THE LAW, EQUALITY AND ANTI-DISCRIMINATION

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While there is debate about whether the present is characterised by more social difference than earlier periods, it cannot be denied that notions of equality and diversity are pervading normative discourses, institutional structures, professions, policies, and practices. The law, legal profession, and the operation of the justice system are no exceptions. Arguably, a commitment to the promotion of fundamental human rights (i.e., equality and diversity) in the legal setting is expected, becoming mainstreamed, and some would even argue, taken-for-granted. With the statutory and institutional bases for regulation in the areas of equality, diversity, and anti-discrimination being the subject of numerous inquiries in respect of the profession and a recognisable legislative scheme nationwide, it is prudent to reflect on what has been achieved after almost 50 years, while also envisaging the way forward.

This essay will canvas the development of, and changes to, internal strategies and practices adopted within the Australian legal system, as it works in tandem with emerging anti-discrimination discourse. In doing so, it becomes clear that promoting equality and diversity is intended to further the Australian legal system's legitimacy, not its transformation nor commitment to distributive justice. It is also critical to explore the development of this area of law – an institution in itself – and the efficacy of its attempts to embody forms of inequality and discrimination. Notwithstanding these developments and its reflection of an evolving public consciousness, the functions of Australia's legal system and legal professionals have not changed. The judiciary's role is to preside over the operation of the law and remain impartial as evidence is adduced and submissions on the law are made. Legal counsel, as officers of the court, must advocate for their clients. Federal anti-discrimination law – enshrined in four substantive Acts – continues to create and confine the rights and obligations expected of Australians, while also dictating the parameters for the prohibition of discrimination. Collectively, the Australian legal system has been forced to adapt to, reckon with, and embody the anti-discrimination ideals as it has diffused socially – and confront the domestic legislative scheme that now reflects Australia's commitment to such ideals.

The long-standing pattern of inflexibility and reluctance with which the law – especially its advocates and arbiters – considers anti-discrimination, as a concept and endpoint, parallels an ingrained reluctance within the Australian legal industry to question or challenge existing

social arrangements. To elucidate this notion, Australian promotion of equality, diversity and anti-discrimination will be compared with the 'open' model adopted by Canada, which is viewed globally as a leader in achieving equality. This essay contends that any proactiveness in the role of Australian practitioners, legal organisations and institutions in the promotion of basic human rights in the future will only materialise through overdue reforms to Australian anti-discrimination legislation.

I. LEGAL PRACTICES: AN INTERNAL ASSESSMENT

On the surface, equality and anti-discrimination discourse have diffused into the legal profession by way of a prioritisation of gender equality and the elimination of discriminatory rhetoric, practices and standards in firms. Interpreting feminisation, in the context of achieving gender equality, in quantitative terms alone paints an inaccurate picture though. While 'fixing the numbers' is an important first step, the masculinist subtexts nonetheless persist.

a. *The Foundation of the Current 'Work Agenda'*

Historically, women were expected to choose – from the outset – between motherhood or a career. Further, it was assumed that women would leave the workforce to assume unpaid, domestic responsibilities upon marriage. In fact, until 1966, it was an Australian Public Service requirement that a woman resign on marriage.[1] Arguably, the concept of feminisation of labour materialised from the challenge to the assumed association between women and the private sphere that emerged in the late 20th century – not just on Australian soil, but worldwide.[2] Not only was this movement a direct challenge to the liberal separation between the private and public spheres (and the gendered connotations associated with each respectively), but it was more importantly the point at which our legislature was forced to reconcile the reality that women were not only an indispensable source of labour but also expected to assume primary responsibility and care for their households. A raft of legal instruments and subsequent policies were implemented (as will be discussed below) to establish formal equality, recognising that it was no longer acceptable to perceive the public and private realms as discrete.

[1] *Public Service Act (No 2) 1966* (Cth).
[2] Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14(2) *Deakin Law Review* 189, 204.

Maternity leave was introduced in the 1970s, offering job security and stability for women (contingent on them in fact being able to access the scheme and benefit from it). 'Maternity leave' eventually evolved into 'parental leave', yet it remains principally aimed at heterosexual couples and namely, mothers. Again, while the gender neutralisation of language in this instance is necessary, the perpetuation of tension between – and masculinist bias inherent in – the welfare and employment mores that underpin parental leave policies in Australia should not be forgotten. A 2014 national survey by the Law Council of Australia found that 55% of female-identifying lawyers, who were also primary carers, experienced discrimination in the workplace,[3] while 29% reported experiencing discrimination during pregnancy, their leave or upon returning to work.[4] This included, but was not limited to, being made redundant or not having their contract renewed, significant restructuring to their position/role and being dismissed. While individual claims by employees – as facilitated by anti-discrimination workplace provisions and policies – have contributed to improvements in standards, there is little incentive or practical impact on the fundamental regulation of the employment relationship. Specifically, wage rates and classification structures remain stagnant. Within the legal profession (as with most professions), the failure to address the impact of pay inequity through any form of industrial relations regulation perpetuates gendered and polarising work-day regimes.

b. *"Flexible Work" Arrangements?*

The introduction of flexible working hours and arrangements, in theory, emerges as a viable solution to tackling the irreconcilable tension between workplace demands and household responsibilities. Yet, this impasse is merely a high-level assessment: it is also worth acknowledging that such a tension is invariably compounded through an intersectional lens. At present, flexible working arrangements take the form of tailored working days, part-time work and job sharing.[5] Again, the statistical overview of current family employment patterns in Australia echo the overwhelming gender inequality at play. The nature of employment for

[3] Law Council of Australia, *National Attrition and Re-Engagement Study* (Report, 14 March 2014) <https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf>. Cf Roberta D Liebenberg and Stephanie A Scharf, *Walking out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice* (Report, 2019).

[4] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, 2014) 48, 53.

[5] Margaret Thornton, 'The Flexible Cyborg: Work-Life Balance in the Legal Profession' (2016) 38(1) *Sydney Law Review* 1.

mothers has drastically changed after having a child, while the employment of fathers illustrates very little change.[6]

Similarly, seemingly high levels of productivity and output do not dispel the stigma attached with flexible work. Particularly problematic within the legal industry is the expectation of presenteeism, internalised by lawyers in a fashion similar to the Foucauldian notion of governing the self.[7] Presenteeism and unbroken career patterns and tenures continue to be perceived as reflective of one's commitment to their career. Taken a step further, this commitment becomes relevant to, and indicative of, eligibility for partnership opportunities.[8] What remains intact is the inordinate pressure to not 'take a step down in [one's legal] career'.[9] While the widespread view that Australian fathers should be actively – and equally – involved in child-rearing as their counterpart, the reality is that very few are.[10] Margaret Thornton observes that the 'absent father' has become the paradigmatic subject of liberalism and neoliberalism, taking 'little to no time off for childbearing or child rearing'.[11] Meanwhile, many practitioners are either denied access to, or feel pressured against, accessing 'family-friendly' arrangements, often as a result of systemic, unrealistic productivity pressures and targets. On balance, the high rate of attrition of women from full-time work, in addition to legal practice, poses a huge threat to any meaningful stride towards equality.

Studies in Canada also indicate historical stigmas attached to working flexibly that are increasingly present for men.[12] Curiously, seeking flexible working arrangements for non-caring activities, such as sport, do not taint one's manhood to the extent that child rearing, or acting as a primary carer, do.[13] To offset this, Canadian legal practices (governed by their open-model legislative framework) mandate an assessment of the reasonableness of the means by

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[6] Jennifer Baxter, *Fathers and Work: A Statistical Overview* (Research Summary, Australian Institute of Family Studies, May 2019) <https://aifs.gov.au/aifs-conference/fathers-and-work>.
[7] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991) 87.
[8] Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45(4) *Osgoode Hall Law Journal* 773.
[9] Ibid.
[10] C Starla Hargita, 'Care-Based Temporalities and Parental Leave in Australia' (2017) 26(4) *Griffith Law Review* 511.
[11] Thornton (n 9) 7.
[12] Laurie A Rudman and Kris Mescher, 'Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?' (2013) 69(2) *Journal of Social Issues* 322; Joan C Williams, Mary Blair- Loy and Jennifer L Berdahl, 'Cultural Schemas, Social Class, and the Flexibility Stigma' (2013) 69(2) *Journal of Social Issues* 209.
[13] Joseph A Vandello et al, 'When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility' (2013) 69(2) *Journal of Social Issues* 303, 304.

which an employer can achieve their goals as part of their flexible working arrangement request. Such an assessment invariably involves an assessment of this request considering the goals of Canadian equality laws, thereby scrutinising the extent to which an employer accommodates difference and makes reasonable adjustments to consider undue hardship. Arguably, the current Australian 'work agenda' approach falls short of addressing prevailing gender relationships and the persistence of gender-based stereotypes. The efficacy of flexible work will play a decisive role in the movement towards gender equality in the legal profession. At present, practitioners face an overwhelming responsibility to adapt to prevailing archaic (and inherently masculinist) workplace expectations, thereby rendering the rhetoric of work/life balance fanciful and increasingly hollow.

Invidiousness attached to the feminine, especially in respect of authoritative and senior positions, lingers and remains an invariable 'glass ceiling' that female practitioners encounter. Women are more likely to be represented at the lower echelons of a law firm hierarchy. Accordingly, women make up less than 25% of female partners in both civil and common law countries.[14] Notwithstanding the creation of 'modern' policies, awards and redress mechanisms, the employment relationship underpinning the legal profession is failing to include any form of intersectional consideration of personal development and social integration. In failing to do so, the relationship between paid and unpaid work becomes recognised as central to the realisation of gender equality within the legal practitioner membership.

II. LITIGATING FOR EQUALITY: FANCIFUL OR PRAGMATIC

Curiously, litigation as a broader strategy for achieving social change is rather unpopular in Australia. Galligan and Morton account for this reality as being the result of limited resources (i.e., time, funding, practitioners solely dedicated to 'strategic' litigation) available to the limited number of rights-protection organisations in Australia, resulting in them often 'not [using] "test case" litigation as a strategy for advancing their right goals'.[15] More crucially, there is yet to be a court-based revolution of rights. Globally, the utility for test-case litigation

[14] Jane Ellis and Ashleigh Buckett, *Women in Commercial Legal Practice* (Report, December 2017) 20.
[15] Brian Galligan and Fred Morton, *Australian Rights Protection* (Conference Paper, Australasian Political Studies Association Conference, University of Adelaide, 29 September–1 October 2004) 9.

as a vehicle for promoting human rights is constantly debated:[16] the small pool of literature available reflects scepticism for the strategy, but also illustrate unsuccessful attempts at addressing structural sources of inequality. Rhode's notion that test-case litigation 'deal with symptoms not causes … and courtroom victories are seldom significant or enduring without a political base to support them'[17] largely resonates within Australian advocacy organisations. Thus, domestic hesitancy in respect of the utility of test case litigation is unsurprising: for example, the Public Interest Advocacy Centre has 'shifted its … tactics away from straight litigation to an integrated approach to public interest advocacy that combines litigation, policy development and education and training'.[18] Similarly, the Australian Human Rights Commission ('AHRC') is not empowered to initiate litigation,[19] which arguably casts doubt as to whether there will ever be scope and appetite for the strategic use of anti-discrimination legislation in Australia. On the other hand, in the Canadian jurisdiction, the Canadian Charter of Rights and Freedoms (an equality right) – offering a constitutional guarantee of equality – has eventuated in test-case litigation becoming a major site of feminist engagement (albeit a costly and often lengthy process).

III. A STRUCTURAL REVIEW OF ANTI-DISCRIMINATION LEGISLATION

While overt discrimination, such as extreme sexual and racial harassment, has been inculcated against through Australian anti-discrimination legislation, groups 'protected' by the anti-discrimination scheme remain entrenched in a socially disadvantaged position. Thus, Australia's current anti-discrimination legislation fails to challenge existing, discriminatory power relations, and the persistent inequality.

Legislation carries an inherent 'symbolic and educative function.'[20] Typically, any recognition and/or consideration of minorities within legislation is dependent on liberal political and legal contexts. Such contexts must invariably reflect the wider community's appetite for social change. Neither can be assumed. Peter Sutton notes that 'deep changes in culture are normally

[16] Dianne L Martin, *A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth?* (Department of Justice Canada, Ottawa, March 2002) referring to Amy Bartholomew and Alan Hunt, 'What's Wrong with Rights?' (1991) 9(1) *University of Minnesota Law School Journal* 1; Stephen Brickey and Elizabeth Comack, 'The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?' (1987) 2(2) *Canadian Journal of Law and Society* 97.
[17] Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 110.
[18] Ibid.
[19] See *Australian Human Rights Commission Act 1986* (Cth) ss 10A, 11, 13.
[20] Thornton (n 9) 7.

and, in most of human history, unintentionally generated in contexts such as substantial economic changes, radical ideological shifts … or social reconstruction following epidemics, warfare or environmental catastrophes.'[21] Arguably, since the conception of Australian anti-discrimination laws, attitudes towards the acceptability of sexual harassment, gender inequality, racism, and discrimination on the basis of disability and sexuality have changed dramatically since the conception of Australian anti-discrimination laws. Accordingly, it is worth examining the factors contributing to this stagnancy in the meaningful promotion of equality and diversity. For the sake of brevity, this essay primarily focuses on providing a structural review of the composition and flaws of Australia's anti-discrimination legislation its entirety, as opposed to comparing the distinct impact(s) and operation of each legislation.

The *Racial Discrimination Act 1975* (Cth) ('RDA') represents Australia's first Commonwealth legislation concerning human rights and anti-discrimination law. Introduced to implement the *International Convention on the Elimination of all Forms of Racial Discrimination,* Noel Pearson describes the RDA as akin to the *Civil Rights Act 1964* in the United States.[22] What followed were the *Sex Discrimination Act 1984* (Cth) ('*SDA*') prompted by Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'), *Disability Discrimination Act 1992* (Cth) ('*DDA*'), and *Age Discrimination Act 2004* (Cth) with largely bipartisan support. Sexual orientation, gender identity and intersex status protections were added through amendments to the *SDA* in 2013. The RDA was 'important trailblazing law'[23] when it was introduced. Similarly, the *SDA* and *DDA* were viewed as international best practice when they were first drafted.[24] Since, however, Australia has fallen behind considerably compared to other jurisdictions in protecting against discrimination and, broadly, efforts to advance equality.

c. *The Flaws of a Complaint-Based Model*

[21] Thornton (n 9) 11.
[22] Noel Pearson, 'The Reward for Public Life Is Public Progress: An Appreciation of the Public Life of the Hon E.G. Whitlam AC QC Prime Minister 1972–1975' (2013 Whitlam Oration, Whitlam Institute, University of Western Sydney, 13 November 2013) 4.
[23] Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills Second Exposure Draft* (31 January 2020) 8 [34] (Recommendation 1); Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills* (27 September 2019) 14–15 [46]–[51].
[24] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 515–16.

The individual complaint model, underpinning the Australian anti-discrimination legislative scheme, is onerous. At present, most complaints, modelled as civil wrongs, are handled by the *Australian Human Rights Commission Act 1986* (Cth), with a strong conciliation focus. Federal agencies, such as the Fair Work Commission, the Fair Work Ombudsman and the Office of the Australian Information Commissioner provide first-stage response: vested with determinative and regulatory powers in respect of discrimination complaints. In theory, a complainant must first assign themselves a category that exclusively and precisely depicts the personal attribute they are pinpointing as the source of discrimination (without accommodating for intersectional claims).[25] Following this arduous task, they must then mould their circumstances into a 'rigid, complex and artificial'[26] statutory definition of discrimination. It is then important to consider the adversarial context within which such remedies must be pursued. From a technical standpoint, it seems rather contradictory that the thresholds for successfully proving discrimination are extraordinarily high: a standard of proof,[27] burden of proof,[28] stringent requirements to prove indirect discrimination – namely, the 'reasonableness test' – and the comparator test for direct discrimination.[29]

Worth noting is that the *SDA* is enforced exclusively by private litigation. Thus, the power disparity that the complainant seeks to rectify is one that often parallels an imbalance in resources – money, expertise, resilience, time, support system – which they must work to offset in the hopes of holding the more powerful perpetrator to account. This is to say nothing of the emotional and mental toll of litigation, which often occurs in conjunction with the overwhelming pressure to break glass ceilings for oneself and groups that are discriminated at large. On a superficial level, proscribing a 'narrow band of discrimination and promot[ing] a limited form of equality'[30] is of limited effectiveness. At its highest, the current framework provides little to no avenue by which laws, practices and procedures that create or perpetuate inequality can be challenged nor radically reformed.

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[25] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (Report, December 2008) 41–3 [4.50]–[4.56].
[26] Loretta de Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 308.
[27] Ibid.
[28] Senate Standing Committee on Legal and Constitutional Affairs (n 25) 79–81[6.46]–[6.51] (Recommendation 22).
[29] Ibid 20–2 [3.15]–[3.22] (Recommendation 5).
[30] Ibid.

d. *How Do We Define Discrimination?*

The normative role anti-discrimination legislation has played in promoting equality is not worth understating. However, close analysis of case law demonstrates the narrowness and complexity of the various iterations of 'direct' and 'indirect' discrimination provisions.

A major source of tension over time has been the application and interpretation of definitions – and varied accounts – of discrimination. Ultimately, the decision of how readily discrimination is to be inferred or found (in the best-case scenario) is a choice left to the judge. While statutory interpretation provisions, such as s 15AA of the *Acts Interpretation Act 1901* (Cth) and s 35(a) of the *Interpretation of Legislation Act 1984* (Vic), encourage a judicial interpretation of discrimination that actively aligns with and emboldens the purpose of the Act,[31] these provisions are rarely discussed in decisions that enliven anti-discrimination legislation. Relevantly, there is a different metric underpinning a racial discrimination claim. Instead of demonstrating 'less favourable' or 'unfavourable' treatment on the basis of a ground, enlivening ss 9(1) and 10(1) of the *RDA* requires a complainant identifying 'an act or a law that has the purpose or effect of creating a distinction based on race, that in turn has the purpose or effect of impairing a person's human rights or fundamental freedoms'.[32] Nonetheless, the Australian judiciary have historically interpreted anti-discrimination legislation with a narrow, 'formal equality' approach: a matter of giving effect to the words.[33] Similarly, there is no scope for determining whether in fact there is 'equality' in light of the historical and contextual framework of disadvantage.

Conversely, anti-discrimination laws in the Canadian jurisdiction have been considered as 'having a higher status than other legislation because of [its unique] subject matter'.[34] The latter requirement sits in stark opposition to the open model – and more intersectional, accessible approach – of Canadian anti-discrimination law that does not prescribe a fixed definition of discrimination.[35] Originally, the Canadian courts similarly followed a bifurcated definition of discrimination wherein cases either fell into 'direct' or 'adverse effect

[31] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Butterworths, 5th ed, 2001) 27.
[32] *Racial Discrimination Act 1975* (Cth) ss 9(1), 10(1) ('*RDA*'). Sections 9 and 10 of the *RDA* prohibit discrimination based on 'race, colour, descent or national or ethnic origin'.
[33] See Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325.
[34] *Ontario Human Rights Commission v Simpsons-Sears Ltd* (1985) 2 SCR 536.
[35] Belinda Smith, 'Models of Anti-Discrimination Laws: Does Canada Offer Any Lessons for the Reform of Australia's Laws?' in Deirdre Howard-Wagner (ed), *W(h)ither Human Rights?* (Proceedings of the 25th Annual Conference of the Law and Society Association of Australia and New Zealand, 2008).

discrimination claims'.[36] However, in the 1999 case of *Meoirin*, the Supreme Court of Canada recognised this approach could 'compromise both the broad purposes and the specific terms of human rights legislation'[37] and prioritised a substantive equality approach henceforth.[38]

Arguably, there is also an overriding tension between finding a contemporary approach to interpreting anti-discrimination law and the function of common law. As the common law operates to resolve disputes between individuals – as opposed to being a launchpad for the impetus for social change – any opportunity to enliven the object of anti-discrimination legislation hinges entirely on the judiciary. As mentioned, Australian judges are more likely to follow a literal/narrow reading of specific provisions, whereby textual methods of interpretation are relied upon to reach a conclusion.[39] The residual effect of this narrow reading of anti-discrimination legislation is a standard wherein success for complainants is rare. Accordingly, systemic discrimination in the content of law remains unchallenged.

Margaret Thornton identified that the inherent contradiction in anti-discrimination legislation being that the fundamental norm of equality is demonstrably 'imperfectly realised'. To compare one citizen with another or one community with another, invariably highlights differences. Consensus can be found in recognising that the dominant voice has historically – and currently remains as – 'a white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy.'[40] Arguably, one is acutely aware that, being the custodians of such social power, men will 'invariably exercise it in their own interest.'[41] Unfortunately, the legal paradigm is not immune to such conditions:

> *The benchmark male continues to be a powerful normative force within law, whose eminent reasonableness is used to disqualify the disorderly voices of women. This is the case with EEO, no less than with rape, wife-battering, provocation, pornography or with any of the manifold social harms to which women are subjected.*[42]

[36] Ibid.
[37] *Meiorin* [1999] 3 SCR 3, [25]–[49].
[38] *Eldridge v British Columbia (Attorney General)* [1997] 2 SCR 624.
[39] See *University of Ballarat v Bridges* [1995] 2 VR 418.
[40] Thornton (n 9) 10.
[41] Ibid.
[42] Ibid.

Through an optimistic lens, anti-discrimination legislation and those that champion it renders hierarchical inequalities within society visible, thus serving 'an important symbolic and educative function.'[43] Should this model be maintained in the future, such a function must be expanded to consider the role of intersectional discrimination: the reality wherein 'people often experience multiple overlapping forms of discrimination and harassment, for example on the basis of gender, race, disability or sexuality'.[44]

e. *The Role of Agencies*

A strength of the federal legislation has been the creation of discrimination-specific agencies and institutions. At the federal level, the Human Rights and Equal Opportunity Commission ('HREOC') (now, the AHRC) was the designated complaint handling body, tasked with the responsibility of investigating complaints and attempting to resolve the dispute by conciliation. Discrimination Commissioners were appointed following the implementation of each respective Discrimination Act. The scope of the Australian Industrial Relations Commission ('AIRC') was also refined in the wake of the *SDA* to ensure labour standards aligned with Australia's international obligations and discrimination on various grounds – including sexual preference, pregnancy, and family responsibilities – were prevented and eliminated. Similarly, the creation of the office of the Sex Discrimination Commissioner, was an important achievement of the *SDA*. Similarly, the creation of anti-discrimination legal commissions has had an enormous influence in Canada in shaping popular perceptions of equality and diversity as a priority for national concern, management and consideration.[45] Yet, this is recognised as the first step. Further, the Supreme Court of Canada notes the importance of not diverting attention from challenging power relations that reproduce gendered and racial hierarchies by minimising complaints as merely 'conflicts arising from ignorance and cultural intolerance.'[46]

Initially, HREOC operated as both an adjudication body and complaint-fielding agency, with complaints that were unsuccessfully conciliated being referred to temporary Hearing Commissioners. In 2000, the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*[47] relegated HREOC to an administrative tribunal, as opposed to a

[43] Australian Human Rights Commission, Free and Equal: A Reform Agenda for Federal Discrimination Laws (Position Paper, December 2021) 222.
[44] Ibid.
[45] Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (University of Toronto Press, 2007) 163.
[46] Ibid. See *Vriend v Alberta* [1998] 1 SCR 493.
[47] (1995) 183 CLR 245.

court operating in accordance with Chapter III of the Constitution. Thus, HREOC was restricted to making non-binding determinations. In practice, this meant that matters of non-compliance with HREOC determinations were taken to the Federal Court as part of enforcement proceedings – and for a complete re-hearing of the proceeding.[48] Put simply, the unenforceability of HREOC determinations eventuated in a shift of determination functions under the anti-discrimination law regime to the Federal Courts. It is worth considering, in abstract, two realities that arise as a result. First, moving the forum of complaints from an informal tribunal to formal court proceedings compounds the delay, additional costs and increased formality attached to the process. Secondly, the shift to a reliance on the court system for access to justice for complainants is not a sustainable trajectory. On balance, anti-discrimination jurisprudence and discourse remains underdeveloped and somewhat archaic.

As noted in the United Kingdom, in Australia 'there can be no doubt that the third generation legislation [for instance, the *SDA*] … has broken down many barriers for individuals in their search for jobs, housing and services, and … driven underground those overt expressions of discrimination that were current 25 years ago'.[49] Yet, it ought to be recognised that third-generation anti-discrimination legislation – as it stands – cannot overcome systemic inequality, as it 'adopts a fragmented, inconsistent and incoherent approach to different manifestations of inequality of opportunity'.[50] Has the operation of anti-discrimination legislation eradicated racial, gender and sexuality-based discrimination? No. Perhaps expecting legislation alone to eradicate systemic discrimination would be impractical. Nonetheless, it is important to identify the gaps in the protections offered by these laws with respect to the accessibility of the discrimination law system. On balance, federal discrimination law must become more practical and intersectional to meet its basic obligations to protect, respect and uphold basic human rights.

IV. THE TRADITIONAL ROLE OF THE JUDICIARY

The judicial role itself is limited to: 'decid[ing] cases brought before the court by parties, and to do so impartially and dispassionately, by applying law to fact'.[51] Integral to the efficiency

[48] *Aldridge v Booth* (1988) 80 ALR 1.
[49] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality, A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000) 14.
[50] Ibid.
[51] Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39(1) *Adelaide Law Review* 1, 4.

and legitimacy of the judiciary is the maintenance of public confidence in the administration of justice for all Australians. In turn, judicial officers are tasked with ensuring justice is both done and seen to be done, while upholding procedural fairness in exercising impartiality and independent thinking.

Australian courts and tribunals are under no institutional obligation to promote human rights; merely an obligation to favour a 'construction that would promote the purpose or object underlying the Act … to a construction that would not promote that purpose or object'.[52] At times, a fixation on the application of the law being one that is equal for all.[53] This can lead to the purpose of anti-discrimination legislation – and the principles underpinning it – being overlooked. As Beth Gaze observes:

> *It is not appropriate to consider the question of reasonableness [in indirect discrimination] by commencing first with a view that human rights and discrimination legislation should be liberally construed. Nor is it correct to approach the meaning of reasonableness informed by the objects and purposes of the Act. As a result, Australian judges most often give a literal or a narrow reading of specific provisions or terms they are construing, using only textual methods to reach a decision. In this process, some very narrow and technical distinctions have been introduced, making success more difficult for complainants, and discouraging the bringing of actions.*[54]

In practice, the application of broad legislation and legal principles, as captured through case law, demands of judicial officers the exercise of discretion: 'the space … between legal rules in which legal actors may exercise choice'.[55] Disappointingly, the conduct of the courts in the exercise of their discretion – and consideration of the broader aim of equality – paints a dispiriting picture. The High Court's history of anti-discrimination jurisprudence indicates a highly technical, almost anachronistic approach where decisions of the trial courts and tribunals (often where complainants have been successful) have been overturned due to disagreement over the stringent application of the statutory provisions. Specifically, a recurrent pattern of

[52] *Acts Interpretation Act 1901* (Cth), s 15AA.
[53] Judicial Commission of New South Wales, 'Equality before the Law Bench Book – Section 1 – Equality' (Web Page, 16 April 2020) <https://www.judcom.nsw.gov.au/publications/benchbks/equality/section01.html>.
[54] Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 330.
[55] Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1992) 11.

courts setting aside tribunal findings of indirect discrimination have emerged. Turning first to the High Court's consistent disregard to the aims and purpose of anti-discrimination legislation, it is worthwhile considering Kirby J's consistent dissent from the Court's approach. In *IW v City of Perth*,[56] Kirby J observed (in dissent):

> *Courts grappling with the novel concepts and objectives of [antidiscrimination] legislation quite frequently complain about the difficulties which they are called upon to resolve. They warn against 'misdirected' litigation which seeks to impose upon such legislation 'a traffic it was not designed to bear'*[57] *... unless courts are willing to give such legislation the beneficial construction often talked about, it seems likely that the legislation will continue to misfire.*

Similarly in *X v Commonwealth of Australia*, Kirby J – again in dissent – recognised that:

> *[t]his [case] again demonstrates [that] the field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief originally granted to them.*[58]

While 'other superior courts have been a little better',[59] decisions that are overturned are instances where it is determined the tribunal gave too much consideration to the detrimental effect of requirement/condition on the complainant.[60] Case law illustrates inconsistent viewpoints in relation to the consideration given to the circumstances of complainants or has sought to reverse the onus of the standard of reasonableness as prescribed by the legislation.[61] When the reasonableness test for establishing indirect discrimination is already a high threshold, any additional inflexibility on the Court's part (in favour of judicial impartiality and narrowed interpretation of statues) perpetuates social inequalities and limits any prospect of achieving distributive justice. Arguably, this fixation on the administration of justice with a

[56] (1997) 191 CLR 1, 52.
[57] Citing *Waters v Public Transport Corporation* (1991) 173 CLR 349, 372.
[58] (1999) 200 CLR 177, 211.
[59] Simon Rice, 'And Which 'Equality Act' Would that Be?' in Margaret Thornton, *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 197, 204.
[60] See *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74.
[61] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 116–18 (Sackville J).

strict follow-through of precedents stems from an underlying pressure to protect public confidence in the judicial system. This observation is not made to question the integrity or altruistic nature of judicial officers in their administration of the law. Rather, it is worth considering whether the need for maintaining public confidence in the justice system is currently extinguishing any opportunity for equality and diversity to permeate within the justice system at present.

V. THE WAY FORWARD

Positive duties are necessary to move beyond the 'third generation' reactive response to discrimination operating at present. Accepting the inherent roles officers of the court and the judiciary itself play, the current situation is unlikely to engender a shift in the mechanisms, processes and outcomes that underpin the justice system without any kind of explicit positive equality duties emerging – especially through legislative standards. Under a positive duty, the right to equality and anti-discrimination is championed by the state, which sets out the specific roadmap for realising the right. This approach intrinsically contrasts the current remedial approach, as reflected within the law and legal system, wherein any claim to a right to equality is attained by calling someone to account for their conduct. Positive duty attempts to achieve equality by demanding conduct, rather than fixating on punishing misconduct, is certainly attractive. It is proactive and requires a preventive rather than a remedial approach. Moreover, at the root of the 'fourth-generation' equality approach would be an emphasis on 'promot[ing] equality rather than simply … refrain[ing] from discriminating'.[62] This transition is succinctly justified and summarised as follows:

> *We have reached a situation where we want our institutions to work in a way which prevents unfairness happening in the first place, rather than addressing it after the event through litigation by individuals—though without removing any rights to seek redress where any discrimination has occurred. Getting it right in the first place is better for individuals, for business and for public administration.*[63]

[62] Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14(2) *Deakin Law Review* 189, 204–5.
[63] Ruth Kelly, 'Foreword', in Framework for Fairness: Proposals for a Single Equality Bill for Great Britain (A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain) (Web Page) (<http://www.equalities.gov.uk/PDF/DLRConsultation.pdf>).

By way of international example, Australia can turn to other legislated positive duties in like jurisdictions such as South Africa,[64] Canada,[65] Northern Ireland[66] and the United States.[67] Similar positive duties also exist legislation with respect to Australian employees: under legislation in New South Wales and Queensland and policy in Western Australia.[68]

VI. CONCLUSION

The looming question as to whether Australia's approach to anti-discrimination, as a goal and in its legislation, is emblematic of 'tokenism or [the] prescription for change'[69] remains just as relevant today as it was at the time such legislation was introduced. The limited effectiveness of Australian anti-discrimination laws and the absence of a proactive approach and commitment to equality warrants the challenging of, and reforming attitudes towards, legal practices and procedures, as well as the wider framework. The legal community and its institutions work in tandem – and form the primary line of defence for – human rights protection and promotion in modern Australia. Thus, the Australian legal system should assume a greater role in the protection of human rights and the promotion of substantive equality by reforming the prescriptiveness of the discrimination model and recognising intersectional discrimination.

[64] *Employment Equity Act 1998* (South Africa).
[65] *Employment Equity Act 1995* (Canada).
[66] *Northern Ireland Act 1998* (UK) s 75, sch 9.
[67] Executive Order 11246 of 24 September 1965 pertaining to equal employment opportunity: United States Department of Labor, Office of Federal Contract Compliance Programs, 'Executive Order 11246, As Amended' (Web Page) <https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended>.
[68] *Public Service Act 1999* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth); *Anti-Discrimination Act 1977* (NSW) pt 9A; *Equal Opportunity in Employment Act 1992* (Qld); Equal Opportunity Commission of Western Australia, *The Policy Framework for Substantive Equality* (January 2023) <https://www.wa.gov.au/system/files/2023-01/1%20The%20policy%20framework%20for%20substantive%20equality%20January%202023.pdf>.
[69] WB Creighton, 'The Equal Opportunity Act: Tokenism or Prescription for Change?' (1978) 11(4) Melbourne University Law Review 503, 535.

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