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IS THE REASONABLE MAN THE RIGHT MAN FOR THE JOB?

SYNOPSIS

THIS article[1] focuses on theoretical and practical aspects of Australia's anti-discrimination law, particularly the attempt to deal with discrimination against women. The central aim is to outline some of the means by which the law against indirect discrimination has in the past and may in the future challenge certain management decisions and practices where those decisions and practices impact adversely upon women. In essence, it suggests that the central problem is one of management mindsets and that this is the central reason for the perceived inadequacy of the law and the perpetuation of the "glass ceiling".

By way of introduction, the article briefly outlines some of the major Australian theoretical, political and legal critiques in this area. The purpose in this first section is to measure the scope and effectiveness of our anti-discrimination laws. Those laws are evaluated against the background of a theoretical overview which emphasises the problems the legislation faces in practice. In this section of the paper, therefore, broader questions are raised about the (in)adequacy of words like "merit" and "potential" in relation to women's career paths and their insulation from the very scrutiny that the legislative framework might have afforded. The relevance of this scrutiny can be most clearly justified through an emphatic reiteration of Jocelynne Scutt's critical assertion that the pivotal word merit in the context of women's careers is "never unproblematic".

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1 Parts of this article were presented at the ANZSIL Conference at the Australian National University in May 1994.

The second section of this article comprises a range of primary material. First, figures relating to the positions occupied by women within the Universities. These figures are taken from two primary sources: the 1993 DEET *National Report on Australia's Higher Education Sector* and the 1990 monograph by Felicity Allen called *Academic Women in Australian Universities*. Allen's critical conclusion that academic women experience sex discrimination, particularly indirect discrimination in employment, is stressed. Then, some figures relating to the position of women in science are examined.

It should be clear from these figures that the law protecting women against discrimination has had only minimal impact upon their position in the relevant workplace. The legislation dealing with discrimination encounters obstacles both in its practical application in the workplace and in the broader industrial relations sphere. Direct discrimination addresses only individual instances of discrimination. What the plethora of legislative provisions cannot overcome is the extreme difficulty of proof. And what those individual and often unproven instances often reveal, whether successful or not, is a case of indirect discrimination. Careful scrutiny is required of "equal" or "neutral" treatment in order to see if it produces unequal results.[2] Hunter has persuasively argued that several unsuccessful cases at the level of direct discrimination have neglected a possible related argument about indirect discrimination to their detriment.

> [Their] argument has failed on the basis that their treatment was due not to their status but to the fact that they did not meet some neutral criterion applied by the respondent to all candidates. Clearly this neutral criterion should then be examined for possible discriminatory impact on members of the complainant's status group.[3]

Hunter has saliently clarified the link between the two forms of action: indirect discrimination law is concerned with the impact of a seemingly neutral standard and not with the individual complainant who cannot prove discriminatory treatment. The third section of this paper is concerned with the potential of indirect discrimination law to scrutinise major workplace practices and policies. For example, the increasing reliance upon contracts as a means of employment in academia is as counter productive to the aims of this legislation as is the concept of merit: both provide seemingly

2 Hunter, "Indirect Discrimination and the Law" (1989) 63 *Law Institute Journal* 734.

3 As above.

legitimate, institutional means of undermining the law. This point is stressed by linking it back to the figures and taking the academic arena as one industrial sector. Since more women are employed on contracts in academia, this is arguably discriminatory because it means women thus employed are virtually excluded from the study leave system and hence disadvantaged in their research, which is essential for promotion. Hunter stresses this same point in relation to women obtaining (or, that is, not obtaining) permanent academic positions. Yet this particular form of employment, although apparently discriminatory, is quite legitimate and seemingly reasonable. At the individual level, it may be extremely difficult (and unpleasant) to prove direct discrimination: at the institutional level, it may be more feasible to challenge a particular workplace practice through the utilisation of the indirect discrimination provisions of the law.

The fourth section of this article asks whether the critical requirement of reasonableness in the statutory provisions dealing with indirect discrimination is counter to policy, in providing a possible legitimation of management practices. It suggests that what may be reasonable from a management perspective may be decidedly discriminatory and that there is implicit tension between "good" administration and reasonableness in the discrimination context. Is it reasonable to subtly deploy a policy of not employing pregnant women as lecturers, for example? Is it reasonable to prefer staff without children? Is it reasonable to prefer overseas academic qualifications? To prefer modest/confident/arrogant staff? To consider or not consider individual or collective financial situations? To consider peer group assessments? At what point can the law intervene in discretionary workplace decisions? The central issue here is the scope and effect of the reasonableness requirement in discrimination law. Where are the reasonableness lines drawn? This simple check-list illustrates the need for an institutional buffer between the tension between subjectivity in decisions and discrimination. A critical question is then raised here: do the decided cases indicate whether the requirement of reasonableness runs counter to equal opportunity policy?

The article concludes with some reflective thoughts in relation to how we can ascertain the extent to which the criticisms advanced in the theoretical debates appear to be borne out by the practical reality which confronts us when we examine the primary figures set out in the middle section. Therefore, an attempt is made to raise discussion about the possibility of finding a way forward.

SOME THEORETICAL CONSIDERATIONS AND ARGUMENTS

The Broad Discourse: Feminist Scholarship

The major recent works of feminist legal scholarship which have been produced within the Australian context rank among the finest in feminist legal scholarship. These works seek to challenge far more than mainstream legal dogma and doctrine: they also address organisational and workplace practices and challenge prevailing economic and political discourse. As a result of these works, we can question the relevance of the Diceyan arguments about the inevitable arbitrariness of discretionary power. And more narrowly and specifically, we must address the question: how do we balance individual and institutional rights in the workplace?

Thornton's work is one of the most comprehensive in this area.[4] Throughout her work, Thornton has challenged current legal discourse, concentrating upon both traditional doctrinal areas of law and also critically scrutinising anti-discrimination law itself. A broad based political conclusion is addressed in her recent book *The Liberal Promise*: that law is integral to and reproduces the prevailing economic orthodoxy. Anti-discrimination law is conceptually and technically limited simply because it is an attempt to compare like with unlike: equal with unequal. A tension between sameness and difference is implicit in and strangles the legislation. Thornton encapsulates this tension by arguing that anti-discrimination law accommodates "somewhat schizophrenically" the critical contradiction between inequality (which lies at the heart of prevailing economic orthodoxy and ideology of merit) and equality (which lies at the heart of liberal thought). In accommodating these contradictions, law both masks and underwrites the inequalities and at the same time provides legal redress for individual instances of discrimination.

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4 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne 1990); "Affirmative Action, Merit and the Liberal State" (1985) 2 *Australian Journal of Law and Society* 28; "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 *Australian Journal of Law and Society* 5; "Discrimination Law/Industrial Law: are they compatible?" (1987) 59 *Australian Quarterly* 162; "Hegemonic Masculinity and the Academy" (1989) 17 *International Journal of the Sociology of Law* 115; "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733; "The Public/Private Dichotomy - Gendered and Discriminatory" (1991) 18 *Journal of Law and Society* 448.

In her most recent work Thornton addresses both the inadequacies of anti-discrimination law against the theoretical background of the irreconcilable premises upon which both the law and feminism are constructed. *The Liberal Promise* first notes the fact that law is integral to and reproduces the prevailing economic orthodoxy. The work then examines the current trend towards legislative attack on discrimination. The thread running through the examination is the ideal of equality as one of the central tenets of liberalism and dominant political discourse in advanced western societies. Thus the critical contradiction already referred to is revealed and exposed as undermining the aims of the law. The central contradiction and tension is exemplified in the case of indirect discrimination law, for "there is something of a disjuncture between the individualised orientation of the legislation and the underlying class-based premises of indirect discrimination".[5]

In keeping with this central contradiction, inevitably, employer concepts of merit and potential in hiring, firing and promotion, take as their yard stick male concepts of excellence, thus implicitly undermining the legislation which purports to deal with inequality. For Thornton, the insulation of the "merit" principle from scrutiny and the tacit recognition of the "male" career path as standard bearer legitimates discriminatory practices, particularly within Universities. This implicit acknowledgment in anti-discrimination law of the traditional right of the employer to hire and fire leaves intact the very managerial prerogative which has built the discriminatory base. Much of Thornton's earlier work has addressed the range of issues which this raises.

For example Thornton has contended that, within the academic system, a restrictive male-structured and assembly-line career pattern remains the yardstick even within institutions that pay lip service to the values of equal opportunity. This provides a convenient exclusionary policy which sets women at a disadvantage from the outset - (and, perhaps we might equally accurately say, from the mindset). By definition, that mindset excludes many women's career paths - and cannot accommodate a different concept of excellence.

> It is understood within the academic culture that the educational and career path pursued by the average male academic - sound academic record (including postgraduate degree from a prestigious foreign or overseas institution in

5 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* p7.

some schools) uninterrupted career, publications in 'international' refereed journals, and so on - epitomises excellence.[6]

Challenging Ability, Merit and Excellence

Most recently, Carol Bacchi has directly raised the issue of the brick wall confronting women in academia. In an article entitled "The Brick Wall: Why So Few Women Become Senior Academics" Bacchi suggests that there is a clear "gap between formal policy and implementation" in the pursuit of equal opportunity in Australian universities.[7] Drawing upon the work of Felicity Allen, Bacchi challenges the notion that what we currently face is simply a situation of "time lag effect" that is, the presumption that the "situation will right itself when growth returns".[8] Referring specifically to the problematic concepts of "merit", "excellence" and "ability" which are used to hire, fire and promote within the University system, Bacchi notes the extent to which these terms "serve ideological functions" and are reflections of the "informal cultural values" which "conceal contradictory interests and preserve existing unequal power relations".[9] An appropriate response to the demand for more senior female academics might be to "interrogate the appointments procedures" rather than continuing to accept the "current designation of merit".[10]

This crucial conclusion is one which warrants reiteration. Like Thornton and Scutt and a range of feminist legal theorists, Bacchi questions the extent to which the separation of employer notions of merit and potential legitimates discriminatory practices. Once we acknowledge the ideological basis of these terms and recognise the extent to which they may function as

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6 Thornton, "Hegemonic Masculinity and the Academy" (1989) 17 *International Journal of the Sociology of Law* 115 at 117-118.

7 Bacchi, "The Brick Wall: Why So Few Women Become Senior Academics" (1993) 36 *The Australian Universities' Review* 36 at 36.

8 As above, citing Allen, "Academic Women in Australian Universities" *Monograph No 4* (Affirmative Action Agency, Canberra, AGPS 1990).

9 As above, citing Veldmann, "'The Rule of Power': The Implementation of Equal Employment Opportunity in a Corporate Setting" *Living Law in the Low Countries* 69-78.

10 At 39. A similar view has also been advanced in one of my own papers on indirect discrimination where I argue that there is only so much that can be gained from attempting to stop interviewers asking particular types of questions. The most critical approach now might be for us to ask questions which interview panels would have to answer upon making decisions. See Hocking, "Indirect Discrimination: A Comparative Overview" (1992) 7 *International Journal of Comparative Labour Law and Industrial Relations* 232.

a means of legitimating prevailing discriminatory practices, we need to ask different questions and raise different issues. For Bacchi, part of the solution may be to reverse that situation and to place men on the defensive:

> Instead of women explaining what attributes they can be expected to bring to the job, let us ask male academics to demonstrate their "merit", to justify their over-representation. Instead of arguing the need for women as role-models, let us ask what kind of role-models male academics make.[11]

Such a solution would lead us away from analyses which question women's merit and ability and towards the vast range of influences upon a particular decision: inter and intra departmental deals and trade-offs, subjectivity, politics, personal likes and dislikes, expedience, budgets, and so on. These may have their proper place, but their acknowledgment will alleviate any agonising over our *curriculum vitaes* in search of definitive explanations. As Thornton has succinctly recognised, any search for solutions and explanations will inevitably be more a process of "probative gymnastics"[12] than one of reasoning and will therefore tie us into conceptual knots, for there is simply

> no possibility of the adduction of persuasive evidence as to the complainant's potential *vis a vis* that of the successful applicant in an area of mere hypothesis and speculation. It is the convenient looseness in the construction of concepts, such as merit and potential, which permits and legitimates discriminatory practices.[13]

The Problem of Organisational Culture

On the vexed question of women's lack of career advancement, theorists return again and again to the problem of organisational culture. This is a central theme, for example, in Hunter's *Indirect Discrimination in the Workplace*[14] and Burton's *The Promise and the Price.*[15] Organisational

11 As above.

12 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* p19.

13 As above.

14 Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney 1992)

15 Burton, *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment* (Allen & Unwin, Sydney 1991)

culture seems to be a critical structural disadvantage to women. The point is that it is implicit within an organisational structure that like will recruit and promote like, that difference is disadvantage. Organisational culture requires and rewards sameness. Essentially, it is a system which discriminates against anybody who does not "fit the bill"; anyone who has not traditionally been in a position to define organisational culture, and who is thus organisationally defined as "different".[16] It is most likely to be a woman and will almost definitely be a woman of a different race or culture. For, the more difficult we are to define, the more unlikely the organisational empathy and common ground.

Furthermore, most "workplaces are saturated with not only masculine but racial, political and sexual values".[17] This holds particular implications for (to take our example here) academic organisational culture: the ability to play the game is implicit in and subtly structured around our concept of equality. Burton stresses this point generally:

> Because men have been playing internal organisation politics through both formal and informal structures since their very foundation, most organisations are saturated with masculine values. These values, derived from men's experience, massively contribute to women's inequality in the workplace.[18]

So the simple requirement of institutional conformity provides an explanation: "homogeneity is a central value of any organisational culture, since it is conducive to the maintenance of bureaucratic control and efficiency."[19]

Defined as Different

Hunter has persuasively argued that work is seen as the "primary structuring principle of people's lives"[20] and that this view is central to the definition of women as different. Hunter has also drawn attention to the need to challenge seriously employment criteria, and in doing so, to challenge "methods of selection, work organisation and career progression

16 Hunter, *Indirect Discrimination in the Workplace*, p165.
17 As above.
18 Burton, *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment*, p3.
19 Thornton, "Hegemonic Masculinity and the Academy" (1989) 17 *International Journal of the Sociology of Law* 115 at 122.
20 Hunter, *Indirect Discrimination in the Workplace*, p150.

that require workers to have private lives that conform to the dominant 'norm'".[21] This means, in the University context, challenging the notion that long hours of physical presence at work necessarily means greater productivity. It means challenging the lack of child care at conferences. It means recognising that contract staff cannot usually take study leave. At present, it means that we pay critical attention to the apparent development of what in America has been called the "Mommy Track" and which we in Australian Universities might call the "contract track". If, as the evidence seems to show, there is in Australian academic institutions a management mindset that shunts "mommy" out of "merit" and into the "contract track" then we need to seriously consider ways in which we can effectively challenge that mindset.

Inevitably attempts to remedy inequality through law encounter a vast range of structural and institutionalised obstacles. A remedy against discrimination may be available in some highly specific instances at the individual level, but these inestimable constraints limit the effectiveness of complaint based, individualistic anti-discrimination law.

> Anti-discrimination law does not end the actual subordination of women in the market ... It obscures for women the actual causes of their oppression and treats discrimination against women as an irrational and capricious departure from the normal objective operation of the market, instead of recognising such discrimination as a pervasive aspect of our dichotomised system.[22]

Major feminist legal critiques therefore look beyond the law to the economic system. They recognise the limitations of any attempt to use the law in a reformist capacity. Central to their argument in the discrimination context is the notion that the priorities of the economic system act in conjunction with the insulation of workplace conceptual tools from scrutiny. This technical and conceptual dichotomy neutralises and legitimises decisions which may have a discriminatory basis.

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21 As above.

22 Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harvard Law Review* 1497 at 1552, cited in Graycar and Morgan, *The Hidden Gender of Law* (Federation Press, Annandale 1990) p101

Developing a Feminist Concept of Harm

This brief exploration of the implications of, and dimensions to, the highly significant body of work by Thornton must refer to another particularly salient conclusion. That concerns the fundamental importance, within the context of anti-discrimination law, of focusing upon the prevention of "future" and "generalised" harms. Howe has drawn attention to Thornton's vital arguments concerning the capacity of anti-discrimination and affirmative action measures to prevent the occurrence of "future harms", and the need for these measures to extend beyond the individualised impact of the civil law model to "foreclose the possibility of harmful conduct of a general kind".[23] Howe's own argument is instructive, for it represented an advance in 1987,[24] and represents a further advance to matters today, in suggesting that we seek to revisit the conceptual terrain of social injury and thereby to reconstruct and redefine the concepts of discriminatory conduct and organisation that shape our lives.[25]

CASE STUDIES

This section refers to a range of material which indicates the workplace positions occupied by many women in Australia. These are Professor Leonie Still's recent conclusions concerning the position of women in private enterprise; figures from the *National Report on Australia's higher education sector*;[26] data in relation to academic women in Australian universities[27] and relevant figures relating to women in science occupying low-level, non-continuing appointments. The scientific material draws upon primary research undertaken by Dr Sarah Ashmore of Griffith University's Faculty of Science.

In spite of anti-discrimination laws, figures indicate a huge discrepancy between discrimination in theory and in practice. We are confronted with

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23 Howe, referring to Thornton, "Affirmative Action and Higher Education" in Sawer, *Program for Change: Affirmative Action in Australia* (Allen & Unwin, Sydney 1985) p123.

24 Howe, '"Social Injury" Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423.

25 At 424.

26 Aust, Dept of Employment, Education and Training, *National Report on Australia's Higher Education Sector* (1993).

27 Data from Allen, "Academic Women in Australian Universities" *Monograph No 4* (Affirmative Action Agency, Canberra, AGPS 1990).

what might be called a yawning disjuncture between theory and practice.[28] The example of Sweden stands by way of contrast in providing a broader concept of citizenship for women through workforce participation.[29] The Lavarch Report *Half Way to Equal*[30] clearly recognised the extent to which Australia's workforce remains a gender segregated one. The Report stated that Australia "has one of the most gender segregated workforces in the industrialised world".[31] It also acknowledged that the "tendency towards segregation appears to be increasing".[32] The purpose of this foray into some more practical material is to illustrate that the various theories of inequality and discrimination are arguably borne out in practice.

Professor Leonie Still recently undertook a study of the top thousand private sector companies in Australia. Professor Still found that the proportion of women who occupy senior management positions had actually *decreased* during the past decade despite the existence of extensive equal opportunity legislation. The study also found that inequality in women's rates of pay persisted and that, where women were groomed for promotion, it tended to be for lateral, and not upward promotion. Professor Still commented, "[Women] are not making any gains - our careers are fundamentally stalled".[33]

Turning from the position of women in the private sector to the position of women in academia, we confront a similar pattern. The 1993 DEET

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28 See in particular, the extensive writings by Thornton: *The Liberal Promise: Anti-Discrimination Legislation in Australia*; "Affirmative Action, Merit and the Liberal State" (1985) 2 *Australian Journal of Law and Society* 28; "Feminist Jurisprudence: Illusion of Reality?" (1986) 3 *Australian Journal of Law and Society* 5; "Discrimination Law/Industrial Law: are they compatible?" (1987) 59 *Australian Quarterly* 162; "Hegemonic Masculinity and the Academy" (1989) 17 *International Journal of the Sociology of Law* 115; "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733; "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 18 *Journal of Law and Society* 448.

29 Scott, *Sweden's Right to be Human* (Allison and Busby Ltd, London 1982); Hewitt, *About Time* (IPPR/Rivers Oram Press, London 1993).

30 Aust, Parl, Standing Committee on Legal and Constitutional Affairs, *Halfway to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992) (hereinafter: Lavarch Report).

31 As above, para 3.3.1.

32 As above.

33 Still *The Australian* 30 November 1993. See Still *Where to From Here: The Managerial Woman in Transition* (Business and Professional Publishing, Sydney 1993).

National Report on Australia's Higher Education Sector[34] reveals the persistence of the gender-structured occupation of senior and tenured positions. The Report reveals that men have a higher rate of tenure: of all academic staff, 45% of women hold tenured positions and 67% of men hold tenured positions. Tenure is concentrated in the senior levels and most non-tenured staff are clustered in the lecturer and below lecturer groups. Women tend to occupy those lower level groups. Thus we find that not only are female academics less likely to hold tenured positions (a pattern which is repeated at *each level* of classification) but, furthermore, that women represent only 17% of full-time teaching and research staff in universities and 43% of staff *below* lecturer level.

The DEET Report's significant conclusion is that "women were under-represented in the pool of people with the necessary qualifications and experience for appointment, as a significantly greater proportion of males than females undertook postgraduate studies, or had experience as senior professionals". Such a conclusion cannot be left unchallenged: we could ask whether women really lack the necessary qualifications and experience and indeed, what counts as qualifications and experience?[35]

Indeed, it has recently been confidently asserted in a major international work in this area that "women are significantly under-represented and occupy lower status positions within the academic realm internationally".[36] The commonality of experience despite increasing participation in undergraduate programmes is that women still occupy lower academic positions across cultures and societies.[37]

It should be mentioned at this point that we are witnessing an increasing erosion of the whole structure of tenure. The DEET Report indicates that the proportion of tenured staff within Australia's university system has decreased between 1982 and 1991. In 1991 only 61% of academic staff had tenure compared with 81% in 1982, with the decrease occurring mainly at the lecturer level.

The ineffectiveness of anti-discrimination law is thus even more relevant against the background of the university system. Felicity Allen produced a

34 Aust, Dept of Employment Education and Training, *National Report on Australia's Higher Education Sector* (1993)

35 At 145.

36 Stiver Lie & O'Leary (eds), *Storming the Tower: Women in the Academic World* (Kogan Page, London 1990) cited in Phelan, book review (1992) 35 *The Australian Universities Review* 47 at 47.

37 As above.

monograph *Academic Women in Australian Universities*[38] for the affirmative action agency in 1990. Allen draws attention to the under-representation of women at the higher levels and to the "strong association between academic rank and the likelihood of attaining tenure".[39] Interestingly, geographic variation was clearly evident throughout Australia's universities, with no clear explanation for relatively high proportions of women and relatively low proportions of women in higher level positions in certain universities with seemingly similar features otherwise. Allen concludes that perhaps "some universities are generally more welcoming to women staff members".[40] Allen's broad finding is that women simply failed to keep up with men in terms of gaining access to higher level positions. This was despite the fact that they increased their share of academic positions overall during the period of expansion from 1952 to 1980. Allen canvasses a number of commonly advanced explanations for the reasons why men continued to outpace women in this regard. Interestingly again, there appears to be little evidence to support many of the familiar explanations such as problems of combining work with motherhood or domestic responsibilities or the notion that women are less ambitious than men.

This leads us to the inference that institutional obstacles may offer a significant explanation for women continuing to occupy lower level employment which lacks career opportunity. This point has been emphasised in a recent analysis of science and technology institutions[41] and in an earlier analysis of academia itself.[42]

The issue of the effectiveness of anti-discrimination law is even more relevant against the background of the primary research that has been already undertaken by Dr Sarah Ashmore. This research deals specifically with the under-representation of women in the scientific structure.[43] Referring to established research, this research indicates that whereas only about 15% of natural scientists at the level of lecturer or equivalent are women, far greater numbers of women are either studying science or

38 Allen, "Academic Women in Australian Universities" *Monograph No 4* (Affirmative Action Agency, Canberra, AGPS 1990)

39 As above, p9.

40 As above, p11.

41 Byrne, *Women and Science: The Snark Syndrome* (The Falmer Press, London 1993).

42 Burton, Cass et al, *Why So Few: Women Academics in Australian Universities* (Sydney University Press, Sydney 1983)

43 See Ashmore, Harvey & Runciman, "Scientific Assistants: contributions and gender issues?" (1992) 23 *Search* 239.

working as scientific assistants (around 50%). Figures for 1989 indicated that a huge 88% of research assistants in medical research are women. These figures prompted Ashmore's own survey-based investigation of Brisbane research biologists. The purpose of this research was to alert the general community to the significant involvement of women in the scientific work process, and significant concentration of women at the poorly paid, insecure research assistant and technical level.

Similar conclusions have recently been drawn by Roach-Anleu in relation to the careers of many women in the legal profession.[44] The results of this survey indicate, as all the analyses presented here have indicated, that women tend to be under-employed and disproportionately excluded from the career structured paths. While noting the low rate of career progression for women in science, Ashmore also meticulously examined the type of work women undertake while working as assistants in experimental research. The extensive demands of the work were not reflected in their career potential. Discrimination law is not framed in such a way as to effectively undermine these particular instances of workplace inequity. Perhaps it is for this reason that complaints under the sexual harassment provisions now form the largest category of complaints dealt with under *Sex Discrimination Act* 1984 (Cth).[45]

CHALLENGING INDUSTRIAL PRACTICES AND POLICIES THROUGH INDIRECT DISCRIMINATION

Definition and decisions

The Australian statutory proscription against indirect discrimination is effectively formulated in the following general way:

> The statutory definition of indirect discrimination tries to measure whether practices have an adverse impact not by reference to women's experience of those practices, and/or to their historical origins and economic effects, but by requiring a precise assessment of whether a substantially higher proportion of men than of women can comply with them.[46]

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44 Roach-Anleu, "Women in Law: Theory, Research and Practice" (1983) 28 *Australian and New Zealand Journal of Sociology* 391.

45 Lavarch Committee para 10.1.48

46 Hunter, "Women v *AIS*" (1990) 15 *Legal Service Bulletin* 40 at 41.

Specifically, the *Sex Discrimination Act* 1984 (Cth) stipulates four technical elements in s5(2) for the concept of indirect discrimination and the State laws repeat this requirement in their enactments, at least to a large extent. On this issue, the definitional section in the Commonwealth Act provides that a person discriminates against another person on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to:

(i) comply with a requirement or condition,

(ii) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply,

(iii) which is not reasonable having regard to the circumstances of the case;

and:

(iv) with which the aggrieved person does not or is not able to comply.

Of these requirements, Hunter points out that "the first (requiring the complainant to comply with a requirement or condition) and the last (that she was unable to comply with it) are generally the least contentious".[47] The other elements require, and have been the subject, of judicial elaboration and, indeed, over the past years the relevant Australian Courts and Tribunals have formulated the boundaries to the critical judicial jurisprudence and practical interpretation of these major aspects of the statutory definition. The major case law, particularly dealing with the reasonableness section, will be examined in the next section of this paper.

One particularly critical issue in the context of this paper warrants detailed attention. Hunter has recently contended that there is a strong likelihood that the increasing reliance upon contracts as a form of academic employment is undermining the aims of anti-discrimination law. The point is that new workplace practices have arisen which disadvantage women: lesser conditions are attached to contract as opposed to tenured or tenurable employment. What we witness now through contract employment, at least in the University context, is disenfranchisement from continuing employment and from the advantages of the study leave system: within a

47 Hunter, "Indirect Sex Discrimination" (1990) 14 *Legal Service Bulletin* 16 at 17.

broad based attack on tenure, contract staff are significantly worse off. Why are the entitlements less? Why are they different?

Writing specifically with reference to Universities in this context, Hunter argues that indirect discrimination law may provide a means of redressing what she terms the "serious erosion of the employment conditions of contract staff". In arguing this point Hunter observes, based on a further set of DEET figures, that in 1991 67.5% of male academics held tenured positions whereas only 45.5% of female academics held tenured positions.[48] Since women form the bulk of contract employees, they would be disproportionately affected by the current attack on academic tenure (which is not available to contract staff) and consequently would generally have less job security (which is only available to tenured staff). The seemingly neutral requirement that academic contract staff work under certain conditions is exposed in fact as a discriminatory requirement because of its disproportionate impact upon women. The tenure requirement for job security "downgrades the status of female academics".[49] The argument is advanced in these terms:

> The AHEIA proposals require academics to be tenured in order to enjoy the greatest job security under the award. This is a requirement with which a significantly higher proportion of male academics than female academics would be able to comply. Given the current equal protection of tenured and non-tenured staff under the second tier award, and given the fact that universities are supposed to have affirmative action programs to enhance the status of women staff, there would be a strong argument that the tenure requirement for job security, which downgrades the status of women academics, is not reasonable. If so, the proposals fall squarely within the definition of indirect sex discrimination.[50]

There is considerable evidence in the academic context that the increasing reliance upon contract employment represents one of the most effective means of undermining any gains which anti-discrimination legislation has made. Hunter has noted that the AHEIA's proposals to "streamline" award

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48 Hunter, "Job Security - The AHEJA's proposals as sex discrimination?" (1993) *Fausa Women* 6 at 7, quoting from Aust, Dept of Employment Education and Training, *National Report on Australia's Higher Education Sector* (1993) p141.

49 As above.

50 At 7.

procedures exclude contract staff, the majority of whom are women. Characterising the proposals overall as a broad "attack on tenure", Hunter observes that the proposals also further widen the gap between contract and continuing staff. Thus what we witness is an erosion of the employment conditions of contract staff. While this appears to be a neutral industrial effect, it is in fact one with a concentrated and disproportionate effect on women. We therefore need to ask whether these proposals, since they disproportionately affect women (and mean that more men than women will gain continuity of employment), are indirectly discriminatory under law. The answer is: only if they are not reasonable.

IS REASONABLENESS COUNTER TO POLICY IN AUSTRALIAN ANTI-DISCRIMINATION LAW?

Hunter's argument is a critical one which leads us directly to the next section of this paper. We must now ask the critical question: how has the reasonableness requirement been interpreted? Is reasonableness counter to policy in Australian anti-discrimination law? To commence with a few general points of interest. First, in essence, the High Court has taken a moderately restrictive approach to the problematic requirement of reasonableness in relation to indirect discrimination. Second, the Queensland and Northern Territory legislatures have taken different approaches to the general issue with their respective recent discrimination enactments. Third, the broader political and industrial issues have again been prominent in the public arena with the increasing recognition that women face a "glass ceiling" in reaching the higher levels of employment and the fact of the Government's setting childcare onto the economic agenda during the election.[51]

Finally, there is the fact that the economic recession is proving the most protracted source of discrimination. The problem of proving discrimination within the framework of large numbers of applicants for any one job simply serves to undermine both the legal and social policy effectiveness of the legislation. As Hunter has noted, the notion of direct discrimination "tends to focus on individualised harm, whereas the notion of indirect discrimination focuses on group-based harm".[52] In a recession, how can we prove individual discrimination other than in rare and extreme instances?

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51 Jocelynne Scutt has long argued the need for childcare to be seen as an industrial issue. Scutt, *Women and the Law* (Law Book Co, Sydney 1990) esp pp130-131.

52 Hunter, *Indirect Discrimination in the Workplace* 11-12.

There is a form of legislative activity that defines indirect discrimination. It challenges management practices and has by far the greatest potential for changing entrenched workplace practices and barriers which may discriminate upon the basis of "difference". But through the legislative prescription we have to confront one specific and narrow aspect of indirect discrimination: the requirement of reasonableness. By virtue of the notion of "reasonableness", an impugned requirement or condition (and in certain circumstances, behaviour) which might otherwise constitute indirect discrimination is *not* rendered unlawful.

The cases mentioned here are instructive in that they clearly did not involve direct discrimination: in both situations, the practice in question was not implemented against any one individual on the basis of their sex, race or disability. Yet in each case, a seemingly neutral workplace practice and policy clearly disadvantaged members of the more vulnerable groups in the community which the legislation dealing with discrimination purports to assist. Therefore each case clarifies the different function of indirect discrimination law. Determination of what constitutes reasonableness for the purposes of indirect discrimination is of crucial significance in that it provides a conceptual and technical pivot around which the Australian legislation turns.

Analysing Australian anti-discrimination law and practice, Hunter drew a significant distinction between empowerment for women gained through equal opportunity legislation and empowerment which has its basis in "solidarity and support networks".[53] The two forms of empowerment met in the case under discussion - *Australian Iron and Steel v Banovic*.[54]

Determining the Appropriate Base Group: The High Court Decision in *AIS*

The *AIS* case saw the High Court deal for the first time with indirect discrimination[55] and the case provides therefore a significant development and deliberation on the subject of indirect discrimination in Australia.[56] It provides authority for the elements of the four part test that the party

53 Hunter, (1990) "Women v *AIS*" 15 *Legal Service Bulletin* 40.
54 (1989) 168 CLR 165 (hereinafter *AIS*).
55 Graycar & Morgan, *The Hidden Gender of Law* (Federation Press, Annandale 1990) p100.
56 Hunter, "Indirect Discrimination and the Law" (1989) 63 *Law Institute Journal* 734.

alleging indirect discrimination must prove. This test includes (at present) this party proving that the practice in question is not reasonable.

Essentially, the High Court addressed the question of retrenchment policy as a form of discrimination and weighted the policy of last on, first off (known as reverse gate seniority) against the previous fact of discrimination in recruitment. It was argued that the company's retrenchment methods constituted sex discrimination because of the interconnection with their previous discriminatory hiring practices. The retrenchment policy was seen to exacerbate the previous discrimination in recruitment policy. Several aspects to the judgements are instructive; in particular, the detailed attention paid to the means of determining the appropriate base group required by the statutory provisions as a means of calculating the proportions (of complying men and women) to be compared. What is required is a comparison which will reveal whether sex is significant to compliance: the comparison must not mask the discriminatory effects of previous practices.

Until 1980 the Company had pursued recruitment practices that resulted in women constituting only a very small proportion of its workforce. There was a recognisably discriminatory delay in hiring women applicants but thereafter the number of women employed as ironworkers increased in absolute numbers and also as a proportion of the total iron worker workforce. The retrenchment policy of last on, first off therefore arguably perpetuated the fact of pre-Act discrimination and was therefore challengeable on the grounds of institutional discrimination.

In the course of his dissenting judgment, Justice Brennan considers the selection of the appropriate base group. Justice Brennan says notwithstanding the fact of pre-Act discrimination in recruitment, the purpose of the legislative provisions is not one of affirmative action. The significant factor is the composition of the workforce at the time of the actual retrenchments and this cannot be reconstituted in order to accommodate the previous discrimination:

> Although the constitution of the group has been affected by earlier unlawful discrimination, the Act does not operate by reference to a hypothetical workforce reconstituted to eliminate the effects of the earlier unlawful discrimination.[57]

However, Justices Deane, Dawson and Gaudron, argue that the base group from which the proportions were to be derived should be selected so as not

57 *AIS* at 171.

to mask the effect of previous discriminatory recruitment practices. The past discrimination was being repeated and institutionalised in circumstances that could not be shown to serve the employer's legitimate interests. In their joint judgment, Justices Deane and Gaudron state that the legislation requires a "calculation which will reveal whether sex, as distinct from the sexual composition of the group, is a factor influencing the number of complying men as compared with the number of complying women".[58] The relevant base groups must not entrench the effect of past discriminatory practices but should provide a reference point for ascertaining the effect of those practices.[59] In their judgment, a balance is sought between competing interests: that of the employer for a legitimate interest in "efficient and trustworthy workmanship" and that of discrimination, for which the composition of the workforce is an appropriate standard only if it is not the result of discriminatory practices.[60]

Interestingly, their Honours observe that no attempt was made to justify the retrenchment policy's exacerbation of the adverse effects of the earlier discriminatory practices as reasonable having regard to the employer's interests in maintaining a stable workforce.

Dawson J suggests that in selecting an appropriate base group, that group should not be defined so as to mask the effect of the previous discriminatory recruitment practice.[61] In relation to the reasonableness requirement, his Honour decided that the requirement imposed in this case was unreasonable because "in the particular circumstances it repeated the discriminatory effect of the prior recruitment practice".[62] However, his Honour noted that the principle of "last on first off" may not be inherently unfair or unreasonable but may, all things being equal, be a common sense way of selecting employees for retrenchment.[63] Section 24(3), the relevant section of the New South Wales Act defining indirect discrimination, has a wide conceptual application and "covers discrimination which is revealed by the different impact upon the sexes of a requirement or condition".[64] Rejecting a bold comparison in determining the appropriate base group, Dawson J observed that remaining in employment was contingent upon having been employed before a certain date. The last on, first off principle exacerbated

58 At 178.
59 At 180.
60 At 181.
61 At 189.
62 At 191.
63 As above.
64 At 185.

the adverse effect of past discriminatory practices: employment before a particular date was contingent upon gender; all things were therefore not equal. It has been noted by Rosemary Hunter in an analysis of the decision, that the argument in AIS is "intuitively correct".[65]

The decision in *Kemp*[66]

The central point in the *AIS* judgment deals precisely with the statutory requirement of the imposition of a requirement or condition that a substantially higher proportion of persons of a different status do or can comply with. The statutory definition requires that initial calculations be made determining the appropriate group or base pool within which to calculate the proportions to be compared. Until *AIS* there was no legal yardstick for ascertaining these proportions. The Western Australian Equal Opportunity Tribunal in *Kemp* drew upon the method of calculation in *AIS* and elaborated upon the legislative requirement of reasonableness. The decision is not significant solely for reinforcing the law under the umbrella of the principles enunciated in the *AIS* precedent. It also re-opened the concept of indirect discrimination in Western Australia, following the Supreme Court's side-stepping of the issue in the decision in *Chief Executive Officer, Ministry of Education v Hall.*[67]

The dispute in *Kemp* arose over which process should govern the appointment to a position as Acting Deputy Principal (Curriculum). The processes in question were the union agreed guidelines which emphasised length of service or the school based selection process. The central question was whether the policy reflected in the guidelines (in relation to an acting deputy principal position) discriminated against the complainant on the ground of her sex because of its emphasis on seniority and continuous service. The application of that policy would inevitably mean that the male contender, who had more service than the Complainant, would be appointed, thus perpetuating the highly usual workplace situation. The precise question therefore arose as to the reasonableness of such a means of resolution between seemingly equal candidates. Indeed, the policy itself had been questioned internally.

As part of a change in policy, a school based selection process had been instigated as a means of supplementing and even avoiding the guidelines in order to ensure the appointment of the applicant "best equipped to fill the

65 Hunter, "Women v *AIS*" (1990) 15 *Legal Service Bulletin* 40 at 41.
66 (1991) EOC 92-340.
67 (1991) EOC 92-333.

position". The change in policy reflected in the school based selection process was extremely significant for the outcome of the case. The difference in intention is distinctly juxtaposed against the guidelines in question and selection on that basis argued for the complainant. This would, it was argued, be preferable to providing for appointment in accordance with the guidelines whereby total teaching service within the Ministry and, ultimately, seniority, would prove to be decisive. The case therefore concerns competing processes of selection for a position as acting deputy principle: union agreed guidelines (for which seniority might ultimately be decisive) and a school-based selection process (which was meant to supplement the guidelines as a means of appointing the applicant "best equipped" to fill the position).

After identifying the requirement or condition stipulated by the legislation the Tribunal considered the comparison that must then be made between the compliance rates for each sex by selecting an appropriate base group or base pool within which to calculate the proportions to be compared. This was considered a question of law for the Tribunal. The methods of calculation used in the case are referred to in the *Kemp* decision following the observation that of the total teachers/senior teachers employed by the Ministry on a full time basis women form the majority. Therefore, the reality of the discriminatory impact of the policy in question might be easily masked:

> These figures illustrate the danger addressed by the majority of the High Court in the *AIS* case of comparing raw figures in circumstances where there is a sexually imbalanced work force owing to the nature of the particular activity.[68]

In applying the framework of analysis and calculation from *AIS*, the Tribunal observes that the full time teaching staff employed by the Ministry is the appropriate base group within which the proportions should be calculated. The narrow group of teachers that might apply for the position is not the yardstick that is relevant to the requirement or condition. The central fact is that out of any group of teachers appointed at the same time, the men are more likely to have a greater total length of service than the women. In isolating this bald workplace reality, the Tribunal emphasises the significance of sex to compliance with the condition:

> What is required is a comparison which will reveal whether sex is significant to compliance, and that involves

68 ¶78-370.

> ascertaining the number of complying men as a proportion of other men within the base group and the number of complying women as a proportion of other women.[69]

This points to Hunter's assertion that while both are concerned with "norms" and "differences", the difference between indirect discrimination and protective legislation lies in indirect discrimination seeking to "ensure that employment practices do not have the effect of turning differences into disadvantages".[70] So in *Kemp*, reference is made to the need to confront, through the law, pervasive and prevailing industrial and social practices and reality. In particular, to confront the selection of a base group built upon seniority:

> Selection of a base group of the kind now being considered would produce a distorted result because such an approach, by excluding a large number of women who had interrupted their career for domestic purposes, would mask the reality that it is generally more difficult for a woman to amass the same amount of teaching experience as a male teacher of her own age.[71]

Consideration of the requirement that the condition is not reasonable is one of the significant features of the *Kemp* case. It is stressed that there is a significant divergence between the guidelines in question and contemporary departmental goals. It is considered not reasonable within the context of the legislation that the policy in question still reflects "the habits of an earlier era". The case acknowledges that guidelines and policies can be discriminatory and also acknowledges the extent to which past practices may be counter to current equal opportunity policy. Furthermore, it weights current concepts of reasonableness against past discriminatory practices which by implication were not reasonable. By this view, the notion of reasonableness virtually runs counter to policy in that it contradicts the aims of the law. Yet the problem is that reasonableness is a pivotal part of indirect discrimination law. The case provides a step towards challenging, through the law, long-standing and indirectly discriminatory industrial policies and practices.[72]

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69 As above.

70 Hunter, "Women v *AIS*" (1990) 15 *Legal Service Bulletin* 40.

71 *Kemp* at ¶78-371.

72 For a more detailed examination of the Tribunal decision see Hocking, "Steps in the Obstacle Race" (1990) 16 *Legal Service Bulletin* 144.

The Side-step in *Styles*

The most legalistic decision to date in the Australian context has been that of the full Federal Court in *Department of Foreign Affairs v Styles*.[73] This case was an appeal by the department concerned from the decision of Wilcox J, who considered the selection criteria adopted for a posting overseas (narrowly confined to A2 journalists) indirectly discriminatory against women within the terms of the Commonwealth law. It is significant that up until the Federal Court decision of Wilcox J it had been "impossible to extract any general principles regarding 'reasonableness' from the previous Australian decisions".[74] In his judgment, Wilcox J formulated guidelines concerning the approach to the reasonableness requirement, noting that management and victims of discrimination will inevitably differ in their perspective on what is reasonable and that the standard ought not to be that of the subjective view of management.[75] Consideration must be given to the "cogency of the reasons" for the adoption of the criterion: sound "economic or administrative reason" might validate the confinement of the criterion concerning appointment.[76]

The Full Federal Court, in considering the matter on appeal, adverted to the fact that mere convenience is not reasonable in the context of the Australian legislation. Nevertheless the Court appears so constrained by the statutory requirements that it effectively jettisons the potential for reform provided by the legislation. Two central issues warrant mention in relation to this appeal decision. The first is that the Court unanimously decided that it was not shown that the decision-maker did not have regard to the equal opportunity program of the Department. The second is that Bowen CJ and Gummow J, in deciding that the requirement or condition in this case was based on merit, suggest that the practice of appointing officers at their substantive grade is conducive to "tidy administration" and conforms to a "precept of fairness".

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73 (1989) 88 ALR 621 (hereinafter *Styles*).

74 Hunter, "Indirect Sex Discrimination" (1990) 14 *Legal Service Bulletin* 16 at 17.

75 As above. Hunter considers that while Wilcox J formulated a test in relation to the reasonableness requirement that "should be followed by other Australian courts and tribunals" nevertheless, the calculation of the "pool" or "base group" upon which the requisite calculation should be based, is considered erroneous due to its emphasis upon relative numbers rather than upon relative proportions. Therefore, Hunter argues that this aspect of the *Styles* decision should not be followed.

76 As above. Hunter observes that Wilcox J's exposition of the Australian requirement of reasonableness in this respect is "in line" with the English authorities which were then current.

Their Honours suggest that in deciding whether a requirement or condition is not a reasonable one, having regard to all the circumstances of the case, the central consideration is whether the requirement or condition is, under all the circumstances, objectively justified.[77] Weighting the "precept of fairness" against the discriminatory impact, their Honours decide that the requirement or condition is rendered reasonable in the circumstances of this case.[78] It is interesting to note in passing that the significance of the policy implications in the major American decisions in this area is adverted to in the following terms:

> The United States law as to indirect discrimination is spelled out by judicial glosses upon the statute rather than in specific terms of the statute itself; thus it is an unsafe guide when construing the *Discrimination Act*.[79]

The elaboration of the "reasonableness" requirement for indirect discrimination by the High Court: the decision in *Waters v Public Transport Corporation*.

The final major Australian decision in this area that must be considered is the recent decision of the High Court in *Waters v Public Transport Corporation*.[80] The case concerned the introduction of scratch tickets and removal of conductors from trams in Victoria - the *Met Ticket* case.

The High Court decision in *Waters* provides a detailed elaboration of the reasonableness concept within the framework of Australian anti-discrimination law. It therefore clarifies this pivotal, elusive and contentious element of the statutory requirements for indirect discrimination. The appellants were nine disabled individuals and various community organisations representing the interests of disabled persons. The individuals had lodged complaints under s44 of the *Equal Opportunity Act* 1984 (Vic) and the organisations had alleged discrimination, which allegations came to the attention of the Equal 0pportunity Board. The complaints and allegations arose out of a direction by the Minister for Transport to the Public Transport Corporation to implement a new ticketing system for the public transport system.

77 *Styles* at 634.
78 At 636.
79 At 633.
80 (1992) 103 ALR 513.

The individuals concerned could not use the scratch tickets introduced as a means of ticketing and some could not travel on trams from which conductors had been removed. The Corporation appealed against the finding by the Board that the changes involved discrimination. The appeal was allowed in the Supreme Court, but the complainants' subsequent appeal to the High Court was upheld. One of the more interesting aspects to the judgments in the High Court is the expansion in several of the judgments of the tidy administration concept: business and financial necessity is written into the reasonableness concept. From a feminist viewpoint, legitimation is through the subtle importation of the reasonable man's values and priorities.[81] Yet because the judges do not agree in their interpretation of the reasonableness requirement, it is elaborated upon and from the different judicial formulations, it is made clear that this is the conceptual engine which will either stall or kick-start the legislation.

For the majority of the High Court, the Board had made an error of law in the way in which it assessed the reasonableness of the proposals to remove conductors and introduce scratch tickets.[82] In considering whether the requirement or condition involved in the introduction of the scratch tickets or the removal of the conductors was reasonable, Brennan, Deane, Dawson, Toohey and McHugh JJ state that in considering reasonableness for the purposes of s17(5) of the Victorian Act, the Board was in error in failing to have regard to the financial or economic circumstances of the Corporation. While this does not read as an endorsement of business efficacy, their Honours stress that "reasonable" means reasonable in all the circumstances of the case.[83] Mason CJ and Gaudron J, however, do not agree with this particular interpretation of the reasonableness requirement.

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81 It is interesting to note Naffine's conceptualisation of the reasonable man, which is pegged to the prevailing ethos of economic rationalism. Her analysis broadens to critically address the dominant legal model of person and the legal view of mankind. The law's purported dealing in abstract individuals is exposed as a preference for a particular person: "the man of law, the individual who flourishes in, and dominates, the type of society conceived by law". That man of law operates within the modern free market along with similarly "self-interested and able" individuals who are equally "assertive, articulative, independent, calculating, competitive and competent". See Naffine, *Law and the Sexes: Explorations in Femininst Jurisprudence* (Allen & Unwin, Sydney 1990) 22.

82 Simpson, "*Waters* v *Public Transport Corporation*" (1990) 18 *Melbourne University Law Review* 482.

83 At 483. Simpson notes that Brennan J goes further than the majority in agreeing that the respondent's circumstances had to be taken into account, arguing that "the whole of the circumstances had to be considered" while McHugh J reaches the same conclusion as Dawson, Toohey and Deane JJ but "through a slightly different reasoning process".

They advance in their detailed joint judgment, an elaboration of the reasonableness concept that is both a particularly interesting and legally compelling argument. They suggest that the concept of indirect discrimination derives from the decision in *Griggs*[84] and refer to the oft-quoted maxim of "practices that are fair in form, but discriminatory in operation".[85] In analysing the American decisions their Honours suggest that the United States and Canada anti-discrimination statutes are expressed in general terms and do not draw any distinction between direct and indirect discrimination. These provisions have been "consistently construed as applying to both forms of discrimination".[86] The court provides an Australian formulation which might be interpreted as finally putting flesh on the bones of the Victorian statute.[87]

In analysing the Victorian statutory requirements, Justices Mason and Gaudron relate s17(1) to s17(5) of the legislation and suggest that the remaining sub-sections in s17 give more precise content to the general concept of discrimination described in sub-section (1). Most importantly, their Honours suggest that s17(5) is not a complete and exhaustive statement of what constitutes indirect discrimination for the purposes of s17. Indirect discrimination may occur otherwise than by means of the imposition of a "requirement or condition" within the meaning of s17(5). Far from being an exhaustive prescription, the object of the second sub-section is to "ensure that s17(1) extended so far, not to confine its operation".[88] Therefore, Their Honours then consider the extent to which the section is limited and assert that it is "limited by the notion of 'reasonableness'".[89] This concept is clearly central to their concept of discrimination: it is the pivot around which the legislation is built. Equally, the scope of this requirement is determined by the purpose of the legislation. Referring to the fact that the reasonableness concept alone effectively

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

85 At 519.

86 As above.

87 As Simpson notes this is particularly timely given the recognised tendency on the part of the Victorian Supreme Court towards a restrictive interpretation of the State's anti-discrimination law: with the decision in *Waters*, the importation of an intent requirement is no longer valid: "it is safe to say that *Arumugam* is dead and buried". Proof of intention as any part of this legislation is therefore currently at rest. In *Waters*, only McHugh J considered intention relevant in proving direct discrimination although Dawson, Toohey and Brennan JJ had nothing "explicit to say on this point": Simpson, "*Waters v Public Transport Corporation*" (1990) 18 *Melbourne University Law Review* 482 at 487.

88 At page 520.

89 At page 523.

determines whether conduct otherwise falling within s17(5) constitutes discrimination, their Honours suggest that this is inevitably not an imprecise concept. For "it would be surprising if 'reasonable' were used in some general and imprecise sense, leaving that question to be answered as a matter of impression".[90]

The meaning of "reasonable" in s17(5) is to be ascertained by reference to the notion of "discrimination" and by reference to the scope and purpose of the Act. Their Honours suggest that the particular nature of the legislation in itself dictates that a particularly restrictive interpretative approach is not appropriate:

> The principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose.[91]

Their Honours then analyse indirect discrimination within the framework of the decision in *Griggs* and the subsequent developments in this area of law in the United States. In *Albemarle Paper Co*, the Supreme Court of the United States held, referring to its earlier decision in *McDonnell Douglas Corp v Green*[92] that even if tests are "job related" (a requirement identified in *Griggs*) it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship". The two stage approach laid down through *Griggs* and *Albemarle Paper Co* had been reaffirmed by the Supreme Court of the United States in *Wards Cove Packing Co Inc v Atonio*.[93] The consideration of "reasonableness" in *Banovic* is considered, to the effect that "reasonableness" in the relevant section of the *Anti-Discrimination Act* (NSW) was directed to considerations identified in *Albemarle Paper Co* but might possibly also embrace matters "pertaining to the stability and harmony of the workforce".[94]

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90 As above.

91 Hunter, *Indirect Discrimination in the Workplace* p25, quoting from *Waters* per Mason CJ and Gaudron J (with whom Deane J agreed) at 520.

92 411 US 792 (1973), cited in *Waters* at page 523.

93 (1989) 57 LW 4583.

94 *Waters* at 523.

The concept of "reasonableness" is read in a restrictive way in order to secure the intention of the legislature. This narrow reading is considered appropriate in order that the distinction between direct and indirect discrimination not be rendered meaningless. Interestingly, Their Honours make a significant public policy assertion in this regard: "there is nothing to indicate that the consequences of direct discrimination are more objectionable and harmful to society than the consequences of indirect discrimination".[95]

The minority view of the concept of reasonableness in this case is (according to their Honours) therefore a narrow "strict" reading: a narrow reading is seen as the appropriate means of securing the aims of the legislation; the pivotal concept is read strictly in order not to restrict the Act. This renders considerations such as finance irrelevant. In advancing this concept of a narrow reading, Mason CJ and Gaudron J consider the purpose of the legislation, the general context to the section, the way in which indirect discrimination has been dealt with in the United States following *Griggs* and the notion of discrimination as revealed in the context of ss92 and 117 of the Australian Constitution. It is their view that the original appeal decision in this case, allowed on the basis that the Board erred in law in not having regard to financial or economic considerations which may have motivated the Corporation, cannot therefore be correct in law in the light of these factors.

The conceptualisation of the concept of "reasonableness" is not unanimous in the *Waters* judgment. In the event of it being an area of disagreement, it is therefore elaborated upon. Deane J, in distinguishing his judgment from that of Mason and Gaudron JJ on the grounds of their preferred meaning of the word "reasonable", deals with the concept in a different way. Like Dawson and Toohey JJ, he suggests that the context provided by s29(2) of the legislation does not justify confining the ambit of the word "reasonable" in s17(5) so as to render irrelevant any financial or other considerations affecting an alleged discriminator. The decision of the majority of the court on that matter is therefore that "reasonable" means "reasonable in all the circumstances of the case".[96] Following *Waters*, the "question of the financial cost of overcoming the requirement or condition ... will be a more significant question in determining the reasonableness of the requirement or condition".[97]

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95 At 524.

96 At 539.

97 O'Neill & Handley *Retreat From Injustice: Human Rights in Australian Law* (Federation Press, Annandale 1994) p377.

Another significant aspect of the decision in *Waters* is the extent to which the judgments represent a jurisprudential and conceptual contribution to the formulation of Australian anti-discrimination jurisprudence. Indeed, Hunter has observed that the High Court "appears now to have reached a position similar to that of the Canadian Supreme Court, indicating a preparedness to interpret general prohibitions of discrimination or different treatment to encompass both formally adverse treatment and substantively adverse effects".[98]

A related point has been stressed by Australian commentators on American anti-discrimination law: that discrimination is prohibited on given grounds without defining specifically the notion of discrimination precisely because of the expectation that courts would be prepared to see law in this area as providing a blueprint for social policy.

Hunter has identified both the usefulness and the hazards of the North American approach of allowing for a degree of conceptual and policy theorising:

> It has thus been left up to the agencies administering the legislation and the courts and tribunals adjudicating upon it to elaborate the concept. This has allowed Supreme Courts in both countries to develop broad, flexible theories of discrimination, although the drawbacks of allowing the courts to define discrimination have been seen in recent United States Supreme Court cases where previous precedents have been significantly narrowed.[99]

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98 Hunter, *Indirect Discrimination in the Workplace* p25, commenting on both *Waters* and *Street v Queensland Bar Association* (1989) 168 CLR 461. This view "clearly emerged", according to Hunter, in the latter case, which was concerned with the requirement in s117 of the Constitution that residents in a State must not be subject in another State to any disability or discrimination which would not be equally applicable to them should they reside in that other State. Hunter comments that

> All seven judges of the High Court agreed that in determining whether a particular State provision contravened s117, it was necessary to look not just at its form, but also at its factual impact in the circumstances. Some of the judges specifically linked this view to the current state of anti-discrimination law, while others linked it to other recent High Court cases stressing substance over form in the context of constitutional non-discrimination provisions.

99 Hunter, "Equal Opportunity Law Reform" (1991) 4 *Australian Journal of Labour Law* 226 at 233.

Furthermore, in Britain and Australia, perhaps the intention in providing specific definitions of "discrimination" within the legislation was to codify meanings developed by North American courts. However, "their rigidity and complexity have posed considerable problems of interpretation and proof".[100] Narrowness of judicial approach was virtually pre-empted in Britain: it was simply anticipated that the courts were unlikely to adopt "a simple concept of 'discrimination' along American lines".[101]

The positive aspect to the North American approach is well illustrated by the decision of the Canadian Supreme Court in *Andrews v Law Society of British Columbia*.[102] In considering equality and discrimination, the case anticipates a test of disadvantage rather than one of being similarly situated. As Kathleen Mahoney argued, *Andrews* is a "groundbreaking constitutional case".[103]

It is ground breaking because the "rejection of identical treatment as the only meaning of equality is a significant departure from traditional constitutional values".[104] Such an approach is seen to broaden "the protective ambit"[105] of the equality guarantees under the Canadian Charter of Rights and Freedoms. Should this test be adopted elsewhere, it could have far reaching implications.

No Matter How Reasonable You Are About It, Indirect Discrimination Is Illegal - Or Is It? (Is Reasonableness Counter To Policy?)

As the jurisprudential framework has evolved, it has become increasingly apparent that the Australian treatment of the reasonableness aspect of the test for indirect discrimination differs from its overseas counterparts.[106] However, the Australian definition of indirect discrimination is "close to but

100 As above.
101 As above.
102 (1989) 1 SCR 143.
103 Mahoney, "The Constitutional Law of Equality in Canada" (1982) 23 *International Law and Politics* 759 at 775.
104 At 779. See also Evatt, "Eliminating Discrimination against Women: The Impact of the UN Convention" (1991) 18 *Melbourne University Law Review* 435 for a discussion of ways of dealing more effectively with alleged violations of women's rights under the women's convention. See also the final section of this article.
105 As above
106 Hunter, "Indirect Discrimination and the Law" (1989) 63 *Institute Journal* 734 at 735.

not identical with" the British definition.[107] This section briefly summarises, by way of comparison, some of the equally problematic conceptual and technical difficulties that bedevil the British counterpart of reasonableness, which is that of a "justifiable" practice. It is now widely recognised that the concept of a "justifiable" practice which may be discriminatory has limited the operation of the United Kingdom Act.

In practice, the British provisions appear to be extremely limited in effect, with a labour force characterised by pervasive sex segmentation both horizontally and vertically. It has been suggested that the British workforce has experienced an increasing erosion of individual employment rights throughout the long term Conservative administration and economic recession. In a recent appraisal of the British situation, Dickens has noted that notwithstanding the wide ranging legislative assault on women's disadvantage in employment in Britain since 1970,[108] nevertheless the "gender segregation of the workforce has remained remarkably constant since 1970".[109] It has been suggested above that the British anti-discrimination legislation is "tightly drafted" and "very specific" and that consequently the judiciary has seen its task narrowly and specifically in terms of the analysis of the statutory material.[110]

Such a narrow interpretative approach may also be a partial reflection on the composition and structure of the British judiciary: Dickens suggests that the greater benefit to English law in this area has been from the "more robust" interpretation of the concept of discrimination in the European Court of Justice and not from British based judicial jurisdiction.[111] Where the British legislation has had positive effects has been in its providing an impetus for private initiatives concerning equal value principles and in the considerable impact of European community jurisprudence in strengthening the British equality legislation and in introducing new methods of

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107 Hunter, *Indirect Discrimination in the Workplace* p25.

108 Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain" (1991) 18 *Melbourne University Law Review* 277. Referring to the *Sex Discrimination Act* 1975 (UK); *Sex Discrimination Act* 1986 (UK); *Equal Pay Act* 1970 (UK); *Equal Pay (Amendment) Regulations* 1983 (UK).

109 At 279.

110 O'Donovan & Szyszczak, *Equality and Sex Discrimination Law* (Blackwell, Oxford 1988) p39.

111 Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain" (1991) 18 *Melbourne University Law Review* 277 at 288.

interpreting domestic equality legislation.[112] Generally, the weaknesses identified in the legislation comprise those also identified by Thornton[113] in the Australian context.

> These weaknesses concern the interrelated assumptions or principles underlying the legislation: the concept of equality, the adoption of male as the standard, and the blinkered perception of discrimination.[114]

The English legislative provisions dealing with indirect discrimination are considered to founder most significantly in the judicial interpretation of the concept of "justifiable" discrimination. Indeed, Dickens notes that the "justifiable" requirement in the English legislation has operated to limit the ambit of the Act through an increasing judicial equation of the concept with business necessity.[115] Although initially interpreted as meaning necessary, as a means of distinguishing the term from administrative convenience, the concept has been "weakened" through a "series of judgments until the low point of interpretation was reached when the Court of Appeal held that 'justifiable' meant a lower standard than 'necessary' and that implicit in its meaning was what was 'acceptable to right thinking people as sound and tolerable reasons'".[116] This narrow formulation stands in contrast to decisions such as *Mandla v Dowell Lee*[117] where the House of Lords held that a private school's requirement that no student could wear a turban (and that all pupils must cut their hair) was not justifiable because "justifiable" connoted conduct justifiable "without regard to the ethnic origins of the person in question". In that case, the House of Lords considered that it was the very fact that the turban was a manifestation of the pupil's ethnic origins

112 At 277.

113 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* 192. Thornton comments inter alia that "the complexity of the Australian indirect discrimination provisions constitutes a set of Herculean obstacles to be overcome by intrepid complainants in order to challenge a discriminatory practice within a particular workplace." Elsewhere Thornton has observed more generally that law and feminism are simply incompatible, for "law and feminism is an oxymoron".

114 Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain" (1991) 18 *Melbourne University Law Review* 277 at 289.

115 As above at 277.

116 As above at 288. Dickens refers to: *Steel v Union of Post Office Workers*, (1977) IRLR 288; *Singh v Rowntree MacIntosh* (1979) IRLR 199; *Ojutiku v Manpower Services Commission* (1982) IRLR 418.

117 (1983) 2 AC 548.

that was relied upon as justifying the refusal to admit him as a pupil at the school.

What is particularly interesting about this decision is the approving reference to the kind of justification that might fall within the section of the British Act formulated in *Panesar v Nestle Co*:[118] one based on public health.[119] Initially, it would appear that the British courts placed a heavy burden upon the discriminating party to show that the condition was necessary but it appears indisputable that this early approach has increasingly given way as subsequent decisions have required only the balance of probabilities.[120] This narrowing of the potential of the law has occurred systematically over the past decade.

Acting in parallel to the narrowing of the justifiable notion, judicial interpretation has therefore operated to also limit the potential of related legislative provisions, for example by allowing a justification for unequal pay through a reference to "market forces".[121] Dickens notes the development of the situation whereby employers simply had to claim small advantages in order to render their discriminatory requirement "justifiable" due to the increasing emphasis placed by industrial tribunals upon business necessity as an interpretative adjunct. Again, the situation has only been alleviated, and only to some extent, as a result of the "more robust" interpretation advanced by the European Court of Justice.[122] An objective test of justifying alleged discrimination practices has been formulated in *Bilka-Kaufhaus*.

Furthermore, the initial absence of a specific provision in the *Sex Discrimination Act* (1975) UK outlawing discrimination on the basis of pregnancy (discrimination on the basis of pregnancy must be proved as being on the basis of sex) has exposed one of the most glaring anomalies of

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118 (1980) ICR 144.

119 In that case, the Court of Appeal held that a rule forbidding the wearing of beards in the respondent's chocolate factory was justifiable within the meaning of the section on hygienic grounds - notwithstanding that the proportion of Sikhs who could comply was less than compliance rates of non-Sikhs.

120 *Mandla* referring to *Ojutiku.*

121 As above. On this point, Dickens cites *Enderby v Frenchay Health Authority and Secretary of State for Health* (1991) IRLR 44 as the most recent example.

122 As above, citing *Bilka Kaufhaus v Weber von Hartz* (1986) IRLR 317; *Rainey v Greater Glasgow Health Board* (1987) IRLR 26; *Rinner Kuhn v FWW Spezial-Gebaudereinigung Gmbh and Co KG* (1989) IRLR 493; *Handels-og Kontorfunktionaerernes Forbund 1 Danmark v Dansk Arbejdsgiverforening* (1989) IRLR 532.

the interpretative power of the courts in this area. English courts and tribunals have attempted to measure pregnancy against the male norm and therefore measured such treatment against what might constitute less favourable treatment of a man in "similar circumstances". Yet, by such a view, the legislation is interpreted completely in isolation from the principles of equal opportunity. Again, it has been left to the European Court of Justice to clarify the position.[123] The interaction between English law and the emerging jurisprudence from Europe is a notable source of tension as well as a safeguard against the widely recognised tendency on the part of the British judiciary to narrowly confine the potential for reform provided by the legislation against sex discrimination.

There has recently been a considerable amount of discussion concerning the ambit and effect of anti-discrimination laws but in many respects they appear curiously neglected as subjects of detailed analysis. While there are notable similarities between developments in the field of unlawful discrimination in Australia, America and Britain, commentators stress that it is really only in America that the judiciary has enunciated *theories* of sex discrimination. However, the American situation has in reality involved a more explicit recognition of business necessity: and that necessity does not necessarily involve a business closure should the practice not proceed:

> Justification by business necessity has long been recognised as a defence to the complaint of disparate-impact discrimination. The scope of this defence was considered by the Supreme Court in *New York Transit Authority v Beazer*.[124] The Court explained that the employer need not prove that the practice is absolutely necessary to the survival of the business. All that was required was the demonstration that the challenged employment practice was job-related and that the legitimate goals of the business were significantly served by the practice.[125]

The US Supreme Court appears to currently be in a phase of broadly allowing employers considerable scope to justify indirectly discriminatory practices: this is closer to *Beazer* than to *Griggs*.

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123 Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain" (1991) 18 *Melbourne University Law Review* 277 at 291, citing *Hertz v Aldi Marked KIS* (1991) IRLR 31.

124 (1979) 440 US 568.

125 Moens & Ratnapala, *The Illusions of Comparable Worth* (Centre for Independent Studies, St Leonards 1992) p30.

The Australian judiciary has hovered somewhere in between the American judicial tendency to see statutes as blue-prints for social change and the tendency of its British counterparts towards narrow reliance upon the statutory text. Although similarities exist, the Australian developments must be analysed within their own context. The British interpretation of "justifiable" warrants analysis as a parallel concept that renders conduct lawful that might otherwise constitute discrimination. Nevertheless, the significant development of a jurisprudence revolving around the requirement of reasonableness in Australian indirect discrimination law and practice might set Australian developments apart from overseas interpretations.

The developments in judicial interpretation of the elements of Australian statutory definitions of indirect discrimination appear to manifest a striking combination of legalism and judicial activism. The agenda-setting decision in *Banovic* provided the precedent required by the Equal Opportunity Tribunal of Western Australia and formed a central part of their analysis in the subsequent determination in the case of *Kemp v the Minister for Education and the State School Teachers' Union of Western Australia Inc.*[126] That reasonableness is a specific standard required by the anti-discrimination provisions is not in issue: the judicial interpretation of the standard has been part of the subject of this paper. The central argument advanced here is that the earlier decision of the full Federal Court in *Styles*[127] appeared to incorporate some aspects of that nebulous, and in the context of this legislation surely most inappropriate, legal construct: the reasonable man.[128] This narrow approach has been modified to a large extent by the most recent High Court decision in this area in *Waters v Public Transport Corporation.* As a result of this (and the cumulative effect of previous decisions) it is the overall effect of practices with which we are concerned and simple business efficiency is insufficient. However, the High Court drew different conclusions concerning the reasonableness requirement and all we can state with certainty is that reasonableness means reasonable in all the circumstances of the case.

Notwithstanding the development of a more favourable Australian judicial currency in this area, Rosemary Hunter has argued that the statutory definition of indirect discrimination might be better served by breaking away from the current need for compliance with the technicalities of the statutory

126 (1991) EOC 92-340.

127 (1989) 88 ALR 621.

128 For an analysis of situations where "neither the reasonable person much less the reasonable man standard of care will suffice" see Forell, "Reasonable Woman Standard of Care" (1992) 11 *University of Tasmania Law Review* 1.

proscriptions.[129] The preference is for a statutory model of indirect discrimination that, in taking account of "gender relations", contains an impetus for reform simply by asking if a particular practice (for example, reliance on seniority) serves to perpetuate women's oppression. Hunter recognises that the newness of the concept of indirect discrimination to the legal arena means that the legal meaning, ambit and effect of the concept are still in the process of development,[130] but advances a persuasive argument in relation to the subordination principle, calling for the legislation dealing with discrimination to ask "appropriate questions" about gender relations rather than concentrating on technical compliance with statutory proscriptions.

> If anti-discrimination law enshrined the subordination principle we would simply need to ask whether a particular practice operated to maintain women's subordination. If it did it should be changed.[131]

Recent Australian Statutory and Theoretical Developments

It is interesting to note by way of conclusion the guidelines dealing with indirect discrimination set out in the relevant provision of the recently enacted *Anti-Discrimination Act* 1991 (Qld). The legislation provides in s11(2) that whether a term, condition, requirement or practice is reasonable in this context depends on all the relevant circumstances of the case, including for example: (a) the consequences of failure to comply with the term; (b) the cost of alternative terms; and (c) the financial circumstances of the person who imposes, or proposes to impose, the term. An example is given of a term imposing a height requirement (this would be unreasonable where there is no genuine occupational reason to justify it) and of a term requiring the wearing of a hat (this would have a discriminatory effect on people who are required by religious or cultural beliefs to wear particular headdress). While the examples given are unexceptional in themselves, nevertheless, the legislation clearly seeks, through the provision concerning reasonableness in this context, to forestall precisely the major issues which were the subject of contention in the *Waters* decision. Furthermore, as Tahmindjis has noted, the Queensland Act introduces the concept of

129 Hunter, "Women v *AIS*" (1990) 15 *Legal Service Bulletin* 40 at 41.

130 Hunter, "Stumbling Over Styles" (1989) 14 *Legal Service Bulletin* (No 5) (October) 238 and (No 6) (December) 291.

131 Hunter, "Women v *AIS*" (1990) 15 *Legal Service Bulletin* 40 at 41.

reasonableness in another way: with respect to sexual harassment.[132] Reasonableness is also used in the *Sex Discrimination Act* 1984 (Cth) in relation to sexual harassment and discrimination on the ground of pregnancy.

The recently enacted provisions in the Australian Capital Territory legislation are also of considerable interest and provide, in their greater breadth, a contrast to the provisions in Queensland. The *Discrimination Act* 1991 (ACT) provides in s8(3) that in determining whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include (a) the nature and extent of the resultant disadvantage, (b) the feasibility of overcoming or mitigating the disadvantage, and (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement. The formulation of the reasonableness requirement in these terms might provide a significant impetus for broadening rather than confining the legislation.

In her significant book on indirect discrimination,[133] Rosemary Hunter devotes considerable attention to the interconnections between the structuring of dominant workplace norms within the workplace apparatus and the extent and persistence of indirect discrimination. Hunter contends that:

> It is now well recognised that the phenomenon of structural discrimination arises from the fact that organisational norms, rules and procedures, used to determine the allocation of positions and benefits, have generally been designed, whether deliberately or unreflectively, around the behaviour patterns and attributes of the historically dominant group in public life.[134]

In this respect, Hunter notes that the seemingly appropriate theory of institutional discrimination has not as yet become established in Australia as an "approach to remedying employment disadvantage".[135] Hunter suggests that partly as a result of the entrenchment of male-structured workplace practices and values, inevitably the subordination principle has provided only minimal influence over the patterns and conceptual structures of

132 Tahmindjis, "The New Queensland Anti-Discrimination Act: An Outline" (1992) 22 *Queensland Law Society Journal* 7 at 17.
133 Hunter, *Indirect Discrimination in the Workplace*.
134 As above, p5.
135 As above, p165.

Australian anti-discrimination law. Applying the indirect discrimination framework of analysis means questioning "methods of selection, work organisation and career progression that require workers to have private lives that conform to the dominant 'norm'".[136] While noting the considerable absence of case law dealing with this central tenet of the law, Hunter constructs a picture of the operations and procedures concerning indirect discrimination law in Australia and devotes considerable detail to the interpretation of the "reasonableness" requirement.

As yet, it would appear that the provisions are sadly under-utilised. One of the salient conclusions drawn in Hunter's work concerns the extent to which the research undertaken revealed so "many examples of potentially indirectly discriminatory employment practices and policies" side by side with "a notable dearth of interpretative activity around the statutory provisions".[137] This points to the critical significance of the judicial approach to the interpretation of the law when it is relied upon. A critical question is answered. Reasonableness is counter to policy in anti-discrimination law.[138]

CONCLUSION - IS THE REASONABLE MAN THE RIGHT MAN FOR THE JOB?

As Laura Bennett has written in a related context,[139] the disproportionate reliance by the judiciary upon certain common law concepts can effect an imbalance between the aims and effects of legislation. If the judiciary, for example, import criminal concepts into the interpretation of anti-discrimination law, that works in opposition to the aims of the legislation, in particular by introducing even more stringent problems of proof. It can be argued along similar lines that should the judiciary import notions of the reasonable man - that "excellent but odious character"[140] - into anti-discrimination law, it will serve also as a means of narrowing the aims of the legislation. If anti-discrimination law is to continue to provide a framework for concepts and codes of discriminatory conduct[141] surely

136 As above.

137 Hunter, *Indirect Discrimination in the Workplace* xxii.

138 Thanks are due to Philip Tahmindjis for pointing out this critical issue.

139 Bennett, "Ideology in Australian Judicial Practice: A Non-Reductionist Account of a Jurisdictional Issue in Labour Law" (1989) 17 *International Journal of the Sociology of Law* 207.

140 Vermeesch & Lindgren, *Business Law of Australia* (Butterworths, Sydney 1990) 355.

141 See the observations in *Street v Queensland Bar Association* (1989) 168 CLR 461.

employers must be given no opportunity for reformulating the question within the framework most familiar to them and asking if this is the best man for the job.

Desperately Seeking Solutions

It is now widely recognised that statutory provisions aimed at direct discrimination possess limited capacity to counteract our extensive institutionalised workplace inequalities. Essentially, direct discrimination involves "less favourable treatment of someone on the ground of their sex (or race)".[142] Such a remedy inevitably falls foul of the feminist criticism that it offers only individualised redress. Even apart from that, it involves a costly individual exercise which will be difficult to prove. Indirect discrimination, however, attacks entrenched and institutionalised discrimination: "the concept of indirect discrimination seeks to ensure that employment practices do not have the effect of turning differences into disadvantages."[143]

The strength of indirect discrimination lies precisely in its addressing something that is far broader than direct discrimination: the structural inequalities that cannot be addressed by legislation solely focused on direct discrimination. In her detailed analysis of indirect discrimination, Hunter indicates that Australia is witnessing an increasing refinement of the concept and grounds of discrimination as well as the development of a range of measures to deal with it. Hunter recognises the extent to which her own research revealed "many examples of potentially indirectly discriminatory employment practices and policies" side by side with "a notable dearth of interpretative activity around the statutory provisions"[144] dealing with indirect discrimination. Yet those statutory provisions possess political empowerment.

A broader focus upon indirect discrimination cannot necessarily alleviate many women's undoubted fears that they will be labelled "troublemakers" and "whingers" and "disloyal" should they lodge a direct discrimination complaint. These are the terms that can reinforce the ideological functions of "merit" and "ability" and "excellence". Taken in combination, these terms form part of the continuum of structural obstacles that can immobilise women even as they recognise their defensive position. The problematic

142 Palmer & Poulton, *Sex and Race Discrimination in Employment* (Legal Action Group 1987) xxxvi.

143 Hunter, "Women v *AIS*" (1990) 15 *Legal Service Bulletin* 40.

144 Hunter, *Indirect Discrimination in the Workplace* xxii.

question of proof compounds the issue - after all, it is always possible that we're just *not quite good enough.* And it seems quite probable that it is often fear that holds back individual complainants and that the eventual decision to lodge a complaint is based simply upon the feeling that the complainant no longer has anything to lose. Since the legislation does not alter the power imbalance for those in work, there is a risk of feeling that, for as long as you have a job, you just don't argue with people who seem to hold all the cards.

It has already been mentioned that Howe has drawn attention to Thornton's creative arguments concerning the capacity of anti-discrimination and affirmative action laws and measures to prevent the occurrence of "future harms". Such an argument encompasses the need for these measures to extend beyond the individualised impact of the civil law model to "foreclose the possibility of harmful conduct of a general kind".[145] Howe's own argument is instructive, for it represented an advance in 1987,[146] in suggesting that we seek to "revisit the conceptual terrain"[147] of social injury and to thereby reconstruct and redefine concepts of discriminatory conduct and organisation.

Yet the difficulty of achieving that goal within the framework of employee-employer relations still characterised by an overwhelming management prerogative remains perennially problematic. Women are being harmed, as a group, because whatever individual successes may say, and whatever legislation may stand on the books, the figures still indicate the extent to which they have not advanced to senior levels of employment. We must continue to maintain the inroads into management prerogative that have been effected to the ever-present right to hire and fire. Equally importantly, we must challenge the discriminatory effects of many workplace practices and procedures. The opportunity to damage and discriminate can be challenged both through greater use of the law against indirect discrimination and a greater focus upon broad concepts of ethical decision-making and behaviour at work.

145 Howe, referring to Thornton, "Affirmative Action and Higher Education" in Sawer *Program for Change: Affirmative Action in Australia* p123.

146 Howe, "'Social Injury' Revisited: Towards a Feminist Theory of Social Justice" (1987) 15 *International Journal of the Sociology of Law* 423.

147 At 424.

Can International Obligations Help?

This paper has been concerned with Australia's domestic laws dealing with discrimination and the interpretation of those laws. It endeavours now to set those laws against the background of the 1979 *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW). It has endeavoured to assess the current state of the practical utility of those laws. It concluded with a somewhat pessimistic view of the effectiveness of the law while suggesting more optimistically that should the reasonableness requirement in indirect discrimination law be changed, this might generate more utility to those provisions. The paper suggests that it is arguable that an increased reliance upon indirect discrimination provisions will assist us in meeting our international obligations in this area more comprehensively.

Background to the Commonwealth Law

First, some background information from the international perspective to the legislation. The Commonwealth Constitution permits only limited powers in this area. The Commonwealth's power to enact laws to eliminate discrimination against women stems from s51(xxix) of the Constitution, which is the external affairs power. Under this power the Commonwealth can enact laws which give domestic force to international agreements to which Australia is a party.[148] As Graycar and Morgan note, the sexual harassment provisions in the *Sex Discrimination Act* 1984 (Cth), in so far as they apply to women generally, are based on the CEDAW and to be valid the legislation needs to conform reasonably closely to the terms of the Convention.[149] Our law appears to have done this - O'Neill and Handley have recently observed for example, that "*The Sex Discrimination Act* 1984 (Cth) is based primarily on the Convention on the Elimination of All Forms of Discrimination Against Women."[150]

One aspect of the legislative conformity with the terms of the Convention was tested in *Aldridge v Booth*.[151] Spender J was confronted with the argument that since the sexual harassment provisions form formulated in s28 dealt only with sexual harassment of women, they could not implement

148 Graycar & Morgan, *The Hidden Gender of Law* p371, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania* (1983) 158 CLR 1.

149 At 371.

150 O'Neill & Handley, *Retreat From Injustice: Human Rights in Australian Law* p336.

151 (1988) EOC 92-222

Article 15(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women*. By that article, State Parties are to "accord women equality with men before the law".

Spender J dealt with the claim by arguing that the prohibition against women but not against men, does not mean that there has been a failure to give effect to the Convention. The fact that the legislation does not address sexual harassment of men in the workplace is irrelevant to the question of whether the Act gives effect to the Convention.[152] The effect of this decision has recently been referred to by Leon in an incisive article dealing with special measures under the law. Leon notes that in some areas, where the only constitutional support is the external affairs power, rather than one of the heads elaborated upon in s9 of the *Sex Discrimination Act* 1984 (Cth), it is likely that the *Sex Discrimination Act* 1984 (Cth) does only prohibit discrimination against women because the application of the SDA in those circumstances is limited to implementing the CEDAW obligations. Leon suggests that the current special measures provision, which has been used by men to challenge "women only" initiatives, fails along with the rest of our law to achieve CEDAW objectives: the law is based upon the essentially liberal model which has at its essence formal sex equality and not the advancement of women.[153] Nicola Lacey has also suggested that the legislation against sex discrimination is underpinned by the "important underlying principle" of "equality of opportunity" and that this principle simply does not allow for the recognition of "the factors implicated in women's oppression".[154] For Lacey, "no concept of discrimination which is based exclusively on formal equality can take proper account of aspects of women's different position resulting from prior discrimination and disadvantage in spheres which fall outside the relatively limited ambit of the legislation".[155] Lacey advocates a re-ordering rather than denial of the value of anti-discrimination legislation.

By this view, the normative concepts must be recaptured and reworked from a feminist perspective. Such an approach would mean a radical reshifting of the reform strategy and one which would encompass a far greater range of women.

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152 *Aldridge* v *Booth* (1988) EOC 92-222 (headnote).

153 Leon, "W(h)ither Special Measures"(1993) 1 *The Australian Feminist Law Journal* 89 at 102.

154 Lacey, "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" (1987) 14 *Journal of Law and Society* 411 at 420.

155 At 413.

> We must continue to struggle for a proper emphasis on changes to material conditions which both reflect and consolidate sexism and women's disadvantage by mechanisms we are slowly beginning to understand. And we must campaign for politics which reach a much broader range of women - particularly those such as black women, working-class women, and single mothers - who suffer specific disadvantages and discriminations.[156]

Abandonment of Formal Equality Measures?

Lacey suggested nearly ten years ago that we could argue for the abandonment of formal equality legislation and the adoption of a specific Act of Parliament prohibiting discrimination against women. This would be aimed at "attaining equality in terms of some more substantive measure, such as resources in the longer term".[157]

What Lacey is referring to and attempting to confront is the "false symmetry" which underpins the ideal of equality reflected in the CEDAW. Shelley Wright has specifically addressed this issue in the context of human rights and women's rights. In a persuasive paper published in 1993, Wright asserted that the CEDAW ideal of equality is one of "sameness" with men, one which "accepts the validity of a male standard as 'human' and indirectly silences or subverts the value of specifically female experiences, such as maternity, which men do not directly share".[158] Wright's conclusion is also that the concept of women's rights must be broadened from its narrow equality base formulated around the specific rights framed within one Convention:

> There is an urgent need to put economic, social and cultural rights as they affect women, children and men at the top of the international agenda instead of close to the bottom. Until major problems of poverty and underdevelopment of women, social ostracisation and political powerlessness, and the maintenance of women's primary role as reproducers and

156 At 419.

157 As above.

158 Wright, "Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women" in Mahoney & Mahoney, *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers, Boston 1993) at 75.

> caregivers are dealt with, "human" rights cannot be fully "human".[159]

By way of conclusion, Leon's critical contentions warrant consideration. Leon asserts that the philosophy of legal liberalism that underpins our anti-discrimination law will always stymie its potential effect and limit its ability to bring about substantial change to patterns of inequality and disadvantage. The focus of the law upon "equal opportunity" rather than "equality of outcomes"[160] is an inevitable result of legislation built upon "gender-neutral sex equality".[161] Leon's conclusion heralded the conclusion in this paper too: "Reform of the discrimination legislation is essential."[162]

Perhaps a Broader Proscription of Discrimination as Unlawful?

However, another view might be that to genuinely and effectively implement our international obligations, Australia might amend the law to grant lawful protection to equality. This would encompass a shift away from procedural rights to a "positive, substantive right to equality or freedom from discrimination"[163] The current law, unlike the *Racial Discrimination Act*, operates within narrow confines and does not provide for a right to equality before the law or generally provide proscriptions rendering discrimination unlawful.[164] Once it is recognised that the discrimination legislation needs changing we may ask if this might not be one way forward.

159 At 88.
160 Leon, "W(h)ither Special Measures"(1993) 1 *The Australian Feminist Law Journal* 89 at 103.
161 At 111.
162 At 113.
163 Lavarch Report at 10.1.42.
164 Lavarch Report at 10.1.41.