

Women and Work Choices Sydney Roundtable

Equal Opportunity Law in an era of Work Choices

Belinda Smith
Faculty of Law
University of Sydney
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- Equal Opportunity Law (ie anti-discrimination and affirmative action laws) were established in Australia separately to industrial laws:
 - ⇒ little used by unions because not integrated into industrial arena
 - ⇒ But spared the razor cuts of Work Choices – Anti-discrimination laws left in tact
- **Limitations** on Anti-discrimination laws –:
 - Only prohibit discrimination – rather than impose any positive duty of affirmative action or accommodation of ‘difference’
 - Only victims can enforce a breach, rather than a public prosecution agency (as is the case for WRA (OWS) or occupational health and safety (WorkCover)
 - Provide only compensatory remedies – compensating the victim, but not ordering employer to change policy or provide education or audit practices, etc
 - Process is largely private or confidential, because claims are dealt with by conciliation first and few go on to be heard (in public) by a court or tribunal.
- **Capacity** - anti-discrimination laws do have some capacity to promote equality:
 - They do provide a right to non-discrimination that has been used by victims and has resulted in public hearings and precedent in limited cases – eg:
 - *Mayer v Ansto* – refusal to allow PT work after maternity leave amounted to indirect sex discrimination. This, in effect, imposes an obligation on employers to seriously consider requests for flexible hours.
 - These rights have a normative/moral impact – they have filtered into a general understanding of what is ‘fair’ and just, despite the limitations on enforcement.
 - HREOC has played a key role in promoting equality:
 - No power to ‘enforce’ the rights – cannot act for or directly assist victims of discrimination to litigate claims.
 - But does:
 - Education – producing material for employers and employees, in plain English and other languages, to raise awareness of rights and obligations
 - Commissioning research – eg WESKI

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- Advocating for human rights – eg submission to AIRC in Living Wage cases and test cases like the Family Provisions Test Case; submission to Senate on Work Choices legislation
- Public Inquiries – such as paid maternity leave (*A Time to Value*), work and family (*It's About Time*)
- ***It's About Time - women, men, work and family***
 - Major inquiry into work – family balance
 - Discussion paper – Striking the Balance – and then consultations
 - Wide-ranging recommendations that:
 - More information be gathered – about time use, family friendly provisions at workplaces, affect of AWAs, etc
 - Resources be created – eg quality part time work, and family friendly practices.
 - Legal rights: Paid maternity leave; new Act prohibiting caring responsibilities discrimination, including a right to request flexible work arrangements to accommodate caring responsibilities
- **What to do with anti-discrimination laws:**
 - Use them – while agencies are slow, they are still free and might be the only right available with unfair dismissals eliminated for workplaces under 100 employees.
 - Threaten to use them! For some employers (those that care about reputation or morale or doing the right thing), the threat is enough to get them thinking.
- **What to do about anti-discrimination laws:**
 - Lobby for HREOC recommendations of PML, and expanding carers' responsibility discrimination prohibitions and the right to request (alternatively called a duty to reasonably accommodate):
 - Lobby for more extensive changes to anti-discrimination laws that could make these laws stronger and more effective:
 - Giving an agency power to enforce
 - Expanding range of sanctions
 - Developing resources or standards so that employers who want to do the right thing know what it is they have to do.

(These ideas are developed more fully in: [Belinda Smith 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' \(2006\) 28\(4\) Sydney Law Review 689-732](#))