WOMEN, WORK AND EQUALITY: THE COMMONWEALTH LEGISLATION

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Introduction

Traditionally in Australia, occupations have been categorised on the basis of whether positions were filled predominantly by males or females. When an occupation was considered to be "male", the wage tribunals would calculate the rate of pay on the basis of what was necessary to support a man, his wife and children in a "civilised community" and then add a margin for the work value of the occupation.[1] When an occupation was considered to be "female", tribunals undertook calculations by reference to "the needs of a single woman who has to pay for her board and lodging, has to maintain herself, out of her earnings, but has no dependents to support"[2] and then added a margin for work value. In occupations which were not classified as either "male" or "female", women were usually awarded a percentage of male award rates.

Before World War II, the mark down in pay for a female for many of the occupations which were not classified as "male" or "female" was to 54 per cent of the male rate of pay. In 1950 this was raised to 75 per cent.[3] On 19 January 1969 a policy of "equal pay for equal work" was introduced by the Commonwealth Conciliation

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1. *Ex parte H V McKay* (1907) 2 CAR 1, 3-4 ("Harvester Case").
2. *In the Matter of the National Security.(Industrial Peace) Regulations and of the Arms Explosives and Munition Workers Federation of Australia v Director-General of Munitions* (1943) 50 CAR 191, 211.
3. F C Hunter *Equal Pay for Comparable Worth* (New York: Praeger, 1986) 39. See also L Beaton "The Importance of Women's Paid Labour: Women at Work in World War II" in M Bevege, M James and C Shute (eds) *Worth Her Salt Women at Work in Australia* (Sydney: Hale and Iremonger, 1982) 84, 95.

and Arbitration Commission ("the Commonwealth tribunal"), to be fully effective by 1 January 1972.[4] From that date the sex of an employee was not to be used as a criterion for fixing wage rates in those jobs which were neither predominantly male nor female.[5] Hunter notes that this ruling affected only the one fifth of women workers who were doing the same work as men.[6]

This policy resulted in only a minority of the female workforce receiving equal pay. Consequently, there was pressure to make further changes to the wage-fixing process. In 1972, the Commonwealth tribunal introduced a policy of "equal pay for equal work of equal value", to be implemented by June 1975.[7] After 1975, award rates for all work were to be considered without regard to the sex of employees. Gregory and Ho state that without a doubt, this has resulted in tribunals increasing the pay of women relative to men by about 25 to 30 per cent.[8] By 1985, studies indicated that women who worked full-time received 82 per cent of men's average full-time earnings.[9]

Connell notes, however, that this statistic greatly overstates the level of economic equality between men and women in Australia. If all adult employees are considered, in 1985 women, on average, received only 66 per cent of men's average weekly earnings. This is because significantly more women than men work part-time. Furthermore, if account is taken of the fact that more women than men do not receive a wage but are dependent upon welfare payments or receive no income at all, Connell estimates that in 1981/82 the average income of all women in Australia was 45 per cent of the average income of all men. He also notes that women's low labour-

4. *In the matter of the Conciliation and Arbitration Act 1904-1969 and of The Federal Meat Industry Interim Award, 1965 and of The Australasian Meat Industry Employees Union and Ors v Meat and Allied Trades Federation of Australia and Ors* (1969) 127 CAR 1142, 1158-1159 ("The Equal Pay Cases 1969").
5. R G Gregory and V Ho *Equal Pay and Comparable Worth* (Discussion Paper No 123) (Centre for Economic Policy Research ANU Canberra, 1985) 7.
6. Supra n 3, 39.
7. *In the matter of the Conciliation and Arbitration Act 1904-1972 and of the Public Service Arbitration Act 1920-1972 and of National Wage and Equal Pay Cases 1972 and Ors* (1972) 147 CAR 172, 178. A comprehensive account of the Commonwealth arbitral history of wages for women workers is in R Hunter "Women Workers and Federal Industrial Law: From *Harvester* to Comparable Worth" (1988) 1 AJLL 147.
8. Supra n 5, 7.
9. R W Connell *Gender and Power* (Sydney: Allen & Unwin, 1987) 6.

force participation rate does not mean that large numbers of women are not working; it means that women are not paid for their work.[10]

I would argue that the foregoing is but one illustration of how "equal treatment" of men and women will secure advantages for only some women. This is because the position of many women will not be improved by refusing to recognise the way in which their lives are different to men's. The deliberate reduction of women's pay so that it was only a portion of men's income was, and is, only one symptom of the underlying social construction of gender difference. What is pivotal to that construction of gender difference is the devaluation of what is thought of as womanly.[11] Strategies that are designed to limit the recognition of such differences do not address the underlying issue of evaluation.

If Connell's assessment of the economic parity of Australian women is accepted, almost a decade after the Commonwealth tribunal ruled that rates of pay for all work were to be determined without regard to sex, women received something less than half of men's average weekly income. At about that time there was also apparent a considerable political impetus to legislate in respect of, among other matters, conditions of employment that discriminated against women (although arbitrated rates of pay were exempted[12]). The first piece of Commonwealth legislation to result was the Sex Discrimination Act of 1984. Other reforms of Commonwealth public sector employment were initiated by the Public Service Reform Act 1984, the Merit Protection (Australian Government Employees) Act 1984 and the Equal Employment Opportunities (Commonwealth Authorities) Act 1987. The Affirmative Action (Equal Employment Opportunities For Women) Act introduced similar initiatives to private sector employment practices in 1986. The issue addressed in this paper is the theoretical implications of such reforms on power- relations, not only between men and women, but also between employers and employees.

10. Ibid, 6-10. I prefer to use Connell's contextual estimate to the official statistics. Official statistics are based on the comparison of wages of only full-time employees and hence fail to reflect the fact that it is only a minority of women who receive full-time wages.
11. S Harding *The Science Question in Feminism* (Ithaca, New York: Cornell University Press, 1986) 18.
12. (Cth) Sex Discrimination Act, 1984 ("SDA") s 40

It is largely for the sake of convenience that I have confined my discussion of anti-discrimination legislation to the main Commonwealth legislative texts on the subject of women, work and equality. My discussion of the case-law is not so confined and, as is found in judicial considerations of the Commonwealth legislation, the relevance of cases concerning similar anti-discrimination legislation is accepted.[13] My purpose in analysing these Acts and the relevant case-law is not doctrinal; rather it is to explain the framework deployed in such Acts and to indicate the limitations inherent in this sort of legislation.

Frameworks deployed in the legislative texts

The following discussion of the Commonwealth legislation is confined to those provisions that reveal something of the framework within which the Acts were constructed. I would characterise the overriding framework as one of legal liberalism.

> Liberalism is the belief in a commitment to a set of methods and policies that have as their common aim greater freedom for individual men [sic].[14]

Smith states that liberal thought and practice have stressed the active freedom of the individual and the dislike of arbitrary authority. Legal liberalism combines these aims with the methods and policies of the "rule of law". An impersonal control based on generality and universality, legal liberalism derives from what Dicey refers to as the "equal treatment of all citizens before the law", and has as its ideal the individual who has opportunity for free expression.[15]

In the following discussion, I look at the different methods which have been utilised in the Commonwealth Acts to implement the objects of those Acts. The Sex Discrimination Act, I will argue, relies on the traditionally liberal device of the active individual who pursues his or her legal entitlements. This device has found its paradigmatic expression in the adversarial model of the common law. By contrast, the other Acts, such as the Equal Employment Opportunities Acts, rely on a bureaucratic model for the implemen-

13. See *Hall v Sheiban* (1989) 85 ALR 503, 515, 552
14. D G Smith "Liberalism" in D L Sills (ed) *International Encyclopaedia of Social Sciences* (New York: Macmillan Co & The Free Press, 1968) 276.
15. Ibid, 276; M Thornton "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 Aust J of L & Soc 10; P Fitzpatrick "Racism and the Innocence of Law" in P Fitzpatrick and A Hunt (eds) *Critical Legal Studies* (Oxford: Basil Blackwell, 1987) 119.

tation of the legislative objects, a model that in many respects may be regarded as the antithesis of traditional liberal individualism. However, I shall also seek to show that despite these different "means", all of the Acts are directed toward securing the equal treatment of women so that they will, as individuals, have the opportunity to enjoy the same freedom as men. In this way, the objects of the Commonwealth legislation fall within the framework of legal liberalism.

A common law paradigm

The adversary model is the paradigm of common law proceedings. The facts on which decisions are based emerge selectively through examination by opposing parties. Because facts must be proved, the onus of proof initially lies on the party initiating proceedings. It is also of note that at common law, there are restrictions as to the persons who are permitted to initiate proceedings that is, who have "standing". The common law tends toward a private law theory. As opposed to public law or droit objectif, the common law insists that a party's standing to initiate proceedings be dependent upon that person being individually affected by the conduct of the accused.[16] Finally, the common law not only limits the parties to proceedings, but also the means of proving the facts in dispute. There is a complex and formal collection of rules that govern the sorts of evidence admitted into common law proceedings.[17]

I intend to discuss onus, standing and evidence in relation to the Sex Discrimination Act, in order to indicate the degree to which that Act adopts an adversarial model for the implementation of its objects. First, however, I shall briefly outline the provisions of the Act.

The objects of the Act are specified in section 3. One such object is to eliminate "in so far as is possible" discrimination in the area of work which involves either sexual harassment or discrimination on the basis of sex, marital status and pregnancy.[18]

16. S Thio *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971)
17. See for example D Byrne QC and J D Heydon *Cross on Evidence* Third Australian Edition (Sydney. Butterworths, 1986)
18. SDA sub-ss 3(b), 3(c).

For the purposes of the legislation, an act of sexual harassment occurs when an applicant or employee is subject to *unwelcome* sexual advances or behaviour by an *employer/co-worker*, and the applicant or employee is actually, or has reason to believe he or she will be *disadvantaged at work* as a result of objecting or refusing.[19] Being asked personal questions when applying for a job regardless of whether the complainant subsequently accepted employment is one instance of sexual harassment as found by the Full Federal Court in *Hall v Sheiban*.[20]

Apart from discrimination involving sexual harassment, there are two definitions of discrimination for the purposes of the Act. On the first definition, there is discrimination if a person is *treated less favourably* by reason of *sex, marital status* or *pregnancy*, or a characteristic pertaining or attributed to that category, status or condition. The circumstances must *not be materially different*,[21] and in respect of *pregnancy* also must *not be reasonable* in the circumstances.[22] There is discrimination pursuant to section 8 if the act is done for more than one reason, and sex, marital status or pregnancy are relevant, although not the dominant or substantial reason.

This prohibition against what is known as direct discrimination would seem fairly unambiguous. The bulk of employment related complaints cited in the Annual Reports of the Commissioner for Equal Opportunity (WA) ("the Commissioner's Report (WA)") fall within this category.[23] The following is an example of a complaint on the basis of marital status.

> A woman complained she was being treated less favourably in the terms on which her union membership was provided. She wished to work for a

19. SDA s 28.
20 Supra n 13 That case also includes a full discussion of section 28 of the SDA Note that French J held that sexual harassment was a form of discrimination, Lockhart J considered that any other finding would be contrary to the trend of judicial opinion and Wilcox J did not decide this point.
21. SDA ss 5(1), 6(1), 7(1).
22 SDA s 7(1).
23. Commissioner for Equal Opportunity ("CEO") *Annual Report 1985-86* (Perth: Equal Opportunity Commission, 1986) 7-12, CEO *Annual Report 1986-87* (Perth: Equal Opportunity Commission, 1987) 14-22. The Commissioner for Equal Opportunity (WA) administers the Commonwealth Racial Discrimination Act 1975, Sex Discrimination Act 1984 and Human Rights and Equal Opportunities Commission Act 1986, as well as the (WA) Equal Opportunity Act 1984. The Western Australian Act is in substantially the same terms as the Commonwealth Acts, although the orders of the Equal Opportunity Tribunal (WA) are binding, unlike those of the Equal Opportunity and Human Rights Commission (Cth).

> large North-West mining company. She applied for the position, had completed the interview, necessary medical examination and received her "ticket" as a union member. There were vacancies for the position in the company. However the company refused to offer her a position because there was an on-site agreement with the union that women married to men who worked for them would only be employed as cleaners. The positions, amongst the lowest paid on site, were 'reserved' for the married women of the town.[24]

On the second definition, a person is discriminated against if required to comply with a *requirement* with which a *substantially higher proportion* of persons who are not of the same *sex, marital status* or *pregnant* can comply, and which is *not reasonable* in the circumstances. In addition that person must not be able to comply with the requirement.[25] The conduct that is prohibited by this definition is known as indirect discrimination. Ronalds states that the aim of the prohibition is to ensure that rules, practices and procedures that on their face apply equally to all employees, do not have a disproportionate impact on one group or section in the community.[26] This however must be qualified in that the disproportionate effect must also not be characterised as reasonable.

Ronalds notes that "it is regrettable that the indirect discrimination provisions have been used so infrequently".[27] Only one case brought under this heading is cited in the Commissioner's Reports (WA). The complaint related to mobility as a criterion for promotion and bonuses.

> A married woman employed by a lending authority complained that she was being overlooked for promotion because she was not indicating her willingness to transfer to other branches. The complainant also alleged that her annual bonuses were less than other employees who had transferred to other locations during the previous year.[28]

The Sex Discrimination Act conferred functions concerning sex/gender discrimination and harassment on the Human Rights Commission.[29] Initial inquiries are made by the Sex Discrimination Commissioner, whose office was established by the Act.[30] If

24. CEO *Annual Report 1985-86* ibid, 10.
25. SDA ss 5(2), 6(2), 7(2).
26. C Ronalds, *Affirmative Action and Sex Discrimination* (Pluto Press: Sydney, 1987) 99.
27. Ibid.
28. CEO *Annual Report 1986-87* supra n 23, 20.
29 Now the (Cth) Human Rights and Equal Opportunity Commission. (Cth) Human Rights and Equal Opportunity Act 1986 and (Cth) Human Rights and Equal Opportunity (Transitional Provisions and Amendments) Act 1986.
30. SDA pt V.

not resolved, inquiries may be undertaken by the Commission.[31] The Commission can make determinations, although these are not binding between the parties.[32] Enforceable rights, as opposed to conciliation or voluntary compliance, can only be attained by recourse to the Federal Court.[33]

A significant concession apparently available to the complainant under the Sex Discrimination Act is that both the Commissioner and the Commission are required to inquire into a complaint unless satisfied, among other matters, that the conduct complained of is *not unlawful* under the Act.[34] In a reversal of the ordinary onus of proof, it is for the "accused" to satisfy the Commissioner or Commission that inquiries ought not be made. However, it is important to recognise that this reversal only applies in so far as proceedings are of a conciliatory nature. Should the complainant be seeking a declaration or order, the complaint will need to be substantiated and the onus will be on the complainant to prove the elements of sexual harassment or discrimination.[35]

One deterrent to the reporting of incidents of sexual harassment is the often embarrassing nature of conduct of this sort. The Commissioner for Equal Opportunity (WA) has noted that a particular problem related to complaints of sexual harassment is that the process of resolution is found to be too stressful and taxing for the complainants, who often do not wish to pursue their complaints.[36] Another difficulty relating to complaints of both harassment and discrimination is the vulnerable position of employees who are expected to take action to ensure that their employers act lawfully.

In *Fenwick v Beveridge Building Products Pty Ltd*,[37] the Human Rights Commission found that the evidence of other non-complainant employees was "incredible" because it was clearly formulated to support the employer.[38] In circumstances such as these,

31 SDA ss 52(5), 57(1), 58.
32. SDA ss 81(1), 81(2).
33 SDA s 82(2).
34. SDA ss 52, 59, 79.
35. SDA ss 81(1)(b), 82(2). See also *Fenwick v Beveridge Building Products Pty Ltd* (1985) 62 ALR 275.
36. CEO *Annual Report 1986-87* supra n 23, 10.
37. Supra n 35.
38. Ibid, 279-280.

it will be difficult for an employee to find any evidence corroborating his or her complaint — although one might have concluded that the Commission would at least have been well aware of the pressures that may be brought to bear on persons who work for an employer allegedly in breach of the Act. However, in that same case, the Commission was also sceptical of the complainant's claim that the conditions of employment were discriminatory. The reason given was that the complainant had not complained about the conditions of employment until after her dismissal.[39] I would argue that it was also possible that the reason for the complainant's failure to complain prior to her dismissal was the power differential between employees and their employers.

There are still other difficulties in attempting to substantiate a complaint of discrimination. The complainant must be aware of being less favourably treated on the basis of his or her sex, marital status or pregnancy, and be able to prove it. Fitzpatrick argues that this will be difficult to prove discrimination unless the person supposedly discriminating is unaware or intemperate enough to provide the necessary evidence.[40] Of some concern is a precedent set by the Victorian Supreme Court in the area of anti-discrimination legislation. The Court found that a complainant had to be able to clearly establish that he or she had been subject to less favourable treatment and that the less favourable treatment was on the basis of his or her status. Moreover the complainant, who in the instant case had alleged racial discrimination, also had to establish that the less favourable treatment was the result of deliberate discrimination;[41] unconscious racism, and presumably other sorts of prejudice, were outside the scope of direct discrimination.

Even when employers are blatant about the sexual basis for the different treatment accorded to employees, there is no guarantee that a court will find that there has been discrimination. In an English case proceeding on substantially similar legislation, *Schmidt v Austicks Bookshops Ltd*,[42] the Court held that a woman employee

39. Ibid, 281.
40. Supra n 15, 124.
41. *Department of Health v Arumugam* [1988] VR 319.
42. [1977] 1 BEQ 139. (My discussion of English discrimination case law is based on summaries reported in the British CCH Volume, Equal Opportunities Reporter (1987)).

was lawfully dismissed because she had worn trousers contrary to her employer's directions. One ground for the Court's decision was that because men were not allowed to wear teeshirts, it was not possible to say that women were treated less favourably. This would seem to indicate that so long as an employer treats both male and female employees unfairly, neither will have a cause of action against the employer.[43] In the case of *Fenwick v Beveridge Building Products Pty Ltd*, a similar complaint was made because of a store policy that required women employees to wear yellow aprons while male employees were supposed to wear yellow teeshirts. This was not considered to be discriminatory.[44]

These cases illustrate how difficult it can be to substantiate a complaint of discrimination when the employer's treatment of employees is regarded as appropriate. Of more concern however, they indicate the relativity of the notion of discrimination under the Act. The concept of discrimination in the legislation is relative to, and substantiated by reference to, employer treatment of other employees. For the purposes of the Act, discrimination does not exist by reference to any criterion independent of employer practices and values. The sole standard against which discrimination can be identified is the employer's treatment of other employees who occupy a similar position to the complainant. The reasonableness of the treatment of an employee only becomes an issue *after* less favourable treatment has been established.

The Act recognises that it is possible for employers to present discriminatory practices as requirements that apply to all employees equally. Where such a requirement has a disproportionate effect on an identifiable section of the workforce, it may be prohibited as indirect discrimination. However, there are difficulties of a different sort inherent in pursuing a complaint under this head. Another English case, this time concerning indirect racial discrimination but based on legislation in substantially the same terms as the Sex Discrimination Act, is *Perera v Civil Service Commissioner & Anor (No 2)*.[45] In that case, a lawyer complained that he

43. Another, somewhat contradictory, reason given for the decision was that because there was no comparable restriction on men, presumably in that they were allowed to wear trousers, it was impossible to say that women were treated less favourably
44. Supra n 35, 280
45. [1983] 1 BEQ 709.

was discriminated against because the employer had taken into account experience in the United Kingdom, command of English, British nationality and age in rejecting his job application. The Court held that Mr Perera failed because he had not formulated a *particular* requirement that had been applied to him and with which he had been unable to comply.

Unless a conciliated settlement is agreeable to both parties, in proceedings under the Sex Discrimination Act, just as in any based on an adversarial model, the onus of proof is on the complainant. However, the provisions of the Sex Discrimination Act do allow persons other than the aggrieved person to initiate inquiries into alleged unlawful acts.[46] Again this would appear to be a considerable departure from the common law paradigm. Nonetheless, an inquiry will only be undertaken or continued when the individual aggrieved persons desire it.[47] To deny aggrieved persons any such control is arguably paternalistic, but in the context of employee/employer relations, the pressure of being individually identified and responsible for proceedings against one's employer is likely to act as a deterrent to the employee.

It is also of note that the Commission's ability to allow complaints lodged other than by the aggrieved person is even more restricted than the Commissioner's.[48] Such complaints are considered to be representative complaints, and unless the "justice of the case demands it", the complainant must not only be actually affected by the conduct of the "accused", but also must be able to satisfy the Commission that a number of criteria are met. The criteria involve assessing the number of potential complaints, the likely result of the complaints if dealt with separately, determining the questions of law and fact that potential complaints would have in common, and the appropriateness of relief to the whole class. I have been advised of one example in which a welfare group sought to pursue a class complaint under similar provisions in the Commonwealth Racial Discrimination Act 1975.[49] The complaint was in respect of State Housing Commission practice in allocating hous-

46. SDA s 50.
47. SDA ss 52(b), 70(2)(a)(i), 59(2)(a).
48. SDA ss 69, 70.
49. Ss 25L, 25M.

ing to Aborigines. The research required to argue the case for a representative complaint before the Commission proved prohibitive. However, it seems that the Commission has since appointed a legal officer who will undertake some of the research required to allow representative complaints.[50] Ronalds indicates that an important concession to the complainant in any event exists under the Sex Discrimination Act in that the Commission may take proceedings to the Federal Court to seek enforcement of its orders.[51]

The provisions of the Sex Discrimination Act indicate that proceedings under the Act are not bound by the rules of evidence.[52] However section 81 requires the complaint to be substantiated before the Commission will make a determination. As stated above, it is often difficult to find evidence to substantiate complaints of direct discrimination. But where there is indirect discrimination, a complainant can indicate the bias through the use of quantitative evidence.[53] Therefore it may be easier to make out a prima facie case of indirect discrimination, so long as the complainant can identify the "particular" requirement with which the employee could not comply.

Note however that this is only a prima facie case, as the requirement must also not be reasonable. English authority indicates that this means that the less favourable treatment cannot be "objectively justified [by] factors unrelated to discrimination on the grounds of sex".[54] If the employer can indicate that mobility, for example, is useful and valuable to the company, any less favourable treatment of employees who are not mobile would not constitute discrimination, as it would be reasonable. Evidence of what is "reasonable" therefore may be based on economic considerations as constituted through existing employment structures and values. Although a complainant can use statistical evidence to indicate that a requirement has a disproportionate effect on an identifiable group, such as women, a very real difficulty remains in characterising this effect as not being reasonable within existing employment practices.

50. F Child, Administrator Sussex Street Community Legal Centre, interview with the author, 9 October 1988.
51. SDA s 82(1). See Ronalds supra n 26, 190.
52. SDA ss 56(2), 77.
53. Ronalds supra n 26, 190.
54. *Rainey v Greater Glasgow Health Board* (1986) 1 BEQ 1123.

As stated, the Commonwealth legislation was drafted so that it was within the discretion of the Commission to dispense with the rules of evidence.[55] In this way substantial use may be made of the Commissioner's reports. However, Ronalds indicates that a "lamentable development" in this area of law is that quasi-judicial bodies have "not used these provisions and have not developed any innovative methods of conducting inquiries", and consequently the tribunals are hardly distinguishable from courts.[56]

I would suggest that this may be attributable to the requirement that a legally qualified person sit on the Commission.[57] But perhaps more significantly, even if the Commission is satisfied of the unlawful nature of the employer's conduct, the Commission's determinations are not binding and conclusive between the parties. It would seem that the Commission's determination, including findings as to fact, may be admissible evidence in the Federal Court.[58] However, the Court must itself be satisfied that the act or behaviour complained of is unlawful under the Act.[59] Ronalds states in determining this issue,[60] the Court's own procedures and therefore presumably it own rules of evidence, would apply.

In one of the few cases that have gone to the Federal Court on the Sex Discrimination Act provisions, *Aldridge v Booth*,[61] Spender J held that because the rules of evidence were not applicable to proceedings before the Commission, its findings were of no assistance. He stated that he did not "think it right to attach any particular weight to the determination made by the Commission"[62] because section 82 of the Act required the Court to be satisfied that there had been an unlawful act or conduct. Spender J held that this meant that the Court had to be satisfied on the basis of the civil standard of proof in respect of both the facts and law at issue. If the Commission does not want to be in a position in which its determinations will be overturned by the Federal Court, the Commission will

55. Supra n 51; Ronalds supra n 26, 183
56. Ronalds supra n 26, 183.
57. SDA s 60(1).
58. Cf SDA s 57(3) and ss 81(3), 82(3).
59. SDA s 82(2).
60. Supra n 26, 190.
61. (1988) 80 ALR 1
62. Ibid, 21.

not be unreasonably legalistic in ensuring that its findings are maintainable on the ordinary rules of evidence.

I would conclude that unless a complaint is amenable to settlement by conciliation, proceedings under the Sex Discrimination Act effectively differ little from the common law paradigm based on an individualised and formalistic adversarial model. Arguably this is of little consequence as conciliated settlements are expressly made the object of the Act.[63] Moreover, the Act would seem to be effective in attaining this objective. It would seem that by far the largest number of complaints are resolved by conciliation.[64] At the time of writing only two cases concerning the provisions of the Sex Discrimination Act had gone to the Federal Court.[65]

However, it is unclear how far conciliation is the result of the contrition of employers and how far it is the result of the complainant's reluctance to engage the public and formal proceedings discussed above in order to obtain any legally enforceable relief. It is of note that even if a complainant is able to satisfy the increasingly narrow and legalistic requirements to bring a complaint before the Commission and the Federal Court, there is no guarantee that the complainant will be entitled to any relief whatsoever. Although unlawful, acts of discrimination and harassment are not offences.[66] Advertisements that indicate an intention to commit an unlawful Act are subject to fines.[67] However, no unlawful act, even if proved to the satisfaction of the Commissioner, will be subject to any penalty under the Act. Penalties attach only to procedural breaches such as the failure to attend conferences, the provision of false or misleading information, or the victimisation of complainants and others.[68] Prohibited acts, such as harassment and discrimination, are unlawful but not offences; no penalties attach to them. Declarations and orders are discretionary.

The Sex Discrimination Act provides many incentives for a complainant/employee to become reconciled to discrimination, not the

63. SDA ss 52(1), 73.
64. See for example the CEO Annual Reports.
65. *Aldridge v Booth* supra n 61 and *Hall v Sheiban* supra n 13.
66 SDA s 85.
67. SDA s 86.
68. SDA ss 87, 88, 93, 94.

least of which is the individualised and formal proceedings under the Sex Discrimination Act which must be undergone in order to even attempt to obtain any legally enforceable relief. This form of proceedings is clearly reliant upon the liberal notion of the active individual who has the opportunity to pursue his or her legal entitlements. However, I hope to have indicated how this "opportunity", in a practical sense, does not often provide employees with a realistic means of obtaining more equitable work conditions.

Bureaucratic control

Unlike the Sex Discrimination Act the Public Service Reform Act and the Affirmative Action Act do not rely on the "active freedom of the individual" to pursue the goals of the elimination of discrimination and the attainment of equal employment opportunities. Instead these goals are to be implemented through a method of "bureaucratic control".

"Bureaucracy" in social sciences usage tends to follow the definition given by Weber; that is, in its ideal sense, an organisation having the characteristics of rationality in decision making, impersonality in social relations, routinisation of tasks and centralisation of authority. One structural characteristic identified by Weber was the use of systematic and general rules which define procedure and which are followed.[69] It is evident that these characteristics fit with the impersonal control advocated by liberal legalism. Although associated with governmental organisations, it is clear that such structural characteristics apply to many large social enterprises.

The common law paradigm relies upon specific rules that are formulated by a purportedly disinterested third party and are given effect through proceedings initiated by aggrieved individuals. Instead of specifying exact rules of conduct, the bureaucratic model of control stipulates only the overriding objectives that are to be attained. Instead of relying on individual initiative, these objectives are given effect by being embedded in the structure of the enterprise itself.[70] On the model of bureaucratic control, objectives are

69. R C Stone 'Bureaucracy' in J Gould and W L Kolb (eds) *A Dictionary of Social Sciences* (USA: The Free Press of Glenoe, 1964) 61-62; R Bendix 'Bureaucracy' in D L Sills (ed) *International Encyclopaedia of Social Sciences* (New York, Macmillan Co & The Free Press, 1968) 206-217.
70. A Game and R Pringle *Gender at Work* (Allen & Unwin, 1983) 20.

embedded through the adoption of certain practices, positions and procedures within the organisation of the enterprise.

The Public Service Reform Act[71] and Affirmative Action Act require employers to develop and implement some form of "program" within their organisations.[72] The overriding objects of the programs are said to be the elimination of discrimination and the promotion of equal employment opportunity for women.[73] However, the onus is on the employer to set more specific objectives and forward estimates, and monitor the programs.[74]

There is some supervision by the Public Service Board, Ministers and the Director of Affirmative Action[75] but the model is essentially one of self-regulation. The aim of the legislation is to systematically eliminate the barriers that prevent women from fully participating in the workforce and to change the patterns of women's employment.[76] It is clear that employees aggrieved by discrimination or the lack of equal employment opportunities are neither able, nor expected, to individually ensure that the appropriate mechanism is implemented.

Under a bureaucratic model there are no proceedings in any traditional sense. However, there are regulations governing who has rights to determine and influence the development and nature of the programmes. Staff organisations have a statutory right to be consulted,[77] and employees are entitled to be advised of the program and have access to its results.[78] The offices responsible to administer the Acts, the Public Service Board and the Director of Affirmative Action, are entitled to make recommendations.[79] But apart from Commonwealth Departments' obligation to comply with Public Service Board guidelines, there is no requirement to implement any recommendations. Nonetheless, failure to do so in some

71. References are made to the provisions of the Public Service Act 1922 (PSA) as these are more specific than those found in the Public Service Reform Act which was an amending statute.
72 PSA s 22B(3); Affirmative Action Act ("AAA") s 6
73. PSA "equal employment opportunity program" s 22B(1); AAA s 3.
74. PSA "program" s 22B(1); AAA sub-ss 8(1)(g), 8(3).
75. PSA sub-ss 22B(2)(f), 22B(6), 22B(8), 22B(9), 22B(10); AAA sub-ss 10, 14.
76. Ronalds supra n 26, 26.
77. PSA sub-ss 22B(30(a), 22B(4)(a), AAA s 8.
78. PSA s 22B(2)(c); AAA s 8(1).
79. PSA s 22B(8); AAA sub-ss 10, 14.

instances will result in the employer being named in Parliament.[80] This process is initiated, not by any aggrieved person, but by the Public Service Board or the Director of Affirmative Action.

Compliance with equal employment opportunity and affirmative action programs is not assessed on the basis of the American system of court imposed quotas.[81] Nonetheless, it is clear that the Australian programs are expected to have quantitative effects on the composition of the workforce. Both the Public Service Reform Act and the Affirmative Action Act require the collection and recording of statistics which may be used to assess program effectiveness.[82] It would seem that this requirement is more stringently applicable to public sector employers, hence the Commonwealth as an employer is more closely regulated than private sector employers.

The clear benefit of bureaucratic control of employer practices for women employees is that they need not individually engage their employers in proceedings in an effort to secure more equitable work conditions. In addition, in a system where immediate objectives are set and assessed by employers there is a degree of flexibility and responsiveness that is not available when regulation is effected through specific and independently set rules.

Perhaps more significant, however, has been the increasing recognition of the difficulty facing governments seeking to control corporate behaviour. Studies of law enforcement in areas of employee welfare (such as occupational health and safety) social welfare, and environmental protection, have indicated that there is a wide deficit between the legal standards set by government, and the practice of both employers and enforcement agents.[83] The undermining of public confidence that accrues from a system of specific but unenforced rules has been a significant factor influencing current

80. PSA s 22B(11); AAA s 19.
81. Affirmative Action Resource Unit *Affirmative Action for Women* (Canberra: Australian Government Publishing Service, 1985).
82. PSA sub-ss 22B(1), 22B(2); AAA sub-ss 8(1), 8(3)(e).
83. J B Braithwaite and P Grabosky *Occupational Health and Safety Enforcement in Australia* (Canberra: Australian Institute of Criminology, 1985); H Glasbeek and S Rowland "Are Injuring and Killing at Work Crimes?" (1979) Osgoode Law Journal 17; M Hill "The Role of British Alkali and Clean Air Inspectorate in Air Pollution Control" (1982/83) Policy Studies Journal 11.

strategies for controlling corporate activity. It has been argued that the "implementation deficit" and any resulting public disillusion can be minimised through a self-regulatory form of "control".[84]

Whatever the reason for adopting a bureaucratic model for the regulation of equal employment opportunities, however, it is apparent that the objects of the legislation remain those of legal liberalism. That is, an impersonal control based on generality and universality, so that all individuals have the opportunity to pursue careers without regard to specified personal characteristics, attributes or status.

Equal treatment

It is evident that there are major differences in approach between what I have designated a common law paradigm and bureaucratic control. However, I would argue that the underlying framework deployed in the Acts remains constant. As far as possible, all employees are to be entitled to the same treatment.

The concept of discrimination inherent throughout the legislation is one that prima facie renders any differential treatment on the basis of sex, marital status or pregnancy unlawful. A striking example of the extent to which legal liberalism is guided by the principle of equal treatment can be seen in judicial encounters with pregnancy and childbirth rights where these are not exempted from sex discrimination legislation.

In an attempt to counter the allegation of less favourable treatment of male employees, the United States Supreme Court sought to legitimise pregnancy and childbirth entitlements by conceptualising them as lawful distinctions between "pregnant and non-pregnant" persons, and not between women and men.[85] In the 1970's there were other judicial attempts in the United States to make an analogy between pregnancy and male-specific medical conditions such as

84 Hill ibid, P Downing and K Kimball "Enforcing Pollution Control Laws in the US: Introduction to the Issues" (1982/83) Policy Studies Journal 11; J Hucke "Implementing Environmental Regulations in the Federal Republic of Germany" (1982/83) Policy Studies Journal 11; J Braithwaite "Enforced Self Regulation: A New Strategy for Corporate Crime Control" (1982) Michigan Law Review 80.

85. D L Rhode "Feminist Perspectives on Legal Ideology" in J Mitchell and A Oakley (eds) *What is Feminism?* (New York: Pantheon Books, 1986) 15.

postectomy, circumcision, haemophilia and gout.[86] Such "curious judicial attempts" are not confined to the American courts. In a case concerning a complaint of discrimination lodged by a pregnant employee, *Hayes v Malleable Working Men's Club & Institute*,[87] the English Court assessed whether the woman was less favourably treated by specific analogy between pregnancy and male illness.

Australian courts have been spared such rationalisations by the exemption of pregnancy and child-bearing rights under the Sex Discrimination Act.[88] This does not mean that the Australian legislation is based on a different understanding of what constitutes discrimination. As stated, such rights are clearly considered to be discriminatory; they are merely not rendered unlawful.

It would seem however, that a major departure from the equal treatment principle can be found in the exemption of affirmative action initiatives. The exemption of such initiatives under the Sex Discrimination Act appears under the heading "measures intended to achieve equality". Nonetheless, in the text of the provision, this is confined to only those acts intended to ensure equal *opportunities*.[89] It would seem that such "acts" may specifically recognise the sex or status of an employee in order to make him or her eligible for preferential treatment. However, I would argue that the rationale behind such measures falls firmly within the equal treatment principle. As Ronalds indicates, affirmative action "is to provide new opportunities to counteract the legacy of past and present discrimination".[90] That is, affirmative action is justified in so far as its positive discrimination balances the effects of negatively unequal treatment. Measures that recognise the sex of a female employee in order to make her eligible for preferential treatment are only exempted from being unlawful under the Sex Discrimination Act in so far as these measures can be said to be aimed at achieving equality of treatment in the long term.[91] The underlying assumption seems to be that eventually if women are treated the

86. Thornton supra n 15, 10.
87. [1985] 1 BEQ 894.
88. S 31.
89. SDA s 33.
90. Supra n 26, 153.
91. See also the Convention for the Elimination of All Forms of Discrimination Against Women Article 4.1, which exempts these special measures as temporary aberrations only.

same as men at work, they will enjoy equality with men at work.

It is important to reiterate that rendering discrimination unlawful in this context does not mean that employers are obliged to treat their employees fairly on the basis of their sex, marital status or pregnancy. *Schmidt v Austicks Bookshops Ltd*[92] is an example of how unfair treatment that is based on sex may be lawful because the employer treated all employees unfairly. Equal treatment does not mean fair treatment. Moreover, it is evident that employees are not entitled to equal treatment in all respects quite apart from the specific exemptions in the Sex Discrimination Act. Employees are entitled to undifferentiated treatment only in so far as any difference can be attributed to sex, marital status or pregnancy. Should different treatment be based on a material difference or a reasonable requirement which is something that can be justified other than by reference to sex, marital status or pregnancy, it is not discriminatory. The circumstances that justify less favourable treatment and make it not discriminatory are examined in the following critique.

Critique of the legislative framework

My thesis rests on the premise that women are different to men. The problem confronting women at work is that sometimes they have the same work skills as the men with whom they are employed and they are treated less favourably because of their sex, marital status or pregnancy. I would contend, however, that a more significant problem confronting women is that their work is not recognised as being the same as men's, and is regarded as being less valuable.[93]

Even within the "workforce" so recognised, the labour-market is one of occupational segregation and segmentation for women.[94] This is not to accept that labour market segregation and segmentation is either constant or inherently sensible. Game and Pringle have indicated how the content of "men's work" and "women's work" is subject to change. However, those changes take place in relation to one another so that a distinction remains.[95] The comparative

92. Supra n 42.
93. Harding supra n 11, 18.
94. Ronalds supra n 26, 3.
95. Supra n 70, 15.

devaluation of the worth of women's work is rationalised, according to Game and Pringle, by an androcentric interpretation of what constitutes skill.

The devaluation of women's worth extends further, however, to the very notion of "work" itself. Booth noted, in her discussion of the *Outworkers'* Case,[96] that much of the delay in extending award rates and conditions to outworkers (the majority of whom were migrant women), was due to the failure to recognise what these women were doing was work; in a large part, because it involved activity within the home.[97] Legislation that does not seek to alter the notion of work and the evaluation of different sorts of work will be limited in its capacity to address the lack of equality experienced by working women.

In the following critique it is noted how the equal treatment principle has been overridden by considerations such as the need to preserve decency and privacy, and the desire to maintain the public/private dichotomy as a limit to legal regulation. More significantly, however, I hope to indicate the extent to which the "equal treatment" principle actually coincides with other more deeply embedded interests that are constituted by and through the law, and how this coalition may act against the interests of the majority of workers and women.

Exemptions

The Sex Discrimination Act exempts certain acts of discrimination from being rendered unlawful. Where discrimination is justified as a "genuine occupational qualification", it would seem that the sex of an applicant will be a permissible criterion for the selection of employees.[98] It is of note that the majority of exemptions under this head relate to the perceived need to segregate the sexes for reasons of "privacy and decency".[99] It is also of note that this control over "intimacy" between the sexes is conferred upon the employer. The employer is not subject to any penalty should he

96. *Re Clothing Trades Award* (1987) 19 IR 416.
97. A Booth "Outwork: The Invisible Industry" paper delivered to 9th National Labor Lawyers' Conference, Perth, 18-20 September 1987.
98. SDA s 30.
99. SDA sub-ss 30(2)(c), 30(2)(d), 30(2)(e), 30(2)(f), 30(2)(g).

or she choose not to be influenced by considerations of privacy and decency.

What is of particular note in respect of these "genuine occupational qualifications" is that the duties specified are those of toilet attendants, customs officers, clothing sales-staff and swimming-pool attendants. The duties do not appear to be those of the health professions, such as doctors and nurses,[100] even though there is potentially a much greater degree of inter-sexual "intimacy" involved in health-care than in any other occupation. Nonetheless, employers are not free to select doctors, for example, on the basis of their sex.

This apparent inconsistency may be explained by the fact that women would have most to gain in terms of employment status, economics and power if sex segregation were extended to the health professions.[101] However perhaps more pertinent is the existing social practice by which professionals are regarded as trustworthy and capable of self-control, while lower class workers are not. The so-called "genuine occupational qualifications" rest on, and perpetuate, the assumption that lower class workers are less capable of dealing appropriately with inter-sexual contact than are upper class workers, and hence need to be subject to closer scrutiny and control by their employers.

There are other exemptions under the Sex Discrimination Act that need not be brought under the rubric of genuine occupational qualification, although clearly relating to occupational discrimination. These exemptions relate to combat duties, residential child-care and residential domestic duties.[102]

The combat duties exemption was included due to media interest in the United States debate about proposed amendments to their Constitution which, it was thought, would result in women being conscripted and sent to the front in war-time.[103] The child-care exemption has been attributed to ill-informed fears that men, particularly homosexual men, would be entitled to be employed to care for children.[104] Ronalds does not indicate what pressures were

100. See for example, CEO *Annual Report 1986-87* supra n 22, 14.
101. Game and Pringle supra n 70, 94-180
102. SDA ss 43, 35, 14(3).
103. Ronalds supra n 26, 124.
104. Ibid, 123.

brought to bear in respect of the exemption of residential domestic duties, although she does note that this distinction upholds the public/private dichotomy which allows the home to be exempted from governmental regulation.[105]

It seems anomalous to find within anti-discrimination legislation exemptions that rest not only on class stereotypes, but also on stereotypical images of men as aggressors, homosexuals as paedophiles and women as childminders and house-cleaners. Such concessions are not only inconsistent with the equal treatment principle, but clearly limit both men and women in their perceptions of life and career opportunities. Of more concern, however, is that legislation purporting to eliminate discrimination against women in so far as is possible, should accede to the public/private dichotomy. By refusing to regulate domestic employment to any degree, the Acts reinforce that dichotomy which legitimates the continuing failure to recognise "women's work" within the home.

Legitimation and empowerment

It may appear incongruous to argue that Acts which clearly seek to regulate and limit employers' ability to treat employees as they wish somehow legitimise the exercise of power by employers. I would not deny that employers, irrespective of this legislation, occupy a powerful position in our society. It is nonetheless true that under this legislation, employers are accorded a particularly dominant position. My concern is that under the legislation the power of employers is legitimated and to some extent hidden. Moreover, in the sense that employers' economic rationalism is presented as being separable from discrimination and as some form of non-subjective measure of worth, I would argue that this not only legitimates employer values, but empowers employers.

Programs

Employers subject to the Public Service Reform Act and the Affirmative Action Act are required to develop programs to eliminate discrimination and promote equal employment opportunities. Under the Acts, employers, particularly private sector employers,

105. Ibid.

have a wide discretion to define what these objects require them to do, and then to monitor and evaluate whether they are satisfactorily attaining their objectives.

It is clear that employers need to present quantitative evidence of changes in the distribution of women in their workforce should they want to present plausible reports on the effectiveness of their programs. Game and Pringle have indicated, however, how such "evidence" overlooks the fact that there are continuing changes to the workforce quite unassociated with the implementation of any such programs. A particularly potent variable is the effect of technological advances on the nature of work and the distribution of women in the workforce. One example cited by Game and Pringle was the greater number of women who had been promoted to the level of bank manager. At the same time, the job had become "deskilled" with the automisation of banking.[106] In this way statistics can record changes in the distribution of women throughout the workforce, without necessarily indicating any substantial improvement in the position of women at work.

Whether changes to the composition of the workforce can be attributed to the effective implementation of programs or are the result of technological changes may be a moot point. One matter is clear however; under the Commonwealth legislation it is employers who are accorded legal authority to construe the meaning of such changes.

Efficiency and merit

In developing and implementing programs, employers are not required to do anything contrary to the dictates of efficiency[107] and merit.[108] Efficiency is defined in the Public Service Act to include capabilities, standard of work, experience, training and personal attributes.[109] Merit is not defined. Ronalds states that it is hoped that statistical data will indicate to employers how far gender-based assumptions have become embedded in their employment practices and procedures. With reform which will enable employees to be

106. Supra n 70, 56-57.
107. PSA s 33(4).
108. AAA s 3(4).
109. S 50A(2).

treated according to their merit, employers will be able to reap the benefit of an as yet under-utilised resource — their female employees.[110]

Undoubtedly lack of recognition and opportunity is a legitimate concern for many women employees. Statistical data on the occupational classification of employed women indicates that most are confined to the middle and lower echelons of the employment hierarchy. For example, only 6 per cent of working women are employed as managers and administrators; that is only 23 per cent of the total number of managers and administrators. Of these women managers, 43 per cent are farmers or farm managers. The low concentration of women at the upper level of the employment hierarchy is apparent.[111]

In striving to attain a more even distribution of women throughout the workforce however, two matters should be noted. Firstly, women comprise something of the order of 30 per cent of the full-time workforce, and 47 per cent of the total workforce.[112] It is not evident that these participation rates will or even should alter if women's opportunities upon entering the "workforce" are improved. Secondly, employers' notions of efficiency and merit have developed through interaction with male working habits and abilities and within particular class and race structures. Merit as it is assessed by employers tends to be based on male norms.[113] This androcentricity does not just go to peripheral and separable gender-based assumptions as to performance capabilities, it colours what constitutes skills, qualifications and the capacity to perform the job, indeed even what will be recognised as a job.[114]

In this way, male norms already influence what is regarded as material or reasonable grounds upon which to differentiate between employees; that is, what will constitute discrimination under the Acts. For example, the legislation does not provide a basis upon which to challenge the evaluation of aggression as a more meritorious attribute than a non-adversarial manner in professions such as sales,

110 Supra n 26, 64.
111. Ibid, 3-4
112. Ibid, 4.
113 Game and Pringle supra n 70, 21; Rhode supra n 85, 155, Thornton supra n 15, 13.
114. Game and Pringle ibid.

management, law, philosophy and politics. Indeed the case of *Department of Health v Arumugam*[115] is an example of how dominant norms come to define what are reasonable criteria for differentiating between applicants. Although in the context of racial discrimination, in that case an employer's preference for an aggressive, dynamic and articulate applicant for the position of Chief Medical Officer of a department in a public hospital was not considered to be discrimination against a non-caucasian applicant, who, despite his greater experience, was considered to be too thoughtful. The evaluation of such attributes is not subject to scrutiny and this sort of legislation only renders unlawful the assumption that particular attributes, such as aggression, are more natural to certain groups than others.[116] Moreover, by so doing, the legislation tends to make any recognition of the existing differences between the different sexes, classes and races more difficult as recognition of difference tends to assume a negative connotation. Finally, if it is not only sexism, but also class and race bias that are inherent in the existing work structure,[117] by seeking to find equality in the workforce on the basis of employer notions of efficiency and merit, women are not only adopting male values but are implicitly accepting those biases.

Empowering whom?

Rhode argues that the drive for equality arises out of the broader social context; that formal legal guarantees are unlikely to be a source of change.[118] In so far as the legislation relies on the activities and reactions of employees, unions, parliament and publicity to implement its objects, it would confirm Rhode's assessment. But this does not mean the particular form of the legislation is without significance or consequence.

It may be a fact that corporations, and particularly multinationals, are largely beyond governmental control. Governments may be able to do little more than reach some form of compromise with employers and rely on broader social pressures to implement such

115 Supra n 41.

116. J Moulton "A Paradigm of Philosophy. The Adversary Method" in S Harding and M B Hintikka (eds) *Discovering Reality* (Dordrecht Holland: D Reidel Publishing Co, 1983) 149-151.

117. Harding supra n 11.

118. Supra n 85, 158.

compromises. In this way at least employers who are concerned with their domestic reputation or who wish to present a non-discriminatory image will find that their interests do coincide with the implementation of the programs as required. However, it should be noted that employers who are not concerned with presenting such an image will have little reason to comply. It is unlikely that pressure will be applied from the unions if these are male-dominated, as the example of the mining union cited above illustrates.[119]

Where even compliant employers are being authorised to determine what equality at work means, it is important to recognise that the legitimising force of the law is bestowed upon the exercise of power by one sector of society. Moreover, it should be recognised how far the interests of that sector will very much coincide with maintaining the status quo as far as is possible.

Equality

> The current debate about human equality is concerned less with its desirability as a universally prized social value, than it is with the meaning and content with which it should be invested.[120]

The premise of the Commonwealth legislation concerning women at work is that "in so far as is possible" women should be treated as if they are men. This will be achieved by ignoring "in so far as is possible" those matters that distinguish women from men. The aim is to ensure that all individuals are assessed according to impersonal, general and universalised standards: efficiency and merit.

I have discussed the difficulty of reconciling the exemptions under the Sex Discrimination Act with the equal treatment model. I have also indicated how some of these anomalies coincide with, among other matters, class prejudices and the public/private dichotomy. Finally, I have indicated my concern with the legitimacy bestowed upon employers to determine what equality at work for women will mean.

It is important to acknowledge that the equal treatment strategy is at least attainable in terms of political feasibility. These reforms have been implemented, and it cannot be denied that a number of individual women have benefited from them. Such results should not readily be dismissed. Moreover, Ronalds argues that:

119. Supra n 24.
120. Ronalds supra n 26, 8.

> [I]t is not contended that the legislation could, would or should achieve all necessary or desirable reforms in the area. The legislation does not end the debate on existing forms of inequality and exploitation, nor does it prevent the formulation of other strategies.[121]

To some extent, what Ronalds claims may be true. However I would argue that it is not clear that the equal treatment principle given expression through the legislation will not impinge on the ability to formulate and implement other strategies.

My analysis indicates that the principle of equal treatment largely coincides with the continued dominance of employers and the universalisation of male (and class and race biased) norms as the criteria of efficiency and merit. However, the nature of the evaluative judgments inherent in such concepts as "skill", "work", "merit" and "efficiency" are not apparent in the legislation itself, but is only manifest in the practical application of these terms by employers in our society. The notion of being given the opportunity to be judged according to one's merit has an undeniable appeal,[122] at least so long as the resulting less favourable evaluation of women, lower class workers and different races is not recognised as being the necessary consequence of the principles of efficiency and merit as applied in practice by employers.

Because the legislation assumes that employer notions of efficiency and merit are separable from discrimination, and are a just basis upon which to evaluate a person's worth, it contributes to embedding these biases within the existing social structures. In this way, the legislation not only impedes recognition of the nature of these social structures, but legitimises their inherent biases. If a significant proportion of women, lower class workers and minority races are judged as inadequate on the basis of "efficiency and merit" as defined by employers, the result may be that their low status is regarded as deserved. The significant successes of individual women under the Commonwealth legislation concerning women, work and equality may act to legitimise and perpetuate the existing work structure in our society, and deflect strategies that seek to effect a more fundamental transformation.[123]

121. Ibid, 9.
122. Game and Pringle supra n 70, 21-22.
123. Rhode supra n 85, 155