

# An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia

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## I. Introduction

Australia has a host of federal and State laws<sup>1</sup> that prohibit direct and indirect discrimination<sup>2</sup> on the basis of race, sex, marital status, and other attributes<sup>3</sup>.

Direct discrimination is defined in the *Sex Discrimination Act 1984* (Cth) in terms of three elements.<sup>4</sup> The complainant must prove that (i) on a ground prohibited by the Act she or he received (ii) less favourable treatment (in circumstances which are not materially different) than (iii) a person of the opposite sex, different marital status or who is not pregnant, received or would have received.

Direct discrimination cases involve an employer's alleged different treatment of similarly situated individuals. The United States Supreme Court described the essence of disparate treatment or direct discrimination in *International Brotherhood of Teamsters v United States*:

'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favourably than others because of their race, colour, religion, sex, or national origin.<sup>5</sup>

One of the major problems that a complainant may face in direct discrimination is: how can you prove it? The assumption is that a discriminatory intent must be an essential element of the wrong, and that intention, a mental state, is not susceptible to investigation. Of course, lawyers are used to the idea that courts identify intentions as facts. The old cliché — 'the Devil himself knoweth not the thought of man'<sup>6</sup> — has been replaced by another: 'the state of a man's mind is as much a fact as the state of his digestion'.<sup>7</sup> As noted by Willborn,

\* I am grateful for the comments of Ms Sarah Joseph of the Faculty of Law, Monash University.

1 *Racial Discrimination Act 1975* (Cth) s 9(1); *Sex Discrimination Act 1984* (Cth) ss 5, 6 and 7; *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1); *Equal Opportunity Act 1984* (Vic) s 17; *Anti-Discrimination Act 1977* (NSW) ss 7(1), 24(1), 39 and 49; *Equal Opportunity Act 1984* (SA) ss 29, 51 and 66; *Equal Opportunity Act 1984* (WA) ss 8, 9, 10 and 36; *Anti-Discrimination Act 1991* (QLD) s 10; (Australian laws have been modelled on the United Kingdom *Sex Discrimination Act 1975* and *Race Relations Act 1976*: the English provisions are based on American law, Title VII of the *Civil Rights Act 1964*, as significantly developed by judicial decisions).

2 Indirect discrimination takes place when a person imposes a requirement or condition that has the effect of disadvantaging a group of people who share an attribute referred to in the Act — *Sex Discrimination Act 1984* (Cth) ss 5(2), 6(2) and 7(2).

3 The *Racial Discrimination Act 1975* prohibits discrimination on the grounds of race, colour, national or ethnic origin, and immigration. The grounds which the Human Rights and Equal Opportunity Act 1986 provides are: race, sex, colour, religion, political opinion, national extraction or social origin, and further grounds; age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference and trade union activity.

4 *Sex Discrimination Act 1984* (Cth) ss 5(1), 6(1) and 7(1).

5 431 US 324, 335 (1977).

6 Attributed to Bryan CJ, Chief Justice of the Kings Bench Division from 1471–83.

7 Bowen LJ in *Edington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

[a] case of direct discrimination involves an inquiry into the motivation of an employment decision. If the employer makes an employment decision because of an employee's race or sex, the decision is directly discriminatory. If the decision is made for any other reason, it is permissible. Persons claiming discrimination under this theory face two imposing obstacles. First, proving motivation is an extremely difficult and subtle task. The 'true' motivation for an employment decision is to be found in the mind of the employer. But proving the state of the employer's mind at the time an employment decision is made is an extremely delicate task. The employer wishes to avoid liability for employment discrimination, so his statements about his state of mind are less than reliable.<sup>8</sup>

Social science research has indicated that, even if the employer is completely honest he or she may not be aware of the subtle discriminatory influences affecting his decision.<sup>9</sup>

A finding of discrimination is a question of fact rather than a process of application of principles of law.<sup>10</sup> Under this approach, the ultimate finding of discrimination is the result of a process in which the elements of the case are divided into various burdens of proof to be borne by the complainant and respondent. While the structure that these elements must take has not yet been definitively prescribed, it appears that a complainant has to show the above mentioned three elements in order to establish a *prima facie* case of direct discrimination.<sup>11</sup> This paper intends to discuss the basic methods of proving these elements in the context of direct discrimination law and to identify certain key issues that have emerged in Australia in recent years.

## II. The means of proof

In disparate treatment cases, the plaintiff may prove that he or she has been discriminated against by (1) directly persuading the courts that a discriminatory reason was most likely motivating the respondent — direct evidence,<sup>12</sup> or (2) indirectly persuading the courts that the respondent's proffered explanation is unworthy of credence<sup>13</sup> — circumstantial evidence. In an age where employers are becoming increasingly sophisticated in covering up discriminatory practices, available proof of direct discrimination usually consists of circumstantial or indirect evidence. Direct evidence of unlawful discrimination is relatively unusual.<sup>14</sup>

8 Willborn S, 'Proof of Discrimination in the United Kingdom and the United States' (1986) 5 *Civil Justice Quarterly* 321 at 321.

9 Note 8. See also, e.g. Rosen B and Jerdee TH, 'Sex Stereotyping in Executive Suite' (1974) 52 *Harvard Business Review* 45; Blumrosen A, 'Wage Discrimination, Job Segregation and Title VII of Civil Rights Act of 1964' (1979) 12 *University of Michigan Journal of Law Reform* 397.

10 *International Brotherhood of Teamsters v United States* 431 US 324, 335 (1977).

11 Cross R, *Evidence*, 5th ed., Butterworths, London, 1979 at 28–9 quoting Stratford JA in *R v Jacobson and Levy* (1931) App D 466 at 478: 'Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges its onus.' See also *McDonnell Douglas Corporation v Green* 411 US 792, 802–825 (1973).

12 The term 'direct evidence' is used to describe a means of proof that is in contrast to indirect or circumstantial evidence and bears no relation to the concept of direct discrimination itself. In Cross R, n 11 at 10–11 the term direct and indirect evidence are defined as follows: '[D]irect evidence means a witness's statement that he perceived a fact in issue with one of his five senses.' 'Whereas, [c]ircumstantial evidence has already been defined as a fact from which the judge or jury may infer the existence of a fact in issue.'

13 *Texas Department of Community Affairs v Burdine* 450 US 248, 257 (1981).

14 See, for example, *Bennet and Anor v Everitt and Anor* (1988) EOC 92–244 at 77,271 per Einfeld J:

Decisions made in the secrecy of boardrooms or the minds of employers will rarely, if ever, . . . find expression to the employee in directly discriminatory terms. Still less will they be exposed to the potentially corroborative eye of a witness, especially as the most likely witnesses, fellow employees, may well entertain the fear of losing their own jobs at the hands of the same employer. . . This means that many discrimination cases (other than sexual harassment) have to be proved by comparatively weak circumstantial evidence, without direct or perhaps any witnesses and based only on an intuition or a deeply held if correct belief that there has been discrimination.

Commenting on the direct and circumstantial evidence requirements in disparate treatment cases, the United States Federal Court (Second Circuit) has recently emphasised that ordinary principles of evidence and litigation require the trier of fact to assess the *probative value of all* evidence presented rather than focus on the *type* of evidence presented. The Court has remarked:

'direct' and 'indirect' describe not the quality of the evidence presented, but the manner in which the plaintiff proves the case. Strictly speaking, the only 'direct evidence' that a decision was made 'because of' an impermissible factor would be an admission by the decision maker such as 'I fired him because he was old'. Even a highly probative statement like, 'You're fired, old man,' still requires the fact-finder to draw the inference that the plaintiff's age had a causal relationship to the decision.<sup>15</sup>

In the United States, half the nation's federal circuit courts,<sup>16</sup> define and apply their direct evidence literally — requiring the plaintiff to present evidence that provides discrimination without inference: that is, the evidence must relate to the specific employment decision in question. The difficulty of distinguishing direct evidence from circumstantial evidence has resulted in judicial inconsistency and ambiguity in the adjudication of claims brought under disparate treatment theory in the United States. For example, in *Brown v East Mississippi Electric Power Association*<sup>17</sup> the Fifth Circuit held that a supervisor's routine use of the racial slur 'n . . .' which he used to allude to African-Americans, constituted direct evidence of discrimination in the challenged employment decision and ruled for the plaintiff. The Fifth Circuit applied its direct evidence requirement non-literally. On the other hand, in *Cooper Houston v Southern Railway*<sup>18</sup> the District Court applied the Eleventh Circuit's restrictive direct evidence standards and determined that the supervisor's comment, 'two down, one to go,' and 'one to go' referring to Cooper-Houston, his use of the term 'n . . .', and his request that the plaintiff not eat lunch with an African-American, did not constitute direct evidence of discrimination and dismissed her claim. Also, while the Fifth Circuit termed calling an employee 'n . . .' direct evidence of race discrimination,<sup>19</sup> the Eleventh Circuit characterised calling older employees 'old bastards' or stating that 'every one over 35 should be sacked' as circumstantial evidence of discrimination.<sup>20</sup> Because courts are inconsistent and indefinite in distinguishing between types of evidence, a plaintiff cannot be assured that his or her claim will succeed. In bifurcating direct and circumstantial evidence for mixed motive direct discrimination cases, some American courts have departed from fundamental principles of the ordinary rules of evidence.

The Australian position is that the courts and tribunals appear to confirm the ordinary rules of evidence, that is the admission of both direct and circumstantial evidence in discrimination cases. Some case examples in which the Australian equal opportunity bodies have examined direct evidence of less favourable treatment will be examined in the following section.

15 *Tyler v Bethlehem Steel Corporation* 958 F 2d 1176, 1185 (2nd Cir 1992).

16 These Federal Courts are, namely, the First, Sixth, Tenth and Eleventh Circuit courts.

17 989 F 2d 858 (5th Cir 1993).

18 822 F Supp 715 (ND Ga 1993).

19 *Brown v East Mississippi Electric Power Association* 989 F 2d 858, 861 (5th Cir 1993). See also, Zubrensky MA, 'Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed Motives Employment Law After *Price Waterhouse v Hopkins*' (1994) 46 *Stanford Law Review* 959-986.

20 *Castle v Sangamo Weston Inc.* 837 F 2d 1550, 1558 (11th Cir 1988).

1. Admissions<sup>21</sup> and other forms of direct evidence

a. Overt expressions of prejudice<sup>22</sup>

Proof of prejudice may provide the basis for a case of harassment. Where racial abuse or name-calling is of such a serious nature or frequency as to poison the environment,<sup>23</sup> or otherwise create different working conditions for the complainant, it is open for a tribunal to find that there has been harassment. In Australia, examples of this type of attitude abound: in *Bull & Anor v Kuch & Anor*,<sup>24</sup> the respondents refused to rent a caravan to the complainants because they were Aboriginal. The first respondent admitted in evidence that she said to the complainant: 'she would not rent to Aboriginals under any circumstances whatsoever.'<sup>25</sup> The Human Rights and Equal Opportunity Commission held that it was a serious and significant case of blatant racial discrimination.

In another case, *Race Relations Conciliator v Marshall*<sup>26</sup> the complainant alleged discrimination on the ground of her skin colour. She sought employment at a nursing home at which the defendant was the matron. The defendant told a person negotiating on behalf of the complainant that she was apprehensive about residents waking up and seeing the complainant's dark face. The Equal Opportunity Tribunal (New Zealand) found that the defendant regarded the complainant's colour and its anticipated effect on the residents, a factor that disqualified her from employment at the nursing home. Therefore, discrimination on the basis of race was found.

Recently, the Western Australian Tribunal founded a claim of overt manifestation of sexual discrimination in the case of *Horne & McIntosh v Press Clough Joint Venture & Anor*.<sup>27</sup> A substantial award of damages (a total of \$92,000) were made to the complainants, the only female workers at a construction site, who had been subjected to sex discrimination and victimisation as a consequence of being exposed to grotesque pornographic material in the workplace. One of the complainants was confronted with a poster of a naked woman that had been stabbed violently through the heart, head and genitals. Offensive graffiti were written about the complainants on the toilet walls and they were verbally abused by the men. Neither the employer nor the union took appropriate action to stop the abuse. The complainants left their jobs because they could not bear to continue working in that environment. The Tribunal held that the employer was both directly and vicariously liable for sexual discrimination and victimisation of the complainants.

Such blatant examples of bigotry, or overt expressions of prejudice, which can be established through admissions or direct evidence are relatively rare. But overt manifestations of discrimination will not necessarily be malicious and may at times be quite the opposite, as the following will discuss.

21 Besides admissions made during the proceedings which are, of course, the best admissions possible, parties may also bring evidence regarding admissions made by the other outside the proceedings and in the presence of a witness. See, Vizkelely B, *Proving Discrimination in Canada*, Carswell, Toronto, 1987 at 132-134. The methods of proof classification applied in this study owe much to the work of Vizkelely.

22 Prejudice is a *state of mind*, a set of negative attitudes held by one person or group about another, tending to cast the other an inferior light, despite the absence of legitimate evidence: See Bach TL, 'Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII' (1993) *Minnesota Law Review* 1251 at 1253.

23 This criterion was first recognised in the United States in a case involving sexual harassment: *Bundy v Jackson* 641 F 2d 934 (DC Cir 1981); see Cox PN, *Employment Discrimination*, 2nd ed, 1993 at paragraph 7.01.

24 (1993) EOC 92-518.

25 *Bull & Anor v Kuch & Anor* (1993) EOC 92-518 at 79,650.

26 (1993) EOC 92-540.

27 (1994) EOC 92-591.

*b. Unwarranted solicitude or paternalism*<sup>28</sup>

Vizkelely argues that under the guise of solicitude, respondents may admit that they refused to employ members of a particular group 'for their own good.' This appears in the face of the concept of equal treatment.<sup>29</sup> In the United States, in the case of *Weeks v Southern Bell Telephone and Telegraph Co*<sup>30</sup> which dealt with the refusal to hire women for jobs that required lifting 30 pound weights or more, the Court commented as follows:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the *bona fide* occupational qualification exception Congress intended to renege on that promise.<sup>31</sup>

The Australian courts and tribunals have examined this issue of paternalism in several cases. For example, in *Proceeding Commissioner v Howell & Anor*,<sup>32</sup> the complainant was refused the position of hotel manager because she had a young child. The respondent said that if the complainant was intending to have another child that a short-term position was quite suitable for her. The respondent denied that his statements were prejudiced against her and said that he was 'sympathetic to her situation.'<sup>33</sup> The New Zealand Equal Opportunity Tribunal held for the complainant.

In another instance<sup>34</sup> the respondent Council dismissed the complainant because it was unwilling to run the risk that there might be some deterioration in the complainant's physical condition even though she was able to perform the duties at the time she sought to resume with the Council. The Western Australian Tribunal found that because of her impairment, she was treated less favourably than other employees.

Similarly, in *Smith v Frankl and Anor*,<sup>35</sup> the complainant became pregnant shortly after having a miscarriage. Her employer thought it was best for her health if she no longer continued in her lucrative sale representative's job and did some home-based work. The Victorian Equal Opportunity Board said that, while the employer's actions were partially done as a result of concern for the complainant's health, the fact remained that he was not entitled to remove the complainant's employment and make the decision for her if she herself wished to continue working as previously. The complainant was awarded damages.

In all these cases the decision to exclude members of certain group was held to be discriminatory, despite well-intentioned motives and protective attitudes on the part of the respondents.

*c. Stereotypes or imputed characteristics*

The most common forms of evidence that is available in direct discrimination cases is 'stereotyping.' Where the refusal to hire, to rent, to provide public services etc is based upon generalised assumptions or attitudes regarding the abilities or habits of members of certain groups, the refusal is said to be based on stereotypes.<sup>36</sup> Australian equal opportunity

28 Paternalism is deciding for another what is or is not in that person's interest; Cox PN, n 24 at paragraph 8.21.

29 Vizkelely B, n 21 at 134.

30 408 F 2d 228 (5th Cir 1969).

31 *Weeks v Southern Bell Telephone and Telegraph Co*. 408 F 2d 228 at 232 (5th Cir 1969).

32 (1993) EOC 92-522 (NZ).

33 *Proceeding Commissioner v Howell & Anor* (1993) EOC 92-522 (NZ) at 79,662.

34 *Churchill v Town of Cottesloe* (1993) EOC 92-503.

35 (1991) EOC 92-362.

36 Vizkelely B, n 21 at 135. See for example, an American case of *Northeast Metro Regional Vocational Scheme Commission v MCAD* 31 Mass App Ct 84, 86 (1991) where the chairperson of the Committee told the plaintiff that 'we don't want a woman in that position . . .' and 'I don't know why you even applied. What we need is a big, strong man with a big strong voice who can come to the Committee and fight.'

bodies have, in some cases, explicitly considered whether sex stereotyping amounts to unfavourable treatment on the basis of an imputed characteristic. In *Murray v Forward & Anor*<sup>37</sup> the complainant, an Aboriginal woman, alleged that she was refused a promotion in her job due to a derogatory assessment regarding her literacy skills, made by the respondent, the Merit Protection Review Agency. One of the major issues in this case was whether the respondent was influenced by the unjust and racist stereotype assumption that Aboriginal persons have difficulty in reading and writing. However, the complainant was unsuccessful as it was held that the evidence did not establish the alleged stereotyping.<sup>38</sup>

Other cases where there has been a discussion of imputing characteristics have not explicitly linked imputation to stereotyping. However, these cases could be analysed as instances of stereotyping. The decision of the New South Wales Court of Appeal in the case, *Waterhouse v Bell*<sup>39</sup> may be worth noting in this respect. The complainant was refused a horse trainer's licence by the Australian Jockey Club because she was married to a person who was warned off all race courses in Australia due to his involvement in a horse substitution scandal. The AJC said that 'she was susceptible to the corrupting influence of her husband.'<sup>40</sup> The Court found that the AJC acted on the basis of a characteristic imputed to married woman: that all wives are liable to be corrupted by their husbands. It appears that whether such bias be conscious or unconscious on the part the respondent is of little relevance.

In another case, *Proceedings Commissioner v Howell & Anor*,<sup>41</sup> the fact that the complainant was a woman with a child was found to be the reason why she was refused the position of hotel manager, a job for which she was well qualified. The respondent admitted in his evidence that he told the complainant that 'he had one major reservation which he felt affected her ability to do the job, and that was her young child.'<sup>42</sup> The Tribunal found it proved that if the complainant had been a man with a child, she would not have been discriminated against. The man who was actually given the job had children but this was not regarded as a disqualifying factor. On the facts of the case, it appears that the complainant was discriminated against on the basis of an imputed 'maternal characteristic.' While stereotyping was not mentioned in this case, it could be said that the maternal characteristic that appertains to female sex is a stereotype: that is women should be responsible for caring for children.

Direct discrimination can also include discrimination resulting from characteristics of or stereotyped assumptions made about a person on the basis of his or her impairment, homosexuality, or HIV/AIDS status. For example, in *Daniels v Hunter Water Board*<sup>43</sup> the New South Wales Tribunal accepted direct evidence of overt manifestation of discrimination based on homosexuality, which led the Tribunal to find a claim of sexual discrimination. The complainant, an electrician with the respondent Water Board alleged that he had been harassed by his co-workers after he adopted a 'trendy' hair cut and began wearing an earring in the left ear. The harassment took the form of name-calling, making derogatory comments, playing practical jokes, and making prank telephone calls to the complainant's home. During an office farewell party, an altercation developed between the complainant and some of his co-workers. One co-worker spat at him at least a dozen times,

37 (1993) EOC 92-545; See also, Gilmour-Walsh B, 'Exploring Approaches to Discrimination on the Basis of Same-Sex Activity' (1994) 3 *The Australian Feminist Law Journal* 117.

38 See also, *Minister of Education v Gameau* (1984) EOC 92-012; *Leves v Haines & Ors.* (1986) EOC 92-167 where at 76,634 the New South Wales Tribunal stated that choice of subjects taught was influenced by stereotypes that women are 'likely to spend the larger and more important part of their adult lives in the home.'

39 (1991) EOC 92-376.

40 *Waterhouse v Bell* (1991) EOC 92-376 at 78,595.

41 (1993) EOC 92-522.

42 *Proceedings Commissioner v Howell & Anor* (1993) EOC 92-522 at 79,662.

43 (1994) EOC 92-626.

pushed him backwards, throwing him onto a table. The management of the respondent Board failed to stop the campaign of harassment against the complainant. The Tribunal held that the harassment amounted to discrimination on the basis of the complainant's perceived homosexuality.

Inevitably, where the discrimination is admitted or overt as in the cases just discussed, the heart of the debate will lie less with the existence of discrimination than with the issue of whether or not the conduct or practice is justified under a 'genuine occupational requirement' defence.<sup>44</sup> Moreover, discrimination is rarely overt. One is more likely to find cases in which the discriminatory element is dissimulated, than vice versa. For instance, rather than admit the fact that they refuse to hire or promote women, respondents might pretend that the candidates lack the necessary educational qualifications or experience for the job, that they show signs of having a difficult personality and an inability to get along with colleagues, or that they lack other personality traits required for the position such as assertiveness, initiative, or the ability to make decisions. The possible excuses are, in fact, endless.<sup>45</sup> The problem that arises is *how* does one prove the true reason for the employer's discriminatory act?

## 2. Circumstantial evidence

A problem of proof arises when the employer's intent is not apparent. The discriminatory reason must then be extracted from all the possible legitimate reasons for the action. Vizkelely argues that although the element of intent is no longer considered a prerequisite in proving discrimination, it may still be difficult to establish the reasons for which a less than candid respondent acted in a particular manner, especially where the decision is largely based upon subjective criteria. The problem arises with similar acuity in cases involving allegations of sexual harassment where the acts are almost always carried out in private.<sup>46</sup>

In these instances, where 'direct evidence' of discriminatory treatment is unavailable, discrimination may be established by way of inference through the use of 'circumstantial evidence.' This latter type of evidence usually depends on a series of facts, each of which would by itself be insufficient to permit an inference of discrimination but when combined may justify it.<sup>47</sup> The question arises as to what degree of proof is required to make the inference and what standard of proof is required in proving a fact in issue by circumstantial evidence. It is the usual civil standard of proof, where inference may be drawn from the circumstances, and the court must act on a reasonable balance of probabilities.

However, the standard of proof demanded in circumstantial evidence cases has been the source of some confusion in general, and strains of these difficulties appear to have filtered into discrimination cases as well.<sup>48</sup> More problematic than this are questions related to relevance. Where there is an undertaking to prove a fact in issue piece by piece, the probative value of each item, when taken singly, will not always be apparent. The same difficulty may occur where a party seeks to introduce, for example, similar fact evidence, or evidence of a comparative nature to show pretext, which will normally extend beyond the circumstances of the case and, again, their relevance to the issue at hand will not be immediately apparent to all. In these instances it may well be impossible to prove discrimination in other ways. A useful way of formulating the test of relevance and

44 This issue is beyond the scope of the present study and will not be discussed here.

45 See, generally, Vizkelely B, n 21 at Ch 5 — 'Defences.'

46 Vizkelely B, n 21 at 140.

47 Vizkelely B, n 21 at 140.

48 See, for example, *Department of Health v Arumugam* (1987) EOC 92-195; *KLK Investment Pty Ltd v Riley* (1993) EOC 95-525.

admissibility would be to ask 'does the evidence offered render the desired inference more probable than it would be without the evidence?'<sup>49</sup>

Moreover the inference process relies extensively upon experience and understanding of the matter being dealt with. Such factors would also help determine the degree of relevance that the evidence being tendered might ultimately bear. In this sense, it may be worth examining cases in which circumstantial evidence has been relied upon in the past. Such evidence tends to fall within one or more of the following categories: (a) prejudiced attitudes and statements; (b) similar fact evidence; (c) subjective evaluations and interviews; (d) failure to explain an act where an explanation is called for, and pretext.<sup>50</sup>

*a. Prejudiced attitudes and statements*

As discussed above, it appears that proof of stereotypes, overt expression of prejudice and paternalism, may constitute direct evidence of discrimination. A distinction should be drawn between such cases and others in which the respondent denies that it had anything to do with the alleged discriminatory act. In such cases the causal relationship between the 'attitude' and the 'act' is absent in the admission and, alone, the evidence may be insufficient to prove discrimination.

However, in these instances, proof of the discriminatory attitude may be relevant as part of a case based on circumstantial evidence. For example, in *CiemCioch v Echuca-Moama RSL & Citizen Club*,<sup>51</sup> the complainant alleged that she had been discriminated against on the grounds of her marital status when she was refused membership of the respondent club because the club bore a grudge against her husband who had been involved in disputes with the club culminating in litigation in which he had been successful. The respondent contended that a decision by the club involving a grudge against the complainant's husband was not one that involved any consideration that was peculiarly connected with the fact of the complainant's marriage to her husband.<sup>52</sup> This statement coupled with the fact that the respondent was unable to provide an acceptable explanation for denying the complainant's membership led the Human Rights Commission to infer that the refusal was indeed based upon sex and marital status.

Prejudiced attitudes against people with disabilities are also relevant to cases of discrimination based on circumstantial evidence. For example, in *DL (Representing the Members of People Living with AIDS (WA) Inc) & Ors v Perth City Council*<sup>53</sup> the true ground of Perth City Council's refusal to grant planning permission for a drop-in centre for the complainants was found to be their HIV status. The Western Australian Tribunal found that the opposition to development was based on the councilors' constituent fears and prejudices against people with HIV/AIDS.

Proof of prejudice is deemed insufficient evidence where the causal relationship between the 'attitude' and act is absent or inadequately shown. It is in this respect that tribunals have held on more than one occasion that proof of prejudice or racial slurs does not constitute conclusive evidence of discrimination unless that behaviour can be shown to have influenced the decision in question. In *Assal v Department of Health, Housing and Community Services*,<sup>54</sup> an Egyptian Veterinary officer's employment was terminated. He alleged that the statements made by the employer, such as his 'qualifications were inferior because they were from Egypt' and 'how dare you come from Egypt and to take

49 Szeinbok M, 'Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Cases' (1988) 88 *Columbia Law Review* 1114 at 1117.

50 See generally, Mendez MA, 'Presumptions of Discriminatory Motive in Title VII Disparate Treatment Claims After *Aikens*' (1980) 32 *Stanford Law Review* 1129.

51 (1993) EOC 92-549.

52 cf *Waterhouse v Bell* (1991) EOC 92-376, discussed above.

53 (1993) EOC 92-510.

54 (1992) EOC 92-409.



a job from an Australian Veterinarian,' were discriminatory on the ground of race and ethnicity. The Human Rights Commission held that the evidence was not capable of establishing racial discrimination. The complaint was dismissed on the basis that it was 'frivolous, vexatious, misconceived and lacking in substance.'

Other examples within this category are the following: *Tsambourakis v CSIRO*<sup>55</sup> where there was no evidence linking racial bias to failure to promote the complainant; *Cronin v Department of Social Security*<sup>56</sup> where the alleged unfair treatment was not based on complainant's national background but on her temperament; *Zollschan v Deakin University*<sup>57</sup> where it was held an academic ranking was not based on race; *Power v Hyllus Maris Aboriginal School Inc*<sup>58</sup> where an allegation by a non-Aboriginal person that he was discriminated against by the administration at an Aboriginal school was dismissed (the complainant's work was unsatisfactory).

On the other hand, where the respondent is unable to provide a credible or plausible explanation for his or her behaviour towards the complainant, his or her state of mind or the discriminatory reasons for the behaviour can in some circumstances be *inferred* from overt statements of prejudice.<sup>59</sup> For example, in *Nowland v TNT Skypak & Anor*,<sup>60</sup> the complainant, who was employed as a manager with the respondent company, alleged that her supervisor made remarks to her of a demeaning, humiliating and sexual nature and that, as a result, she resigned from her employment. During a conversation, the respondent supervisor uttered the following offensive and degrading remarks on women: 'Who do you think you are? I am not as you see me . . . I think women have a place in the workforce and that is to provide a second opinion.' Referring to the mode of dress of the complainant he said, 'Well Cathy you know if you dress like a tart, you act like a tart, and if you dress like a manager you act like a manager . . . If you want to act like a tart, you can do it elsewhere, not under my roof.'<sup>61</sup> Such evidence of discriminatory statement, together with the fact that inconsistent evidence was presented by the respondent and that it lacked credibility, led the New South Wales Tribunal to infer that the complainant was discriminated against on the grounds of her sex.

Moreover, racial slurs, name-calling, and derogatory statements concerning the abilities of minority groups, are all relevant to a case of discrimination based on circumstantial evidence. For example, in *Bell v Aboriginal and Torres Strait Islander Commission & Ors*,<sup>62</sup> the Human Rights Commission found that the statements which identified a non-Aboriginal person in a derogatory way, such as 'white' or 'racist' in the employment of the respondent commission, abused and threatened the non-Aboriginal complainant by reference to his race. The Commission accordingly rejected the respondent's argument that to call someone a 'racist' reflected on the political views of the person not his/her race. Similarly in *Laher v Barry James Mobile Cranes Pty Ltd*<sup>63</sup> the Human Rights Commission found the complainant, a man of French origin, had been discriminated against when offensive notices, photographs and statements of a racist nature were placed on a staff noticeboards and were directed to him. The respondent's explanation about the complainant's unfavourable attitude to his work was found not to be substantiated.

As these cases show, individual prejudice is a state of mind that may or may not result

55 (1992) EOC 92-411.

56 (1992) EOC 92-431.

57 (1992) EOC 92-470.

58 (1994) EOC 92-587.

59 There is, of course, no need to rely upon inference process, where overt manifestation of discrimination is available through admissions and direct evidence. See above nn 22-27 and accompanying text.

60 (1993) EOC 92-509.

61 *Nowland v TNT Skypak & Anor* (1993) EOC 92-509 at 79,596.

62 (1994) EOC 92-565.

63 (1994) EOC 92-585.

in actions towards another. Discrimination, on the other hand, implies an act which in some instances is motivated by prejudice and in other instances is spurred by considerations of an altogether different nature including well-intentioned or neutral motives such as the desire to avoid economic loss, the wish to avoid discontent by co-employees, the desire to fulfil allegedly neutral marketing aims, and even the presence of genuine solicitude towards a person. In sum, tribunals have generally considered proof of prejudice, or malice as one form of evidence to proving direct discrimination.

*b. Similar fact evidence*

In order to establish differential treatment, a complainant may submit evidence concerning the respondent's similar conduct on occasions not directly related to the case at issue. It is also permitted in some circumstances to present evidence of previous misconduct. This is known as similar fact evidence.<sup>64</sup> The rule regarding the admission of similar fact evidence was formulated by the House of Lords in *Boardman v Director of Public Prosecutions*<sup>65</sup> in terms of its 'degree' of probative worth or relevance. According to Lord Cross:

The question must be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt . . . if they accepted it as true, would acquit in face of it . . . Its admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission.<sup>66</sup>

In line with this approach, equal opportunity tribunals have had occasion to consider the probative value of similar fact evidence and to weigh it against the prejudice that it might cause to a respondent if admitted. In the case of *Nowland v TNT Skypak & Anor*<sup>67</sup> the complainant alleged that her supervisor of the respondent company made remarks to her of a demeaning, humiliating and sexual nature which resulted in her resignation. The respondent denied that he uttered the alleged offensive remarks. The complainant led the similar fact evidence on the basis that it contained a characteristic in common alleged by the complainant, namely her supervisor's attitude to the place of women in the workplace.<sup>68</sup> Accordingly several other male and female managers gave evidence on behalf of the complainant. The two American managers who gave evidence commented that 'it must be an Australian view, as it was not held by the rest of the world.'<sup>69</sup> The New South Wales Tribunal decided to admit the evidence of these witnesses in question on the ground that the probative value of allowing their evidence far outweighed any possible prejudicial (in the sense of unfairness) impact on the respondent.

In *Zoiti v The Cheesecake Factory Pty Ltd & Anor*,<sup>70</sup> the complainant who was a factory worker with the respondent company, alleged that the second respondent, a senior pastry cook, had harassed her sexually with the knowledge of the management of the company, which subsequently dismissed her from employment. In support of these allegations, the complainant sought to have other witnesses testify to the fact that they also had been sexually harassed by the individual respondent and that the company was well aware of

64 Piragoff DK, *Similar Fact Evidence*, Carswell, Toronto, 1981 at 1.

65 (1974) 3 All ER 887.

66 *Boardman v Director of Public Prosecutions* (1974) 3 All ER 887 at 909. Despite the emphasis upon criminal context, it is worth noting the description about similar fact evidence. (However, the concerns regarding undue prejudice are not as relevant in civil proceedings).

67 (1993) EOC 92-509.

68 *Nowland v TNT Skypak & Anor* (1993) EOC 92-509: see above n 60 and accompanying text regarding the statements made by the respondent.

69 *Nowland v TNT Skypak & Anor* (1993) EOC 92-509 79,597.

70 (1993) EOC 92-539.

these incidents. The effect of the similar fact evidence was that it confirmed the reliability of the Human Rights Commission's finding that the evidence of the complainant was to be preferred to that of the respondent company and the second respondent.

Just as it is open to a complainant to rely upon evidence of previous misconduct to prove discrimination indirectly, so a respondent may bring evidence of past conduct that tends to rebut such an allegation. A case on point is that of *University of Ballarat v Bridges & Anor*,<sup>71</sup> discussed above, where the Full Court of the Supreme Court of Victoria agreed with the employer's submissions relating to its past non-discriminatory conduct. In this context, the Court remarked as follows:

the evidence disclosed, that the two persons who were selected by the panel to fill the vacant positions as house attendants both have children, and that there is no house attendant employed by the appellant who is not a parent.<sup>72</sup>

The Court concluded that the evidence of the case did not disclose unlawful discrimination on the part of the employer. Similarly, in *Marshall v M & M Binders Pty Ltd.*,<sup>73</sup> the complainant's allegations of impairment discrimination were unfounded. The Victorian Board accepted rebuttal evidence based on the fact that the complainant had been offered light duties and had been in fact treated more favourably than other employees, as indicative of an absence of discrimination.

It must be noted that when deciding whether or not to admit similar fact evidence, a tribunal may consider other rules of exclusion such as hearsay.<sup>74</sup> It may also be noted that discrimination is not a criminal but a civil matter, where less stringent precautions regarding similar fact evidence are necessary.

### *c. Subjective evaluations at interviews*

This type of evidence may appear as a general practice used to mask sexually and racially motivated hiring decisions. In this category of cases, the nature of the interview and the questions put to the complainant may indicate bias. A case on point is that of *Bridges v Ballarat University College*<sup>75</sup> where the complainant alleged that during an interview for a permanent cleaner's position she was asked a series of questions by the interview panel about her children and family responsibilities. Questions included: 'How will your family life be affected with the long hours?' 'What arrangements would you make over the school holidays?' and 'If you received a phone call at work from your children's school your youngest child has a temperature . . . what would you do?' The Victorian Board found that these questions were inappropriate in the circumstances of the employment interview in question. The Board concluded that a person who was not a parent would not have been asked the same question and would not have been rendered confused, shocked and nervous as was the complainant at the interview.

In a similar vein, Tribunals tend to view with considerable suspicion job interviews that are shown to dwell upon a candidate's nationality, colour, sex etc. In the case of *Oyekanmi v National Forge Operations Pty Ltd & Anor*,<sup>76</sup> the complainant, a black person, who was employed as a technical services manager with the respondent company, was terminated after eight months of service. During an interview for the position he was asked by the interview panel how he would feel about racist attitudes, as he would be the only black person employed by the company. The respondent did not deny this. In addition, when references were called with inquiries regarding the complainant's competence, they

71 (1995) EOC 92-681.

72 *University of Ballarat v Bridges & Anor* (1995) EOC 92-681 78,163 per Tagdell J (Teage J agreeing).

73 (1995) EOC 92-688. See also, *Toledo v Eastern Suburbs Leagues Club Ltd.* (1992) EOC 92-493.

74 See, for example, *Bennet and Anor v Everitt and Anor* (1988) EOC 92-244 at 77,275.

75 (1993) EOC 92-527.

76 (1995) EOC 92-695.

were also asked race-related questions. These factors, combined with the fact that the complainant was treated differently from other company managers were sufficient to convince the Victorian Board that the complainant was dismissed because of his race.

Similarly, in *Proceedings Commissioner v Howell & Anor*,<sup>77</sup> the complainant alleged that during her interview for the hotel manager's position, she was asked questions about how she would develop a career while caring for her young child. She was also asked questions relating to her ability to deal with conflicts and violent situations, although such questions were not put to male applicants. In all of these instances, the subjective evaluations of the employer were perceived as fertile ground for direct discrimination.

*d. Failure to explain an act where an explanation is called for, and pretext*

While it is clear that complainants bear the ultimate burden of proving the ground for discrimination, there is a point at which respondents must come forward with some explanation for their discriminatory act.<sup>78</sup> According to the ordinary rules of evidence the failure to explain a situation which requires an explanation may give rise to the inference that the evidence if given would have been adverse. In other words it may give rise to an inference of discrimination. As an example, in the case of *KLK Investments Pty Ltd v Riley*,<sup>79</sup> the complainant, an Aboriginal, who was asked to leave the respondent proprietors' hotel, alleged that he was discriminated against on the ground of his race. The reasons that supported the Tribunal to decide in favour of the complainant were the fact that the respondent manager asked the complainant to leave the premises and that the manager was not called to give evidence.

The hotel proprietor appealed against this finding. In the appeal before the Supreme Court of Western Australia an issue arose out of the fact that the manager, Mrs F, was not called to give evidence. The Supreme Court held that the failure to call Mrs F could not lead to an inference of discrimination, saying:

no person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation . . . Nothing could be made of the fact that [the manager] was not put into the witness box.<sup>80</sup>

It is submitted that the approach taken by the Supreme Court is not in conformity with the ordinary rules of evidence. The plaintiffs in direct discrimination cases must be provided with a fair and workable theory of liability free from overly burdensome evidentiary requirements.

In another case, *McCarthy v Metropolitan (Perth) Passenger Transport Trust*,<sup>81</sup> the Western Australian Tribunal found that the complainant was refused employment as a bus operator because the respondent's doctor certified her unfit for employment because of her pregnancy and excess weight. The Tribunal said the fact that the respondent did not call any medical evidence in order to substantiate either that the complainant was incapable to perform her duties satisfactorily whilst pregnant, or that she possessed health and safety risks, suggested that right from the outset the respondent's case stood little chance of success.<sup>82</sup> Accordingly, the Tribunal held for the complainant.

But on the whole it is unusual for respondents to offer no explanation at all. More often than not, they will come forward with some reason for their actions. It is then incumbent upon the complainant to rebut the explanation by showing that it is not the real reason for

77 (1993) EOC 92-522.

78 This point arises once the complainant has made out a *prima facie* case of discrimination.

79 (1993) EOC 92-525.

80 *KLK Investments Pty Ltd v Riley* (1993) EOC 92-525 79,670.

81 (1993) EOC 92-478.

82 *McCarthy v Metropolitan (Perth) Passenger Transport Trust* (1993) EOC 92-478.

the decision, but rather that it is a mere pretext.<sup>83</sup> The manner in which pretext can be shown will, of course, vary from case to case. Nonetheless, certain fact patterns are strongly indicative of pretext. Such is the case where the respondent's explanation is based on non-discriminatory reasons, where contradictory explanations have been given, or where the explanations proffered are simply not credible or lack specific evidence to support them.

Examples of this type of pretext abound. In *Shaw v Perpetual Trustees Tasmania Ltd*,<sup>84</sup> the Commission found that the existence of a personality clash between the complainant and her supervisor did not exclude a characterisation of his conduct as discriminatory treatment referable to her sex. In another case, *Lawrence v Clark & Ors*,<sup>85</sup> the complainant, who had been employed for several years as a driveway attendant at the respondent's garage, was told by the respondent that she was no longer needed. The complainant's husband was told by the employer that he did not want to be responsible for any injury she might suffer on the driveway whilst she was pregnant. The employer alleged that the real reason the complainant was dismissed was that her work had deteriorated. The Commission found that the explanations provided by the employer were not credible, and concluded that her pregnancy was the real reason for dismissal. An example where contradictory explanations have been given is *Nowland v TNT Skypak & Anor*<sup>86</sup> where the complainant alleged that the respondent supervisor repeatedly made sexist comments and remarks that resulted in her resignation. Conflicting evidence was presented regarding the complainant's work performance, her attention to detail and lazy office hours, and about her professionalism. The Tribunal said that 'the alleged criticisms of the complainant by the supervisor was at odds with glowing reports she had received by her other supervisors.'<sup>87</sup> In all of these instances the reasons to exclude members of certain groups were proved to be pretext, despite the well-intentioned or non-discriminatory attitude on the part of the respondents. However, the requirement that the complainant must prove that the real reason for his or her rejection is a cover up for a discriminatory decision is too onerous. As has been suggested, it must be mitigated through legislation.

### III. Conclusion

The present paper has examined the devices that have been established to facilitate proof of direct discrimination, underscoring the inescapable limitations of some methods. As long as the respondent's prejudice or state of mind at the time of the denial remained the dominant object of proof, scepticism with respect to such legal proceedings was understandably widespread. The time consuming search for circumstantial evidence could not forever be justified, particularly where the ultimate goal of such meandering was to establish the reasons for one individual's behaviour, on one specific and isolated occasion in order to determine another individual's rights of redress.

The methods involved in proving direct discrimination are intricate and sophisticated. They compel parties and fact-finder to gloss over many relevant but complex issues. The intent requirement in direct discrimination cases hinders the discrimination victim's effort to achieve legal redress and violates the spirit of the anti-discrimination legislation. Referring to the Victorian legislation, the *Equal Opportunity Act 1984* (Vic) should maintain its initial view that it should apply to discriminatory conduct, and eliminate the

83 *McDonnell Douglas Corporation v Green* 411 U.S. 792, 805 (1973), suggested a somewhat heavier burden: the plaintiff must demonstrate that the presumptively valid reason for his rejection was 'a cover up for a racially discriminatory decision.' But see *Hicks v St Mary's Honor Center* 756 F Supp 1244 at 1250 (ED Mo 1991): 'pretext is a statement that does not describe the actual reason for the decision.'

84 (1993) EOC 92-550.

85 (1993) EOC 92-539.

86 (1993) EOC 92-509.

87 *Nowland v TNT Skypak & Anor* (1993) EOC 92-509 79, 597.

requirement of consciousness of the discriminatory ground. The legislators must have regard to the desirability of consistency with relevant Commonwealth legislation. Consciousness or motive is not a requirement under the *Sex Discrimination Act 1984* (Cth) or *Racial Discrimination Act 1975* (Cth). The inclusion of unconsciously motivated discrimination in the legislation is important as it would minimise the problems of proof associated with stereotyping, because much discrimination occurs as a result of thoughtless stereotyping rather than overt prejudice.

The courts and tribunals must be prepared to look beyond the narrow and literal construction of anti-discrimination laws and to give effect to their purpose. That is, on the basis of a liberal approach, the courts must recognise the effects concept of direct discrimination and thereby open new avenues of proof.