equality in work are formally separated from the sex discrimination legislation.

General duties provide for flexible and innovative responses, but pose compliance difficulties – without elaboration through regulations or evidentiary standards, compliance is only certain when adjudicated after the fact. The *SDA* does not recognise any evidentiary standards, although agency guidelines have been developed, as explored below. The courts

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15 See, e.g., *Escobar v Rainbow Printing Pty Ltd* (No.2) [2002] FMCA 122; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584.

16 See, e.g., *Thomson v Orica Australia Pty Ltd* [2002] FCA 939; *Rispoli v Merck Sharpe and Dohme and Ors* [2003] FMCA 160.

17 Smith B and Riley J, "Family-friendly Work Practices and The Law" (2004) 26 *Sydney Law Review* 395 for an analysis of recent cases that have used anti-discrimination laws and contract law to seek redress for family-unfriendly practices; Smith B, "Maternity Leave: Still Unpaid and Still Uncertain" (2002) 15 *Australian Journal of Labour Law* 291.

are left to provide guidance on the content of the general duty, but can only do so in the context of resolving a particular dispute, leaving other employees and organisations to ponder the applicability of the precedent to their circumstances. And with limited guidance and limited experience in resolving discrimination questions, judges have often struggled to understand the legislation and articulate clear principles about its scope and operation that accord with the normative objective of the legislation. Many provisions have been interpreted in very limited and technical ways, making the burden of proving a claim even more onerous for applicants, as explored in detail by many commentators already.[18]

Enforcement rights and dispute resolution processes

The power to enforce compliance with the *SDA*'s prohibition on discrimination is limited to victims, who are granted a right to sue for redress. The Human Rights and Equal Opportunity Commission (HREOC) established by the federal anti-discrimination legislation has no power to initiate investigations of non-compliance, no explicit power to support complainants in breach proceedings, and no power to enforce judgements or settlement agreements that have been made. The absence of an agency with such enforcement powers distinguishes the anti-discrimination regulatory scheme from both other Australian workplace regulation – e.g. award compliance and occupational health and safety (OHS) – and from US and UK anti-discrimination schemes, where agencies have and use such powers strategically (although limited by resources).[19]

In respect of compliance, HREOC's powers are limited to responding to each claim of breach with a preliminary investigation and attempting to resolve each complaint as an interpersonal dispute, using confidential conciliation. The conciliation is confidential in the sense that it is not open to the public, anything said is not admissible in later proceedings, and the Act places a duty on the agency not to disclose to anyone the particulars of claims or conciliation proceedings, including party names. This latter restriction means the agency cannot use publicity of specific claims to raise awareness of the Act or to apply public pressure to corporations to prevent or settle disputes. In conducting conciliation, HREOC has taken a neutral or impartial position in helping to resolve claims even though such impartiality is not strictly dictated by the legislation.[20]

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18 See, e.g., Thornton M, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (Oxford University Press, Melbourne, 1990); Hunter R, *Indirect Discrimination in the Workplace*, (Federation Press, Annandale, 1992); Gaze B, 'Context and Interpretation in Anti-Discrimination Law' [2002] *MelLRev* 18; Hunyor J, "Skin-deep: Proof and Inferences of Racial Discrimination in Employment" [2003] *SydLRev* 24.

19 Sternlight, above n.14, at 1413; Baker A, "Access vs Process in Employment Discrimination: Why ADR suits the US but not the UK" (2002) 31 *Industrial Law Journal* 113 at 118.

20 Raymond T and Ball J, "Alternative Dispute Resolution in the Context of Anti-Discrimination and Human Rights Law: Some Comparisons and Considerations", HREOC, http://www.hreoc.gov.au/complaints_information/publications/alternative.html (21 November 2005).

If conciliation is unsuccessful or inappropriate, HREOC can only terminate the matter, leaving the complainant to pursue it through the Federal Court or Federal Magistrates Court, with all the formality and legal trappings this entails. The bulk of matters do not proceed beyond HREOC.

Complainants under anti-discrimination legislation are, by the very nature of the legislation, members of traditional disempowered groups. Expecting them alone to identify breaches, press claims, and enforce outcomes without any public assistance represents a fundamental regulatory weakness even when the initial dispute resolution system is relatively informal and accessible. Without public prosecution or assistance the problem of discrimination is characterised as being a private matter, a conflict between individuals rather than a matter for the state. This makes systemic discrimination less likely to be addressed by the legislation.

Further, by limiting enforcement to the victim, HREOC is denied an enforcement role and the scheme thereby lacks one of the key elements required for responsive regulation. Without any enforcement powers, the agency is limited in doing what it might be in the best position to do – identify systemic discrimination and, through the strategic use of investigation and regulatory sanctions, compel the worst offenders to change and help ratchet up the standards of the mild offenders or reluctant compliers.

Sanction

In designing regulation a range of sanctions are available from which to choose: financial or injunctive, and varying in nature from compensatory to punitive. There are also publicity sanctions that can threaten the reputation of organisations.

The sanctions available for breach of the *SDA* are limited to compensatory remedies.[21] Publicity cannot be used by HREOC because of its confidentiality obligations, and the reputational risk of litigation is minimised by private conciliation being the primary dispute resolution process. If a matter does make it to court, the remedy ordered is usually damages – primarily for economic and non-economic loss, with aggravated damages available but rarely awarded. Thus, the victim is granted a tort-like right to sue for a remedy to compensate them for any harm caused by the discrimination.

Importantly, penalties and punitive damages are not available.[22] Again, the regulatory scheme can be contrasted with both other Aust-

[21] Section 46PO(4)(d) HREOC Act permits "an order [for unlawful discrimination] requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered." There are a few penalty provisions, but these generally relate to dispute resolution powers of HREOC or victimisation.

[22] *Hughes (formerly De Jager) v Car Buyers Pty Ltd and Ors* [2004] FMCA 526 at [69] to [71]; Cf the decision of Raphael FM in *Font v Paspaley Pearls* (2002) FMCA 142 at [158] to [167].

ralian workplace regulation – including OHS and some *Workplace Relations Act* 1996 (Cth) breaches – and US anti-discrimination laws.[23]

Limiting remedies to compensation has a number of implications. Firstly, the focus of the remedy is the individual complainant, restricting remedial orders to the harm that the victim has suffered and, importantly, not extending them to require systemic changes to prevent harm to others. This limits the capacity for change to be ordered and reinforces the notion of discrimination being merely an interpersonal dispute rather than a public wrong.

Further, compensatory remedies focus attention on the impact of the wrongful act on the applicant, while punitive damages focus on the wrongdoer. Without a range of sanctions that includes penalties or punitive damages, there is no capacity for the court to punish or set an example in the case of flagrant, egregious or repeated wrongdoing. And on the flip side, the court is denied the capacity to provide a penalty discount that acknowledges efforts the respondent took to prevent the conduct through, for example, instituting compliance programs and training.[24] In a compensatory scheme a reduction in damages could only be a deduction from the victim's compensation.

Finally, being only compensatory, the damages ordered or settled upon are generally very low, and thus have minimal deterrent effect. Despite regular assertions that "damages for non-economic loss should not be minimal as this would tend to trivialise or diminish respect for the public policy behind anti-discrimination legislation,"[25] awards for non-economic loss maybe nominal and rarely exceed $10,000.[26] Awards in respect of economic loss have been higher, but often claimants are from low paying jobs and also struggle to show the economic impact of the particular discriminatory action. Such quanta can be contrasted to US cases where there is legal capacity, as well as a practice and culture of awarding very high damages in particular cases, which has the potential to prompt wider change by the example that is made of the respondent.[27] While ostensibly capped in federal actions, the limits are set very high (by Australian standards) at $300,000 for punitive damages and $300,000 for compensatory damages.[28]

The Australian legislative scheme certainly does not have the "big stick" that, according to Ayres and Braithwaite, is needed to regulate responsively and most effectively use the more persuasive or lower level

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23 Baker, above n.19, at 115.

24 Subject to avoiding liability under the vicarious liability defence of s.106, see below, Parts 0 and 1.1(c).

25 *Mayer v Australian Nuclear Science and Technology Organisation* (2003) FMCA 209 at [98].

26 HREOC, *Federal Discrimination Law 2005*, p 278.

27 Baker, above n.19, at 115.

28 Ibid.

enforcement mechanisms.[29] And, importantly, what 'stick' there is, is not in the hands of the regulatory agency.

Exceptions, defences and vicarious liability

Any risk of litigation and consequential liability can prompt organisations to develop compliance programs to minimise their risk. Anti-discrimination legislation poses a risk to organisations in that it imposes a general duty of non-discrimination on employers and makes them liable for all discriminatory conduct of their employees carried out in connection with employment. The vicarious liability provisions are likely to prompt organisations to develop internal non-discrimination policies and grievance procedures, to prevent, minimise or manage the risk of discrimination.

Regulatory mechanisms can further encourage the development of management systems. In an outline of new regulatory techniques and specifically compliance-oriented regulation, Parker notes that:

> 'Regulatory crime' laws, such as trading standards and consumer protection statutes, frequently encourage self-regulation by providing businesses with a defence to offences if they can show they exercised 'due diligence' by having in place management and quality assurance systems aimed at ensuring compliance with the standards.[30]

Such due diligence provisions, she argues, are examples of how "legislators and regulatory agencies are experimenting with formal programs that provide incentives for voluntary implementation of sophisticated compliance systems by business, and sanctions for lack of a program."[31]

The *SDA* appears to provide an incentive of this kind for organisations to develop compliance systems, but a closer examination reveals its limitations. Section 106 of the *SDA* provides for a defence to vicarious liability that the employer took "all reasonable steps" to prevent the employee from committing the wrong. There are at least three limitations. Firstly, this defence technically applies to all forms of discrimination and harassment, but in practice could only apply to conduct the employer is capable of distancing itself from, and not, for instance policy decisions or structural discrimination. Increasingly discrimination is of the latter rather than the former kind.

Second, the term "all reasonable steps" is not defined, and the legislation does not provide for standards to be developed and officially adopted as evidentiary standards. As with the general duty, the courts are left to judge post-facto and articulate standards for an appropriate response, as discussed in Part 1.1(c) below.

Finally, as noted above, in a system of only compensatory damages, there is no capacity to reward preventative efforts other than at the

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29 Ayres and Braithwaite, above, n.2.

30 Parker, above n.2, p 16 (citations omitted).

31 Id, p 15-16 (citations omitted).

expense of the victim. Under the *SDA*, good behaviour cannot be rewarded by a reduction in penalty; only by a finding of no liability at all.

LOOKING BEYOND THE "LEGAL" MECHANISMS

Having outlined the mechanisms that are the traditional focus of legal scholars, I now turn to look beyond these elements at other ways in which this law might effect normative change. There are two primary reasons for doing so:

- to help explain the normative change that seems to have occurred despite the limited legal mechanisms described above; and
- to more fully describe the current regulatory picture as a basis for possible future empirical studies and reform proposals.

In respect of the first of these, Australian anti-discrimination legislation has been highly criticised as little more than a sop to equality advocates, a "liberal promise"[32] that would deliver little change and at the same time operate to quell agitation for something stronger. Certainly, establishing a general prohibition that relies for enforcement on initiatives taken by disempowered victims, rather than proactive enforcement by a public agency, is arguably one of the weakest forms of achieving behavioural change, barely one step above free-market self-regulation.

However, while it is clearly limited and may have stifled agitation for reform, there is some evidence of normative change that might be attributable to the legislation. There have been many changes toward greater gender equality over the past 30 years, such as increases in women's workforce participation, educational participation and achievement, movement into professions, and average pay relative to men's. Of course these are not necessarily attributable directly to the legislation, but could also reflect wider changes to society, the needs of business, and even globalisation. Empirical surveys might be able to answer this question of what role law has played, but I have not carried out such surveys and am not trying to prove this point in this chapter.

I do, however, believe that there is some evidence – mostly anecdotal and circumstantial – that anti-discrimination laws have played a role by filtering into work practices and our notions of fairness. There is evidence of a relatively high degree of commitment in Australian corporations to a non-discrimination norm, demonstrated by: the high percentage of corporations that have anti-discrimination and anti-harassment policies and procedures; the reasonably high level of compliance with the auditing and reporting requirements of the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth); and the very low proportion of cases that are fought out through to hearing, possibly suggesting an understanding by corporations that it is not politically or reputationally acceptable to be accused of

[32] Thornton, above n.18.

discrimination.[33] This does not say anything about the quality and efficacy of the programs, nor even about whether they were actually prompted by the legislation. A proportion are likely to be little more than window-dressing or marketing ploys, but anecdotal evidence says this is not the entire picture. I believe the norm has shifted. Generation Y will not put up with what their mothers and fathers might have accepted. The battle line has at least moved forward – it is no longer drawn over blatant and intentional exclusion, but has moved to more indirect and structural forms of discrimination. This evidence is far from unequivocal and does not reveal how patchy or contextual any non-discrimination norm is, but I believe it is sufficient to suggest that anti-discrimination laws have had some effect.

In any event, in addition to trying to identify whether normative change has been wrought by the legal rules, we need to understand what regulatory mechanisms might be at play in achieving this goal. The legal rule might be no more than a springboard for advocates to develop a norm that represents organisational commitment and true self-regulation. The traditional legal focus on rules and enforcement – the deterrence approach – is too narrow, missing both the symbolic power of the rules and other indirect or non-legal regulatory mechanisms in achieving change. In this part I explore both of these elements of the regulatory picture – the symbolic or normative power of law and the informal or soft regulatory mechanisms.

Symbolic effect of law

Legislation has symbolic or normative power. In assessing whether a rule and its enforcement might be effective in achieving normative change, the normative power of the rule itself should not ignored. It means that for some, the public statement in legislation that discrimination is prohibited – is wrong - is enough to motivate them to eliminate discrimination in their workplace. It does not necessarily require a big stick, positive duty or public enforcer. And one thing this reflects is that profit maximisation is not the only motivator for private corporate actors; integrity, dignity, "self-image and the desire to be a responsible citizen"[34] should not be underestimated as motivators for individual and corporate action. In this way legislation can prompt or fuel action, even though appearing to have a sanction so weak it should not rationally deter.

Further, as Sturm points out, even where the risks of legal liability are small, change agents within corporations such as human resource managers might use (and possibly exaggerate) the threat of liability as leverage for effecting change.[35] This means that the law, and legal risk,

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33 See Parker C, "Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation" (1998) 5(1) *Australian Journal of Human Rights* 159.

34 Fisse and Braithwaite, above n.2.

35 Sturm, above n.2.

does not fully explain any resultant change, but it has played a role by providing some impetus and ammunition for developing better practices.

This normative effect of law is experienced also by employees, and can operate to change their views about what is fair and acceptable for themselves and their colleagues, as discussed further below.

HREOC functions

While lacking traditional "big stick" enforcement tools, HREOC uses education, persuasion, and technical assistance to bolster, translate and leverage the otherwise weak formal mechanisms. Using these tools, HREOC works on both sides of the calculation of the costs of discrimination. On the one side it has illuminated, increased and at times even exaggerated the costs of doing nothing to address discrimination, and on the other side it has developed practical guidelines to elaborate the general duty and tools to assist employers and thus lower the costs of devising policies, procedures and new, non-discriminatory ways of operating.

To carry out these functions, HREOC has been granted a range of powers. In respect of the *SDA* these include:

- "to promote an understanding and acceptance of, and compliance with" the Act;[36]
- "to undertake research and educational programs … for the purpose of promoting the objects" of the Act;[37]
- "to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy and discrimination involving sexual harassment";[38]
- as well as the catchall, "to do anything incidental or conducive to the performance of any of the preceding functions".[39]

Even a quick glance at HREOC's website[40] reveals the plethora of ways in which it carries out these functions to develop public awareness of human rights and specifically discrimination – through information brochures, inquiry reports, amicus curiae and intervener applications, email listserves, media releases, national consultations and forums, classroom education resources, human rights awards, fact sheets and summaries of legislation.

I want to look at three specific ways in which HREOC's educational efforts arguably work to give the formal mechanisms greater effectiveness: translating legal rights into a public norm of fairness; shaping the

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36 S.48(1)(d).
37 S.48(1)(e).
38 S.48(1)(ga).
39 S.48(1)(h).
40 http://www.hreoc.gov.au/index.html(21 November 2005).

"reasonableness" debate for indirect discrimination claims; and promoting the development of best-practice compliance programs for employers.

(a) **Developing a non-discrimination norm**

All of the educational efforts of HREOC fundamentally operate to develop a norm of non-discrimination. By providing a wide array of materials for a range of contexts they give concrete detail or translation of the otherwise abstract concept of non-discrimination. Every publication, forum, speech, supported school instruction, and response to an inquiry acts to promulgate the law and thereby develop the discrimination prohibition as a public norm of non-discrimination. To some extent this serves to address the criticism that the legislation cannot serve the public goal of changing behaviour because disputes are mostly settled confidentially and thus without the potential normative effect of publicising outcomes.

By converting a legal right of action into a public norm or expectation of behaviour, the right to work without discrimination becomes more real or enforceable. Not necessarily more enforceable as a legal action, but empowering for victims of discrimination. In the face of discriminatory behaviour this norm is able to prompt assertions of "you can't do that" or "that's not acceptable" that have some weight and have the potential to cut short discriminatory behaviour. Similarly, the norm can prompt and be reinforced by employees expecting and asking for better behaviour and conditions, such as flexible hours and part-time arrangements.[41]

Does the legislation really provide such assertions and demands with any weight? As noted above, the possible damages payouts are historically quite minimal and thus represent little threat. There are, however, other costs associated with any legal claims – such as the cost of management and workers diverting their time and energy into responding to claims, and the costs of legal representation, although the informal dispute resolution mechanism under the Act minimizes these somewhat.

Further, as the norm becomes more established the cost or threat of damage to morale and reputation increases. Even a claim of discrimination, let alone a finding of liability (which translates as "guilt"), can undermine trust among employees and tarnish an image of fairness. In this sense breaching the norm is more serious than breaching the legal prohibition: while sanctions under the Act might be limited to compensatory remedies, breach of the norm risks a de facto punitive sanction.

As employers compete for recruits and customers by marketing themselves as good employers, the real threat of discrimination claims increase. Both HREOC and the Equal Opportunity for Women in the Workplace Agency (EOWA) have traded on this link to encourage firms

[41] Anecdotal evidence suggests, for instance, that demand is driving the development of family-friendliness in law firms – younger employees are expecting and asking for more liveable working conditions.

to develop better practices and then market the changes to improve their image. For example, EOWA has established a citation called "EOWA Employer of Choice for Women." The agency explains:

> Women-friendly organisations with Equal Opportunity (EO) programs that recognise and advance their female workforce can brand and position themselves in the marketplace as an 'EOWA Employer of Choice for Women' (EOCFW).
>
> Organisations whose achievements have been acknowledged by this award, can use this citation in their recruitment, advertising and other company promotional material.
>
> This prestigious citation provides significant positioning in a competitive marketplace, particularly when a company is seeking to attract the best possible talent.
>
> The 'EOWA Employer of Choice for Women' citation allows organisations to differentiate themselves from their competitors and achieve public acknowledgment of their efforts in the area of equal opportunity for women.[42]

Similarly, the ACCI/BCA National Work & Family Awards[43] (and similar awards in the States) operate to promote more family-friendly workplaces by rewarding progressive organisations. This serves to constitute a norm of family-friendliness. By promoting the kudos of non-discrimination in this way, HREOC, EOWA and other advocates can actually increase the costs to perpetrators of discrimination claims and thereby shift the balance in any calculations about whether and to what extent a corporation should try to address the problem.

However, the sensitivity of companies to a developing norm or expectation of their employees, recruits and clients would vary greatly and is likely to reflect the relative power of employers to their current or potential employees. So, for instance, employers of highly skilled workers are likely to appreciate, independently of any efforts by HREOC or EOWA, that family-friendliness is a drawcard for recruiting, motivating and retaining employees. For such employers HREOC and EOWA are merely fostering or bolstering a pre-existing understanding of management. But for employees with less market power, their own rising expectations about what is acceptable might face employers who have little need to acknowledge or accommodate family-friendly demands. Exploring and understanding this sensitivity – the parameters of the business and moral cases - will be critical to improving the effectiveness of equality regulation.

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42 Equal Opportunity for Women in the Workplace Agency, http://www.eeo.gov.au/EOWA_Employer_Of_Choice_For_Women.asp (21 November 2005).

43 See http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/WorkFamily/WorkandFamilyAwards.htm (21 November 2005).

(b) ***Shifting the reasonableness debate***

HREOC's efforts to raise awareness of discrimination issues filter into litigation as well because the duty or standard is so general and thus requires judicial interpretation and value judgement. One example of this is the question of justification, or the defence of reasonableness, for workplace practices that have a disparate impact.

The *SDA* prohibits both direct and indirect sex discrimination in the workplace. In respect of indirect discrimination the Act requires the applicant to establish that their employer has imposed a requirement, condition or practice that has "the effect of disadvantaging persons of the same sex" as the applicant.[44] That is, it has a disparate impact on members of the applicant's sex. However, the Act provides for a defence that is akin to justification – the discriminatory requirement is not unlawful if it "is reasonable in the circumstances."[45]

We have seen over time more cases of family responsibilities discrimination skirting the limitations under the family responsibilities protections of the *SDA* and being pursued as sex discrimination claims.[46] A number of these have specifically sought to prove indirect discrimination, but have faced the defence of reasonableness.

The Act does not define reasonableness, but it does prescribe particular matters to be taken into account, which largely reflect the jurisprudence in respect of this term in other Acts and the preceding version.[47] Essentially the test is one of weighing the disadvantage to the applicant against the respondent's reasons for the requirement and the feasibility of mitigating the disadvantage.

The open texture of this term calls for a value judgement by the court. As Gaze has pointed out, given the relatively narrow experience and background of our judicial members, they may struggle to fully understand the nature and experience of discrimination.[48] Similarly, they may struggle to appreciate the disadvantage imposed by disparate impact requirements in weighing these against possibly more familiar business imperatives proposed by the respondent.

However, many of HREOC's educational efforts operate to open up debate and illuminate the ways in which many workplace rules and conditions are inherently biased, reflecting the interests of particular groups in society. These in turn can challenge public and possibly judicial

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44 S. 5(2).

45 S.7B(1).

46 See, e.g., *Thomson v Orica Australia Pty Ltd* [2002] FCA 939; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.

47 S.7B SDA – the prescribed factors are: "(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice."

48 Gaze, above n.18.

thinking on what is "reasonable," an inherently valued judgement about what is an appropriate and feasible way of sharing costs and benefits in society.

Specific examples of HREOC's efforts to challenge the current work-family picture in Australia include: the project on paid maternity leave, *A Time to Value*, which involved a discussion paper, substantial national inquiry and comprehensive final report and recommendation;[49] its participation and submissions in the Australian Council of Trade Unions' Family Provisions award test case in the Australian Industrial Relations Commission;[50] and the recently initiated project on work and family balance, *Striking the Balance: Women, Men, Work and Family*.[51] The latter project is specifically "about how men and women manage their paid and unpaid work and the impact this is having on us as families, as communities and as a nation."[52]

Such efforts do not support particular applicants in specific cases under the Act, but by provoking and influencing public debate on what is appropriate and in the public interest, HREOC may indirectly support indirect discrimination applicants by strengthening their responses to arguments of reasonableness.

(c) ***Promoting best-practice compliance programs***

As noted above, many corporations have developed non-discrimination policies and procedures for their workplaces. These represent tailored and contextualised workplace translations of the legal prohibition on discrimination – the local elaboration of the general norm.

HREOC has both promoted the development of such programs in workplaces and worked to develop benchmarking standards by which they can be assessed. Every time HREOC urges employers to address discrimination, it indirectly promotes the development of workplace policies and procedures, but a few publications focus directly on this, utilising HREOC's power to develop guidelines. Examples include the *Sexual Harassment: A Code of Practice*[53] (*Harassment Code*) and associated resources, and *Pregnant and Productive: It's a right not a privilege to work while pregnant*,[54] and associated guidelines.[55]

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49 Sex Discrimination Unit of HREOC, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002).

50 Available via the Australian Industrial Relations Commission website at http://www.e-airc.gov.au/familyprovisions/stories/storyReader$12 (21 November 2005).

51 Sex Discrimination Unit of HREOC, http://www.hreoc.gov.au/sex_discrimination/strikingbalance/index.html (21 November 2005).

52 Ibid.

53 HREOC, http://www.hreoc.gov.au/sex_discrimination/code_practice/SH_codeofpractice.pdf (21 November 2005).

54 HREOC, http://www.hreoc.gov.au/sex_discrimination/pregnancy/report.html (21 November 2005).

55 HREOC, *Pregnancy Guidelines 2001*, http://www.hreoc.gov.au/sex_discrimination/pregnancy/guidelines.html (21 November 2005).

These publications employ a tone that is mostly persuasive but has hints of threat, utilising compliance, business case and moral arguments to move employers to develop and implement policies and procedures. It ignores the lack of a positive duty to develop such programs and goes remarkably close at times to suggesting that such a duty actually exists. In this way, and by talking up the risk of liability, it possibly exaggerates the *legal* imperative for addressing discrimination.

The publications help employers understand what might constitute harassment or discrimination, and urge them to develop compliance programs, but they also operate to ease the work required of employers to develop their policies and procedures for their own workplace. They comprehensively explain how a corporation can develop a policy and they give many practical examples and ideas appropriate for micro, small and large businesses. This can ease the costs to employers and help to skill them in the task of self-regulating.

However, providing guidance and encouragement does not ensure policies are developed. As discussed above, there is no positive duty to develop compliance programs, only the incentives provided by the vicarious liability defence of "all reasonable steps", and the threats that discrimination claims present. This is clearly a weakness of the regulatory model, but again it is arguable that the informal tools that work to develop the norm and encourage compliance have bolstered the otherwise clawless legal mechanisms. The follow on research question that this prompts is: what workplace factors determine whether a workplace implements non-discrimination policies and procedures, and, more importantly, what factors contribute to their success?

Further, we need to ask what accountability mechanisms are available to assess the quality or standard of such programs? Without an obligation to create such policies or procedures, there is naturally no obligation to consult employees or other stakeholders about their development. Ultimately, limits on the form or scope of the policies emerge out of their purpose – if prompted primarily or purely by the threat of the litigation, they will be devised to prevent discrimination in the workplace and, where it does still occur, assist the firm to avoid liability for it under the vicarious liability defence.

Who is the ultimate arbiter on whether the standard is an adequate response to the risk of discrimination in any particular workplace? It is the court that must decide whether discrimination has occurred or whether "all reasonable steps" have been taken to warrant a finding of no liability. The legislation provides no definition or even criteria to guide the judiciary in their task, leaving them to draw on limited precedent and their own experience and values about what a corporation could be expected to do.

The HREOC codes can also act as a source of guidance on this question, giving content to the question of what is "reasonable". In developing the guidelines about internal policies and procedures, HREOC has drawn

on the caselaw, to see what has been accepted judicially, but importantly has also drawn on industry best practice to lead employers beyond merely minimum compliance. The current version of the *Harassment Code*, for example, is the third edition, having evolved as practices have developed. To promote its use, it is available in a variety of forms and, importantly, free of charge via the HREOC website.

Drawing on his own work on democratic experimentalism, Dorf has explored in the US context the way in which such reports and guidelines can perform an important regulatory role. In particular he notes how the agency can be a conduit for feeding data about local experimentation back into the development of the general norm. He explains:

> [C]onsider the role of the Equal Employment Opportunity Commission (EEOC) in enforcing the anti-harassment norm. Given the structure of that norm, the EEOC might 'take the lead in disseminating the most successful strategies for preventing and combating sexual harassment'. To do so would first require the EEOC to be familiar with those strategies, in other words, for it to compile lists of what are sometimes called 'best practices'. Those best practices, of course, come from the regulated entities themselves. As in the case of discerning the best currently known method of minimizing the production of some harmful pollutant, so with sexual harassment, the role of the central government (or in some cases, nongovernment actor) is to set initial goals, collect data from the regulated entities about what works and what does not, and then disseminate that information back to the regulated entities so that they may learn from each others' successes and failures. The entire process is then repeated, leading to a regime of 'rolling' regulation, in which performance standards are continually ratcheted up as local experimentation reveals what is possible.[56]

This sounds very positive and promising, and illuminates a role that HREOC is to some extent currently fulfilling.

An outstanding question to be addressed in a subsequent paper, however, is whether the ratcheting up thesis depends upon factors that are not present in the Australian regulatory approach, such as a punitive sanction, and a regulatory agency that can utilise such a sanction in regulating responsively. Alternatively, does it depend upon factors that are not universal across the regulated entities, such as sensitivity to the threat of adverse publicity or damage to workplace morale.

CONCLUSION

Anti-discrimination legislation provides an understudied regulatory response to inequality in Australian workplaces. Its effectiveness in achieving its stated goal of eliminating discrimination has been significantly limited by a regulatory approach that in effect gives a higher

[56] Dorf M, "Review Essay: The Domain of Reflexive Law – Regulating Intimacy: A New Legal Paradigm", (2003) 103 *Columbia Law Review* 384 at 398-399 (footnotes omitted).

priority to the remedial goal of compensating victims and resolving breaches as interpersonal disputes. Much of the previous criticism of Australian anti-discrimination law reflects an objection to this prioritisation of the private remedial goal over the public normative goal. This chapter takes the next step of reconceptualising this issue from a regulatory perspective.

It has been argued in this chapter that it is imperative to appreciate and acknowledge that this legislation has regulatory mechanisms and effects that might not be immediately apparent under a traditional legal analysis. The effectiveness of the *SDA* may be limited by the: general and narrow coverage of the prohibition; technical and conservative interpretations of the substantive provisions; the restriction on punitive damages; and the absence of a regulatory agency with enforcement powers. But the symbolic power of law and the informal or soft regulatory mechanisms available under the Act have been used to develop a norm of non-discrimination that gives the formal prohibition much greater force than it would otherwise have. Looking only at formal mechanisms, one would expect virtually no change; but there has been change – compelling us to look further at informal mechanisms and institutions. We have seen organisations start to change and I believe anti-discrimination legislation has played some role in this and has the seeds, even in its current apparently clawless form, to effectively challenge the current constitution of work and family as separate spheres and the associated costs to women's participation and the value of their contributions.

The bigger question I am ultimately seeking to address is how to develop a more effective regulatory response to gender inequality with respect to work. I hope to have provided some illumination here to the existing regulatory picture of anti-discrimination law, as a first step in considering openings for reform.

Abstract

Anti-discrimination legislation provides an understudied regulatory response to inequality in Australian workplaces. Its effectiveness in achieving its stated goal of eliminating discrimination has been significantly limited by a regulatory approach that in effect gives a higher priority to the remedial goal of compensating victims and resolving breaches as interpersonal disputes. Much of the previous criticism of Australian anti-discrimination law reflects an objection to this prioritisation of the private remedial goal over the public normative goal. This chapter takes the next step of reconceptualising this issue from a regulatory perspective.

It is argued that it is imperative to appreciate and acknowledge that anti-discrimination legislation has regulatory mechanisms and effects that might not be immediately apparent under a traditional legal analysis. The effectiveness of the *Sex Discrimination Act 1984 (Cth)* may be limited by the: general and narrow coverage of the prohibition; technical and conservative interpretations of the substantive provisions; the restriction on punitive damages; and the absence of a regulatory agency with enforcement powers. But the symbolic power of law and the informal or soft regulatory mechanisms available under the Act have been used to develop a norm of non-discrimination that gives the formal prohibition much greater force than it would otherwise have. Looking only at formal mechanisms, one would expect virtually no change; but there has been change – compelling us to look further at informal mechanisms and institutions. We have seen organisations start to change and I believe anti-discrimination legislation has played some role in this and has the seeds, even in its current apparently clawless form, to effectively challenge inequality.