COMMENT ON LINDA DICKENS' ROAD BLOCKS ON THE ROAD TO EQUALITY: THE FAILURE OF SEX DISCRIMINATION LEGISLATION IN BRITAIN

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INTRODUCTION: THE PARADOX OF LAW REFORM

The choice of a legislative path as a means of ameliorating the condition of women's working lives is one which is inevitably fraught with ambiguities.[1] Law is not neutral, despite the positivistic myth that it is. It cannot simply take on a radically new set of prescripts and values and instantaneously shed the old ones at the behest of a legislative mandate.

A statutory proscription against sex discrimination is radical because law has played a significant role in constructing men as dominant and women as subordinate in any familial, social or political relationship. Ambiguities arise in pursuing the legislative route, not only because this gendered hierarchization continues to characterize relationships between men and women generally, but also because liberal legalism itself is predicated on the existence of a division between public and private spheres which, in turn, is a metaphor for male and female.[2] Thus, sexual relations are reflected within the very structure of law and then immediately refracted again as though the law were not implicated; the neutral carapace of the law must be maintained at all costs. To compromise this neutrality is to compromise law's legitimacy.

Dickens refers to the 'blinkered approach' of the Sex Discrimination Act 1975 (U.K.) in its failure 'to acknowledge the two-way link between women's domestic and wage labour roles' (p. 294), going on to suggest that little change will occur in women's position in paid employment until these factors are 'recognized and addressed'. While I agree that the linkage between women's domestic and paid work roles is crucial in maintaining women's subordination, I do not believe that the mere recognition of this problem is going to lead automatically to it being addressed. It is certainly not in the interests of the dominant to surrender their roles as the wielders of power and authority. In addition, men have the added advantage of being the 'cared for' in our society, in contradistinction to being the carers, the role ubiquitously assigned to women. This reality represents a powerful, albeit little examined rationale in favour of retention of the status quo. Liberal theory is predicated upon the 'naturalness' of the assignation of women to the private sphere and men to the public.

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1 Thornton, M., 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453.

2 I have expanded upon the significance of the dualism for sex discrimination legislation in 'The Public/Private Dichotomy: Gendered and Discriminatory' *Journal of Law and Society* (forthcoming).

It is a central tenet of liberalism that liberty, equality and justice are realizable only within the public sphere. The law may make forays into the private sphere, as in the case of family law, but its proclaimed regulatory terrain is the public sphere. However, by averring that it does not regulate the private sphere, the state legitimates self-regulation which is likely to connote male dominance. Although the doctrine of coverture no longer prevails, its seeds of invidiousness continue to attach to the married state for women who generally take their husband's name as a symbolic acknowledgement of the fact that their identities have been subsumed within those of their husbands. This 'private' hemisphere of liberalism recognizes that it is acceptable for men to dominate women, although liberalism is presently ambivalent about the extent of this domination.

If the domestic sphere is a site of domination and inequality, cordoned off from sex discrimination legislation, how can equality for women be secured within the public sphere? Equality for men, those who exercise *dominium* within the private sphere, can be secured in the public sphere amongst male peers in order to constitute a political 'society of equals'. But how can those who are subordinate within the private sphere join with their masters in the public sphere to constitute the 'society of equals'? Indeed, women have never been fully accepted as belonging to the society of equals but continue, with a little help from Freud, to be regarded as a subversive and disorderly force within the public sphere.[3] I suggest that the ways in which women are contained and controlled within the workplace are built into the structures of work itself. This epistemological paradox lies at the heart of effecting 'equality' for women through anti-discrimination legislation of the kind found in both Britain and Australia.

The most notable of these structural controls are addressed by Dickens as manifestations of sex discrimination, namely, the sexual segmentation of the workplace and unequal pay, both of which I shall briefly examine within the context of Australian 'equality' initiatives.[4]

ANTI-DISCRIMINATION LEGISLATION

The sexual segmentation of the workforce refers to the fact that the preponderance of women are engaged in predominantly female jobs, while the preponderance of men are engaged in predominantly male jobs. A 1980 O.E.C.D. study revealed that Australia possessed the highest degree of sexual segmentation of 10 O.E.C.D. countries with 84% of the female workforce engaged in predominantly women's work.[5] This work tends to be derivative of the type of work women do in the home for no pay, such as caring for small children, teaching, nursing and cleaning.[6] Just as this essential work is officially undervalued (for instance it does not appear in the computation of the Gross

[3] Pateman, C., *The Disorder of Women: Democracy, Feminism and Political Theory* (1989) 17 ff.

[4] I propose to draw on arguments I have developed more fully in *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

[5] Organisation for Economic Cooperation & Development, *Women and Employment* (1980).

[6] Power, M., 'Women's Work is Never Done — By Men: A Socio-Economic Model of Sex-Typing in Occupations' (1975) 17 *The Journal of Industrial Relations* 225.

National Product), it is also likely to be of comparatively low status and to be paid less than men are paid for comparable work. Like the British sex discrimination legislation on which it was modelled, the Australian legislation is structurally unable to provide a remedy for women engaging in women's work.

As with the British legislation and with civil legislation generally, in Australia the individual complaint-based model is the favoured approach.[7] This means that the individual bears the onus of proving discrimination even if the harm is of a broader structural or institutional nature. The approach accords with the typical model of civil litigation within liberal legalism. This model of harm recognizes an atomised complainant and wrongdoer, linked by a taut causal thread. The context in which the discriminatory harm occurs is irrevelant. The representative complaint, a form of class action, is available for group complaints when the complainant members are similarly situated.[8] However, not only is the action complex and viewed as potentially destabilizing within the Anglo-Australian legal culture, but damages are also not generally available by way of remedy. Consequently, group actions are still inchoate in Australia, as in the United Kingdom.

Fundamental to any complaint is the threshold need to establish that discrimination has occurred, albeit that the formal burden of proof does not arise until a public hearing or inquiry takes place. Although the preponderance of complaints are dealt with at the conciliation level where proof does not have to be formally established, the probative issue can nevertheless influence the conduct of conciliation. Both direct and indirect discrimination are probatively problematic for women in employment.

Comparability is the essence of direct discrimination doctrine. This means that a woman must establish that she was treated less favourably than a man (real or hypothetical) in the same or similar circumstances. Women in sexually-segmented work may be denied a remedy under the legislation because a similarly-situated comparator is not available. Thus, Ms Curtis, who complained because she had to clean the silver, make the coffee and run errands in addition to performing her secretarial duties, was unable to make out a case of sex discrimination.[9] Her argument was that a male secretary would not have had to perform such tasks. However, the Victorian Equal Opportunity Board was not satisfied that there was 'any evidence that Mrs Curtis was given those tasks because she was a woman rather than because T. & G. saw them as part of the role of secretary.' Sex-based harms may therefore be held to be non-existent absent a (male) comparator.

One would think that indirect discrimination, which is concerned with facially-neutral practices that have a disproportionate effect on persons of the opposite sex, might offer more scope for women than direct discrimination in the case of sexually-segmented work. The test for indirect discrimination,

[7] Sex Discrimination Act 1984 (Cth); Anti-Discrimination Act 1977 (N.S.W.); Equal Opportunity Act 1984 (S.A.); Equal Opportunity Act 1984 (Vic.); Equal Opportunity Act 1984 (W.A.).

[8] Sex Discrimination Act 1984 (Cth) s. 69; Anti-Discrimination Act 1977 (N.S.W.) s. 103(2); Equal Opportunity Act 1984 (W.A.) s. 115(2).

[9] *Curtis v. T. & G. Mutual Life Society Ltd.* (Unreported, Victorian Equal Opportunity Board, 3 July, 1981).

however, is so beset with hurdles that its reality belies its promise.[10] There must be a requirement or condition with which a substantially higher proportion of the opposite sex can comply and which is not reasonable.[11] The complainant also must be unable to comply with the requirement or condition. Let us construct an example in respect of secretarial work based on hypothetical facts. Let us posit that the requirement or condition was that promotion to executive status within an organization was dependent upon supervisory experience. If all the women in the organization occupied subordinate and ancillary positions and none occupied supervisory positions, it would be clear that substantially more men than women would be able to comply with the requirement or condition. The sticking point would be whether the requirement or condition was reasonable or not. The fluidity of this well-known legal standard permits it to be used in a particular context so as to maintain the status quo.[12]

The inability of anti-discrimination law to address discriminatory structures such as the sexual segmentation of the labour force operates to reify those very structures. The daunting complexity and technocratic veneer of indirect discrimination also operates to privilege direct discrimination complaints as the norm. The inference is that men and women are similarly situated and that discrimination is aberrant behaviour of a relatively minor nature which can be corrected through the lodgment of individual complaints. Major structural phenomena, such as the sexual segmentation of the workplace, are rendered invisible by the focus on direct discrimination. However, I would not wish to convey the impression that a reconstituted 'effects test' of indirect discrimination would be able to address the class-wide harms emanating from sexual segmentation. There is likely to be resistance towards the notion of rendering an individual employer liable for a systemic harm, the cause of which is deeply embedded within the social consciousness.

Dickens alludes to adherence to the male standard as 'a further weakness in the formulation of equality' (p. 291). But it is more than this. I would argue that anti-discrimination legislation, through its focus on direct discrimination, actually enhances male dominance within the workplace. The benchmark standard against which women and others are differentiated is a white, Anglo-Celtic, heterosexual, able-bodied male standard. If women cannot comply with this standard, no discrimination will be found to have occurred. Thus, discriminatory harms arising from sexual segmentation of the workplace, childcare responsibilities and so on can be dismissed because women are not similarly situated to men. Equality, which is bereft of meaning without reference to a specific context, has been deployed by the dominant to reinforce the *status quo*.

[10] The leading Australian decision on indirect discrimination is *Australian Iron & Steel v. Banovic* (1989) E.O.C. 92-271 (H.C.A.). Although the 31 complainants in this case were ultimately successful, this 'success' came more than 10 years after the lodgment of their initial complaints, and after protracted conciliation proceedings, quasi-judicial hearings and appeals.

[11] Sex Discrimination Act 1984 (Cth) ss 5(2), 6(2), 7(2); Anti-Discrimination Act 1977 (N.S.W.) ss 24(3), 39(3); Equal Opportunity Act 1984 (S.A.) s. 29(2)(b); Equal Opportunity Act 1984 (Vic.) s. 17(5); Equal Opportunity Act 1984 (W.A.) s. 8(2).

[12] See, *e.g.*, *Secretary of the Department of Foreign Affairs & Trade v. Styles* (1989) E.O.C. 92-265 (F.C.A.).

EQUAL PAY

Paying women lower wages than men is not only a major manifestation of discriminatory practices in work, but the payment of low wages ensures that women marry and become dependent on men. Husbands then take 'responsibility' within the private sphere for individual women. The sexual segmentation of the workforce, the rationale for unequal pay for work of equal value, is not only an impediment to the realization of equality for women but it facilitates the continuance of patriarchal relations.[13]

The evidentiary basis for this thesis is directly borne out by the history of wage-setting in both Australia and Britain during the twentieth century. The underlying principle of the Harvester Decision[14] was that the average male worker was a married man with a dependent wife and three children, while the average female worker was a single woman without dependants. For many years, this assumption justified paying women in predominantly female occupations 54% of the male basic wage.[15] The equal pay decisions of 1969[16] and 1972,[17] together with the extension of the minimum wage to female workers,[18] formally brought an end to the family wage concept in Australia. Nevertheless, a wages gap has continued to be apparent with women in full-time employment currently receiving 84% of the male weekly wage (ordinary time earnings).[19]

The fact that Australia has a centralized wage system has been a significant factor in securing somewhat higher wages for women in full-time employment than is the case for British women. In Australia, Federal and State industrial commissions establish award wages. Hence, wages are not dealt with through either anti-discrimination or equal pay legislative machinery. As it stands, women have been the beneficiaries of a centralized system designed to benefit men. The move to enterprize-based bargaining is likely to have a deleterious effect on women's wages. Without the bulwark of the male-dominated Australian Council of Trade Unions (A.C.T.U.) in the conduct of national wage cases, the diminished industrial muscle of women in sex-segregated occupations would inevitably see a decline in women's wages even though the move away from centralized wage fixing is averredly in the interests of the economy.

AFFIRMATIVE ACTION

Affirmative action legislation was enacted in Australia[20] in order to foreclose the possibility of individual discrimination complaints. It was hoped that the

13 Hartmann, H., 'The Family as the Focus of Gender, Class, and Political Struggle: The Example of Housework' in Harding S., (ed.) *Feminism and Methodology: Social Science Issues* (1987) 114.

14 *Ex parte H. V. McKay* (1907) 2 C.A.R. 1.

15 *Federated Clothing Trades v. J. A. Archer* (1919) 13 C.A.R. 647.

16 *Equal Pay Cases* (1969) 127 C.A.R. 1142.

17 *National Wage and Equal Pay Cases* (1972) 147 C.A.R. 172.

18 *National Wage Case* (1974) 157 C.A.R. 293.

19 Australian Bureau of Statistics *Average Weekly Earnings, States and Australia, May 1991*, Catalogue No. 6302-0. This figure falls to 66% in respect of average weekly total earnings.

20 Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth); Public Service Act 1922 (Cth) s. 22B; Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth); Anti-Discrimination Act 1977 (N.S.W.) Pt IXA; Tasmanian State Service (Equal Employment Opportunity) Amendment Act 1990 (Tas.); Public Authorities (Equal Employment Opportunity) Act 1990 (Vic.); Equal Opportunity Act 1984 (W.A.) Pt IX.

proactive approach would also be able to address the structural problems which are not tractable to amelioration by means of individual complaints.

In fact, as Dickens intimates (p. 296), the legislation leaves much to be desired. The focus of compliance is directed towards the filing of annual reports; it is not directed towards substantive compliance. Accordingly, sanctions may be imposed (in the form of naming a transgressor in Parliament) for failure to lodge a report rather than for the failure to develop an adequate programme.

As suggested in the case of complaint-based legislation, the individualized focus of the Anglo-Australian legal system is not capable of addressing class-wide or systemic harms. This problem is not overcome by affirmative action legislation, as responsibility for action rests with individual employers. Just as society at large cannot be held legally liable for all those years of conditioning which have sought to compress men and women into gendered straitjackets, an individual employer cannot unilaterally take responsibility for their correction. For example, the individual 'private sector' employer (one with more than 100 employees)[21] has no legal duty to address its sexually segmented workforce. An enlightened employer may succeed in attracting the occasional woman into a non-traditional job which, while important in breaking down the men's work/ women's work dichotomy in a particular workplace, falls short of a concerted attack on systemic discrimination.

CONCLUSION

The material condition of women's working lives is remarkably similar in Britain and Australia. Improvements in pay have occurred with the increase of the female participation rate but, as Dickens notes (p. 295), structural change has not been a corollary of increased renumeration. Australian sex discrimination legislation is superficially superior to the British with its express proscriptions of discrimination on the ground of pregnancy and sexual harassment and its somewhat better administrative and quasi-judicial machinery. However, as observed by Dickens in her 'First Level of Explanation' (p. 284), the Australian legislation is fraught with similar problems arising from a plethora of legal obstacles and exceptions.

More fundamentally, and consistent with Dickens' analysis of the British situation in her 'Second Level of Explanation' (p. 289), comparability with the white, Anglo-Celtic, male standard is also necessary in Australia in order to make out a case of direct discrimination. The absence of comparability may be used to deny the existence of sex-based harms altogether. Theoretically, indirect discrimination does permit the masculinist structure of work to be addressed, but the difficulty and the fluidity of the quadripartite test have had the effect of privileging direct discrimination as the favoured form. Affirmative action has also failed to live up to its promise with the enactment of toothless legislation.

[21] Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth) s. 7(1)(b).

The inefficacy of sex discrimination legislation arises primarily because any reformist mechanism conceived within a liberal legal paradigm is skewed towards the public sphere. The gendered lives of the private sphere are rendered invisible. The nexus between the two spheres is nevertheless crucial: for men, there has been an essential symbiosis; for women, a burdensome dissonance. As liberal legalism legitimates inequality for women within the domestic sphere, it cannot logically be expected to provide effective mechanisms for fostering equality within the public sphere.