The Indirection of Sex Discrimination

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Introduction: The Systemic Nature of Sex Discrimination

Discrimination is a contested concept. Like justice and inequality, it has no precise denotation; it always takes its meaning from the socio-political context in which it operates. Not only does its meaning alter temporally and culturally, but a particular standpoint highlights the contingency of meaning and adds to the hermeneutic kaleidoscope. The uncertainties surrounding the nature of genuine sexual differences, overlaid with the socially-constructed accretions of centuries, provide a fertile field for semioticians. Although words are malleable tools for lawyers, a word such as *discrimination*, which lacks even a kernel of certainty, can cause nervous dyspepsia amongst practitioners, particularly as legislators have been reticent about attempting to define the term in legislation.[1] The problem is compounded for lawyers, no less than for legislators, by the solemn declaration that men *desire* to dominate women, a consideration which is noticeably absent from economic models of discrimination.[2]

An equally vexed legal issue is the nature of the connection between a discriminator, the person alleged to have perpetrated the discriminatory harm, and a "discriminatee", that is, a person deleteriously affected. This connection between wrongdoer and victim is the essence of recovery in any civil wrong. What sense does an individualised model of harm make in light of systemic sex discrimination? The genderisation of male and female bodies occurs at birth and continues throughout the education and acculturation process, involving differential handling, dress, games, expectations and aspirations. Women have been assigned a central place in the ideology of the family in Australia.[3] With a few exceptions, work is

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1 For an overview of judicial approaches under American legislation, see Perry, PL, "Two Faces of Disparate Impact Discrimination" 59 *Fordham Law Review* 523, at 527ff (1991).

2 Becker, ME, "Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment" 79 *Georgetown Law Journal* 1659, at 1667 ff (1991).

3 For discussion, see de Lepervanche, M, "The Family: In the National Interest" in Bottomley, G, de Lepervanche, M & Martin, J (eds),

segregated along clear sex lines, both horizontally and vertically. Thus, not only are particular jobs performed by the sexes respectively, but men invariably occupy the positions of authority and women the subordinate and ancillary positions. Women's work is undervalued and rendered invisible by the presence of men, such as occurs in the case of secretarial work. Indeed, the entire structure of work is predicated on the assumption that the normative worker is male. The gendered needs of women arising from child-bearing and rearing, as well as caring for the needs of others, are reflected in attenuated career patterns, and in casual and part-time work.[4] The overall effect conduces to a society-wide picture of sexism and workplace discrimination against women, a picture which is further complicated by the intersection of sexism with racism, homophobia, class and disability discrimination.

The individualised nature of our legal system is not capable of addressing classwide or systemic harms. There is a disjuncture between the reality of sex discrimination and the limited manifestation which existing legal form can address. Affirmative action does represent an alternative model which attempts to foreclose the possibility of future harms occurring. However, as is apparent from the *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth), the responsibility for action rests with individual employers; society at large cannot be held liable for all those years of conditioning which have sought to compress men and women into gendered straightjackets.

Herein lies the nub of the legal problem before us, a veritable Pandora's box of sex roles and genderised assumptions, which necessitates the containment of discrimination to fit an individualised model of complaint-based discrimination. Despite the systemic nature of sex discrimination, the lodgment of any discrimination complaint necessitates the identification of a wrongdoer who can be shown to have caused the discriminatory harm to the complainant. A generalised societal harm, such as the discouragement of girls from undertaking advanced science and maths, may partially explain the dearth of women in engineering but a failure to employ women

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Intersexions: Gender/Class/Culture/Ethnicity, Sydney, Allen & Unwin, 1991.

4 For a detailed analysis of the amount of time Australian men and women spend on unpaid work *vis-à-vis* paid work, see Bittman, M, *Juggling Time: How Australian Families Use Time*, A Report on the Secondary Analysis of the 1987 Pilot Survey of Time Use, Prepared for the Office of the Status of Women, Department of the Prime Minister and Cabinet, May 1991, 2nd ed, Canberra, Australian Government Publishing Service, 1992. See also, Young, C, for the Department of Employment, Education and Training, *Balancing Families and Work: A Demographic Study of Women's Labour Force Participation*, Canberra, Australian Government Publishing Service, 1990.

cannot be easily attributed to a particular engineering firm. As a legal wrong, sex discrimination requires a clear causal nexus to be established. While classwide discrimination constitutes the backdrop to any discrimination complaint, a vague societal attribution, such as the historic exclusion of women from engineering, may leave the complainant without a remedy unless the complainant and respondent are linked by that elusive linear thread.

The Limitations of Legal Formalism

So far as anti-discrimination legislation in Australia is concerned, the most familiar manifestation of discrimination is known as *direct discrimination*. The complainant needs to establish that she was treated less favourably than a man in the same or similar circumstances on a proscribed ground. Comparability is the essence of this doctrine. Thus, a woman who happens to be well-qualified as an engineer but is refused consideration for a job, on the basis of the employer's stereotypical assumption that a building site is no place for women, may lodge a complaint of sex discrimination alleging that a similarly qualified man would not have been treated the same way. While conceptually straightforward, instances of direct discrimination may be probatively problematic for the complainant in the workplace when entangled with issues of merit, particularly the evaluation of credentials and experience.

In addition, feminist scholars recognise the inadequacy of mechanisms based on comparability to cope with barriers to employment opportunity, because comparability accepts the male standard as the norm.[5] There is an incongruity in the claim of sameness or similarity of circumstances in light of the vastly different nature of men's and women's experiences in public and private life. Hence, it is only those women whose circumstances most closely approximate those of their male comparators who have any hope of meeting the requisite burden.

The second type of discrimination which is legislatively proscribed in Australia, and the focus of this article, is *indirect discrimination*. Although intended to go beyond the limitations of the *ad hoc* individual complaint to address systemic discrimination to some extent, a complex formula, following the *Sex Discrimination Act* 1975 (UK), together with a legal obtuseness as to the nature of the phenomenon, has resulted in an under-utilisation of the provision, if the number of reported inquiry decisions is an appropriate gauge.

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5 For example, Hassberg, L, "Toward Gender Equality: Testing the Applicability of a Broader Discrimination Standard in the Workplace" 40 *Buffalo Law Review* 217, at 218 (1992).

While the rejection of our female engineer clearly occurred *because she was a woman*, instances of indirect discrimination may be more subtle. The causative factor is likely to be disguised by some ostensibly neutral or non-sex-based practice. Thus, if the hypothetical engineering job required successful applicants to have had experience on a building site, women who had qualified as engineers might well be excluded because they had previously been denied site experience. That is, women may be able to satisfy the criteria in respect of the formal qualifications but not in respect of work experience. In this way, women are characterised as less meritorious. With the concept of indirect discrimination we are focusing on the disproportionate impact or effect on women of a requirement which is outwardly neutral. Indirect discrimination represents an attempt to come to grips with systemic discrimination, albeit in a limited way, because legal responsibility has still to be ultimately attributed to an identifiable wrongdoer. Thus, in our engineering hypothetical, the complainant would have to show, by satisfying the requisite tests, that the respondent engineering firm should be held liable for the refusal to employ women without building site experience. A harm which is buried too deeply within the societal psyche cannot be attributed to one identifiable respondent.

The Elements of Indirect Discrimination

Although indirect discrimination is concerned with the effect of a practice, the *Sex Discrimination Act* 1984 (Cth) requires more than a simple effects test. The statutory definition favoured in this Act pertaining to sex, marital status and pregnancy (ss 5(2), 6(2) and 7(2)) is expressed in similar terms within State and territory anti-discrimination legislation.[6]

At the outset, I would like to make clear that indirect discrimination involves no element of intent. Indeed, it would make no sense to seek to import an intentional dimension when the focus is on the effect of ostensibly neutral practices. Such a requirement was imported into the operation of the *Equal Opportunity Act* 1984 (Vic) in respect of direct discrimination jurisprudence by the Victorian Supreme Court in *Chief General Manager, Department of Health v Arumugam*.[7] A complaint is an atomised manifestation of systemic discrimination, not the aberrant act of a single wrongdoer as intent

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6 *Anti-Discrimination Act* 1977 (NSW), ss 24(3), 39(3); *Anti-Discrimination Act* 1991 (Qld), s 11; *Discrimination Act* 1991 (ACT), s 8; *Equal Opportunity Act* 1984 (SA), s 29(2)(b); *Equal Opportunity Act* 1984 (Vic), s 17(5); *Equal Opportunity Act* 1984 (WA), ss 8(2), 9(2), 10(2).

7 (1987) EOC 92-195. But in *Waters v Public Transport Corporation* (1991) EOC 92-390 (HCA), Mason CJ and Gaudron J, with whom Deane J agreed, have since expressed the view, *obiter*, that direct discrimination involves no necessity to prove intent.

suggests. The focus must therefore be directed towards the discriminatory effect of the practice on the complainant once the causative link has been established. In some cases, there may well be a discriminatory motive, but it goes to the question of causation; it is not a separate element to be proven.

Under the *Sex Discrimination Act*, there are four criteria to be met by a complainant in order to make out a complaint of indirect discrimination successfully at the public inquiry level. Although most complaints do not proceed beyond the confidential setting of conciliation, the Human Rights and Equal Opportunity Commission (or its agent) must address the alleged unlawfulness of an act the subject of a complaint prior to embarking on conciliation. Section 52(1) necessitates advertence to the indirect discrimination criteria, if not proof in the more formal sense required at the inquiry level.[8] The four criteria, on which I propose to elaborate, are as follows:

1. there must be a requirement or condition with which the complainant is expected to comply;

2. a substantially higher proportion of members of the comparator class must be shown to be able to comply than the class to which the complainant belongs;

3. the requirement is not reasonable in the circumstances; and

4. the aggrieved person is not able to comply with the requirement or condition.

1. Requirement or Condition

The phrase "requirement or condition" has been interpreted broadly in Australia following the English judicial interpretation of the similarly worded indirect discrimination provision in the *Sex Discrimination Act* 1975 (UK).[9] The words are not read disjunctively, for there is an overlap between them.[10] The requirement or condition may cover any form of qualification or prerequisite demanded by an employer of its employees. The English industrial tribunals have

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8 For a detailed discussion of the proof requirements, see Hunter, R, *Indirect Discrimination in the Workplace*, Sydney, Federation Press, 1992.

9 For a useful overview of overseas developments, see Tongue, S, "Indirect Discrimination: Some Recent Overseas Cases and Developments" in *Papers from the "Indirect Discrimination and the Sex Discrimination Act" Seminar - Sydney*, Occasional Paper No 6 from the Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, 1991.

10 *Styles v Secretary of the Department of Foreign Affairs & Trade* (1988) EOC 92-239 (FCA), per Wilcox J.

accepted that a requirement or condition may be written or unwritten, formal or informal.[11]

In terms of systemic sex discrimination, a very clear and familiar example of a requirement or condition which was shown to have a differential impact on men and women arose in *Kemp v Minister for Education* [11a] a decision of the Western Australian Equal Opportunity Tribunal. In that complaint, the requirement or condition for appointment to deputy principalship was to have been a senior teacher with a substantial period of uninterrupted full-time service. In *Australian Iron & Steel Pty Ltd v Banovic,*[12] the "last on first off" policy did not itself constitute the requirement or condition, although the case is concerned with the differential impact of that policy on women. The requirement or condition with which an ironworker needed to comply to avoid dismissal was to have commenced employment prior to a specified date. In our engineering hypothetical, the specification of building site experience would constitute a requirement or condition.

The indirect discrimination provisions are concerned with the practical, rather than the theoretical, effects of a requirement or condition. In *Secretary of the Department of Foreign Affairs & Trade v Styles,*[13] a departmental circular invited applications for a London posting from lower status A1 journalists. The requirement or condition was the *preference* accorded A2 journalists. The practical effect was that A1 journalists had no chance of selection if A2 journalists applied.

These examples highlight the ostensible neutrality of the requirement or condition which must fall randomly on both sexes. If a practice were designed to rid the workplace of women, it would more properly be conceptualised as direct discrimination. For example, if *all* the recent hirees subject to retrenchment in the *Australian Iron & Steel* case had been women, it would not then have been possible to characterise the policy as sex-neutral.

The *Styles* case and the *Australian Iron and Steel* case, in respect of which there was a judicial difference of opinion as to the relevant cut-off date, highlight the element of uncertainty in

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11 O'Donovan, K & Szyszczak, E, *Equality and Sex Discrimination Law*, Oxford, Blackwell, 1988, at 99.

11a (1991) EOC 92-340.

12 (1989) EOC 92-271 (HCA). For a detailed analysis of this decision, see Tahmindjis, P, *Indirect Discrimination in Australia: The High Court Decision in AIS v Banovic* (1990) EOC 91-700.

13 (1989) EOC 92-265 (FCA).

determining the relevant requirement or condition.[14] In other words, there is no "right" answer. It is not possible for a group of individuals to look at a factual situation and to reach instantaneous agreement as to a specific requirement or condition. It is the persuasiveness of legal argument which is likely to be determinative.

2. Proportionality

A substantially higher proportion of people of a different sex to the complainant must be able to comply with the requirement or condition. While we suspect that, proportionally, more male than female engineers are able to comply with a requirement or condition that applicants have had building site experience, how would we *prove* the disproportionality? In accordance with the accepted canons of interpretation, we must look to the High Court for guidance in the *Australian Iron and Steel* case because different judges have had different views about how one effects the comparison. However, it is not easy to extrapolate from the facts in this case to multifarious instances of indirect discrimination.

When we are focusing on sex discrimination, we need to establish separate male and female pools in order to address the proportionality question, not just one denominator or benchmark class. The High Court rejected the one-pool approach (the aggregate workforce in Australian Iron & Steel) on the basis that it constituted a numerical comparison, not a consideration of proportionality as required by the legislation.

But how do we compute these pools? If a complaint has been lodged by employees against an employer or former employer, the pool is likely to be confined to that workplace. But even then, choices have to be made. In *Australian Iron & Steel* the majority of the High Court computed the male and female classes by reference to the date of application for employment, unlike the minority judges who computed it from the cut-off date for operation of the "last-on first-off" policy. Because there had been an increase in the number of women hired in recent years (due to intervention by the then

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14 The requirement or condition is more easily discernible in some of the complaints dealing with people with a disability. See, for example, *Henderson v City of Whittlesea* (1991) EOC 92-370 (Vic EOB) - a condition of swimming in a pool was that swimmers did not wear blue jeans; *Byham v Preston City Council* (1991) EOC 92-377 (Vic EOB) - that the first floor of the Municipal Offices be accessed via a stairway. However, in *Waters v Public Transport Corporation*, Phillips J of the Victorian Supreme Court ((1991) EOC 92-334) differed from the Equal Opportunity Board ((1990) EOC 92-294) and some members of the High Court (Mason CJ, Gaudron, Dawson and Toohey JJ (Deane concurring) (1991) EOC 92-390) as to whether the removal of conductors involved the imposition of a requirement or condition or not.

Counsellor for Equal Opportunity under the *Anti-Discrimination Act* 1977 (NSW)), the computation of the pool based on the later date gave a quite different result. As Deane and Gaudron JJ point out, however, this computation ignored the historic effects of past discrimination.[15] In other words, it validated and perpetuated the systemic discrimination against women in non-traditional jobs which the indirect discrimination provisions were supposedly designed to eradicate, because the computation made it appear that women and men were similarly situated in the administration of the last-on first-off policy. In practice, it may be virtually impossible to establish a base group untainted by bias, particularly when dealing with a non-traditional area of employment which has long been characterised by the exclusion of women. The evidence in *Australian Iron & Steel* revealed that, between June 1977 and April 1980, the company had employed 4,289 ironworkers of whom only 58 or 1.35% were women. Although there was a marked increase in the percentage of women appointed in 1980, "the waiting time for women as compared with men was still vastly disproportionate being measured in years rather than in days or weeks".[16] It was this sex-linked delay in appointment which disproportionately impacted on women in the exercise of the ostensibly neutral last-on first-off policy. A computation based on the cut-off date, rather than the date of application for employment, occluded an essential dimension of the discriminatory conduct.

The *Australian Iron & Steel* case concerned the impact of a retrenchment policy on women recently employed in a male-dominated workplace. Different factual situations necessitate the computation of different pools or base groups. In *Kemp v Minister for Education,*[17] 4,288 male teachers and 7,183 female teachers comprised the base groups of all senior teachers employed by the respondent. An agreed statement of facts and other evidence revealed that a much higher proportion of men than women would be able to comply with the requirement involving a substantial period of uninterrupted full-time service.

But how would the base pools be computed if we were to focus on the point of recruitment? The difficulty lies in determining the relevant labour pool. Should it be calculated on a national basis, by State, by region or by locality? In some American cases, the benchmark class has been held to be as broad as the national population divided into males and females. Much simpler would be a focus on job applicants only. However, the chilling effect of the necessity for building site experience on women may mean that fewer

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15 (1989) EOC 92-271, at 77,734.

16 *Najdovska v Australian Iron & Steel Pty Ltd* (1985) EOC 92-140 (NSW EOT) at 76,387.

17 (1991) EOC 92-340 (WA EOT).

women might have applied than would have otherwise been the case. The proportion of complying men compared with complying women then might look like this:

Men	Women
15/20 = 75%	1/2 = 50%
	or, say
	2/3 = 66.6%

But does this mean that the proportion (not the total number) of complying men is "substantially higher" than the proportion of complying women? "Substantially higher" is a question of fact for the Commission to determine. Seventy five per cent is probably substantially higher than 50%, but almost certainly not substantially higher than 66.6%. Proportionality would seem to distort the numerically small numbers of women in non-traditional jobs. To avoid comparisons of this nature which fail to account for historic discrimination, it would seem that the establishment of relevant geographical labour pools would need to be established. There is a danger in becoming enmeshed in statistical niceties. It is clear that a great deal of time and effort has been devoted to statistical questions pertaining to proportionality in labour pools in American disparate impact cases which may take decades to resolve,[18] an approach not viewed favourably by the English Appeal Tribunal.[19]

I believe that we should resist making the indirect discrimination provisions even more technical. Instead, we should keep in mind the objects of the *Sex Discrimination Act* set forth in s 3, namely, to eliminate discrimination and to promote sexual equality. Unfortunately, adversarialism has significantly shaped the nature of discrimination jurisprudence in Australia, which means that corporate respondents are likely to oppose trenchantly any broadening of labour pools beyond their workplaces. The tension between systemic discrimination and the legal requirement to prove wrongful conduct on the part of an individual tortfeasor is thrown into sharp relief when addressing recruitment practices.

Proportionality has not been contested in any of the indirect discrimination complaints dealing with people with a disability to date, possibly because the inability to comply has been unequivocal and there has been no point in a respondent challenging it.[20] It might

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18 Dansicker, AM, "A Sheep in Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act" 25 *Columbia Journal of Law and Social Problems* 1, at 33 (1991).

19 *Perera v Civil Service Commission* (No 2) [1983] ICR 428.

20 English courts have accepted that statistical proof need not be produced "where common experience makes it evident that a substantial

also be noted that the 1990 amendment to the *Racial Discrimination Act* 1975 (Cth) dealing with indirect discrimination is based on comparability rather than proportionality.[21] Although not without its problems, as the reported complaints dealing with direct discrimination reveal,[22] a comparability test, if construed sensibly, would obviate what may appear as little more than statistical games which have little to do with the purpose of the legislation.

3. Absence of Reasonableness

Even if our intrepid complainant were able to establish that a requirement or condition existed with which a substantially higher proportion of male engineers than female could comply, she has then to establish that the requirement or condition was not reasonable in the circumstances. The Act offers no guidance as to the meaning of this vexed legal standard.

Justice Wilcox in *Styles v Secretary of the Department of Foreign Affairs & Trade*[23] took the view that convenience of the requirement or condition, in terms of both expense and tidiness of administration, must be objectively justified in the circumstances. Chief Justice

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proportion of members of a particular group are adversely affected by a particular practice". See Bindman, G, "Proof and Evidence of Discrimination" in Hepple, B & Szyszczak, EM (eds), *Discrimination: The Limits of Law*, London, Mansell, 1992, at 59-60.

21 Under the American Equal Employment Opportunity Commission Guidelines, an inference of disparate impact may be raised if members of a protected group are selected at a rate less than 80% at which members of the comparator group are accepted. Recent cases, such as *Watson v Fort Worth Bank & Trust Co* 487 US 977 (1988) and *Wards Cove Packing Co v Atonio* 490 US 642 (1989) developed a more restrictive evidentiary standard for litigants. The raising of a *prima facie* case was no longer sufficient to place the burden of persuasion upon the defendant. The changed judicial position was construed as a resiling from the trailblazing *Griggs* case and lobbying began for legislation to secure the *Griggs* standards. As a result, a Civil Rights Bill was introduced in 1990, which was then vetoed by President Bush. A new Civil Rights Act was successfully enacted in 1991. See Pattison, P & Varca, PE, "The Demise of the Disparate Impact Theory" 29 *American Business Law Journal* 413 (1991); and "The Resurrection of the Disparate Impact Theory?" 29 *American Business Law Journal* 451 (1991) ; Apruzzese, VJ, "Selected Recent Developments in EEO Law: The Civil Rights Act of 1991, Sexual Harassment, and the Emerging Role of ADR" 43 *Labor Law Journal* 325 (1992).

22 For example, *Chief General Manager, Department of Health v Arumugam* (1987) EOC 92-195 (Vic SC) (race); *Teed v Mount Alexander Hospital* (1987) EOC-211 (Vic EOB) (sex); *Boehringer Ingelheim Pty Limited v Reddrop* (1984) EOC 92-108 (NSW CA) (marital status); *Keefe v McInnes* (1991) EOC 92-231 (Vic SC) (impairment); *Ralph M Lee Pty Ltd v Fort* (1991) EOC 92-357 (WA SC) (political conviction).

23 (1988) EOC 92-239 (FCA).

Bowen and Gummow J endorsed the view of Wilcox J in the Full Federal Court although the preference accorded A2 journalists was held to be reasonable in the circumstances, thereby overruling the finding of Wilcox J on the merits.

In *Kemp v Minister for Education*,[24] the Western Australian Equal Opportunity Tribunal held that a requirement that an appointee to a position as deputy principal be a senior teacher with a substantial period of uninterrupted full time service was not reasonable. It is readily apparent, without the benefit of mathematical calculations, that such a policy would necessarily impact disproportionately on women in view of women's child bearing and rearing responsibilities. In any case, the evidence revealed that the Ministry of Education already had a policy that both a male and a female Deputy Principal be appointed. Thus, a requirement or condition which had the potential to obstruct the Ministry's own policy of ensuring the representation of women in senior positions could hardly be considered reasonable.

The High Court addressed the meaning of reasonable within the *Equal Opportunity Act* 1984 (Vic), s 17(5)(c), in *Waters v Public Transport Corporation*.[25] A majority of the court (Brennan, Dawson and McHugh JJ, Deane J concurring) held that reasonableness is a matter of fact which is determined by weighing up all the relevant factors. While Mason CJ and Gaudron J opted for a narrower construction of reasonableness which focused on the effect of the requirement or condition on the complainant, the majority adopted a broader view (which now prevails), entailing a consideration of the ramifications for the respondent of altering the requirement or condition, such as its financial and economic circumstances. Thus, while the burden of proof rests with complainants, respondents have an evidentiary burden which they are always going to use to their advantage.

While purporting to be an objective test, reasonableness contains an undeniable evaluative element which precludes an unequivocal response at the outset. Thus, even if our engineering discriminatee were to succeed this far, how could one say whether the requirement or condition that successful appointees have building site experience was reasonable or not, without weighing up the evidence in support adduced by the respondent employer? It would not be enough for the respondent simply to aver that such experience was necessary; it would have to be established that the requirement

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24 (1991) EOC 92-340.

25 (1991) EOC 92-390. For a detailed analysis of this decision, see Seeman, J, *Disabling or Enabling the Equal Opportunity Act? Waters & Ors v The Public Transport Corporation of Victoria* (1991) EOC 91-702.

was job-related. In meeting this criterion, there is always a presumption in favour of respondent employers emanating from their managerial prerogative. Not surprisingly, employers are deemed to know best what criteria are necessary to perform jobs in their organisation. Indeed, most English indirect discrimination cases have failed because employers have been able to establish that the suspect practices were "justifiable" under similar legislation.[26]

We can see that placing the burden on the complainant to prove that the requirement or condition is not reasonable is onerous. The Lavarch Committee recommended a reversal in the burden pertaining to reasonableness and that the respondent be required to show that the requirement was "the least discriminatory option available".[27] The Coalition of Australian Participating Organisations of Women, at its meeting in Canberra on 19 September, 1992, went further than this and recommended a reversal of the burden of proof for complainants in discrimination complaints generally. Complainants would then have the burden of making out a *prima facie* case only at the threshold.

4. Inability of the Aggrieved Person to Comply

If the complainant is able to progress this far, it is unlikely that the final criterion will prove to be an impediment, for one would expect the complainant's inability to comply to be a prime factor motivating lodgment of a complaint. But legal interpretation is never straightforward.

The difficulty inherent in the provision was adverted to by Wilcox J in *Styles v Secretary of the Department of Foreign Trade & Affairs.*[27a] His Honour took the view that "is not able to comply" must refer to a practical reality, not a theoretical possibility, following the House of Lords in *Mandla v Dowell Lee* [27b] . In that case, a Sikh boy was refused admission to a school because he wore a turban and wore his hair long. Theoretically, he could have complied with the requirement or condition regarding headdress and tonsure if he were to discard his turban and cut his hair. However, the House of Lords held that an ability to comply does not entail violating a cultural prohibition, even if it were physically possible to do so.

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26 Poulter, S, "The Limits of Legal, Cultural and Religious Pluralism" in Hepple & Szyszczak, work cited at footnote 20, at 181.

27 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women (The Lavarch Committee Report)*, Canberra, Australian Government Printer, 1992, Recommendation 70.

27a (1988) EOC 92-239 (FCA).

27b [1983] 2 AC 548.

A focus on the practical reality of a situation, rather than the theoretical possibility, is clearly of great significance in sex discrimination complaints since women are expected to perform the preponderance of nurturing and caring for others in our society. Thus, a requirement or condition of full-time employment as a predicate to eligibility for promotion or access to fringe benefits may disproportionately impact on women in part-time employment. While it might be theoretically possible to work full-time by arranging alternative care for a child or invalid relative, it may not be feasible to do so. This final point establishes that the complainant has suffered a detriment, albeit inferentially. It is not necessary to establish a detriment specifically, as is the case with direct discrimination.

Conclusion

I have argued in *The Liberal Promise* that the excessive degree of technicality associated with indirect discrimination is to underscore the direct discrimination complaint as the *sine qua non* of discrimination law.[28] The state thereby endeavours to treat all instances of discrimination as individual aberrations in order to deny the existence of systemic discrimination, an acknowledgment which would be deeply destabilising. The promotion of direct and indirect discrimination as discrete forms also sets up a false dichotomy between them which further serves to deny the pervasiveness of discrimination. There is frequently a convergence between direct and indirect discriminatory practices, as the engineering hypothetical reveals, because both are manifestations of systematic discrimination against women in the workplace and in non-traditional jobs in particular.[29]

Nevertheless, given the present legislative formula, sex discrimination, of all the proscribed grounds, is theoretically most suited to the lodgment of indirect discrimination complaints, particularly in respect of the workforce. The sex-segregated structure of work and its myriad gendered practices pertaining to hours and conditions of work, access to supervisory positions, eligibility for training programs and fringe benefits, opportunities for interstate and overseas travel, and so on, continue to confine women to fringe-dweller status in the world of work. Although systemic sex discrimination is not readily tractable to amelioration through legal mechanisms, "[i]ndirect discrimination goes some way towards

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28 Thornton, M, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Melbourne, Oxford University Press, 1990, at 192.

29 Bindman, in writing on the English provisions, has called into question the need for a sharp distinction between direct and indirect discrimination: see Bindman, G, work cited at footnote 20, at 62.

acknowledging the problematic dominance of the male norm".[30] Consequently, women's working lives can be improved by publicly challenging specific discriminatory practices.

Legal formalism represents a mechanism by which dominant interests in our society seek to assert control over women and subordinate groups. Thus, even if we were to alter the wording of the indirect discrimination provision to provide for a simpler effects test, I believe that respondents would push hard for, and succeed, in obtaining a stringent interpretation to the detriment of women and minority groups. This has been the case in the United States where indirect discrimination, or disparate impact, is a judicial creation. While a broad interpretation characterised the first Supreme Court disparate impact case,[31] the Reagan/Bush-influenced court resiled from the Warren Court's broad interpretation in favour of a very restrictive approach.[32]

The power and prestige of corporate respondents are such that the dominant can shift meanings in their own interests through their lawyers as the privileged decoders of legislation.[33] Law is not neutral. In the past, women have had to accept that "jurisprudence, like history, is written by the victors".[34] Nevertheless, the potential for changed meanings is always available through the interpretation of anti-discrimination legislation, although it is individual women who have to assume the psychological and financial cost of any legal challenge.

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30 Fredman, S, "European Community Law: A Critique" (1992) 21 *Industrial Law Journal* 119, at 125.

31 *Griggs v Duke Power* 401 US 424 (1971).

32 For discussion of recent developments in American disparate impact analysis, see Dansicker, AM, work cited at footnote 18; Pattison & Varca, work cited at footnote 21; and Perry, PL, work cited at footnote 1. See also, footnote 16, above.

33 Cf Montgomery, J, "Legislating for a Multi-faith Society: Some Problems of Special Treatment" in Hepple & Szyszczak, work cited at footnote 20, at 207.

34 Devlin, RF, "Nomos and Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory" (1989-90) 12 *Dalhousie Law Journal* 298, at 316.