

THINKING ABOUT EQUALITY

REG GRAYCAR* AND JENNY MORGAN**

I INTRODUCTION

The *Sex Discrimination Act 1984* (Cth) ('SDA'), now 20 years old, is widely seen as the law that aims to 'enshrine legal equality' for women in Australia.¹ Others in this *Forum* will be discussing particular aspects of that Act and its operation during that period, but our task here is to stand back from the *SDA* and to consider what we mean by 'equality' and interrogate the ways in which equality might be understood when used in the context of the *SDA*. This is because, while the term is used frequently and widely, equality is a concept with a number of different meanings. In this discussion, we will outline some of the different ways the concept has been understood and applied, and then speculate on why the notion of formal equality, or treating men and women the same, continues to have such purchase in Australia.

Recently, we published the second edition of our text, *The Hidden Gender of Law*, which, while it has only one chapter specifically devoted to 'equality', is nonetheless centrally concerned with the meaning of that concept.² Following the publication of the book, we were asked to reflect on the ways in which feminist legal scholarship has influenced (or failed to influence) developments in the substantive law, in the light of the 12 years that had elapsed between the publication of the first and second editions of *The Hidden Gender of Law*.³ We used a number of examples from our joint and several current projects, together with some direct reflections on the two editions of our book, to fulfil our brief. What united our examples was the theme of equality. We examined the persistence of an understanding of equality as merely formal equality or, at best, subject to a 'differences approach'.⁴ We also looked at whether we had

* Professor of Law, University of Sydney.

** Professor of Law and Deputy Dean, University of Melbourne. This is a revised and modified version of our article, Reg Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20 *Australian Feminist Law Journal* 23.

1 See generally Jenny Morgan, 'Equality Rights in the Australian Context: A Feminist Assessment' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994).

2 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002).

3 For our reflections on this theme, see Reg Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20 *Australian Feminist Law Journal* 23.

4 See below Part II(B).

succeeded in reconceptualising some of the harms that happen to women (and other outsiders) as gendered harms, that is, as legal claims that are predicated upon a recognition of (in)equality.⁵

II DIFFERENT UNDERSTANDINGS OF EQUALITY⁶

A Formal Equality, or Gender Neutral Treatment

One approach, known as formal or rule equality, sees equality as a matter of gender neutral treatment: women and men are to be treated exactly the same in all circumstances. An advantage of this model is its simplicity: no law may validly distinguish between women and men in any way.⁷ It is also politically acceptable as it falls squarely within a liberal political paradigm. And, it does convey the important message that women should not be distinguished as 'other'. However, it has some important deficiencies. Historically, women and men have not been treated identically. Treating them exactly the same now may only reinforce the already existing disadvantage of women. This model also has nothing to offer where there is no comparable male experience by which to claim women's right to identical treatment. Nor can it respond to structural disadvantages faced by women. Indeed, it may play an important role in further entrenching those disadvantages. As Canadian Professor Liz Sheehy has suggested, 'unequal gender relations thrive when the rhetoric of gender neutrality denies their existence'.⁸

B The Differences Approach

A second approach to equality recognises that women do not necessarily have the same experiences as men. It acknowledges women's differences from men and suggests that women and men should not be treated identically in all circumstances, and that women's differences from men need special recognition. Sometimes recognising differences between women and men, such as the capacity to bear children, can promote women's equality. This can assist in the provision of employment-related benefits such as maternity leave. But a problem with the way in which differences between women and men have been dealt with by law is that 'different' treatment has more often meant less favourable treatment for women. The approach also seems to assume that differences between women and men will always justify different rules. In this way, women

5 While we focus here on gender inequality, the same analysis applies to other issues of the unequal distribution of social power, such as racial hierarchy or discrimination on the basis of sexual orientation. That is, despite some claims to the contrary, white people in Australia generally do not experience inequality because of their whiteness, and heterosexuality is not a position of disadvantage.

6 More detailed accounts of these different ways of dealing with equality can be found in Elizabeth A Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (1987); Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69, pt II (1994) ch 3; Graycar and Morgan, *The Hidden Gender of Law*, above n 2, ch 3.

7 Sheehy, above n 6, 3.

8 Ibid 41.

can be further disadvantaged because discriminatory practices will be justified by resort to women's differences from men. For example, this approach has been used to exclude women from certain jobs, such as those in the lead industry,⁹ or as prison guards.¹⁰

A number of different labels are sometimes used to describe these approaches: what the Australian Law Reform Commission ('ALRC') in its work on 'equality before the law'¹¹ has described as 'formal equality' or 'gender neutral treatment' is also often known as the 'strict equal treatment' or 'sameness' approach; what is described as the 'differences' approach is often known as 'special treatment'. These terms – 'strict equal treatment' or 'special treatment' – describe what have tended to be seen as the only available options for law: law should either treat women and men in exactly the same way, with formal equality, or it should give women 'special treatment' because of their differences to men. While these were seen as two different approaches, Catharine MacKinnon argued that the differences approach is simply a variant of the formal equality or gender neutrality approach.¹² What they have in common is that both use men as the benchmark: the first requires women to be the *same as* men; while the second stresses women's *differences from* men. Neither challenges maleness as the standard or as involving, in effect, an original entitlement. Emphasising women's similarities to, or differences from, men has the effect of distracting attention from the major issue of systemic inequality between women and men. That is, it is not difference as such that has led to inequality for women, but rather, differences between women and men have been relied on to disadvantage women.¹³

C Subordination, Dominance or Disadvantage Approach

In the 1980s, Catharine MacKinnon devised an alternative approach, commonly referred to as the subordination or dominance approach, or the disadvantage approach. This analyses inequality, not as an issue of whether women are the same as or different from men, but as the consequence of the relative distribution of power between women and men.¹⁴ It looks at laws, policies and practices to determine whether they operate to maintain women in a subordinate position. In order to apply this understanding of equality it is necessary to engage in a careful analysis of the reasons for a particular law or

9 See *Mount Isa Mines Ltd v Marks* (1992) 35 FCR 96. Cf *Automobile Workers v Johnson Controls Inc*, 499 US 187 (1991).

10 *Dothard v Rawlinson*, 433 US 321 (1977) is a good example: women were excluded from jobs as prison guards on the grounds that they were susceptible to rape.

11 See ALRC, *Equality before the Law: Access to Justice*, Report No 67 (Interim); ALRC, *Equality before the Law: Justice for Women*, Report No 69, pt I; ALRC, *Equality before the Law: Women's Equality*, above n 6.

12 See especially Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989).

13 'Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power': MacKinnon, *Feminism Unmodified*, above n 12, 40.

14 For perhaps the clearest articulation of this, see *ibid* ch 2.

practice including its historical origins and its current social and economic effects on women, that is, how inequality has been created.

Instead of focussing on whether some differences between women and men justify different treatment, this approach looks at the effects on women of a particular legal rule or practice. For example, the fact that women and men have different reproductive capacities should not, of itself, lead to women's lesser social status and limited access to paid work opportunities. However, because caring for children has been seen as a 'woman's role', and most jobs have not been designed to take account of childcare responsibilities, the effect has been to deny women appropriate work opportunities. This, in turn, has led to women occupying a disadvantaged position in the workforce.

The disadvantage approach is concerned with whether a practice or rule has harmed women or has been detrimental to them. In some circumstances, it is convenient to assess this disadvantage by examining the comparative situation of men. To this extent, in practice, it might appear to be similar to the other models of equality, in that it too uses a male comparator. However, the disadvantage approach uses a quite different methodology from the other two models. It is less concerned with formal or abstract notions of rights, or formal similarities or differences between women and men, and more with whether women's lives are characterised by incidents of lesser social power, such as being paid less than men in paid work; having their work undervalued generally; living in poverty after relationship breakdown; and greater vulnerability to violence.

While all three models might have something to offer, depending on the circumstances,¹⁵ we would suggest that the disadvantage approach, or a substantive equality approach, in its focus on outcomes, can best ensure that inequalities are not entrenched.

We started working on *The Hidden Gender of Law*, which grew out of our teaching, in the late 1980s. At that time, MacKinnon's book, *Feminism Unmodified*,¹⁶ had just been released, and Sheehy's influential equality analysis, referred to earlier, had been published,¹⁷ so the critique of formal equality was then well-established. This more complex understanding of equality was focussed on substantive rather than formal equality and it did not take long for that understanding, or at least part of it, to be adopted by a court: the Supreme

15 After all, formal equality secured (at least non-Indigenous) women the vote – Aboriginal women (and men) had to wait until 1967. Similarly, although the *National Wage and Equal Pay Case* (1972) 147 CAR 172 did not lead to women earning as much as men, it was still an important symbolic victory for women – prior to this, wages for men were explicitly structured around the idea of what a man needed to support his wife and children; wages for women were set on the basis that they had no dependants: see *Ex Parte McKay* (1907) 2 CAR 1 ('*Harvester Case*'); Bettina Cass, 'Rewards for Women's Work' in Carole Pateman and Jacqueline Goodnow (eds), *Women, Social Science and Public Policy* (1985).

16 MacKinnon, above n 12.

17 Sheehy, above n 6.

Court of Canada decided *Law Society of British Columbia v Andrews*¹⁸ in 1989. By the time we came to work on our second edition, there was a quite sophisticated understanding of equality in the feminist scholarly literature, yet that understanding has had very limited purchase in courts, at least Australian courts.

III WHY THE PERSISTENCE OF FORMAL EQUALITY IN AUSTRALIA?

Why is the academic critique of equality apparently so immured in the academy and not part of the public debate? While we do not purport to have ‘the answers’, we proffer a few observations. Obviously we do not have a Bill of Rights or indeed any constitutionally-based equality rights in Australia. It could be argued that this absence of some constitutional statement of equality has decreased the opportunities for the development of a complex public discourse about equality. It can be contrasted with the situation in Canada, where the Supreme Court of Canada has developed a strong jurisprudence of substantive equality,¹⁹ and with the emerging jurisprudence of the Constitutional Court of South Africa.²⁰ However, our lack of a constitutionally entrenched right is clearly only a partial explanation for Australia’s judicial failure to engage with substantive equality – the United States has a Bill of Rights and its constitutional jurisprudence has not moved much beyond formal equality.²¹

While we are not sure whether this is a function of the absence of an entrenched equality right, a scan of the footnotes of the Commonwealth Law Reports would suggest that the Australian judiciary does not read much beyond the curial utterances of their ‘fellow’ judges. This lack of exploration of scholarly and contextual literature could be another partial explanation for the persistence of formal equality. We think it is also not completely irrelevant that there is a

18 [1989] 1 SCR 143. In this case, the Supreme Court first set out its substantive view of ‘equality’, subsequently reaffirmed in a number of cases. See also *Law v Canada (Minister for Employment and Immigration)* [1999] 1 SCR 497 (building on developments since *Law Society of British Columbia v Andrews*). Some of the significant ‘post-*Andrews*’ jurisprudence, discussed by the Supreme Court in *Law v Canada (Minister for Employment and Immigration)*, includes: *Symes v Canada* [1993] 4 SCR 695; *Egan v Canada* [1995] 2 SCR 513; *Miron v Trudel* [1995] 2 SCR 418; *Thibadeau v Canada* [1995] 2 SCR 627; *Eldridge v A-G (British Columbia)* [1997] 3 SCR 624; *Vriend v Alberta* [1998] 1 SCR 493.

19 It is possible that this view is one that only those outside Canada, and perhaps especially those despairing of judicial engagement in their own country, might take. For suggestions that the *Canadian Charter of Rights and Freedoms* remains wedded to notions of formal equality, see Diana Majury, ‘The Charter, Equality Rights and Women: Equivocation and Celebration’ (2002) 40 *Osgoode Hall Law Journal* 297. Majury raises the suggestion that, given that equality is a comparative concept, it can only ultimately mean formal equality: at 306. We return to this theme in our concluding comments.

20 See, eg, *Harksen v Lane* 1998 (1) SA 300 (CC), where the court set out the approach to be adopted. This approach has been applied in a number of decisions including *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) and, most recently, *Bhe v Magistrate, Khayelitsha* CCT 49/03 (15 October 2004) (striking down as unconstitutional the law of African primogeniture in succession).

21 See Catharine MacKinnon, *Sex Equality* (2001).

very strong strain of (mythological) egalitarianism in Australia. In short, we Australians apparently think that we do not have a class system, that everyone gets a fair go and that difference is recognised and indeed celebrated. In fact, what we have is assimilation not diversity: multiculturalism means we like the food, and we don't mind you keeping your funny dances, but make sure you move on to become 'just like us', and colonialism or its legacy is overlooked and ignored. Finally, but by no means least, we must remember that formal equality has the great advantage of being simple – it does not take a lot of effort to understand and does not require any disruption in the current distribution of power.

IV SOME THOUGHTS ON EQUALITY IN THE NEXT TWENTY YEARS

It would be nice to believe that 20 years after the introduction of the *SDA*, there is an inexorable progress narrative; that since 1984, things have continued to improve for women and that the *SDA* has had at least some positive role in that. However, it is not so clear that that is the case. In 1993–94, when we participated in the ALRC inquiry into 'equality before the law', two things were particularly important to us. The first was that the understanding of equality used was a substantive one,²² and secondly, at least some of us wanted a statutory equality right that was gendered; one that acknowledged that gender inequality was not a reciprocal 'peas in a pod' issue but was about women's disadvantage.²³ One of our main reasons for arguing in favour of a gendered equality right was that the *SDA*, like many of its overseas counterparts, was being used by men to argue against what they saw as 'inequality', arguments based soundly on formal equality discourses.²⁴ We did have cause to reconsider that commitment to a gendered equality right. By the time we spoke at the Women's Constitutional Convention in 1998,²⁵ it had become painfully obvious that we would not get a raced or gendered equality right and, as the political process was apparently so hostile to any progressive interests, it seemed natural to think of turning to the legal process. And in that context, being able to use a Bill of Rights to challenge government legislation seemed especially attractive, regardless of whether it

22 See ALRC, *Equality before the Law: Women's Equality*, above n 6, ch 3.

23 With Hilary Charlesworth, we articulated this concern in ALRC, *Equality before the Law: Women's Equality*, above n 6, ch 16. For discussion of what we mean by a 'peas in a pod' approach, see Graycar and Morgan, 'Examining Understandings of Equality', above n 3, where we draw on a discussion by Constance Backhouse, 'Bias in Canadian Law: A Lopsided Precipice', in Christine Boyle et al (eds), *R v RDS: An Editor's Forum* (1998) 10 *Canadian Journal of Women and the Law* 159.

24 See, eg, Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (1989); Miranda Kaye and Julia Tolmie 'Discouraging Dads: The Rhetorical Devices of Fathers' Rights Groups' (1998) 22 *Melbourne University Law Review* 162.

25 Jenny Morgan, Reg Graycar and Hilary Charlesworth, 'Equality for Women under the Constitution?' (Speech delivered at the Women's Constitutional Convention, Canberra, 30 January 1998), <<http://pandora.nla.gov.au/nph-arch/H1998-Sep-2/http://www.womensconv.dynamite.com.au/threeppt.htm>> at 5 November 2004.

explicitly recognised the unequal situation of women or Indigenous people, or was gender and race-neutral.

As for a substantive equality right, we had relied extensively on the jurisprudence developed in Canada under its *Charter of Rights and Freedoms*. However, in a review of the first 20 years of the Supreme Court's equality jurisprudence under the *Charter*, Diana Majury demonstrates that there has been an almost complete failure by that Court to engage with socio-economic disadvantage which is increasing and, of course, has a disparate impact on women.²⁶ Most recently in Canada we have seen a move, supported by the courts of some provinces, toward the endorsement of marriage for gay men and lesbians.²⁷ Is this the inevitable outcome of an equality analysis – however substantive it purports to be – that you end up with sameness because our imaginations are unable to transcend comparative notions and, with them, the fixed standards of power and privilege against which we must compare?²⁸

So while we congratulate the *SDA* on reaching its 20th birthday, we query the extent to which it has brought equality to Australian women, rather than having played a role in entrenching the kind of formal equality discourse that has led to claims about 'men's disadvantage'. The signs seem mixed: on the one hand we have a decision like *Proudfoot v Australian Capital Territory Board of Health*,²⁹ where the Human Rights and Equal Opportunity Commission held that to provide women with the health services they need is discrimination (though saved by the 'special measures' provisions); on the other, at least the first application by the Catholic Education Office seeking an exemption from the Act because there were 'not enough' male teachers was rejected with a firm statement that, in effect, rejected formal equality reasoning.³⁰ But at the very least, the mere existence of an Act like the *SDA*, particularly in the absence of any constitutional guarantee of equality, gives us a focus and a framework in which to debate issues of equality.

26 Majury, above n 19.

27 *Halpern v A-G (Canada)* (2003) 172 OAC 276; *Barbeau v A-G (British Columbia)* [2003] BCCA 406 (Prowse, Mackenzie and Low JJ, 1 May 2003). The Supreme Court of Canada is expected to rule on a reference to it about proposed federal legislation later in 2004.

28 For a discussion of why marriage might be considered problematic by some lesbians and gay men, see Ruthann Robson, 'Assimilation, Marriage, and Lesbian Liberation' (2002) 75 *Temple Law Review* 709.

29 (1992) EOC ¶92-417. For an analogous Victorian case, see *Ross v University of Melbourne* (1990) EOC ¶92-290 (a successful challenge to the setting aside of 'women-only' times in the light weights room). Note that the *Sex Discrimination Act 1984* (Cth) was amended in 1994 to provide that if a person takes special measures in order to ensure equality between women and men, a person is taken not to have discriminated: see s 7D.

30 See Human Rights and Equal Opportunity Commission, *Catholic Education Office – Application for Exemption from Certain Provisions of the Sex Discrimination Act 1984* (2003) <http://www.humanrights.gov.au/sex_discrimination/exemption/decision.html> at 5 November 2004. A subsequent application for an exemption was granted: see Human Rights and Equal Opportunity Commission, *Commission Grants Temporary Exemption to CEO after New Application Offers Equal Number of Male and Female Scholarships* (2004) <http://www.humanrights.gov.au/legal/sda_exemption.html#catholic> at 5 November 2004.