# The Separation of 'Anti-discrimination Law' and 'Labour Law' in Australia: Future Prospects?

Rosemary Owens
Adelaide Law School
Australia

## Introduction - 'The Job it is Supposed to Do'

When anti-discrimination legislation was first introduced in Australia, generally from the mid 1970s, policy makers recognised the enormous challenge that embedding human rights into the fabric of Australian life entailed. This was so not least because, with no 'bill of rights', there was no tradition of human rights jurisprudence and consequently a degree of scepticism that this could develop quickly and adequately through the ordinary courts. Furthermore, to accomplish the deep transformations in social behaviour to which anti-discrimination legislation aspired, it was accepted that a more complex regulatory approach than the traditional 'command and control' model was needed. Anti-discrimination legislation needed as much 'to effect equality' generally in 'public' arenas of social and economic life, for instance through education, as 'to redress the harm' to individuals who were affected by discriminatory behaviour in one of the areas of public life targeted by the legislation.[1] Specialised anti-discrimination commissions with a wide range of responsibilities and powers were thus established. When there was a breach of the law, the softer enforcement model of conciliation between parties was adopted, and only where that failed would a determination from a specialist tribunal resolve the matter. Formal court hearings were reserved for cases where, for instance, a tribunal made an error of law.[2]

In relation to workplace matters, the new anti-discrimination jurisdictions stood alongside the well-established labour law (as they might be loosely described) jurisdictions, which then focused on conciliation and arbitration as the means of settling industrial disputes. The two areas of law were viewed as being quite different (even incompatible):[3] labour law regulation was concerned predominantly with collective, industrial (labour versus capital) issues, while anti-discrimination law dealt with individual, human rights issues.

This paper argues that, at least in relation work matters, the capacity of anti-discrimination law to do its job depends largely on its relationship with labour law. Over the last four decades the two arenas have co-exited. However, influenced by both Australia's constitutional framework as well as legislative changes, the nature of their relationship has not remained static over that period. That relationship is now at a critical juncture – given labour law's transformation through the gradual incorporation over the last two decades of many individual workplace rights and the establishment for the first time of an (almost comprehensive) national system of regulation under the new *Fair Work Act 2009* (Cth) commencing in 2010. This paper will briefly examine these issues by looking at some of the regulation dealing with equality at work and the work/family/care interface in Australia. I take equality not to be the mere sameness or difference in the treatment of workers, but to encompass a substantive conception incorporating aspirations of social inclusion and participation with the goal of delivering decent work (and through it a decent life) for all.[4]

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[1] See Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in Christopher Arup et al (ed), *Labour Law and Labour Market Regulation* (Federation Press, Melbourne, 2006).

[2] For an account of the Australian anti-discrimination system as first established, see Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, Melbourne, 1990). See also Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (OUP, Melbourne, 1995).

[3] Margaret Thornton 'Discrimination Law/Industrial Law: Are they Compatible?' (1987) 59 *Australian Quarterly* 162.

[4] See the ILO Reports on Equality under the reporting framework in relation to the *Declaration on Fundamental Principles and Rights at Work 1998*.

**The Intersection of Labour Law and Anti-discrimination Law - Historically**

An early High Court decision determined that labour and anti-discrimination law were not inevitably inconsistent, because labour regulation could operate against the backdrop of a more general anti-discrimination law. But, it was always obvious that direct conflict was possible. The initial policy response was to subordinate anti-discrimination law to labour law.[5] However, from 1993 a different policy prevailed and anti-discrimination principles were gradually incorporated into labour law. After this time labour legislation specifically mentioned the importance of eliminating discrimination against workers with family responsibilities, although the emphasis in the legislation varied over time (eg after 1996, it was placed in the context of securing 'mutually beneficial work practices').[6] Despite this, in an era of 'de-regulation', where flexibility and productivity were the dominant values, the reality was that any 'balance' at the work/family/care interface was usually achieved through women taking precarious forms of employment.

**The Intersection of Labour Law and Anti-discrimination Law – under *Fair Work***

The new *Fair Work Act 2009* (Cth) specifically includes an objective of 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements' (3(d)), as well as a more general object of '... protecting against unfair treatment and discrimination …'(s3(e)). The legislation also declares itself, and instruments made under its authority such as awards and enterprise agreements, to be subordinate to State anti-discrimination legislation.[7]

In relation to work/family/care matters there are two aspects of the new *Fair Work* legislation that are of particular interest. First, incorporated in its National Employment Standards is a new right for employees 'to request flexible work arrangements' to accommodate care responsibilities.[8] However, access to this right is restricted to a limited range of relationships and situations. The right is granted only to employees who are 'a parent, or who have responsibility for the care, of a child' who is 'under school age' or 'under 18 years and has a disability'. Furthermore, an employee must have completed at least 12 months of continuous service with the employer immediately before making the request. While an employer can only refuse the request for flexible work on 'reasonable business grounds', any such refusal cannot be questioned through the enforcement agency, Fair Work Australia. Thus the right to request under the *Fair Work Act* is the only National Employment Standard that is unenforceable. However, a further provision states that the Act does not apply to the exclusion of State laws that provide employees with more beneficial provision.[9] Employees may, therefore, be able to turn to State anti-discrimination law in cases of refusal.

Secondly, the *Fair Work Act 2009* (Cth) also provides a general right to individual employees and independent contractors not to be discriminated against in relation to any aspect of work on a wide range of grounds, including family responsibilities.[10] This effectively expands the provisions giving protection from unlawful discriminatory dismissal from employment, which have been in labour legislation since the early 1990s. Although there is no detailed elaboration of 'discrimination' in the legislation, previous cases decided under the unlawful termination provisions suggest that the protection is wide enough to cover both the 'direct' or 'indirect' forms of discrimination. For those who can utilise the *Fair Work Act* there are some subtle differences in the procedure for enforcement when compared to most anti-discrimination enforcement regimes – the *Fair Work* process, for instance, requires a complaint to be laid within a shorter period of time, a reverse onus of proof

[5] On the intersection of labour law and anti-discrimination law see Rosemary Owens and Joellen Riley, *The Law of Work* (OUP, Melbourne, 2007), p 385ff.
[6] Prompted by Australia's obligations under ILO *Convention concerning Workers with Family Responsibilities* (ILO C 156).
[7] *Fair Work Act 2009* (Cth), ss 27(1A) and 29(2). However, note in relation to awards and agreements this may be reversed by regulation, s29(3).
[8] *Fair Work Act 2009* (Cth) s 65. This is modeled on the UK provisions. See also Sara Charlesworth and Iain Campbell 'Right to Request Regulation: Two New Australian Models' (2008) *AJLL* 116.
[9] *Fair Work Act 2009* (Cth) s66.
[10] *Fair Work Act 2009* (Cth), s351.

applies in relation to the reason or intent for the action and a wide range of remedies including reinstatement and compensation are available (no longer capped as previously in relation to emotional hurt, etc). However, there is a caveat inserted in the *Fair Work Act* that any such discriminatory action is not unlawful (s351 'does not apply') where it is also 'not unlawful under any anti-discrimination law in force in the place where the action was taken'.[11] In other words, this new right provided in national labour legislation arguably does nothing to extend the protection against such behaviour that already exists under anti-discrimination legislation. The national labour law system provides a differential level of protection depending on the State or Territory in which the action occurs.

Thus in these two significant areas the new national labour legislation merely defers to State anti-discrimination law.

**Work/Family /Care – Protection under Anti-Discrimination Law**

Tackling the interface of wok/family/care has proved one of the greatest challenges for anti-discrimination law in Australia, though these issues are not unique to Australia.[12] Initially issues of discrimination arising from work/family/care interface could only be addressed through the ground of 'sex', thus entrenching stereotypical gender roles of care. Gradually a number of States amended their anti-discrimination legislation to incorporate a more specific protection against discrimination at the work/family/care interface. The scope of such protection varies widely between the State jurisdictions – although all anti-discrimination law in Australia has the advantage of covering a broader range of paid work situations.[13] In most jurisdictions there is reference to protection on the ground of 'family responsibilities', which was initially defined to encompass only the 'traditional' family – spouses (married or de facto), parents, children and siblings. The breakdown of the hetero-sexed norm first came through coyly expressed extensions to those who care for 'a member of their household', although now there is sometimes a reference to same-sex relations. Where protection in relation to caring responsibilities is restricted to 'families', there is seldom recognition of the potential for cultural bias. Indeed, only one recent amendment explicitly recognises that 'an Aboriginal or Torres Strait Islander person also has caring responsibilities if the person has responsibilities to care for or support any person to whom that person is held to be related according to … kinship rules …'.[14] A broader protection offered to those who have 'caring responsibilities' remains unusual in Australian anti-discrimination law.[15]

The hesitancy in extending protection against discrimination at the work/family/care interface is also illustrated by the reluctance in some jurisdictions to encompass all forms of discrimination. Thus, under the *Sex Discrimination Act 1984* (Cth) which is the most limited of all Australian legislation in the work/family/care arena,[16] only direct discrimination, but not indirect discrimination, is proscribed, although in all State jurisdictions both direct and indirect forms of discrimination are prohibited.[17]

In recent times there have been significant reviews of anti-discrimination legislation in some States, and a more proactive approach adopted including the institution of faster, more flexible and

[11] *Fair Work Act 2009* (Cth), s351(2)(a). There are also limits relating to the 'inherent requirements of the position, and the views of religious institutions: *Fair Work Act 2009* (Cth), s351(2)(b)-(c). While the *Explanatory Memorandum* to the legislation suggests that it is only 'defences or exemptions' under the State anti-discrimination law that are relevant, the final wording of the legislation is much broader.

[12] See eg Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family* (OUP, Oxford and New York, 2005).

[13] Avoiding the problem that bedevils labour law, which is focused predominantly on protecting 'employees', occasionally concerned with 'independent contractors, and rarely dealing with other work relationships.

[14] See *Equal Opportunity Act 1984* (SA), s5(3).

[15] The widest protection is provided by the *Equal Opportunity Act 1995* (Vic), s4: carer is defined as "a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention on a commercial basis".

[16] This is the most limited of all Australian anti-discrimination legislation in relation to work/family/care matters.

[17] The *Equal Opportunity Act 1984* (SA) was only amended to cover discrimination on the basis of caring responsibilities in late 2009.

responsive dispute handling processes.[18] In one State (Victoria) anti-discrimination legislation now imposes positive obligations on those responsible for workers: discrimination occurs where there is an unreasonable failure to accommodate a worker's parental or carer responsibilities.[19] The legislation is quite broad ranging in its scope (although there are some exemptions, eg for businesses employing less than 5 employees), and provides an avenue of seeking redress where there is an unreasonable failure to accommodate the worker (although proving the 'unreasonableness' of the failure may well prove very difficult for complainants).

It is difficult to evaluate the over-all success of anti-discrimination legislation. This is especially so in terms of the protection of individual rights and the provision of redress for the harm of discrimination, because most complaints are resolved though conciliation with the outcomes remaining confidential to the parties. However, while the initial impulse was to keep discrimination issues out of the ordinary courts, this was never going to be able to be completely achieved. Scholars have found that the interpretative approach adopted by courts has become more conservative over the years,[20] and in some cases has been hostile to purposes of anti-discrimination law.[21] Some notorious cases – such as the *Schou* litigation – certainly seem to support this analysis, with judges downplaying the purposes of anti-discrimination law in the context of labour law that focus on managerial prerogative and freedom of contract.[22] In this way anti-discrimination law has tended to remain in the shadow of labour law.[23] (For this reason it is not clear that there would be a different outcome in, for instance, the *Schou* litigation under the new Victorian laws.)

**'In the Shadow of Labour Law'**

The recent *Fair Work* changes to labour regulation in Australia make this a critical period for anti-discrimination law. Despite the fact that *Fair Work* presents a new national system of regulation, as noted above, in some significant work/family/care matters it is limited in line with the scope of existing anti-discrimination law which is different in different States. Any advantages of a national system of regulation are thus negated in this arena. But the significant thing is that it does incorporate in labour legislation for the first time a general protection against discrimination, and it presents the right to request as an example of flexibility alleviating work/family/care conflict. Clearly the separation of discrimination law and labour law is all but over. In this context the significance of having a national system for the regulation of work in Australia should not be under-estimated. It is likely to achieve a dominance and the real issue is whether it is equipped to take on the challenge of developing anti-discrimination principles.

While great strides have been made in the 'labour law' arena towards a national system of regulation, 'anti-discrimination law' in Australia still comprises a complex of federal and state laws. In the past this very complexity has sometimes been seen as providing openings or spaces for the development of the law. There are in Australia four federal anti-discrimination statutes, each of which is supported predominantly (but not solely) by the external affairs power. Constitutionally, their validity depends upon them being 'reasonably appropriate and adapted' to implement international conventions (excluding any merely 'aspirational' provisions).[24] Each of the States has also enacted an anti-discrimination statute. For the most part the State anti-discrimination statutes are more comprehensive than the federal statutes – for instance, they prohibit discriminatory behaviour on a wider range of grounds. But because these anti-discrimination statutes are all different in scope,

[18] See eg, State of Victoria, Department of Justice, *Equal Opportunity Review Final Report: An Equality Act for a Fairer Victoria*, June 2008.
[19] *Equal Opportunity Act 1995* (Vic), ss 13A and 14A. For commentary see Anna Chapman 'Care Responsibilities and Discrimination in Victoria: The *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)' ((2008 21 *AJLL* 200.
[20] Belinda Smith 'From *Wardley* to *Purvis* – How far has Australian anti-discrimination law come in 30 years?' (2009) 21 *AJLL* 3.
[21] Beth Gaze 'Context and Interpretation in Australian Anti-discrimination Law' (2002) 26 *MULR* 325.
[22] See Rosemary Owens and Joellen Riley, *The Law of Work* (OUP, Melbourne, 2007)
[23] See Rosemary Owens and Joellen Riley, *The Law of Work* (OUP, Melbourne, 2007), pp405-406
[24] Such as those of the ILO, as well as, eg, CEDAW.

Australians experience different levels of protection against discrimination depending on where they live, and enterprises operating across Australia are faced with a complex of different regulatory schemes and institutions for the resolution of discrimination disputes. While there is now a national system of labour regulation under the *Fair Work Act 2009* (Cth), a like move to a national system of regulation in the anti-discrimination arena has been much slower. A national portal linking the websites of all anti-discrimination agencies has been established, and while the issue is noted for discussion at meetings of SCAG ( State and Commonwealth Attorneys-General) things are at a very preliminary stage.

The critical question is now whether the anti-discrimination jurisdiction in Australia can or should remain separate and distinct or whether, at least in relation to work matters, it should become more closely incorporated into the labour law system. It will undoubtedly be confusing for citizens and their advisers to have in some instances two identical jurisdictions, but with different procedures, and possibly the risk of the development of different jurisprudential emphases. However, the challenge will be for equality issues to survive in a system that is already so entrenched with a set of values (flexibility, productivity, managerial prerogative, freedom of contract) that may be inimical to it.