The Anti-Discrimination Laws and the Illusory Promise of Sex Equality

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Anti-discrimination laws exist in Australia at the Commonwealth and state levels.[1] Their existence is often interpreted partly as the result of the influence of feminists in the government. Within the feminist movement in Australia, as elsewhere in the world, there is no agreement as to the desirable means of achieving a just society or even as to what may be considered a just society; and the wisdom of the strategy to work with the state is doubted.[2] However, it is undeniable that anti-discrimination laws are, among other things, an expression of the hope of achieving social justice through law and this is a hope necessarily shared by all legal feminists.

Australia is credited with having relatively progressive laws in many areas of specific concern to women, such as the criminal laws

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1 Tasmania is the only state that has not enacted anti-discrimination laws.

2 Among feminists there is considerable disagreement about the kind of social justice one should strive for. In my opinion, it is important to understand that feminists do not disagree about the value of equality. The disagreement relates to the issue of what constitutes equality, ie whether equality is to be conceptualised as being the same as men or whether equality can mean the equal right to be oneself, different, distinct and not have to become like men. In interpreting equal opportunity laws, however, it is no longer an issue whether legal feminists wish to pursue one concept of equality or the other as these laws have already accepted a concept of equality as only formal equality. The underlying assumption of all equal opportunity laws is that every one is entitled to a good life but a good life is that which is led by white, able-bodied, heterosexual men. All that the tribunals and courts are required to do is to decide whether men and women are relevantly equal in a particular context or not. I will return to this issue later in the article. Considerable literature exists on the issue of the nature of equal opportunity or anti-discrimination laws. For example, they are variously analysed as positive steps to combat discrimination, as conformative measures produced by a capitalist state, as perpetuating the very discrimination they claim to combat. See the following as random examples of the above-mentioned latter two views: Jeanne Gregory, 'Sex Discrimination, Work and the Law', in B Fine et al (eds), *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (Hutchinson, 1979) pp 137-150; P Fitzpatrick, 'Racism and the Innocence of Law' in P Fitzpatrick and A Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) pp 119-132.

of sexual assault, domestic violence laws, family law and anti-discrimination laws.[3] Recently, however, the focus of discussion for most legal feminists has shifted away from law reform. This trend is in keeping with other dominant currents of legal scholarship where scepticism is the prevailing mood.[4] In view of the ever-increasing sophistication of legal theory it is almost passé for legal theorists to talk about legal rights and law reform, but I wish to argue that anyone concerned with social justice cannot ignore the significance of concrete legal rights for the lives of the disadvantaged. More importantly, the community debate surrounding both the High Court's decision in *Mabo's* case[5] and a spate of seemingly sexist pronouncements by a number of judges has put issues of social justice firmly back on the agenda. I wish to argue that whether we are discussing *Mabo*-related issues, or exploring the ways in which to educate our judges, we must begin by refocussing our attention on the concepts of law with which we operate. I have chosen to concentrate on the concept of equality informing Australian anti-discrimination laws to argue that because equal opportunity is equated with formal opportunity oppressed groups in society are denied any real chance of transcending their disadvantages by relying on law. To conceptualise equal opportunity as formal legal equality is to give equality a very narrow interpretation which defeats the underlying philosophy of non-discrimination.

In this article, I have taken as my text the decision of the Human Rights and Equal Opportunity Commission (hereafter 'HREOC') in the *Proudfoot* case.[6] I use this decision only to illustrate my argument. I have made no effort to conduct a comprehensive survey of decisions of tribunals in equal opportunity cases.[7] But, even

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3 For an overview of laws of particular relevance to women, see Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990); Jocelynne Scutt, *Women and the Law* (Law Book Co, 1990); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990).

4 I have relied on Cotterrel's classification of modern trends as species of scepticisms, see Roger Cotterrell, *The Politics of Jurisprudence* (Butterworths, 1989) esp pp 182- 215.

5 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

6 *Proudfoot v ACT Board of Health* (1992) EOC ¶92-417.

7 For a discussion of recent decisions of equal opportunity tribunals, see Renee Leon, 'W(h)ither Special Measures? How Affirmative Action for Women Can Survive Sex Discrimination Legislation' (1993) 1 *Aust Feminist LJ* 89-114. For an overview of the operation of equal opportunity laws, see Margaret Thornton, *The Liberal Promise: Anti-discrimination Legislation in Australia* (Oxford University Press, 1990). For discussions of the concept of indirect discrimination, see Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12 *U Tas L Rev*

though the decision relates only to the *Sex Discrimination Act* 1984 (Cth), it is useful in the wider context. All anti-discrimination laws rely on similar concepts of discrimination. Thus, even though my argument is made with regard to sex discrimination it is equally applicable to all anti-discrimination law generally. While I acknowledge that all discrimination is not inter-changeable, we need to reconceptualise the nature of true equal opportunity for differently disadvantaged people.

Equal opportunity legislation is not, I would argue, meant to guarantee absolute formal equality. Historically, the concept of equal opportunity was developed in recognition of the shortcomings of formal legal equality. Its thrust was to ensure limited substantive equality for specified disadvantaged groups. This objective is defeated by defining all forms of different treatment as discrimination. If the potential of anti-discrimination laws to achieve even a limited form of social justice is to be realised, it is imperative to recognise that the existing disparities between genders, races or ethnic groups cannot be rectified by pursuing formal legal equality.

The article is divided into three main parts. After examining *Proudfoot's* case in the first section, I explain the possible foundation for a right to equality in the Australian legal system. The second part explores whether the concept of formal equality can co-exist with classification of persons into various groups. Even if classification is permitted, only formal legal equality is ensured. To overcome the limitations of formal equality and achieve limited substantive equality we need the concept of equal opportunity. The third part of the article analyses the ways in which Australian equal opportunity laws are interpreted and applied. In this part I argue that legal feminists must bear the responsibility of reinterpreting equal opportunity laws so as to realise their anti-subordination potential.

Proudfoot's Case

In three seperate complaints under the *Sex Discrimination Act* 1984 (Cth) three men challenged the provision of health services offered only to women as discriminatory against men. The complainants alleged that the special services were not meant to deal with health problems faced only by women. They argued that statistical evidence showed that, on average, men died earlier than women and that men had sex specific diseases. These two facts were alleged to show that if anyone needs special health services it is men. As a consequence, it was argued that the provision of special health services for women constituted sexual discrimination against men because such services

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88; Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992).

deny men their rightful equal share of the health dollar and do not provide for the special health needs of men.

The HREOC gave its decision in March 1992 and it disallowed the application of the complainants. The HREOC held that the special health services provided for women only did discriminate against men on the ground of sex. But these services were not invalid because sections 32 and 33 of the *Sex Discrimination Act* do allow services for one sex only and special measures are permitted.

Equality in the Australian Legal System

The Australian legal system does not guarantee equality as a fundamental right or as a human right. Yet as a liberal legal system it is premised on the assumption that all human beings are equal.[8] In other words formal legal equality is an underlying value of the Australian legal system.[9] Formal equality is also described as the bourgeois conception of equality[10] and its shortcomings in not being able to achieve social justice or egalitarianism are well recognised. As a result the concept of substantive equality has emerged.[11] Not surprisingly, a great deal of confusion persists regarding the use of equality.[12] It is this confusion as to the appropriate meaning of equality in a given context that characterises the interpretation of Australian equal opportunity laws.

In its equal opportunity legislation the Australian legal system guarantees equality in very limited circumstances, to a few

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8 See B Williams, 'The Idea of Equality' in HA Bedau (ed), *Justice and Equality* (Prentice-Hall, 1971) pp 116-137, for a concise discussion of the reasons for treating all humans as equals; see also C Edwin Baker, 'Outcome Equality or Equality of Respect: the Substantive Content of Equal Protection' 131 *U Penn L Rev* 933 (1983).

9 For a brief discussion of equality in the Australian legal system, see Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (Law Book Co, 1990) pp 395-436.

10 Juliet Mitchell, 'Women and Equality', in Phillips (ed), *Feminism and Equality* (Basil Blackwell, 1987), pp 24-43.

11 For a concise discussion of the concepts of formal equality and substantive equality, see S Berns, 'Tolerance and Substantive Equality in Rawls: Incompatible Ideals' in (1990) 8 *Law In Context* (*Feminism, Law and Society* issue, ed J Grbich) 112.

12 Some writers take the position that the idea of equality does not help us decide anything and therefore should not be the subject of analysis: see, for example, P Westen, 'The Empty Idea of Equality' 95 *Harv L Rev* 537 (1982); JR Lucas, 'Against Equality' in HA Bedau (ed), *Justice and Equality* (Prentice-Hall, 1971) pp 138-151.

specified groups, in specific areas.[13] In EEO law, the interpretation of equality as formal legal equality is counterproductive. It shows a failure to understand that the various meanings of the concept equality as formal legal equality, equal opportunity and substantive equality are all positions on a continuum. Substantive equality is as much part of equality discourse as is formal equality. One way of stepping out of the impasse is to focus on the compatability of equality with the existence of classification.

Thus in the Australian context it has to be recognized that there is nothing in the language of EEO laws which prohibits the development of a test of justified classifications. On the contrary the aims of equal opportunity demand that the law take into account the social reality of hierarchies and disadvantages experienced by groups of people and move away from insisting on formal equality. Within the concept of formal equality there is scope for classifying people into different groups and in some cases there is justification for affirmative action or reverse discrimination in order to achieve a substantive result of real equality.

Formal Equality and Classification

The idea of equality is usually traced back to Aristotle and is linked to that of justice - to be just is to be equal. The proposition that equals should be treated equally coexists with the statement that unequals should be treated unequally in proportion to their unalikeness.[14] However, there is some disagreement whether there is an invariable connection between the fact that two things are equal and how they ought to be treated.[15] Westen argues that the criteria that help us determine whether two things are equal or not are the significant factors. Once it is decided 'that two people are alike for the purposes of equality, one knows how they ought to be treated'.[16] He emphasises that whether two persons or things are equal or not can only be determined by reference to a given standard of measure. The problems in equality discourse are a result of the common practice of

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13 For a detailed account of the scope of various EEO laws, see *Australian and New Zealand Equal Opportunity Law and Practice* (CCH, 1992), pp 3,046-3,131.

14 See, eg, W Hardie, *Aristotle's Ethical Theory* (2nd ed, Clarendon Press, 1980) p 189.

15 P Westen, 'The empty idea of equality' 95 *Harv L Rev* 537 (1982); cf K Greenawalt, 'How Empty is the Idea of Equality', 83 *Colum L Rev* 1167 (1983); AK Sen, *Inequality Reexamined*, (Clarendon Press, 1992), pp 23-25.

16 Westen, op cit n 15, at p 543.

leaving the standard of measure unspecified.[17] Thus in deciding whether people or things are relevantly equal or not we need to identify the characteristics by reference to which measurements are to be made.

Another way of putting this is to say that allegiance to the idea of equality does not foreclose the possibility of classifying things or people into different categories. Sadurski[18] points out that equal treatment of individuals with respect to one criterion results in unequal treatment of these individuals with respect to other criteria. Reliance on the idea of equality before the law does not mean that every one has exactly the same rights in law but it does mean that every one who is similarly situated has the right to equal or same treatment. Thus the important issue is to define criteria to determine whether individuals are relevantly similarly situated. Sadurski designates this as equality in law. Whether any classification is valid or invalid, permissible or impermissible, cannot be decided by reference to the principle of equality. The standards or values used to make these judgments are derived from constitutions and from moral or ethical value systems which may or may not be expressed in laws. Whether any classification is considered appropriate or not is related to the hierarchy of our values.[19] For example, what is the proper role for women in our society is a matter of moral opinion and divergence on this issue will result in different conclusions about the appropriateness of classification which bars women from lifting heavy weights. Therefore, instead of expecting the law to make no classifications the basis of classification made must be justified. For example, the earlier judicial interpretation of the US constitution as a race-blind constitution has been now replaced with the view that classification based on race is permissible if it is necessary for the accomplishment of some permissible state objective.[20]

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17 Ibid. See also JR Lucas, op cit n 12; A Ross, *On Law and Justice* (Stevens & Sons, 1974) p 287 where he says 'which objects are of the "same kind" is surely not determined by the hand of nature, but only by their inclusion in the same conceptual category, irrespective of how this is defined'.

18 W Sadurski, 'Equality Before the Law: A Conceptual Analysis' (1986) 60 *ALJ* 131. See also Robert C Farrell, 'Equality, Classifications, and Irrelevant Characteristics' 12 *Vermont L Rev* 11 (1987).

19 Sadurski points out that the progress in law is not necessarily correlated to an eventual freedom from classifications. Only the bases of classification keep changing: op cit n 18, at 133.

20 For an overview of the developments in American law, see Michel Rosenfeld, 'Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal' 46 *Ohio State LJ* 845 (1985).

All Australian anti-discrimination laws prohibit discrimination, amongst other things, on grounds of race and sex. Generally they are interpreted as prohibiting classification based on grounds of race or sex for any purpose covered by the legislation, ie provision of services, employment, education etc. Two inter-related issues need to be separated here: i) the possibility of introducing classification in the interpretation of EEO laws; and ii) the possibility of extending the spirit of EEO laws and scrutinizing any classification so as to ensure non-discrimination in areas not covered by EEO laws. It is incumbent on the judiciary to introduce the test of justified classification in interpreting EEO laws. Thus in sex discrimination cases instead of treating men and women on par, the judiciary ought to identify the objective sought to be achieved by the challenged scheme. If the objective is to achieve sex equality then the scheme would be valid even if it treated men and women differently. The emphasis is on 'seeks to achieve' as it indicates that men and women are not relevantly equal and therefore we need to treat them differently at the present moment. The judiciary has the responsibility to develop an appropriate test of what constitutes justified classification.

At the same time the limited scope of anti-discrimination laws means that in areas not covered by such laws the use of race or sex as the basis of classification cannot be challenged. For example, discrimination on the grounds of sex in the area of family matters, property rights, religion etc, is not covered by the guarantee of equality. Even if the Australian Constitution does not guarantee equality, this is an unsatisfactory outcome. The judiciary could insist that a liberal legal system guarantees equality and that the state must justify all its actions in conformity with this basic value. It could develop a judicial doctrine to scrutinise any classification: whether a classification ought to be permissible or not, one must ask whether the classification is substantially related to the achievement of specified objectives. Thus, even if equality before the law is not guaranteed in the Constitution it could be woven into the law. If this is considered to be too optimistic a hope,[21] it can still be argued to be the best way of interpreting anti-discrimination laws.

Equality of Opportunity

In the absence of a constitutional guarantee of equality it is inevitable that the disadvantaged or the oppressed in society are in an unenviable position. The existence of the *Sex Discrimination Act* 1984

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21 Though it can be argued that there is reason for optimism because the High Court could move towards the recognition of an implied constitutional right of equality before the law: see *Leeth v Commonwealth* (1992) 107 ALR 672 per Deane and Toohey JJ.

(Cth) is an explicit recognition that women suffer disadvantages due to their gender. So too the *Racial Discrimination Act* 1975 (Cth) is an example of the recognition that the race or ethnicity of non-whites is constructed as a disadvantage by the dominant sections of society. Thus when an anti-discrimination law is enacted it is a step forward in combating disadvantage. However, if the *Sex Discrimination Act* is then interpreted as protecting both men and women against discrimination on the grounds of sex, it is pertinent to ask why men need protection from discrimination on the ground of sex. In contemporary societies it is a social reality that, as a general rule, gender hierarchisation puts men in positions of power and women in positions of relative powerlessness. That there are exceptions to this general pattern does not detract from the truth or the pervasiveness of the general pattern. In this context, protecting men and women equally against discrimination on grounds of sex is to buttress the superior power of men. Those who already are in a disadvantageous position are further disadvantaged by the law.

In any event, equal opportunity laws have rather modest aims. Equal opportunity laws[22] recognize that some groups are unfairly disadvantaged and aim to create a level starting point for the race of life.[23] These laws by and large do not ensure that everyone will achieve the same result, or what is sometimes called equality of outcome or result. Nor do they create a level starting point with regard to all hurdles.[24] The underlying philosophy of equal opportunity legislation seems to be that once equal opportunity is made available the law has done its job and no blame or further responsibility attaches to it if not everyone achieves the same outcome or result. While the extent and scope of equal opportunity laws in Australia are limited they do represent an acknowledgement that gender differences disadvantage a section of society and such disadvantages should be ameliorated.[25]

The legislation aims to achieve such amelioration by comparing men and women and making it illegal to provide less

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22 See for various interpretations of the concept of equal opportunity, O'Nora Nell, 'How Do We Know When Opportunities are Equal' in CC Gould and MC Wartofsky (eds) *Women and Philosophy: Toward a Theory of Liberation* (Pedigree, 1976) pp 334-346.

23 B Gaze and M Jones, *Law, Liberty and Australian Democracy* (Law Book Co, 1990) pp 399-400.

24 Disadvantages due to race and sex are uniformly targeted by all equal opportunity laws but a variety of other disadvantage-causing hurdles are also tackled by these laws: see note 13 above.

25 In the following parts of this article I use the example of gender but the discussion is equally applicable to all other proscribed grounds of discrimination.

favourable treatment in materially similar circumstances on the ground of sex.[26] However, this definition of discrimination is put in gender neutral language and the concept of equal opportunity is thereby turned on its head. What started as a recognition of the disadvantages suffered by women because of their gender is thus transformed into a guarantee of formal legal equality. Instead of removing unjustified hurdles in the path of women because of their gender, anti-discrimination legislation helps create an impression that its goal is to achieve a gender-neutral or a gender-irrelevant society. In itself, this may be a commendable aim, but its achievement is impossible simply because it ignores the power differentials between men and women. Feminist analyses of law have been relentless in exposing the function of the ideology of treating men and women as equal. Not only are the two genders socially constructed as different but they are also hierarchised. When law ignores such power differentials between men and women it helps perpetuate the oppression of women.[27] Law cannot achieve sex equality by simply ignoring the existing imbalance of power.

One of the recurring issues in anti-discrimination cases is how to determine whether two persons are placed in materially the same or similar circumstances. This is the essential initial step for the comparison to be possible. If it could be established that the complainant and the defendant are not comparable there would be no scope for arguing that the complainant has been treated less favourably because of her or his sex (or any other proscribed ground). However, which circumstances are material is determined by the tribunal in every case. I will illustrate this argument with the help of the *Proudfoot* decision.

In *Proudfoot's* case, the main issue for discussion was whether or not gender by itself was sufficient to put men and women in materially different circumstances. The HREOC stated that 'a difference to be material cannot be referable to the prohibited basis for less favourable treatment, namely, sex'.[28] Thus the *Sex Discrimination*

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26 See, eg *Sex Discrimination Act 1984* (Cth) s 5 (1). This section provides that a person discriminates against another person on the ground of the sex if by reason of i) the sex of the aggrieved person; ii) a characteristic that appertains generally to persons of the sex of the aggrieved person; or iii) a characteristic that is generally imputed to persons of the sex of the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

27 Catherine MacKinnon is the most consistent proponent of this view: see, eg *Towards a Feminist Theory of the State*, (Harvard UP, 1989).

28 (1992) EOC ¶92-417 at 72-980.

Act does not allow comparison between men and women or take into consideration the consequences that flow from gender heirarchisation. Instead the Act compares a man and a woman in similar circumstances, ie a male patient and a female patient, a woman teacher and a man teacher, man student and woman student, etc. The underlying premise behind such comparison is that everyone is entitled to similar or equal opportunities. What constitutes a desirable equal opportunity is defined by reference to the norm of a white, able-bodied, heterosexual man. Thus women (and other disadvantaged groups) must strive to approximate this norm, and if they are being treated differently from the way such a man would be, they have a remedy in law.[29]

The flip-side of this position is that any different treatment gets defined as discrimination. If something is made available for women in recognition of social and historical disadvantages which are not legally recognised, the logic of anti-discrimination law allows such different treatment to be illegal. As a result women are doubly disadvantaged. First, the only kind of equal opportunity available is that they have to approximate the male norm. Secondly, in their effort to become like men, if some specific programmes or services are provided to enable women to reach the same starting point as men, such services are challenged as discriminatory because similar arrangements are not made for men. For example, the complaint in the *Proudfoot* case was that there was an imbalance in the services provided to men and women. Since comparable arrangements had not been made for men's health services, this constituted discrimination against men. The decision in the *Proudfoot* case accepted that men and women should be treated absolutely on par. While no one denies the prevalence of social inequality between men and women, the very legislation designed to combat it ignores its existence. The device used to get over this absurd result is to characterise something as a special provision or as a service that can only be provided to one sex.[30]

In the *Proudfoot* decision the HREOC accepted that 'the distinctive health concerns of women extend beyond conditions

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29 Catherine MacKinnon, in *Towards a Feminist Theory of the State* (Harvard UP, 1989) at pp 215-234, gives a brilliant analysis of the absurdity of this position.

30 See *Sex Discrimination Act* 1984 (Cth) ss 32 and 33. Cf Renee Leon, op cit note 7. I disagree with her argument that the concept of special measures if given purposive interpretation can be a suitable concept to combat discrimination. The central argument of this article is that the concept of equality is broader than formal equality and that, therefore, there is no need to rely on the concept of affirmative action to legitimise different treatment of women.

exclusively suffered by women as a result of differing physiology to conditions capable of being suffered by both genders, but are more commonly caused in women by particular circumstances which call for special treatment'.[31] One of the examples given is the physical injuries which result from domestic violence. But this is a convoluted manner of characterising services which can only be provided for women. The indivisibility of a person's general health makes it imperative that ancillary aspects of health be treated as part of the distinctive health concerns of that individual, whether female or male. However, it is problematic to define what is a distinctive or an ancillary health need of a woman. In any case, to characterise physical injuries caused by domestic violence as either ancillary or distinctive aspects of women's health is to miss the significance of gender power imbalances. There is nothing natural or inevitable about women rather than men suffering domestic violence.[32] The fact that more women suffer so is a clear demonstration that in this regard men and women are not in relevantly similar circumstances. If they are not in materially same circumstances there can be no problem in providing dissimilar services to them. Such services will be a recognition of the social consequences of power disparity rather than an acknowledgement of the special physiological health needs of women.

Similarly the HREOC was of the view that the enormous strain, both physical and mental, of rearing children is largely borne by women.[33] But to characterise the consequences of child rearing as a special aspect of women's health, and thus an area where special services can only be provided to women, is to underpin the stability of the contemporary social system where women are the primary nurturers and child carers. The underlying logic of the *Proudfoot* decision can only be that both men and women can be primary care-givers and nurturers therefore, both should be entitled to the same health services. However, special health services for women will not be considered invalid because the Act allows special services which can only be provided for one sex. The crucial question however is this: why can these services be provided to women only? Is it because of the prevailing social norms of sexual division of labour that women

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31 (1992) EOC ¶92-417 at 78-981

32 There is a vast amount of literature on the subject of domestic violence; see the following for an introduction: Jan Horsfall, *The Presence of the Past: Male Violence in the Family* (Allen & Unwin, 1991); Margaret Condonis, *The Mutual Help Group: A Therapeutic Programme* (Redfern Legal Centre Publications, 1990); Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* (Virago, 1989); Susan Schechter, *Women and Male Violence: The Visions and Struggles of Battered Women's Movement* (Pluto Press, 1982).

33 (1992) EOC ¶92-417 at 78-982.

are the primary care-givers? The Commission had declined to recognise the existence of these social norms at the initial stage of determining whether men and women are in similar material circumstances, for logically both men and women are capable of being primary care-givers and both men and women can be subject to domestic violence. That being so it becomes problematic to explain why judicial notice of social reality is not acceptable at the initial stage but is acceptable at the later stage. This shift in the position of the Commission enables it to legitimise prevailing social relations. Law thus reinforces the idea that women have special health needs as they are especially vulnerable to domestic violence or as they are mothers bringing up children. Even though recognising and catering for these special needs would be discriminatory against men, the law exempts such treatment from its prohibition against less favourable treatment on grounds of sex.

Obviously this line of argument ignores the social reality that domestic violence is a consequence of powerlessness of women or that men usually do not perform the child-rearing and nurturing tasks. If this is so, it follows that men cannot have the same health needs as battered women or mothers, the primary nurturers. However, the crucial point is that these different health needs of women are not a consequence of their physiological constitution but of their social roles. These social roles are defined and underpinned by the prevalent meaning attributed to gender.[34] Not all women have the special health needs which were the subject of dispute in the *Proudfoot* case. By characterising them as special health needs of women, the HREOC is avoiding the difficult issue of whether the likelihood of being subjected to domestic violence or the health needs of the primary care givers with its attendant emotional, physiological and financial stresses, are attributes of the contemporary sexual division of labour. If these can be equally attributed to whoever happens to be powerless in a relationship or whoever undertakes child-rearing and care, then it becomes imperative to ask why they are being classified as special health needs of women. The answer cannot be anything other than that it is the fact of being one gender or another which determines who perpetuates domestic violence or who withstands it.

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34 There is a considerable literature discussing the social construction of gender, eg: Ruth Bleir, *Science and Gender: A Critique of Biology and its Theories on Women* (Pergamon Press, 1984); Evelyn Fox Keller, *Reflections on Gender and Science* (Yale UP, 1985); Robert W Connell, *Gender and Power* (Allen & Unwin, 1987); Moira Gatens, 'A Critique of Sex/Gender Distinction' in Sneja Gunew (ed), *A Reader in Feminist Knowledge* (Routledge, 1991) p 139; Anne Edwards, 'The Sex/Gender distinction: Has it Outlived its Usefulness', (1989) 10 *Aust Feminist Stud* 1; Moira Gatens, 'Woman and her Double(s): Sex, Gender and Ethics', (1989) 10 *Aust Feminist Stud* 33.

The power disparity between genders is the underlying reason why men and women are not situated in materially similar circumstances. Therefore, to compare men and women as equals with regard to their health needs is to ignore the most fundamental attributes of gender difference.

In current legal practice, the fact that men and women have very different life patterns and responsibilities is ignored. As a consequence anything done for women only can be challenged and characterised as discriminatory. Moreover, within the logic of this argument no scope is left for legitimising special measures. If men and women are not relevantly different there can be no justification for providing special measures for one sex (ie women). Arguably, if men and women are already equal (non-different) there is no need for equal opportunities to be ensured by the law. When the law in its magnanimity allows special measures for one sex only (women), it sees itself, and is seen, as paternalistic. In this way women become indebted to the paternal care of the state through equal opportunity laws. By providing for special measures, law makes the disadvantaged carry the opprobrium of paternalism when, at the same time, this very law is actively maintaining disadvantages by treating as the same people who are obviously not in the same position. In a different context, Katherine O'Donovan makes the particularly apt observation that '[t]he protection of the wife comes from law, but the power against which she is to be protected is reinforced by law. Stripped to its essentials the argument is that law confers, woman defers, and law protects.'[35]

One has to pause just for a moment to realise that not much has been achieved by women through the introduction of equal opportunity laws in Australia. Without such laws there would have been no hindrance to the provision of any services for women only.[36] Obviously, health services for women would have recognised the special needs of women because of their specific position in society. By the introduction of equal opportunity legislation any provision of different services is characterised as discriminatory but then a proviso is added that special measures will be allowed nevertheless.[37] As a result of this legislative scheme men have an opportunity to challenge any programme or anything done for women only. They may

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35 Katherine O'Donovan, 'Protection and Paternalism' in MA Freedman (ed), *The State, The Law and The Family* (1984), p 86.

36 It is significant to remind ourselves here that the services under dispute in the *Proudfoot* case were not justified as part of any equal opportunity programme made incumbent upon the state due to its responsibilities under the equal opportunity laws.

37 For a discussion of the limitations of this course of action, see Dorothy Broom, 'With Friends Like These' (1992) 17 *Alternative Law Journal* 142-3.

succeed in having such a programme declared discriminatory and therefore illegal. The chance of any programme being defined as a necessary special measure is at best a gamble.[38] If the judges classify something as a special measure women ought to be grateful that equal opportunity is safeguarded for them. However, women need not have been so indebted if the equal opportunity legislation did not exist. It is hard not to surmise that the equal opportunity laws legitimise claims by the dominant sections of society, ie white, able-bodied, heterosexual men, that whatever any disadvantaged group member gets is permissible in so far as these men get it too. The equal opportunity laws thus guarantee the dominance of such men and underpin the stability of the contemporary social structures.

The implication of this conclusion is that equal opportunity laws are damaging to women's interests and the logical extension of the argument is that they should be repealed. However, that is not what I wish to argue. The purpose of the above analysis is to unravel how male privilege is being maintained by the legal system. As a result it is now incumbent upon anyone concerned with social justice to challenge the particular concepts of equality, discrimination and less favourable treatment being used in interpreting equal opportunity laws.

Reinterpreting Equality

It is my argument that the tendency to interpret equal opportunity laws as embodying the ideal of formal equality or, at most, formal equal opportunity is based on a lack of appreciation of the relevance of existing differences between various persons or groups. To be meaningful the discourse about equality has to be contextualised. Whether two persons or groups are equal or not cannot be answered in the abstract. This issue can only be resolved meaningfully in a specific context, and the determination in one specific context may not be equally applicable in other contexts. For example, it is undeniable that men and women are entitled to equal or the same fundamental human rights. This finding does not preclude an acknowledgement that men and women are different in a number of social contexts, eg health needs. Therefore, it is eminently possible that access to health services can be differently structured without contravening the principle of equality. Such an acknowledgement justifies the recognition and therefore a rectification of existing disparities. Ignoring the differences between men and women because they are similarly human beings[39] is an unnecessarily narrow conception of

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38 Renee Leon, op cit note 7, provides a good overview of how tribunals have interpreted the special measures provisions.

39 Williams, op cit note 8, at pp 125-131 describes this as the transformation of the moral value of equality into the political right of

equality and it prevents the anti-discrimination potential of equal opportunity legislation being realised. Therefore, it is important to shift the equality debate to the issue of determining which factors are relevant in deciding whether two persons or groups are equal or not equal in a specific context. In this understanding of equality, different treatment does not in itself constitute discrimination. Instead, it is the initial classification into different groups which has to be justified. We therefore need to find suitable criteria of justification.

Constitutional doctrine in the United States has developed the test of rational connection: whether a particular classification is justified or not is determined by the nexus between the ground of classification and the objective sought to be achieved by the law. For example, if teachers are classified into different categories on the basis of their height, this classification can have no rational nexus with the objective of providing competent teachers. In addition, the objective sought to be achieved must be of a kind that is permissible for the state to pursue.[40]

Australian anti-discrimination laws are not enacted pursuant to a constitutional guarantee of equality and are not directed only to state action. Therefore, reliance on North American legal doctrines is not always useful. For example, Sadurski argues that if the rational nexus doctrine is used we can accommodate the need for classification without contravening the principle of equality.[41] However, in the contemporary Australian context this test does not help resolve the problem of determining what may constitute a valid objective that is sought to be achieved by the classification. One possibility is to discern the limits of valid objectives from the ambit of anti-discrimination laws. For example, the *Sex Discrimination Act* may be read as putting a limit on objectives - no objective may be considered legal if it promotes sex-discrimination. However, this becomes a circular argument because we are trying to determine what constitutes sex-discrimination. Moreover, even in the American context there is increasing recognition that virtually all classifications pass the test of rational nexus.[42]

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equality. Thus we are not only concerned with the abstract existence of rights but we must focus on the extent to which those rights govern what actually happens.

40 There is an extensive literature on this aspect of American law; see for a representative work, Michael J Perry, 'Modern Equal Protection: A Conceptualization and Appraisal' 79 *Columbia Law Review* 1023 (1979).

41 Sadurski, op cit note 18, makes this argument in the context of a prospective Australian Bill of Rights.

42 Perry, op cit note 40 at 1070-71 says that there has been only one case since the 1930s where a law which dealt with a socio-economic scheme

Since the rational connection test does not yield a workable principle for us in Australia, it is perhaps more useful to focus on the likely effect of the proposed classification. Ruth Colker has developed the anti-subordination principle to test the validity of any classification.[43] Thus, instead of saying that the *Sex Discrimination Act* prohibits classification on the ground of sex, it is more appropriate to say that it prohibits such classification only if the object of the classification is to discriminate or subordinate. Whether classification into different groups and the consequential different treatment is discrimination will depend upon the effect of that particular classification or action. Relying on this test, the decision in the *Proudfoot* case would depend on whether the provision of some health services to women only subordinates men. By focussing on the anti-subordination principle equal opportunity laws can be interpreted as the means of rectifying historical disadvantages suffered by women and other disadvantaged groups.[44]

The most likely problem with this way of interpreting equal opportunity laws is that many women or non-white people do not wish to be classified as 'different' or 'other' so as to legitimise the centrality of the current norms. Historically the differences between men and women or between whites and non-whites have been translated into power differentials and thus into superior and inferior positions in society. While this is a perfectly valid and understandable reaction, I think it needs to be changed. The unwillingness to be put in a category which is classified as different (from the norm) and is devalued does not make the reality disappear. Instead it makes transformation more difficult because it precludes the realisation that in the contemporary context insistence on treating men and women as absolute equals is itself discrimination.[45]

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has been struck down under the rationality requirement. See also Cass R Sunstein, 'Naked Preferences and the Constitution' 84 *Columbia Law Review* 1689 at 1713-14 (1984), who says that the test of rationality review under the equal protection clause, as elsewhere, almost always results in the validation of statutory classifications.

43 Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection' 61 *New York University Law Review* 1003 (1986).

44 For example, Robert L Hayman Jr, 'Re-cognizing Inequality: Rebellion, Redemption and the Struggle for Transcendence in the Equal Protection of the Law' 27 *Harvard Civil Rights Civil Liberties Review* 9 (1992).

45 Discussions with regard to the best way of organising child care illustrate some of the problems. For instance, if one argues for adequate child care as one way of meeting the needs of mothers, at the same time one legitimises the conventional division of labour, in which the responsibility of child care is that of women and not of men. However, ignoring existing realities does not in any way change the state of

Nor does an acknowledgement of differences between men and women compel legal feminists to choose the kind of equality for which feminists should aspire. In fact, this issue has already been resolved by equal opportunity legislation. And it is important to realise that the equality discourse operates at various levels. The sameness/difference debate in legal feminism is related to the broader issue of what kind of guarantee of equality we should aspire to.[46] However, once a particular concept of equality or equal opportunity is already in existence the issue becomes more circumscribed, namely, to interpret the scope of equality within the confines of that particular law. Thus the question is no longer whether the feminist goal is to establish difference or sameness between men and women (equal opportunity laws have already resolved this issue), but whether acknowledging or ignoring the existing differences will best serve the feminist goal of anti-subordination.

The anti-subordination goal is virtually lost in the contemporary interpretation of equal opportunity laws in Australia. Equal opportunity legislation unambiguously relies on comparison to determine whether discrimination (or denial of equality) can be established. The logic of this position is that the able-bodied, white, heterosexual man is defined as the norm and any deviation from the norm is actionable. Thus if a woman is not treated as a man she may legitimately complain. Sexual harassment cases[47] illustrate the extent to which the rationale of comparison is taken. In response to complaints of sexual harassment it is often argued that a woman cannot establish discrimination because she cannot compare her treatment to that of a man. That is, her alleged harasser would not similarly harass a man except in the unusual case of a bisexual harasser. Therefore, since no comparison can be made neither can less favourable treatment be established. The conclusion from this argument is that any experience which is a distinct experience of women cannot by itself be characterised as discrimination. It is in this context that legal feminists have to decide whether the anti-subordination potential of equal opportunity laws can be realised by ignoring the differences in the position of men and women. By

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affairs. The mere fact that feminists recognise the existing division of labour does not commit them to saying that child care will always be the responsibility of women. The crucial issue is to focus on how best to change the existing situation. See for a detailed discussion of this issue, Denise Riley, *War in the Nursery: Theories of Child and Mother* (Virago, 1983).

46 Carol Bacchi, 'Do Women Need Equal Treatment or Different Treatment?' (1992) 8 *Australian Journal of Law and Society* 80.

47 See, eg *Aldridge* v *Booth* (1988) EOC ¶92-222; *O'Callaghan* v *Loder* [1983] 3 NSWLR 89.

insisting on the recognition of differences between men and women, feminists are not being untrue to their cause of disassociating difference from disadvantage. Instead, it is a very limited initial step towards the recognition of the reality that women are subordinated because of their gender. Therefore, a classification based on the ground of sex can be a limited step towards achieving anti-subordination.

A likely objection to this argument is that if the goal is to remove subordination then one should target subordination rather than race or gender. In my view, this objection is dubious because it asserts that the oppression of men (and of whites) ought to be given equal consideration to that of other oppressed persons. This claim may be logical but it denies the historical connection between disadvantage and gender (as well as race). Moreover, equal opportunity laws were enacted to rectify discrimination on the ground of sex (and a few other grounds) in very limited areas. They were not enacted to remove discrimination from the face of earth. It is in interpreting the very limited scope of legislation that tribunals and courts are making erroneous assumptions, not in laying down broad philosophical principles.

It would be utopian if Australian legislatures set themselves the task of removing all kinds of oppression and subordination. It would then make sense to use subordination as the category for defining the target groups. However, until such a development comes about, we should not destroy the potential of very limited measures to rectify very small aspects of discrimination suffered by women on the ground of sex.

Conclusion

The aim of this article has been to relate the broader concerns of legal feminism to the everyday reality of women's lives. The project of legal feminism, as all other forms of feminism, has to be the end of oppression of women and all other disadvantaged groups. This aim may not be fully realisable through a reliance on law and law reform, but law is one aspect of our lives that feminists cannot afford to ignore.[48] Contemporary legal feminist analyses are extremely

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48 Many analyses of contemporary legal feminists impliedly or explicitly reject the possibility of law reform. Legal feminists are increasingly engaging in 'academic' debates about postmodernism, semantic deconstruction and psychoanalytic theorising. These emphases are understandable but not equally easily justifiable if they have no vision of social transformation. In my view, it is simply not feasible for academics to ignore the reality of law in our lives and therefore our

sophisticated and grapple with the fundamental theoretical and philosophical issues concerning the nature of law. While such activity puts legal feminism in the 'respectable' company of academics it need not stop at being a purely academic activity. The transformative potential of legal feminism can only be realised by linking theoretical analyses to the practical workings of law. For example, in this article I have sought to demonstrate that the current interpretations of equal opportunity are perpetuating the subordination of women and therefore need to be challenged. Such a challenge has the potential to create a discourse of discrimination which genuinely deals with oppression rather than one which pretends that formal legal equality is the only conception of equality. The challenge ought to be multifaceted - to generate academic debate on the particular notions of equality appropriate for the Australian legal system; to use legal arguments in courts and tribunals to delegitimise the interpretation of equal opportunity laws as ensuring formal legal equality; and to work towards legislative change. These are pragmatic and fairly instrumental suggestions but no less desirable for that reason. It is imperative for legal feminism to maintain some kind of balance between grand theorising and the focus on limited and defined aspects of law which directly affect our everyday lives. Only then can legal feminism play a role in transforming the contemporary oppressive situation of women.

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analyses cannot afford to 'decenter' law, as advocated by Carol Smart, *Feminism and the Power of Law* (Routledge Kegan Paul, 1989).