

AFFIRMATIVE ACTION, SPECIAL MEASURES AND THE SEX DISCRIMINATION ACT

JULIE O'BRIEN*

I INTRODUCTION

Affirmative action aims to redress historic and lingering deprivations of the basic civil right to equality. It encompasses a wide range of proactive measures designed to overcome a history of exclusion and discrimination against women, racial minorities and others born into groups or communities that disproportionately experience poverty, unemployment and ill health.¹ It includes any program that takes positive steps to enhance opportunities for disadvantaged groups.

Although the term 'affirmative action' is probably more widely known, international law uses the term 'special measures' to describe such programs and in Europe such measures are described as 'positive action'. The measures may be 'soft' and encounter little resistance, for example, images of women in recruitment material for male dominated occupations and the encouragement of women to apply for such positions. Also in the affirmative action arsenal are 'hard' measures including goals, preferences and quotas that might involve reserving a specific number of positions exclusively for women. Despite the ongoing disadvantage suffered by women and the relatively long period in which these 'hard' or strong measures have been applied to meet this disadvantage, these measures continue to be controversial.

Implicit in the concept of affirmative action is the notion that substantive equality requires more than the simple termination of discriminatory practices. It requires programs to correct or compensate for past or present discrimination, or to prevent discrimination from recurring in the future.² The *Sex Discrimination Act 1984* (Cth) ('SDA') permits the use of affirmative action in these terms by providing that a person may take 'special measures' for the purpose of achieving substantive equality between men and women. It is the scope and limitations of

* Senior Legal Officer, Human Rights and Equal Opportunity Commission. The author would like to thank Craig Lenehan for his ideas and comments on this paper. The views in the paper are the author's own and do not necessarily represent the views of the Commission.

1 Ruth Ginsburg and Deborah Merritt, 'Affirmative Action: An International Human Rights Dialogue' (1999) 54 *Record of the Bar of the City of New York* 279, 281.

2 See United States Commission on Civil Rights, *Statement on Affirmative Action* (1977) 2.

the special measures provision within the *SDA* that will form the subject of this discussion.

II THE LEGISLATIVE FRAMEWORK

Sex discrimination is defined in Part I of the *SDA* as taking two forms, generally known as direct discrimination³ and indirect discrimination.⁴ Section 7D of the *SDA* contains a carve-out to these definitions of discrimination by providing that a person may take special measures for the purpose of achieving substantive equality between, inter alia, men and women. A person does not discriminate against another person by taking special measures authorised by s 7D of the Act.⁵ The section does not authorise the taking of special measures for a purpose that has been achieved.⁶

Section 7D was introduced into the *SDA* by the *Sex Discrimination Amendment Act 1995* (Cth). That Act repealed s 33 of the *SDA*, which provided that an act that would otherwise be discriminatory for the purposes of the *SDA* was not unlawful if a purpose of that act was to ensure equal opportunity. Section 33 therefore operated to provide an exemption to the anti-discrimination provisions of the *SDA* and treated special measures as discriminatory, but lawful. This reflected the fact that the legislation was structured on an 'equal treatment' model under which any difference in treatment was *prima facie* discriminatory.⁷

The introduction of s 7D in 1995 therefore made two significant changes.

First, it provided that special measures were not to be treated as exempted forms of discrimination; instead they would be considered as part of the threshold question of whether there was discrimination at all. Section 7D provides that acts that are special measures are not discriminatory and thus do not require any exemption. Consequently, the special measures provision was moved from the exemptions section of the *SDA* to the definitions section, ensuring that it was presented and understood as an expression of equality rather than an exception to it.⁸

Second, the focus of the provision shifted from an emphasis on the attainment of equal opportunities, which ignored the historical and structural barriers to equality, to measures aimed at achieving substantive equality. To achieve substantive equality, it is necessary to look at the end result of a practice that purports to treat people equally. In this way, structural barriers that prevent a disadvantaged group from attaining real or genuine equality can be taken into account. A narrow or formalistic interpretation of equality will not produce

3 *Sex Discrimination Act 1984* (Cth) s 5(1).

4 *Sex Discrimination Act 1984* (Cth) ss 5(2), 7B.

5 *Sex Discrimination Act 1984* (Cth) s 7D(2).

6 *Sex Discrimination Act 1984* (Cth) s 7D(4).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2456 (Second Reading Speech, *Sex Discrimination Amendment Bill 1995* (Cth)).

8 *Ibid.*

equality in fact or equality as an outcome and may entrench existing discrimination.⁹

III JUDICIAL CONSIDERATION OF THE SPECIAL MEASURES PROVISION

Section 7D of the *SDA* was considered for the first time by the Federal Court of Australia in a decision handed down on 24 September 2004: *Jacomb v Australian Municipal Administrative Clerical and Services Union*¹⁰ ('*Jacomb*'). The Sex Discrimination Commissioner appeared as amicus curiae in this matter and made submissions in relation to the interpretation of s 7D. The former special measures provision, s 33, had been considered by the Human Rights and Equal Opportunity Commission,¹¹ the Australian Conciliation and Arbitration Commission¹² and the Australian Industrial Relations Commission,¹³ but the case law on s 33 was of little assistance as that section was in terms substantially different from s 7D.

In *Jacomb* the branch rules of a union provided that particular elected positions on the branch executive and at the state conference were available only to women. A male applicant challenged the rules, alleging that they discriminated against men and were unlawful under the *SDA*. The essence of the applicant's objection to the rules was that the union policy of ensuring 50 per cent representation of women in the governance of the union (which was the basis of the quotas within the branch rules) exceeded the proportional representation of women in certain of the union branches. Consequently, women were guaranteed representation in particular branches of the union in excess of their membership to the disadvantage of men. The union denied that the applicant had been unlawfully discriminated against and submitted that the branch rules complained of were special measures designed to achieve substantive equality between men and women in accordance with s 7D.

Justice Crennan found that the branch rules were special measures within the meaning of s 7D. Her Honour's judgment provides useful guidance as to the scope and interpretation of the special measures provision in the *SDA*.

IV SCOPE AND LIMITATIONS OF THE SPECIAL MEASURES PROVISION

The special measures provision in the *SDA* is limited, in its terms, by a test as to purpose. Section 7D(1)(a) provides that a person may take special measures for the purpose of achieving substantive equality between men and women.

9 Ibid. See also Explanatory Memorandum, Sex Discrimination Amendment Bill 1995 (Cth) 9.

10 [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004).

11 *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC ¶92-417.

12 *Re Australian Journalists Association* (1988) 27 IR 207.

13 *Re Municipal Officers' Association of Australia* (1991) 38 IR 13.

Section 7D(3) makes clear that the achievement of substantive equality need not be the only, or even the primary, purpose of the measures in question. Measures fall fairly within the section if the achievement of substantive equality was one of the purposes for which they were taken.

Accordingly, any application of s 7D requires an assessment of whether the measure in question was taken for the purpose of achieving substantive equality. It was accepted by Crennan J in *Jacomb* that the test as to purpose is a subjective test.¹⁴ Her Honour stated that 'it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory'.¹⁵ The subjective element of s 7D will not be met if the person or entity taking the special measure lacks the requisite purpose or if a purported purpose is shown not to be held on a good faith basis. Evidence regarding the existence or otherwise of substantive inequality and the utility of the measure taken will be relevant in considering whether such a purpose is genuinely held. In applying this test, her Honour was satisfied that the union believed that substantive equality between its male and female members had not been achieved and that solving this problem required having women represented in the governance and high echelons of the union so as to achieve genuine power sharing. Justice Crennan commented that it 'was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under s 7D (subs 7D(3))'.¹⁶

Section 7D also requires the court to consider the 'special measure' objectively. Justice Crennan appeared to accept the submission of the Sex Discrimination Commissioner that s 7D requires the court to assess whether it was reasonable for the person taking the measure to conclude that the measure would further the purpose of achieving substantive equality.¹⁷ In making this determination the court must at least consider whether the measure taken was one which a reasonable entity in the same circumstances would regard as capable of achieving that goal. The court ought not substitute its own decision, but should consider whether in the particular circumstances, a measure imposed was one which was proportionate to the goal. Consequently, in addition to the subjective test as to purpose, it appears that s 7D is limited by a consideration of the proportionality of the particular measure sought to be employed.

This approach is consistent with the approach of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') to the construction of the phrase 'special measures' within the text of the *Convention on*

14 [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004) [61], [64].

15 Ibid [47].

16 Ibid [28].

17 Ibid [34], [62], [65].

*the Elimination of All Forms of Discrimination against Women*¹⁸ ('CEDAW'). Article 4(1) of CEDAW deals with special measures and states as follows:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The CEDAW Committee has identified the purpose of art 4(1) as

to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women.¹⁹

The CEDAW Committee, however, views special measures as being more than simply actions taken on a good faith basis to achieve a particular purpose. The Committee indicated that the meaning of 'special' refers to the fact that the measures are designed to serve a specific goal.²⁰ The Committee has emphasised that a degree of rigour is required in the consideration and implementation of such measures. The measures must be designed, applied and evaluated against the background of the specific nature of the problem that they are intended to address.²¹ Such measures must be justified by reference to the 'actual life situation' of the disadvantaged group and the reasons for choosing one type of measure over another must be able to be explained.²²

The approach recommended by the CEDAW Committee suggests that in the context of s 7D, the term 'special measures' requires a closer degree of scrutiny

18 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). CEDAW is set out in the Schedule to the *Sex Discrimination Act 1984* (Cth). The CEDAW Committee is the expert body with responsibility for considering the progress made in the implementation of CEDAW: art 17(1). The Committee considers reports prepared by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to CEDAW and the progress made by States Parties in that respect: art 18. It also has the power to make 'suggestions and general recommendations' based on that material: art 21(1).

19 *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 59th sess, Supp No 38, [15], UN Doc A/59/30 (2004). The General Recommendations made by the CEDAW Committee are interpretative comments which develop analysis of the articles of CEDAW. Australian courts have accepted that guidance as to the meaning and effect of international conventions may be gathered from the writings and decisions of foreign courts and expert international bodies: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392 (Mason CJ), 396–7, 399–400 (Dawson J), 405 (Toohey J), 416 (Gaudron J), 430 (McHugh J); *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, 117 (Gummow J); *Commonwealth v Hamilton* (2000) 108 FCR 378, 388 (Katz J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ). See also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 294–5 (Lord Scarman). For examples of references to the jurisprudence of human rights treaty bodies, see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J, with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J); *Johnson v Johnson* (2000) 201 CLR 488, 501 (Kirby J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ); *Commonwealth v Hamilton* (2000) 108 FCR 378, 387 (Katz J); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

20 *Report of the Committee on the Elimination of Discrimination against Women*, above n 19, [21].

21 *Ibid* [33].

22 *Ibid* [28].

of the *problem* (substantive inequality between men and women) and the *means* of addressing that problem (the special measure adopted in the particular case). This approach is broadly consistent with the High Court's approach to special measures in the context of the *Racial Discrimination Act 1975* (Cth). In *Gerhardy v Brown*,²³ Brennan J discussed the Court's role in determining the necessity for and purpose of a special measure. Brennan J stated as follows:

To determine whether the measure in question is intended to remove and is necessary to remove inequality in fact (as distinct from formal inequality), the circumstances affecting the political, economic, social, cultural and other aspects of the lives of the disadvantaged group must be known and an opinion must be formed as to whether the measure is necessary and likely to be effective to improve those circumstances.²⁴

Although the text of, and commentary on, *CEDAW* informed much of Justice Crennan's analysis in *Jacomb* in relation to the construction of s 7D, her Honour did not expressly adopt the above reasoning that was set out in the submissions of the Sex Discrimination Commissioner. Her Honour, however, acknowledged that the *SDA* gives effect to certain provisions of *CEDAW*,²⁵ and accepted that in the absence of any contrary intention, s 7D should be construed in accordance with the method applicable to the construction of the corresponding words in the Convention.²⁶ Her Honour stated:

It is clear that in adopting and implementing Art 4 para 1 of the Convention, Parliament chose to use some of the same words in s 7D as used in the Convention ... The phrase 'special measures' ... cannot be understood without recognising that the *SDA* is implementing the express wording of the Convention in this regard or without recognising the context, object and purpose of the Convention.²⁷

Finally, it should be noted that s 7D(4) provides that the taking, or further taking, of special measures for the purpose of achieving substantive equality is not permitted once that purpose has been achieved. Similarly, in art 4(1) of *CEDAW* 'special measures' are described as 'temporary' and it is stated that 'measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved'. The *CEDAW* Committee has observed that

the duration of a temporary special measure should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time. Temporary special measures must be discontinued when their desired results have been achieved and sustained for a period of time.²⁸

23 (1985) 159 CLR 70.

24 Ibid 137.

25 *Sex Discrimination Act 1984* (Cth) ss 3(a), 9(10).

26 [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004) [37], [40]–[42], citing *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980); *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 265; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 238–41 (Dawson J), 251–6 (McHugh J). There may be a need to consider both the text and the object of *CEDAW*, and extrinsic materials which reveal *CEDAW*'s object and purpose: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 231–2 (Brennan CJ).

27 *Jacomb* [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004) [40]–[42].

28 *Report of the Committee on the Elimination of Discrimination against Women*, above n 19, [20].

This gives rise to the question: when can it be said that measures are no longer authorised because their purpose has been achieved?

The judgment of Crennan J in *Jacomb* provides little guidance on this point. Her Honour stated as follows:

having regard to the inflexibility of the quotas and the express provisions of subs 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed ... However, rr 5 and 9 cannot remain valid as a special measure beyond the 'exigency' which called them forth.²⁹

It may be that it is a practical consequence of employing special measures that individuals or entities need to monitor whether the special measures they have employed continue to be required for the purpose of achieving substantive equality. The nature of such monitoring and the regularity with which the question may need to be revisited would depend on the circumstances in which the special measure is applied. In *Jacomb*, where the special measure was in the nature of a quota system for elected positions, it might be expected that the regularity of the assessment of whether substantive equality had been achieved would occur at least prior to each election and that the degree of rigour applied to the assessment would be high, due to the fairly inflexible nature of quota systems. Her Honour did not, however, draw any conclusions in this regard.

V QUOTAS AS A SPECIAL MEASURE

There are many types of measures, depending on the circumstances and the substantive inequality to which they are addressed, which might reasonably be regarded as measures that may further the purpose of achieving substantive equality, and which, therefore, meet the description of special measures within the meaning of s 7D. In considering the meaning of 'measures' within the formulation 'special measures', the *CEDAW* Committee has stated that it encompasses a wide range of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach programs, preferential treatment, targeted recruitment and promotion, numerical goals connected with time frames, and quotas. The *CEDAW* Committee indicated that the choice of a particular measure depended on the specific goal it aimed to achieve.³⁰ Section 7D does not, by its terms, define particular measures as falling outside the scope or concept of special measures.

In *Jacomb*, Crennan J interpreted s 7D as accommodating the taking of 'hard' forms of affirmative action so long as the particular measure was proportionate to the goal sought to be achieved. The measure upheld as a 'special measure' in *Jacomb* was an inflexible quota system, reserving a number of elected positions exclusively for women. No discretion was reserved for the consideration of

29 See *Jacomb* [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004) [65].

30 *Report of the Committee on the Elimination of Discrimination Against Women*, above n 19, [21]–[22].

particularly worthy and/or popular male candidates. Justice Crennan stated that the phrase 'special measures' includes affirmative action measures which confer a benefit on a group for the purpose of achieving substantive equality.³¹

This approach differs from that taken in the European Union and in the United States (albeit in the context of a different framework) where courts have rejected the use of bare numerical quotas or inflexible quotas imposed to effect affirmative action. For example in *Regents of the University of California v Bakke*,³² the United States Supreme Court held that a school's admission program that reserved 16 of the 100 positions in the class for minority students was unconstitutional. More recently in *Gratz v Bollinger*,³³ the Supreme Court held that a university admission policy that awarded minority students 20 points of the 100 points needed to guarantee admission violated the equal protection clause of the *United States Constitution*. Similarly in the European Union, the Court disallowed a law which gave women with the same qualifications as male candidates in the public service automatic priority for employment and promotions in sectors in which women were under-represented.³⁴

However, the jurisprudence in both these jurisdictions indicates that softer or more flexible forms of affirmative action, where the minority status is considered as a 'plus factor', rather than the sole factor, for employment opportunities or university admission policies, may be countenanced.³⁵ For example, in *Marschall v Land-Nordrhein-Westfalen*³⁶ the Court of Justice of the European Communities upheld a rule which required priority to be given to female candidates where there were fewer women than men at certain levels in the public service, and both female and male candidates were equally qualified, unless reasons specific to the individual male candidate tilted the balance in his favour. The critical aspect of the rule was its flexibility in that it retained the capacity to give special consideration to exceptional male candidates. The Court also upheld as valid a flexible quota system (where the quotas were not automatic or unconditional) in *Badeck v Hessischer Ministerpräsident*.³⁷ It appears from the jurisprudence that, in the European Union, special measures are upheld where they do not automatically or inflexibly exclude other candidates from consideration.

VI CONCLUSION

In Australia, a cautious stance has been adopted in respect of affirmative action initiatives of all kinds – by legislatures and courts as well as by employers. The *Equal Opportunity for Women in the Workplace Act 1999* (Cth), which replaced the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth),

31 *Jacomb* [2004] FCA 1250 (Unreported, Crennan J, 24 September 2004) [60].

32 438 US 265 (1978).

33 539 US 244 (2003).

34 *Kalanke v Freie Hansestadt Bremen* (C-450/93) [1995] ECR I-3051.

35 *Grutter v Bollinger*, 539 US 306 (2003).

36 (C-409/95) [1997] ECR I-6363.

37 (C-158/97) [2000] ECR I-1875.

is modest legislation.³⁸ Moreover, the very structure of anti-discrimination legislation in Australia is based on an individual complaint-based model where class-wide remedies have not been ordered by tribunals and courts. In this environment, s 7D provides a welcome opportunity to implement measures aimed at accelerating substantive equality. The section is of course limited in its terms by a test as to purpose and the choice of a particular measure may be restricted by reference to the particular goal sought to be achieved and considerations of proportionality. Nevertheless, the terms of the special measures provision are sufficiently broad to cover a range of actions and to accommodate both 'soft' and 'hard' forms of affirmative action. Section 7D should thus be seized as a vehicle to pursue the goal of substantive equality and to effect the structural and cultural changes necessary to correct past and current forms and effects of discrimination.

38 Margaret Thornton, 'Affirmative Action, Merit and Police Recruitment' (2003) 28 *Alternative Law Journal* 235, 236.