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The Political Contingency of Sex Discrimination Legislation: The Case of Australia

Margaret Thornton

ANU College of Law, The Australian National University, Fellows Road, Acton 2600, ACT, Australia; E-Mail: margaret.thornton@anu.edu.au; Tel.: +61-2-6125-8363

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Abstract: There has been a marked shift away from social liberalism in many parts of the world which has profound ramifications for women, whose status remains contingent on the good graces of public institutions that remain resolutely masculinist. Neoliberalism, with its focus on the privatisation of public goods and promotion of the self within the market has become the dominant political ideology everywhere and is further undermining the interests of the majority of women. This essay will address the changing fortunes of sex discrimination legislation as a specific example of an initiative designed to improve the status of women. Australia will be used as a case study because of its passionate embrace of, first, social liberalism, and then, neoliberalism. Issues pertaining to affirmative action (positive action), intersection with human rights instruments, reporting requirements and incentives will also be addressed. Although Australia is a multi-jurisdictional federation, the essay will focus primarily on the federal arena in terms of legislative initiatives, policy and jurisprudence.

Keywords: sex discrimination; equality; neoliberalism; Australia

1. Introduction

The idea that discrimination on the ground of sex might be considered unlawful was unknown to the common law. Indeed, the common law played a prominent role for hundreds of years in entrenching discrimination against women in all spheres of life. Women were largely excluded from the public sphere and denied access to universities, the professions and the governance of the state. This allusion to the common law highlights the novelty of the non-discrimination principle and the resistance to overcoming gender inequalities buried deep within the social psyche.

Indeed, it is anomalous that law might be regarded as an instrument of liberation for women at all when such a short time ago it was an instrument of oppression. Such is the liberal faith in the neutrality of law, however, that we are prepared to ignore its seemingly duplicitous character, underscored by the fact that the key institutions of legality were populated entirely by men for centuries. Women had to approach men in power as supplicants, begging for enfranchisement, as well as admission to universities and the professions. Wendy Brown suggests that the idea of women seeking protection from masculinist institutions *against* men is more in keeping with feudalism than freedom ([1], p. 170). Nevertheless, in order to maintain its legitimacy, the liberal state must *appear* to be fair ([2], p. 184). The enactment of sex discrimination is one such initiative that gives the appearance of fairness while thinly disguising the play of power beneath the surface.

In this essay, I am interested in disinterring the ideological shifts and turns of power in the case of sex discrimination legislation. I draw on the Australian experience as a case study because Australia was remarkably receptive to social liberalism, which gave rise to anti-discrimination legislation but was soon equally passionate in its embrace of neoliberalism. An examination of the recent trajectory of sex discrimination legislation, primarily at the federal level, highlights how the fortunes of women continue to be closely imbricated with the political mood of the day.

In making the argument, I overview the genesis of the *Sex Discrimination Act 1984* (Cth) (SDA), the inequality of bargaining power in the lodgment of complaints, the operation of indirect discrimination arising from work/life balance at the appellate level and selective dimensions of the contemporary jurisprudence in relation to corporeality and care. In this regard, I briefly address the political trends in reported decisions over the 5-year period 2009–2014 in regard to the attributes of pregnancy, caring responsibilities and sexual harassment. I also consider the fortunes of affirmative action (AA) legislation, as well as a number of other ill-fated initiatives designed to overcome the limitations of the SDA and effect substantive equality. The historical detail and doctrinal analysis are beyond the scope of the article and can be pursued elsewhere [3–6].

2. From Social Liberalism to Neoliberalism

While it is not disputed that the status of women has changed dramatically over the last century, one should be wary of too readily adopting a liberal progressivist thesis in which it is accepted that society is moving inexorably towards an ideal end state where equality between men and women is a reality.

As freedom and equality are the twin variables of liberal political theory, equality needs to be considered in the context of its symbiotic relationship with freedom, a relationship in which there is a constant tension. Indeed, as Wendy Brown points out, liberalism produces a Nietzschean notion of *ressentiment* (a desire to retaliate by inflicting pain) [7] because it simultaneously promises both freedom and equality ([1], p. 67. Cf. [8], pp. 21–27). When equality is in the ascendancy, as manifest in social liberalism, it provokes *ressentiment* on the part of conservatives who feel that their freedom has been attenuated. Conversely, when freedom triumphs, as manifest in neoliberalism, the commitment to equality is minimised and the *ressentiment* of progressives is ignited. The experience of sex discrimination legislation illustrates well the attack on equality by conservatives, whose demands for freedom became more and more vociferous, as I will show.

Social liberalism, or Post-War Keynesianism, was an iteration of liberalism commonly associated with democratic regimes in the West, particularly the UK, Canada and Australasia, in which a concern for the common good and wellbeing of the community as a whole was in evidence. There was a degree of cooperation between the primary stakeholders—government, employer and employee groups—to shape policy, illustrated by a formal co-operative arrangement that was known as “the Accord” in Australia (1983–1991) ([9], pp. 5–8). In free market economies, one of the responsibilities of the social liberal state is to restrain the untrammelled freedom of the market through regulation. Distributive justice is effected by the state through progressive taxation and welfare policies. Equal opportunity (EO) is also the responsibility of the state because, as Marian Sawer points out, markets are incapable of delivering EO ([10], p. 365). It is this key role of the state in mitigating inequality to which conservatives objected in the latter part of the 20th century because, they claimed, it constrained their freedom. The *ressentiment* of the right manifested itself in the policies of Margaret Thatcher in the UK and George Bush Snr. in the US. They began to cut welfare and privilege the market, which engendered the rise of the new ideology. In Australia, the neoliberal turn caused the Accord to break down.

Neoliberalism defies a precise definition as it lacks not only a manifesto but a systematic set of ideas. It is nevertheless associated with certain “dogmas” which are succinctly summarised by Peter Self:

The high importance attached to market-led economic growth; the value of complete free trade in money and capital as well as in goods and services; the need to subordinate social welfare to market requirements; the belief in cutting down or privatising government functions; the acceptability of profit as a test of economic welfare...([11], p. ix).

Within neoliberal discourse, the market is depicted as intrinsically more efficient than government and a trade-off between equality and efficiency is assumed. Equality, then, comes to be associated with government and “inefficiency”, a conjunction that does not bode well for equality initiatives, as I will demonstrate.

Neoliberal ideology also endeavours to link the market to democracy, taking its cue from Milton Friedman, an early proponent of neoliberalism: “economic freedom is...an indispensable means towards the achievement of political freedom” ([12], p. 8). The pre-eminence of the market caused civil society to contract in such a way as to become “neoliberalized” ([13], p. 2). As the market assumes centre-stage, the social co-operation weakens “and the impulse to a selfish or self-protective form of individualism grows” ([11], p. 97).

Neoliberalism is redolent of the neoclassical economic position in which the market is viewed as superior to state command; the functions of the state are then limited to protecting citizens against violence, theft and fraud ([14], p. 26). Despite the commitment to small government, which has seen the state resile from a commitment to social justice and equity, the neoliberal state transcends the neoclassical liberal state by virtue of its intimate relationship with the market and its obsessive concern with capital accumulation and the “good of the economy”.

The neoliberal turn has profound ramifications for the implementation of the non-discrimination principle, particularly in regard to employment, where the preponderance of discrimination complaints arise ([15], p. 124). Neoliberalism has induced a marked resiling from workers’ rights in favour of employer prerogative in accordance with the economic imperatives in vogue. This has led to the transformation of the nature of work, including its intensification ([16], p. 5), and the erosion of working

conditions, such as the casualisation of labour, which has profoundly impacted on women [17]. Nevertheless, as the conditions of work have deteriorated for all workers, anti-discrimination legislation, as presently conceptualised, is incapable of providing a remedy either on the basis of sex or other characteristic of identity. In order for the legislative schema to maintain its legitimacy, what we see instead is an increased focus on corporeality and care as systemic sex discrimination becomes normalised once more. Within the context of neoliberalism, where the emphasis is on productivity, performativity and profits, the focus on equity and social justice has become virtually ineffable.

3. Legislating against Sex Discrimination

Australian Labor Prime Minister, Gough Whitlam (1972–1975), is a key figure associated with the high point of social liberalism. He sought to modernise the nation state by means of a body of social liberal and distributive justice reforms, including no-fault divorce, free higher education, rights for Aboriginal people and the implementation of the non-discrimination principle. The National and State Committees on Discrimination in Employment and Occupation, which preceded the enactment of legislation, were set up in 1973 following ratification of ILO 111. The *Racial Discrimination Act 1975* (Cth) (RDA) was enacted soon afterwards, but federal sex discrimination legislation could not be enacted without a constitutional basis, and the Convention on the Elimination of Discrimination against Women (CEDAW) was not adopted until the end of the decade [18].

Nevertheless, by the early 1970s, feminism had become an important force for change and feminist advisors became de rigueur within the bureaucracy ([19], pp. 21–25). In fact, the “femocrat” was an Australian neologism that was coined to describe the feminist bureaucrat, and Gough Whitlam was responsible for the appointment of the first women’s advisor to government in 1973. Ironically, however, Whitlam cut tariffs on imports by 25 per cent ([20], p. 89), an action that presaged the neoliberal turn, thereby putting paid to the idea that there is a clear line of demarcation between social liberalism and neoliberalism.

While sex discrimination was proscribed by several Australian States in the 1970s—South Australia [21], Victoria [22] and New South Wales [23]—the national level proved to be more controversial. The passage of the SDA in 1983–1984 was accompanied by a protracted and sometimes hysterical debate in federal Parliament, which revealed a deep anxiety about sex roles, the patriarchal family and the wellbeing of children [24]. At the time, only six of the 125 members of the House of Representatives and 13 of the 64 members of the Senate were women, underscoring how women had to rely on the good graces of male parliamentarians to effect social change beneficial for women. The support of the incoming Labor Prime Minister, Bob Hawke, was therefore crucial and the SDA was passed with bipartisan support even though thousands of petitions were marshalled against it [25].

Despite the hysteria surrounding the SDA, it was a modest, individual complaint-based piece of legislation that applied to men as well as women, unlike CEDAW, which is sex-specific. The SDA proscribed discrimination on the grounds of sex, marital status and pregnancy although a number of other attributes were added subsequently, namely, family responsibilities (1992), potential pregnancy (1995), breastfeeding (2011) and sexual orientation, gender identity and intersex (2013). The ambit of operation is restricted to areas of public or quasi-public life, including employment, education, goods and services, accommodation, land and clubs. Sexual harassment was expressly proscribed from the

outset, but only in employment. In accordance with the liberal paradigm, private life was largely off-limits, although the strict line of demarcation between public and private life was challenged by the inclusion of sexual harassment and the more recent grounds. As sexuality is regarded as paradigmatically private within liberal legalism, the proscription of discrimination on the grounds of sexual harassment and sexual orientation *in the public sphere* involved a new way of understanding these characteristics.

The conservative critics of the bill, including the oddly named anti-feminist group, the Women Who Want to be Women (WWWW), had sought to retain the conventional liberal legal line of demarcation between public and private life, arguing that, if passed, the legislation would bring about the breakdown of the family unit [26]. While the WWW were unsuccessful in preventing passage of the bill, a number of exemptions were included that acceded to traditional values, such as single sex schools and clubs, and occupations where sex was a “genuine occupational qualification”, such as authenticity in a dramatic performance or where decency might be required in the fitting of clothes or the conduct of body searches. The opponents of the bill were also successful in securing a religious exemption regarding employment and education. This permitted discrimination in the case of conduct carried out in “good faith in order to avoid injury to the religious susceptibilities of adherents of [a] religion or creed” (SDA, s. 38). Although discrimination on the ground of religious belief is not proscribed under federal legislation, unlike most State and territory jurisdictions, the exemption in the SDA accords religious organisations a privileged status *de facto*. The exemption privileges not only overtly patriarchal practices, such as the ordination of male priests and rabbis, it also exempts educational institutions run by religious organisations. This allows them to refuse employment to a lay person (such as a teacher or clerk, for example) because of their sex, marital status, pregnancy or sexual orientation if it would cause injury to others by virtue of their “religious susceptibilities”. It is notable that this exemption does not apply to cognate legislation relating to race, disability or age. Although few complaints have proceeded to public hearing to test the nexus between non-discriminatory employment and “injury to religious susceptibilities” [27], the exemption is an example of a status-enforcing mechanism that perpetuates women’s inequality [28,29].

Despite the exemptions (together with Australia’s reservations to CEDAW in respect of combat duties and paid maternity leave) [30], the rhetoric of equal employment opportunity (EEO) assumed a prominent status in public discourse following the passage of the SDA. At the high point of social liberalism, corporations began to include statements in their advertisements that they were EEO employers and annual awards were offered to exemplary performers. For a fleeting moment, they were anxious to show that they had sloughed off pre-modern patriarchal practices and were welcoming of women. The official commitment by the state towards EEO was nevertheless simultaneously being undermined by the rise of neoliberalism, particularly the sense that the market was the pre-eminent good and equality was antipathetic to efficiency.

It is clear at the outset that there was a significant disjuncture between the SDA and the realisation of equality. A framework for the lodgment of individual complaints within specified areas of public life that were subject to significant exemptions fell far short of the means of effecting substantive equality for women, as I will demonstrate.

4. The Body of Jurisprudence

4.1. Inequality of Bargaining Power

Conciliation is the primary mode of dispute resolution under the SDA, which is dealt with confidentially behind closed doors ([6], pp. 143–70; [31,32]). Conciliation undoubtedly has positive dimensions: it is cheap and expeditious; it endows complainants with voice and it acknowledges the emotional harm they might have suffered as a result of discrimination, but it does not overcome the power imbalance between them and respondents. The Australian Human Rights Commission (AHRC), which undertakes the role of conciliator under the SDA, is expected to act impartially, not to play a role in counterbalancing the power of the respondent on behalf of a complainant ([33], p. 919).

Only if conciliation is unsuccessful may a complaint proceed to a tribunal or court hearing, but less than two per cent of complaints do so. As formal hearings are held in public and necessitate the adduction of reasons, they are of valuable precedential value. Nevertheless, formal hearings before either the Federal Circuit Court or the Federal Court of Australia involve a risk for individual complainants as losing a case is likely to mean having to pay the respondent's costs as well as their own. In the case of State and territory tribunals, the norm is that each party is responsible for their own costs—a principle that is difficult to reverse—and a successful complainant may find that their costs exceed the modest damages awarded [34].

Furthermore, it is notable that respondents are invariably corporate entities, a factor that accentuates the inequality of bargaining power between the parties, particularly at the appellate level. Indeed, it is startling to observe that the anti-discrimination complaints which have proceeded to the most authoritative courts, including the High Court of Australia, have been initiated by some of the country's most powerful corporations as appellants [35]. It is therefore apparent that the structural inequality between the parties has assisted in the neoliberal aim of restoring power to capital. Also attesting to the role of the state in sustaining neoliberalism is the fact that governments themselves are habitual respondents, in which case their appellate status places them in the invidious position of undermining their own legislation in the adversarial cut and thrust of litigation, thereby underscoring one of the fundamental contradictions of liberal legalism.

As with conciliation, there is little attempt to balance the scales of justice within the formal judicial arena despite the rhetoric of equality before the law. There is no legal aid at the federal level and even in the case of State legislation, it is rarely accessible [36]. In *Ansett v Wardley* [37], for example, the respondent who had been denied an application to become a trainee pilot on the ground of sex, was supported by the fund-raising efforts of women's groups. In *Banovic* [38], the unemployed complainants unsuccessfully applied for legal aid on four separate occasions before receiving financial assistance from the Premier of New South Wales to be legally represented before the High Court where their former employer (a subsidiary of Australia's largest company) was appealing a decision in their favour. In the *Commonwealth Bank* case [39], which involved Australia's largest bank, the female complainants were unable to appeal to the High Court when their union declined to support them because of fear that a conflict of interest would arise with its male members. *Schou* [40] was run pro bono for the complainant by a law firm which was prepared to run an appeal to the High Court provided that the respondent State of Victoria gave an undertaking not to sue for costs, but it declined to do so and the case lapsed.

There is no provision for the federal agency, the AHRC, to institute litigation on its own motion. The high level of abstraction associated with superior courts, such as constitutionalisation, has the effect of sloughing off the merits of a complaint in a way that favours respondents [41]. These structural inequalities in the administration of justice have been accentuated by the neoliberal turn which has boosted the power of corporate respondents further, as I will demonstrate. The net effect is that it enables those with power to write sex discrimination jurisprudence from their own perspective, just as the history of war is written by the victors.

4.2. Sex Discrimination

While many of the initial complaints of sex discrimination related to questions of “letting in” were successful, such as women wishing to become airline pilots [37], the focus of the regulatory discourse is now on the interconnectedness of work and life [42]. Pregnancy, family responsibilities, sexual harassment and sex discrimination in employment more generally generate 83 per cent of sex discrimination complaints under the SDA ([15], pp. 135–36). Pregnancy, family responsibilities and sexual harassment complaints commonly appear as the primary ground, the preponderance of which are based on direct discrimination. Sex discrimination has nevertheless been the basis for a small number of significant complaints based on indirect discrimination, which involves a practice that is neutral on its face but exercises a disproportionate impact on one sex. There is a materiality associated with pregnancy, family responsibilities and sexual harassment which renders these grounds more tractable to remediation than indirect discrimination. While the latter ostensibly lends itself to challenging many established workplace practices, the unencumbered worker model at the heart of these practices remains resistant to change [43].

For example, *Amery* (2006) [44] involved a group of casual high school teachers who alleged that they were subject to sex discrimination as they were paid less than those on the permanent scale, even though they performed the same work. To satisfy the permanency scale, the women would have had to have been prepared to accept a posting anywhere in the State. The gravamen of the case was that women gave precedence to the needs of their families, in accordance with the well-entrenched social norm, and declined to move. The relocation requirement arguably amounted to indirect discrimination on the ground of sex as it impacted disproportionately on them. However, the majority judges of the High Court were dismissive of the idea that the casual and the permanent scales could be compared and found for the State of New South Wales. They took no cognisance of the historic discrimination against women or the social norms that placed pressure on them to give precedence to the needs of their families. In contrast, Kirby J (the sole dissenting judge) was critical of the “narrow and antagonistic” stance adopted by the majority judges that paid scant attention to the beneficial and purposive intent of the legislation ([44], p. 230; [45]).

The complex test for indirect discrimination invites the sort of strict legalism that typifies appellate decisions. The result is that the employment contract, in which the unencumbered worker has been the traditional norm, is privileged over the worker with family responsibilities [46]. It means that the systemic sex discrimination that harks back to the days when married women lacked any vestige of independence is not cognisable by discrimination law, and justice is accorded short shrift. A number of other appellate decisions based on indirect discrimination, also involving powerful respondents and

women with family responsibilities, have been decided in favour of respondents when courts have similarly deferred to managerial prerogative.

The *Commonwealth Bank* case (1997) [39] involved a major redundancy and restructuring exercise, which is a familiar neoliberal phenomenon that is conducted with the aim of effecting workplace efficiency. The case was run on behalf of more than 100 female employees who argued that the restructure disproportionately impacted on them as they were denied access to a redundancy package when they were on family leave, including maternity leave. The Federal Court held that the approach of the bank was “reasonable”, a “catch-all” test commonly found in indirect discrimination provisions that purports to be objective but may in fact privilege the standpoint of the employer.

Schou (2004) [40], which was initiated under the Victorian legislation involved a woman with caring responsibilities who wished to work flexibly. Once again, the respondent was a powerful entity, the State of Victoria (Department of Parliamentary Debates). The complainant had a chronically ill child and sought to do her transcription work at home for two days per week when Parliament was sitting, which was easily managed with the available technology. However, both the single judge and the Full Bench of the Victorian Supreme Court held that the reasonableness provision should have been directed to the attendance requirement. That is, if the employer specifies attendance at a place of work, employer prerogative should prevail. This was despite the fact that the option of flexible work had been initially agreed to by the respondent. Consideration of alternatives that might accord with the non-discrimination principle was given short shrift.

Thus, we see not only a restrictive and positivistic interpretation of anti-discrimination legislation in which employer prerogative prevails over the spirit of the legislation, but instances when governments are prepared to undermine their own legislation by appealing decisions in favour of complainants as we see in the cases of *Amery* and *Schou*. These cases show how neoliberal values favouring employer prerogative have seeped into the judicial mindset and overshadowed the ostensibly egalitarian aims of anti-discrimination legislation.

As I argued in *The Liberal Promise* 25 years ago, instances of discrimination cognisable within the legislation are those closest to the surface [6] These are typically instances of direct discrimination; there are few successful indirect discrimination claims ([47], p. 113). Indeed, the only successful indirect discrimination complaint on the ground of sex decided by the High Court was *Banovic* [38] in 1989 at a time when social liberalism was in the ascendancy [35]. *Amery* (2006) [44], the next sex discrimination case and the most recent to be heard, was also based on indirect discrimination but it is in sharp contrast to *Banovic*, both in style and outcome. Gone is the notion of anti-discrimination legislation as beneficial legislation designed to effect gender equality in favour of a formalism that accords with employer prerogative. To illustrate the neoliberal influence that tends to favour employers in this jurisdiction, I now turn to a consideration of recent complaints 2009–2014, dealing with pregnancy, family responsibilities and sexual harassment, all based on direct discrimination and generally dealt with by lower courts in the first instance.

4.3. Pregnancy

Although discrimination on the ground of pregnancy was included in the SDA from the outset and in State legislation for a decade before that, as well as being the subject of thoroughgoing campaigns and

reports [48], pregnancy continues to be a common source of discrimination against women at work. Employers fear that women will transfer their loyalty from the workplace to their families, cost them money as a result of frequent absences and no longer be productive employees. A stereotype that is hard to shake off is that working mothers trade competence for warmth. Psychological studies have shown that while pregnant women are liked, they are not wanted in the workplace ([49], p. 711). Thus, while managers may congratulate women when learning of the pregnancy, their attitude quickly changes to one of animosity.

The reported decisions follow a typical pattern in which the complainant is progressing well in her job until she informs her employer that she is pregnant. She suddenly finds that she has been downgraded and subjected to hostile treatment, culminating in dismissal, which may also result from victimisation for lodging a complaint [50]. While employers frequently claim that the demotion or dismissal ensued from substandard work, this is unlikely to be accepted if the quality of the work issues arose only after announcement of the pregnancy. What is notable in view of the neoliberal turn, however, is that when a restructuring of the business is adduced as a reason for redundancy, it is not regarded as pretextual but accepted by courts as bona fide [51–54]. The familiarity of restructuring in a neoliberal climate renders it virtually impossible for a complainant to refute the respondent's evidence of business necessity.

As well as having the option of lodging a complaint under the SDA or State anti-discrimination legislation, a complainant may also lodge a complaint under s. 351 of the *Fair Work Act 2009* (Cth) alleging adverse action against her by the employer for affecting her ability to exercise a workplace right. This avenue allows a pecuniary penalty to be imposed on the employer, which may be paid to the complainant in addition to damages [55]. It is an appealing avenue of complaint for women at work in respect of pregnancy and family responsibilities, as it includes a reverse onus of proof, discretionary compensation powers and the ability to impose a fine.

Damages, including economic loss and penalties, awarded in pregnancy discriminatory cases are nevertheless generally modest, regardless of jurisdiction. For example, in *Stern* [56], a paradigmatic pregnancy discrimination complaint, the employment status of the complaint was downgraded after she became pregnant; she was then bullied and humiliated and made redundant. However, her damages were less than AUD7000, including AUD3000 for loss of employment status and a mere AUD800 for emotional distress. There is nothing comparable in Australia to the USD186 million (including USD185 million in punitive damages) awarded to a pregnant woman in the US for a similar case involving the familiar pattern of demotion, harassment and dismissal [57], although this decision is likely to be appealed.

4.4. Family Responsibilities

Balancing work and family has been described as “the topic of the 21st Century for families, employers and government” ([58], p. xi). While there may well be greater receptivity to the ground of family responsibilities in contemporary discourse, flexible work continues to be resisted by many employers who all too often insist on full-time work *in situ*, as seen in the case of *Schou* [40]. Women may find that they are subjected to discrimination when they return to work from maternity leave or when they seek to work flexibly or adjust their hours. A direct collision arises between women's rights at work and employer prerogative and, as with pregnancy discrimination, demotion and/or dismissal is common [59–61].

An unreasonable refusal of a request to agree to leave of absence, part-time or flexible work on the basis of family responsibilities may constitute adverse action under the Fair Work Act [62,63]. In *Wilkie* [64], an employee sought to advise her employer that she needed to leave work early the following day to collect her son from school. She had a right under the Fair Work Act to take personal/carer's leave due to an unexpected emergency. However, she was issued with a warning letter, demoted, transferred and finally dismissed. The fact that she was pregnant at the time and would have had difficulty in obtaining another position was taken into account in assessing damages at AUD32,000.

While the overwhelming preponderance of complaints dealing with care and corporeality involve female complainants, complaints arising from family responsibilities are now being lodged by men alleging adverse action. In *Wolfe* [65], for example, the employee was an associate director of the respondent bank and took four months off to care for his family. Shortly after his return, he was retrenched following a restructure. His position and that of another director were merged and W was told on the day of his return that the other employee was the preferred candidate, even though W had been given no opportunity to apply for the position. The court found for the bank, although it was critical of the lack of transparency. Whether the restructuring exercise against W amounted to adverse action for having taken family leave cannot be unequivocally established. However, research has shown that a "femininity stigma" attaches to men who engage in caring which can lead to organisational punishment, such as being demoted or dismissed [66]. This reality does not portend well for the feminist hope that equality for women at work is predicated on the assumption that men will assume an equal role in parenting.

4.5. Sexual Harassment

More than 20 per cent of sex discrimination complaints arise from the ground of sexual harassment ([15], p. 135). A wide variety of conduct is involved, including the creation of a hostile working environment [67,68], and the conduct is invariably heterosexed, involving a male harasser and a female target. This conforms to the typical masculinist understanding of sexual conduct [69], and such complaints have a relatively high chance of success ([47], pp. 112–13). In the paradigmatic case, when the woman rejects an overture for sexual favours, she is subjected to adverse treatment, such as complaints about her work ethic and job performance [70,71], followed by dismissal [72,73]. The pattern is therefore similar to that found in complaints of pregnancy and family responsibilities. Dismissal may also result from victimisation for lodging a formal complaint [74].

The SDA, like anti-discrimination legislation more generally invests the tribunal or court with wide discretion to make an order to restore the complainant to the position she would have been in *but for* the discriminatory act. The most common remedy and the simplest for a court to administer in the case of sexual harassment is to order the payment of damages to redress any loss suffered. However, the damages awarded in sex discrimination cases, including sexual harassment have been unduly low, as with pregnancy discrimination, and it is only recently that there has been a change of heart.

The facts in *Richardson v Oracle* [75] were unremarkable in terms of the unwanted sexual overtures and humiliating put-downs of the female complainant by a male co-worker. What was unusual was that, first, the complainant had been successful in the primary hearing before a single judge and, secondly, it was she, not the respondent, who appealed that decision, although the settlement offer she had been made would have left her significantly out of pocket in terms of legal costs [76]. Accordingly, this

initiative enabled her rather than the corporate respondent to rewrite the sexual harassment jurisprudence on damages. Kenny J reviewed the history of damages awards in sexual harassment cases and found that damages had been set at a disproportionately low level from the time the legislation came into operation; this was usually between ten and twenty thousand dollars. She compared the non-pecuniary damages in sexual harassment cases with other areas, such as workplace bullying (mentioned below), where substantial damages were awarded as compensation for comparable psychological injury and distress. The judge, with whom her fellow judges, Besanko and Perram JJ, agreed, held that the initial award of AUD18,000 was “manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards” ([75], para. 109) and the damages were increased to AUD130,000. In another case soon afterwards, the Full Court upheld the payment of AUD110,000 in general damages, although the facts were extreme and included sexual assault [77].

However, if the harassment is not overtly sexualised, albeit sexed, it may not qualify as sexual harassment, as with instances of abusive and demeaning language and minor assaults associated with managerialism, such as poking the complainant in the “chest” and telling her to do what she is told [78]. Neoliberalism has encouraged the development of a more aggressive style of managerialism which may make it harder to tell the difference between harassment and management. As Finn J points out, “it is not workplace harassment for managers to manage” ([79], p. 56).

Nevertheless, it is notable that women who have been subjected to bullying in the workplace have secured substantial damages by using tort law as their avenue of redress. They have alleged that the employer has failed to provide a safe workplace and the bullying has resulted in significant psychiatric injury. In *Swan* [80], damages of almost AUD600,000, including AUD300,000 for pain and suffering, were awarded to the plaintiff who had been subjected to sustained bullying by her manager over a number of years. The plaintiff in *Keegan* [81] was awarded AUD238,000 when the court found that her life had been “shattered by her employer’s breach” when she was subjected to bullying by her manager after returning from maternity leave, even though she worked for only eleven days. While not wishing to detract from the harm suffered by the plaintiff in this case, it does stand in sharp contrast to the paltry sums conventionally awarded for sexual harassment (at least prior to *Richardson* [75]), as well as for discrimination on the grounds of pregnancy and family responsibility.

While bullying in the workplace became formally cognisable under the *Fair Work Act 2009* (Cth) in 2014, the gendered dynamics of managerialism remain elusive within anti-discrimination legislation. There was only one reported sexual harassment decision where the adverse action was alleged to be a redundancy resulting from restructuring. In *Shea* [82], the complainant was a director of corporate affairs with the respondent and the only female member of the executive management team. Her complaint of harassment was against another senior employee, the Chief Financial Officer. She received an ex gratia payment but was made redundant as a result of the restructure soon afterwards as she did not wish to continue working with the Chief Financial Officer. Again, it is impossible to ascertain whether a restructure was bona fide or whether the company decided that it was convenient to remove a “complaining woman”. It does not appear that the harasser was subjected to any detriment, although a number of other decisions deal with the dismissal of harassers [83–85].

Although the reporting rate remains low ([86], p. 3), there would seem to be a greater willingness to acknowledge sexual harassment compared with sex discrimination in the workplace, which could be attributed to the fact that sexual harassment does not depend on showing a reason for acting, but merely

establishing that the unacceptable conduct took place as Gaze suggests ([33], p. 917). The alacrity of the state to act may also arise from the fact that sexualised conduct has the potential to detract from productivity in the workplace [87], which may partially explain the willingness to increase damages.

5. Proactive Legislation

It is generally agreed that AA or positive action at the institutional level is a more effective mechanism for realising gender equality than an individual ad hoc complaint-based regime that is dependent on the occasional heroic complainant being prepared to embark on the risky process of suing a corporate respondent. Instead of addressing instances of discrimination retrospectively, AA involves institutional measures designed to foreclose the occurrence of future harms. I trace the volatile course of federal AA legislation in which the neoliberal swing can be clearly discerned.

As a result of the furore associated with the initial sex discrimination bill, the draft provisions concerning AA were removed and subsequently enacted as the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) (AAA). From the outset, this was an extremely timid piece of legislation in which the language of quotas was eschewed in favour of “objectives” and “forward estimates” ([6], pp. 227–32). As with the SDA, exaggerated claims about the effects of the AAA had been made beforehand, such as necessitating the appointment of “unqualified women” on the basis of biology alone. Hence, the AAA contained an express provision that the merit principle would not be compromised.

The Act required all private and some public organisations with more than 100 employees to develop and implement an AA plan involving the institution of “appropriate action” as the organisation thought fit. The Act did not mandate any gender-specific measures; the only formal requirement was that an annual report be lodged with the AA Agency, although there was no evidence that the Agency checked the validity of the information appearing in the reports or followed up on them [88]. The only sanction for failing to lodge a report was to be named in the Agency’s annual report which was tabled in Parliament. Contract compliance was introduced but it does not appear that it was ever invoked against a transgressor. The Act conferred no right to institute legal action, which means that it generated no jurisprudence.

Despite its toothless nature, the AAA was trenchantly attacked during its lifetime by detractors who averred that it constituted a form of improper preference, or “reverse discrimination” [89] against men who were reduced to “victims” [90,91]. What we see here is evidence of a backlash against women as they move from the private sphere into the public sphere and challenge the masculine monopoly over professional employment. The sustained criticism of the AAA by conservatives and employer groups resulted in its repeal in 1999. It was replaced by another Act that was similar in form but even weaker. This was the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWWA). Most significantly, the language of AA was jettisoned altogether and disappeared overnight from the public record. References to “objectives” and “forward estimates” were also removed out of fear that they might be confused with quotas. In deference to the objections of employer groups that annual reporting constituted an impost on business, this could now be waived in favour of triennial reporting.

As equality, equity and social justice receded from public discourse, there was also an attempt to remove the phrase “Equal Opportunity” from the title of the Human Rights and Equal Opportunity Commission in 2003. Although the bill lapsed, the name was changed to the Australian Human Rights

Commission in 2008. EO units too began to disappear from workplaces during the 1990s [92]. The anodyne concept of diversity or, more precisely, “managing diversity”, began to supplant the rhetoric of equality and EEO [93]. “Diversity” appealed because it is a depoliticised term, unlike equality or its antonym, inequality. The change of language sought to persuade society that gender discrimination no longer existed as equality had been attained. Thus, conservative Prime Minister, John Howard, was able to claim confidently at the millennial turn that we now live in a “post-feminist” age ([94], p. 21).

The modest replacement piece of pro-active legislation of 1999, however, was short-lived, for it too was repealed and replaced with the *Workplace Gender Equality Act 2012* (Cth) (WGEA). Reflecting the neoliberal turn, the WGEA specifically includes productivity and competitiveness as objects of the Act [95,96]. It also dispenses with the gender-specific word “women”—as is apparent from the title—in favour of gender neutrality. Nevertheless, a positive development on this occasion was the report prepared by the Australian Senate to assist with the drafting of the new legislation, for it stressed the inadequacy of AA legislation to date [97]. The report pointed to the irrefutable evidence of the continuing inequality for women in the workplace as revealed by the gender pay gap, the minuscule number of women in senior management and the ongoing problems confronting workers with family responsibilities. This was the first time that it had been officially acknowledged that a softly-softly approach dependent on voluntary employer action was inadequate. Nevertheless, sustained opposition from both the industry lobby and the conservative Coalition Members of Parliament meant that the reluctance to impose sanctions remained. Like a mantra, opponents continued to reiterate their concerns about the impact of increasing “red tape” on small business. The bill was passed by a narrow majority but, shortly after it became law, a Coalition Government once more assumed office and sought to water it down by reducing the reporting requirements [98]. This led to a further period of consultation in 2014 [99], in response to which the Minister for Employment and the Minister Assisting the Prime Minister for Women announced a further reduction in reporting requirements in early 2015 [100].

An additional linguistic shift that places work and family at the centre is also discernible as we now find that “choice”, “flexibility” and “work/life balance” have largely replaced the earlier EEO discourses ([101], p. 534). This language suited the neoconservative morality that goes hand-in-glove with neoliberalism and is not restricted to the more conservative side of politics.

This short but volatile history of AA, or positive action, highlights the impact of the neoliberal turn on women’s quest for equality at work. It clearly points to the pendulum swing from equality for women in favour of freedom for employers to maximise their returns from labour.

6. The Triumph of Freedom over Equality

It is apparent that structural deficiencies have existed in sex discrimination legislation from the outset to limit its efficacy. While sex, race, disability and age are treated as discrete by virtue of the separate federal Acts, the reality is that sex is invariably complicated by the existence of the other characteristics ([102], p. 441). Age plus sex, for example, is particularly problematic for women ([103], pp. 160–61), but the intersection between gender and class in the workplace is even less tractable to remediation. Although women might be moving into managerial positions in small numbers, the preponderance of support staff, clerks and care providers are still primarily women, but no legislature has been brave enough to tackle the intersection of gender and class. Indeed, class itself is ineffable

within anti-discrimination legislation because neoliberalism through its privileging of corporate power, capital accumulation and competition fosters inequality, not equality.

Although bypassing the conundrum posed by class, multiple reports and recommendations have sought to overhaul the SDA throughout its lifespan, but only minor changes have been accepted and implemented. First, in 1992, the House of Representatives Legal and Constitutional Committee reviewed and proposed a number of changes to improve the effectiveness of the SDA [104], such as the inclusion of potential pregnancy and family responsibilities as operable grounds, as well as changes to the definition of indirect discrimination. Secondly, the idea of an Equality Act that would have binding force was seriously raised in 1994 in the context of a comprehensive Law Reform Commission Report on women's equality [105], but it was not acted upon. It is notable that there was a division among the commissioners as to whether the Equality Act should be gender neutral or for the benefit of women only [106]. Even then, the proposed Equality Act or Acts did not transcend the negative duties approach associated with anti-discrimination legislation at that time ([107], p. 201). Thirdly, in 2008 the Senate directed the Standing Committee on Legal and Constitutional Affairs to inquire into and report on the effectiveness of the SDA [108]. The committee recommended that numerous changes to the Act be considered in addition to reviving the idea of a single Equality Act. As a result of this inquiry, breastfeeding was included as a new ground, but other recommendations were deferred. Fourthly, a national charter of human rights was proposed in 2009 after an extensive Australia-wide consultation [109]. The report proposed the enactment of a federal human rights Act based on the major international human rights treaties, but that proposal was also shelved. Instead, in 2010, the federal government announced the fifth major initiative, which was the consolidation and reform of the separate Commonwealth anti-discrimination laws relating to race, sex, disability and age.

What is notable about the announcement of the consolidation project in light of the neoliberal turn is that it was issued in the form of a joint press release from the then Attorney-General and the Minister for Finance and Deregulation, a new portfolio, thereby signifying the economically rationalist origins of the project [110]. Despite extensive public consultation, however, the consolidation project was abandoned by the Gillard Labor Government in 2013. Pressure arose largely from employer groups to reduce regulation and “red tape”, a recurring theme so far as employer groups and conservative politicians were concerned, as already mentioned in relation to AA. In addition, in what might be regarded as a textbook example of the *ressentiment* of the right, the exposure draft of the bill was trenchantly attacked for constraining freedom, particularly freedom of speech. The attack was triggered by the application of the vilification provisions of the Racial Discrimination Act to a case involving a journalist who was found to have engaged in conduct reasonably likely “to offend, insult, humiliate or intimidate” a group of fair-skinned Aboriginal people [111]. The only reform to emerge from the protracted consolidation effort was the 2013 amendment to the SDA proscribing discrimination in respect of sexual orientation, gender identity and intersex status.

Soon after the collapse of the consolidation project, a conservative Coalition government was once more elected, which put paid to any immediate prospect of reform. What counted now was freedom, in all its manifestations, including freedom from regulation; equality was dispensable. Indeed, the Attorney-General, Senator the Hon. George Brandis QC, had made it clear prior to assuming office in 2013 that he intended to shift the focus of the AHRC away from discrimination towards traditional rights and freedoms, including freedom of speech, despite the fact that the administration of the anti-discrimination

Acts was the primary function of the AHRC as specified in the enabling legislation, the AHRC Act itself. Indeed, in order to implement the new agenda, Senator Brandis appointed a Human Rights Commissioner for the express purpose of promoting rights and freedoms. As a result, the new commissioner was dubbed the “Freedom Commissioner”. Furthermore, the Australian Law Reform Commission was enjoined to conduct a thoroughgoing inquiry into the question of possible encroachment by Commonwealth laws on traditional rights and freedoms [112].

To recapitulate, the grounds of potential pregnancy, family responsibilities, breast feeding, sexual orientation, gender identity and intersex were all included as new grounds within the SDA over the last two decades. However, the ongoing efforts of feminist activists to move from a formalistic to a substantive understanding of equality and their protracted efforts to modernise and reform human rights and anti-discrimination legislation have come to naught despite the proliferation of reports and recommendations. The resistance to change clearly illustrates the way that neoliberalism has veered away from equality and the correlative values associated with social justice in favour of individual freedom, entrepreneurialism and capital accumulation.

7. Conclusions

In this overview of the recent trajectory of sex discrimination legislation in Australia, I have sought to show how the fortunes of women in the world of work, continue to be contingent not only on the good graces of men, as has always been the case, but also on the dominant political ideology of the moment. This is particularly marked in the swing from social liberalism to neoliberalism. I am not asserting that there is a clear line of demarcation between these two incarnations of liberalism, for progressives and conservatives necessarily coexist, whichever party is in power. Most legislation withstands changes in government, as can be seen from the example of the SDA. However, the efficacy of legislation can be undermined by withdrawing funding or by appointing personnel designed to effect a particular agenda, as with the creation of new positions, such as the “Freedom Commissioner”. Judges continue with their interpretative role, although the subjectivity of a particular judge can exercise a marked effect on the outcome of a particular case. Judges, after all, are appointed by the government of the day in accordance with the Anglo-Australian tradition, which is necessarily going to favour a particular political ideology. Institutional changes are often subtle and ad hoc, but a pattern is clearly discernible when viewed through a longitudinal lens. The picture is nevertheless blurred by positive initiatives such as the legislative proscription of discrimination on new grounds, such as sexual orientation, gender identity and intersex, and the significant increase in damages for sexual harassment.

Sex discrimination legislation was enacted at the height of social liberalism and provided an avenue of complaint for those alleging less favourable treatment on the ground of sex, or a cognate facet of identity, but is dependent on a heroic complainant having to carry the burden of proof at a formal hearing, often against a powerful corporation or a government entity. The many attempts by feminists and progressive law reformers to enhance the efficacy of the legislation over more than two decades foundered.

The High Court decision of *Banovic* [38] encouraged women to view sex discrimination legislation as beneficent and purposive. The swing in favour of neoliberalism accompanied something of a shift in judicial interpretation at the appellate level away from the equality and social justice aims of the legislation in favour of a more positivistic and technocratic interpretation that favours corporate

respondents. Former High Court judge, Michael Kirby (1996–2009), who consistently found himself in dissent in discrimination cases that dealt with disability and sexuality, as well as sex, rued the retreat. He was highly critical of the narrow, technocratic approach favoured by the Court from the late 1990s, which by the time of *Amery* (2006) [44] had crystallised into what he refers to as “hostile litigious environment” ([44], p. 219). This has had the effect of heightening the burden of proof for complainants and deterring them from proceeding to a formal hearing, particularly in view of the prospect of onerous costs.

Sex discrimination legislation is incapable of tackling the structures of the workplace, many of which emanate from the industrial relations system, which is largely treated as discrete, thereby causing an uneasy relationship between the *Fair Work Act 2009* (Cth) and the SDA [113], despite the adverse action innovation. In recognition of the fact that the individual complaint-based mechanism is not an efficacious way of bringing about social change, AA legislation was enacted to lessen the burden on the individual complainant. However, the AAA and its two successor Acts, the EOWWA and the WGEA, were vociferously attacked and watered down, albeit that the original AAA was practically devoid of substance and overly deferential towards employers.

This overview of the 30-year trajectory of sex discrimination legislation has shown that the struggle for substantive gender equality is ongoing. While the liberal progressivist thesis may be that we are always coming closer to an ideal end state of gender equality, this is a myth. The ideological shifts and turns within the political realm create an arena of perennial contestation. The Australian Labor Party, as well as the Liberal Party, is supportive of neoliberal policies, such as deregulation, despite Labor’s traditional association with social justice and progressive policies. As Purcell points out: “Neoliberalization is an incomplete process that struggles with internal contradictions, manifests its agenda unevenly, and produces unintended consequences” ([13], p. 31). At present, there is no obvious wholesale sign of rejection in sight for neoliberalism. Even more alarming is the possibility of a far-right alternative ([114], p. 333). This volatility in the political firmament means that women’s struggle for equality in the public sphere is necessarily a work in progress.

Conflict of Interest

The author declares no conflict of interest.

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