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**VICTIMS OF CIRCUMSTANCE: COULD A TRANSFORMATIVE AND
REDISTRIBUTIVE APPROACH TO EQUALITY PROVIDE BETTER
PROTECTION FROM MATERNITY LEAVE DISCRIMINATION THAN
THE SEX DISCRIMINATION ACT?**

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I INTRODUCTION

It has been 30 years since the *Sex Discrimination Act 1984* (Cth) ('SDA') was introduced in Australia. Developed with the aim of eliminating discrimination and promoting gender equality,¹ it has been a catalyst for change in the workplace. In providing a regulatory framework for challenging blatant sex-based discrimination, it has enabled women to access better jobs, better conditions, and marginally better pay.

Yet despite the existence of legislative provisions designed to protect women from discrimination and disadvantage when they become pregnant, maternity leave discrimination persists more than a generation after the SDA's introduction. This paper will examine the legal basis behind the recent judgment in *Poppy v Service to Youth Council Incorporated*² in order to illuminate the restrictive scope of anti-discrimination legislation following almost two decades of narrow judicial interpretation. In this decision, the Federal Court strengthened its support for a narrow approach to interpreting direct discrimination provisions by reaffirming the limited use of the comparator from the majority judgment in *Purvis v New South Wales (Department of Education and Training)*.³ This support confirms that Australian courts are intent on finding a formal rather than a substantive equality basis within our direct discrimination laws, an approach that severely limits the scope and protection of anti-discrimination legislation.

It is argued that in adopting a narrowed, highly technical construction of anti-discrimination legislation, courts are losing sight of the legislation's remedial purpose, and as a result are failing to adequately protect women on maternity leave from discrimination in the workplace. Sandra Fredman's multi-dimensional theory of equality will be put forward as an evaluative framework in which to examine policies, practices and laws for their capacity to achieve substantive equality. It is argued that two key dimensions of her theory, the redistributive and transformative dimensions, hold the most potential for redressing the position of entrenched structural disadvantage faced

¹ *Sex Discrimination Act 1984* (Cth) s 3.

² [2014] FCA 656.

³ (2003) 217 CLR 92.

by women who leave work to have children.

II THE EFFECTIVENESS OF THE SEX DISCRIMINATION ACT

In the three decades since its introduction, the SDA has had significant success in providing avenues of redress for women who suffer blatant sex-based discrimination. Australia's first contested anti-discrimination case on the grounds of sex, *Ansett Transport Industries (Operations) Pty Ltd v Wardley*,⁴ provided the building blocks for women to challenge arbitrary gender restrictions on their capacity to work, enabling women to gain employment in sectors previously closed to them.⁵

Despite these improvements, recent reports suggest the Act is failing to achieve its objectives, and may not be adequately protecting women from maternity leave discrimination. The 'Supporting Working Parents' report by the Australian Human Rights Commission undertook a revealing national review into the prevalence, nature and consequences of discrimination experienced by working parents relating to pregnancy, parental leave and return to work. The report demonstrated that discrimination towards pregnant employees and working parents remains a widespread, systemic issue that inhibits the full and equal participation of working parents in the workforce.⁶ Quantitative data collected for the report relevantly discovered that:

- One in two (49 per cent) mothers reported experiencing discrimination during pregnancy, parental leave or return to work.⁷
- Almost a third (32 per cent) of mothers reported experiencing discrimination in the workplace when they requested or took parental leave.⁸

⁴ (1984) EOC 92-002 (Equal Opportunity Board of Victoria).

⁵ Such as the mining industry: *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; and the piloting industry: *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-002 (Equal Opportunity Board of Victoria).

⁶ Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review Community Guide' (Report, AHRC, 2014) 8.

⁷ *Ibid* 26.

⁸ *Ibid*.

- 18 per cent of mothers indicated they were made redundant, fell victim to workplace restructuring, were dismissed or had their contract not be renewed due to their pregnancy, their request or taking of parental leave or because of family responsibilities.⁹

The pervasiveness of workplace pregnancy and maternity leave discrimination indicates that, notwithstanding its best intentions, the SDA is failing to adequately protect women on maternity leave from discrimination. While there may be several overlapping factors for the unrelenting nature of maternity leave discrimination in the workplace, there are concerns that a narrowed construction of direct discrimination provisions within the Act may be leading to narrower avenues of redress for maternity leave discrimination claimants.

In order to understand the progression towards a narrowed interpretation of direct discrimination provisions within anti-discrimination legislation, and the impacts this may have on maternity leave discrimination, it is necessary to examine the case law.

III VICTIMS OF CIRCUMSTANCE: THE NARROWING JUDICIAL INTERPRETATION OF THE COMPARATOR IN ANTI-DISCRIMINATION LEGISLATION

Australian courts are tasked with interpreting statutory provisions by discovering the purpose of the term in question, and adopting an interpretation that furthers that purpose or object.¹⁰ Where courts have been invited to consider the equality concepts underpinning anti-discrimination legislation, they have generally supported that the remedial nature of anti-discrimination law requires it to be given a broad and beneficial construction.¹¹

⁹ Ibid.

¹⁰ See *Acts Interpretation Act 1901* (Cth) s 15AA.

¹¹ *I W v City of Perth* (1997) 191 CLR 1, 12, 22–23, 27, 39, 58; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J with whom Deane J agreed); see also 372 (Brennan J), 394 (Dawson and Toohey JJ) and 406–407 (McHugh J).

However, the outcomes of several anti-discrimination cases within the last two decades suggest Australian courts are taking an increasingly narrowed construction of provisions within anti-discrimination legislation. The majority High Court judgment in *Purvis v New South Wales (Department of Education and Training)* ('Purvis')¹² reflects a clear shift away from the purposive-oriented direct discrimination jurisprudence established in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* ('Wardley').¹³

Before turning to the differing outcomes in these judgments, it is worth reflecting on the legislative protections available to women on maternity leave under the SDA, so that we may situate the progression of interpretation taken in response to discrimination claims.

A The Legislative Protection for Women on Maternity Leave

Women are protected from direct maternity leave discrimination under s 7(1)(b) of the SDA.¹⁴ While this section speaks to pregnancy discrimination, it has been judicially recognised that the taking of maternity leave is a *characteristic* that appertains generally to pregnant women.¹⁵ Women on maternity leave are therefore offered the same level of legislative protection from discrimination as pregnant women.

Pursuant to this provision, direct discrimination on the grounds of pregnancy will occur if a person on maternity leave has been treated less favourably than another person who is not on maternity leave and is in 'circumstances that are the same or not materially different' to the person on maternity leave. This requires two interrelated assessments of comparison and causation to establish direct discrimination:

- a) whether someone has been treated less favourably than another person who does not share the protected attribute and is in the same, or not materially different circumstances (the comparator approach); and
- b) whether the person has been treated less favourably 'because of' the protected attribute (the causative test).

¹² (2003) 217 CLR 92.

¹³ (1984) EOC 92-002 (Equal Opportunity Board of Victoria).

¹⁴ *Sex Discrimination Act 1984* (Cth) s 7(1)(b).

¹⁵ *Thomson v Orica* [2002] FCA 939, [165], [167] (Allsop J).

B The Wardley Decision

The *Wardley* decision concerned the rejection of an application by a woman ('*Wardley*') to become a trainee pilot for Ansett on the grounds that the airline had a policy of 'only employing men as pilots'.¹⁶ *Wardley* challenged Ansett's sex-based rejection, commencing a sex discrimination claim under the then recently enacted *Equal Opportunity Act 1977* (Vic).

An argument put forward by Ansett was that it could justify its decision to reject applicants on the basis of their sex, arguing it had a business case rationale because the recently-married *Wardley* was likely to take leave to have a child in the near future.¹⁷ In this sense, it had not treated her any different to how it would treat any other applicant, male or female, who was likely to take *extended leave*.¹⁸ The potential for taking this extended leave therefore made different the relevant circumstances between her and the other candidates for the position, and therefore such candidates were not appropriate comparators in an assessment as to differential treatment. It was in fact, Ansett insisted, those applicants who were likely to take extended leave who were in circumstances similar enough to *Wardley*.

The Board rejected this argument, stating that *Wardley*'s absence for a potential pregnancy was 'of a kind which could only arise because of her sex'.¹⁹ Therefore investing the characteristic of extended leave onto the comparator could not be permitted because it was a characteristic so closely associated with the female sex that a decision grounded on such a characteristic was a decision on the grounds of sex.²⁰ The Board reinforced this reasoning with the following reflection on the purpose of the SDA:

It seems to us unlikely that the legislature having proscribed discrimination in employment on the ground of sex would then open the way to that discrimination against members of the female sex because of their child-bearing potential which is the very essence of the distinction between

¹⁶ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-002 (Equal Opportunity Board of Victoria).

¹⁷ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 261.

¹⁸ *Ibid.*

¹⁹ *Ibid* 262.

²⁰ *Ibid.*

the sexes ... child bearing potential of women should not be used as an excuse to limit women's role in society.²¹

It is clear from such comments that the Board had engaged with the legislation's remedial purpose. The Board made clear that the purpose of the legislation was relevant in a consideration of who was comparable to the claimant. Characteristics that were so closely associated with the protected attribute could not be invested in the comparator because to do so would render the remedial nature of the legislation redundant. This meant that the use of such traits and characteristics would, under the *Wardley* approach, be considered discriminatory and, if a respondent wanted to justify their conduct they would need to argue for an exception. The court would then assess whether this particular different treatment was justified under an exception or not.

C The Purvis Decision

In stark contrast, the comparator test was reinterpreted and narrowed by the High Court in *Purvis*. The decision concerned a direct discrimination claim under the *Disability Discrimination Act 1992* (Cth)²² that a school had expelled an anti-social, violent boy (Daniel) on the grounds of his disability.

Here, the Court was similarly required to determine whether the boy had been treated differently to a comparative person without the disability, and similarly required to consider the presence of any 'same, or not materially different' circumstances that were to be invested in the comparator. Arguing using similar reasoning to the successful judgment in *Wardley*,²³ the claimant put forward that Daniel's violent and anti-social behaviour was a manifestation of his disorder, and therefore violent behaviour could not be invested in the comparator as a relevant characteristic.²⁴ However, deviating from the approach taken in *Wardley*, the majority determined that violent behaviour was a

²¹ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-002 (Equal Opportunity Board of Victoria).

²² See s 5(1).

²³ Reasoning that was also adopted in the original HREOC decision in *Purvis obo Hoggan v New South Wales (Department of Education)* (2001) EOC 93-117, and in the dissenting judgments of McHugh and Kirby JJ in *Purvis v New South Wales (Department of Education)* (2003) 217 CLR 92, [48].

²⁴ *Purvis v New South Wales (Department of Education)* (2003) 217 CLR 92, [10].

characteristic that *could* be imported to the comparator, as it was an ‘objective feature’ which surrounded his treatment as a disabled person.²⁵ Consequently, his violent behaviour formed part of the circumstances in which he was treated less favourably than other students and it was in these circumstances that he was found to have been treated the same as a non-disabled comparator.²⁶ Consequently, the school was found to have not discriminated against Daniel on the grounds of his disability.

D The Implications of a Narrowed Interpretation of the Comparator: The Poppy Case

That the Court in *Purvis* did not limit its reasoning to the facts in front of it means that the majority reasoning has precedential application to other anti-discrimination cases, as evidenced by the judgment in *Poppy v Service to Youth Council Inc* (*‘Poppy’*).²⁷ Here, White J strengthened its support for a narrow approach to interpreting direct discrimination provisions by reaffirming the limited use of the comparator from the majority *Purvis* judgment. He determined the appropriate comparator to a woman who had been made redundant during maternity leave to be a hypothetical manager of similar experience who also took approximately four months’ leave with their employer’s consent.²⁸

Under the broader *Wardley* approach, a claimant such as Poppy might have succeeded on a direct discrimination claim on the basis that her comparator could not have been invested with a characteristic such as maternity leave and/or leave, to the extent that such a characteristic would be regarded as closely associated with her sex. Instead, White J relied on the shared characteristic of an extended absence to demonstrate that it was her absence, rather than the reason for it, which ‘created the circumstance’ in which the redundancy occurred.²⁹ Thus, while the applicant’s leave had ‘allowed for the alternative arrangements to be tested and to be found satisfactory’³⁰, the same outcome

²⁵ *Purvis v New South Wales (Department of Education)* (2003) 217 CLR 92, [224]–[225] (Gummow, Hayne and Heydon JJ, Gleeson CJ concurring [11] and Callinan J [273]).

²⁶ *Purvis v New South Wales (Department of Education)* (2003) 217 CLR 92, [225].

²⁷ *Poppy v Service to Youth Council Inc* [2014] FCA 656.

²⁸ *Ibid* [134].

²⁹ *Ibid* [132].

³⁰ *Ibid*.

would have occurred in the case of the hypothetical comparator.

White J consequently found that the redundancy of the applicant arose following an operational review and restructure rather than on the grounds of her maternity leave or her family responsibilities.³¹

By adopting the position in *Purvis* that the reason for leave isn't relevant to a determination of direct discrimination, the outcome in *Poppy* makes clear that an employer will avoid liability under the SDA if they demonstrate they were treating like individuals alike, by treating all leave-takers like all other leave-takers.³²

IV THE PERSISTENCE OF FORMAL EQUALITY AND ITS IMPLICATIONS FOR EQUALITY JURISPRUDENCE IN AUSTRALIA

The outcome in the *Poppy* case demonstrates the ongoing relevancy of the narrow interpretive approach to the comparator adopted in the *Purvis* case. It also confirms that Australian courts are intent on finding a formal rather than a substantive equality basis within direct discrimination provisions. Through the adoption of a narrowed, highly technical construction of the comparator, courts are losing sight of the legislation's remedial purpose, and are, as a result, failing to adequately protect women on maternity leave from discrimination in the workplace.

The increasingly technical distinctions drawn between circumstances to be attributed to the comparator mean that the complainant must now fit their case within smaller evidentiary boundaries, making it difficult for claimants to prove under direct discrimination provisions that they were treated less favourably.³³ Consequently, it may be argued that the direct discrimination provisions of the SDA have become so highly

³¹ Ibid [136].

³² Belinda Smith, 'From Wardley to Purvis — How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 22.

³³ See Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008.

technical and specialised in their application, that they now may only cover the most blatant acts of sex-based exclusion, prejudice and assumption.³⁴

And yet despite their clear limitations, direct discrimination provisions bear the brunt of most claims of discrimination. This may in part be because there is considerable doubt that the indirect discrimination provisions under the Act can contribute to substantive equality jurisprudence in any meaningful way. While indirect discrimination provisions may have the capacity to challenge embedded social practices that contribute to discrimination, it has so far proven underused. Reasons for its infrequent use include the considerable difficulty for claimants to prove their case, unfavourable judicial interpretations of indirect discrimination provisions³⁵ as well as the general rarity of such cases making it to court.³⁶

This limited opportunity for success may in turn discourage claimants from bringing their discrimination cases forward. The ‘Supporting Working Parents’ report showed that, of the mothers who had experienced pregnancy, parental leave or return to work discrimination, 91 per cent had not made a formal complaint within their organisation or to a government agency,³⁷ a figure that lends support to a lack of faith in the adequacy of the SDA to protect women from discrimination.

With these limitations in mind, it is becoming increasingly apparent that the SDA may not be the best avenue for protecting women from maternity leave discrimination.

V THE MULTI-DIMENSIONAL CONCEPT OF EQUALITY AND ITS POTENTIAL FOR SUBSTANTIVE EQUALITY OUTCOMES IN AUSTRALIA

The formal equality approach continues to hold considerable purchase in Australian anti-discrimination law.³⁸ Yet formal equality is unprepared to account for the types of

³⁴ Ibid; see also *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186.

³⁵ Typically reflected in a conservative approach to the interpretation of ‘not reasonable’ that benefits the employer in employment cases.

³⁶ Smith, above n 32.

³⁷ Australian Human Rights Commission, ‘Supporting Working Parents’, above n 6, 9.

³⁸ Regina Graycar and Jenny Morgan, ‘Thinking About Equality’ (2004) 10(2) *University of New South Wales Law Journal Forum* 833.

barriers that may face women returning to work following maternity leave. In fact, a focus on treating unequally situated people as if they were the same may only further entrench systemic forms of discrimination.³⁹

It has been suggested by some that the persistence of formal equality in our anti-discrimination legislation may be linked to a judicial failure to engage with substantive equality discourse and literature.⁴⁰ Beth Gaze adds that it is crucial to the effect of anti-discrimination law that judges have an enhanced understanding of the conceptual frameworks of equality and social contexts in which discrimination occurs.⁴¹ Without this knowledge, there is difficulty in giving effect to the words of a provision while also giving strength to the remedial purpose of the Act.

It is perhaps as a fixed conceptual framework in which to engage with equality discourse that Sandra Fredman's 'multi-dimensional' concept of substantive equality may be of value to legal practitioners, judges and government decision-makers. Fredman argues that the multi-dimensional concept offers an evaluative framework towards determining whether policies, practices and laws are: a) fulfilling the right to equality; and b) pointing to ways to reshape them to achieve equality.⁴² It is within this framework that I intend to investigate what substantive equality might be able to offer the task of adequately protecting women on maternity leave from discrimination in the workplace, an area that has until now been inadequately addressed by Australian anti-discrimination legislation.

Fredman's theory suggests that equality should be viewed as a multi-dimensional concept with four interrelated aims: breaking the cycle of disadvantage through redistribution; promoting respect for out groups and redressing stigma by recognition; accommodating difference rather than demanding sameness by transformative

³⁹ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 15.

⁴⁰ Graycar and Morgan, above n 38, 837.

⁴¹ Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325.

⁴² Sandra Fredman, 'Substantive Equality Revisited' (Legal Studies Research Paper No 70, University of Oxford Faculty of Law, 15 October 2014) 20–21.

structural change; and facilitating the full participation of all in society.⁴³ It is beyond the scope of this paper to examine all four dimensions comprehensively, and so the following analysis considers the two dimensions of redistribution and transformation and how they may interrelate to afford women suffering maternity leave discrimination better protection than is currently offered by the SDA.

A Redistributive Equality

Rather than aiming for the formal equality ideal of neutrality or sameness, the aim of this dimension is to develop an awareness of the groups and individuals that have most suffered disadvantage, and to remove the detriment attached to that disadvantage.⁴⁴ This involves a consideration of what makes people different, by virtue of their group status or individual identity, and looking at ways in which to redress their disadvantage. That the Australian judiciary itself presently only reflects categories of social advantage, with minimal reflection of groups in society that have traditionally been disadvantaged⁴⁵ may mean the judiciary is limited in its capacity to look beyond its own privilege to develop substantive ways in which to redress disadvantage. In this sense, government bodies and employers may perhaps be better situated to do this.

Disadvantage in the context of maternity leave discrimination is reflected in the fact that women typically pay the price for maternity leave, with women experiencing notably lower wages following an extended period of maternity leave, leading to a drastically reduced future earning capacity.⁴⁶ Compounding this disadvantage was a disparity, in the level of access to paid maternity leave across occupational lines, with professional women enjoying higher levels of paid maternity leave access than women in clerical, administrative or sales positions.⁴⁷ In this sense the disadvantage of reduced future

⁴³ Sandra Fredman, *Discrimination Law* (Clarendon Press, 2nd ed, 2011) 25.

⁴⁴ Fredman, 'Substantive Equality Revisited', above n 42, 23.

⁴⁵ Gaze, above n 41, notes Gaudron and Kirby JJ (at the level of the High Court) as examples of judicial appointments that belong to traditionally disadvantaged groups.

⁴⁶ David Baker, 'Maternity Leave and Reduced Future Earning Capacity' (2011) 89 *Australian Institute of Family Studies Journal*
<<http://www.aifs.gov.au/institute/pubs/fm2011/fm89/fm89i.html>>.

⁴⁷ *Ibid.* This was prior to the introduction of a paid parental leave scheme by the Australian government in 2009.

earning capacity following maternity leave is paired and its impact made more powerful with existing socio-economic disadvantage.

Fredman suggests that a method of targeting such disadvantage under this dimension may be affirmative action measures undertaken by employers or the government.⁴⁸ Affirmative action is based on an understanding that to remedy the effects of past discrimination and disadvantage, proactive steps are required to benefit disadvantaged groups with protected attributes.⁴⁹

B Analysis

There is an immediate concern that using affirmative action initiatives, such as setting out gender diversity quotas and targets for Australian workplaces,⁵⁰ may only serve to promote an assimilationist policy for women returning from maternity leave, whereby women are still measured against their capacity to meet a universal male standard.⁵¹ In this sense, affirmative action may help change the gender composition of a workplace, but the structures that perpetuated female absence from employment in the first place: inadequate access to affordable child care, and limited parental leave benefits for fathers and partners, remain intact.⁵²

Fredman thankfully accepts that a numerical, quota-based approach to affirmative action is not enough to bring about substantive equality, stressing that a redistributive approach to affirmative action should focus primarily on reducing the gap between the more disadvantaged and the less disadvantaged. In order to effect this reduction of disadvantage, structural change is required, calling for collaboration with the transformative dimension of her multi-dimensional concept of equality.⁵³ The transformative dimension of her framework will now be discussed in further detail

⁴⁸ Fredman, 'Substantive Equality Revisited', above n 42.

⁴⁹ Fredman, *Discrimination Law*, above n 43, 232.

⁵⁰ Workplace Gender Equality Agency, 'Targets and Quotas: Perspective Paper' (Perspective Paper, Australian Government, 2013)
<https://www.wgea.gov.au/sites/default/files/20131119_PP_targetsquotas.pdf>.

⁵¹ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 34.

⁵² Fredman, *Discrimination Law*, above n 43, 232.

⁵³ *Ibid* 259.

below.

Fredman's redistributive dimension may be beneficial to our examination of maternity leave discrimination under the direct discrimination provisions of the SDA. To the extent that it requires an awareness of disadvantage, it potentially invites an awareness by the court that women are disproportionately more likely than any other group to take the length of leave that the courts have traditionally invested in the comparator in maternity leave cases. That such a person, hypothetical or real, is also disproportionately more likely to then be considered for redundancy in the event of a bona fide restructure, risks reinforcing structural disadvantage for women returning from maternity leave. If a court were enabled to turn its mind to this disadvantage, a very simple measure to redress the disadvantage would be to shift away from a narrowed interpretation of direct discrimination provisions, re-inviting a broader, remedially-minded approach to handling direct discrimination claims.

C Transformative Equality

Having engaged with Fredman's redistributive dimension of equality by examining disadvantage and ways in which to redress it, the transformative dimension of equality moves to change existing social structures that actively perpetuate disadvantage, which can also stand directly in the way of the efficiency of redistributive efforts such as affirmative action.⁵⁴ This transformation of existing institutions, according to Fredman, should 'accommodate difference, rather than require members of out-groups to conform to the dominant norm'.⁵⁵ Thus, rather than expecting women returning from maternity leave to "have it all" by conforming to hectic full-time work hours alongside family responsibilities, transformative equality purports to transform the existing social structures that perpetuate their disadvantage.

In practical terms, this may be addressed with a transformation of paid parental leave schemes that better promote egalitarian parenting, so that participative parenting may be made possible for both mothers and fathers. This type of transformation has been

⁵⁴ Ibid 30.

⁵⁵ Ibid.

undertaken in Sweden, which has a generous parental leave scheme whereby parents receive 480 days' leave — including 390 at around 80 per cent of their salary — for each child, with 60 days reserved for each parent and the remaining 360 shared however the couple so choose.⁵⁶ The scheme stands in stark contrast to the current paid parental leave scheme in Australia, whereby the 'primary carer' of a child is provided 18 weeks of paid leave set at the minimum wage,⁵⁷ while fathers and partners can access a mere two weeks of paid leave under 'dad and partner pay'.⁵⁸ The language of 'primary carer' and 'dad and partner pay' is perhaps descriptive of the scheme's limited intention to radically transform the social structures that perpetuate disadvantage for women's capacity to return to the workforce following maternity leave: namely, one-sided parenting models.

The transformative capacity of a paid parental leave scheme as utilised by Sweden is twofold: on the one hand, a generous parental leave scheme for fathers enables men to take a more participative role in their family life. In Sweden, almost 25 per cent of all fathers utilise the leave scheme.⁵⁹ The biggest beneficial impact is felt by women, however, who are able to continue their careers relatively uninterrupted if their partner takes their share of leave. According to OECD figures in 2013, about 80 per cent of Swedish mothers participate in the workforce.⁶⁰ Australia's female workforce participation rate pales in comparison, settled at a rate of 45.7 per cent of all employees.⁶¹

D Analysis

⁵⁶ Swedish Institute, *Gender Equality in Sweden* (9 April 2015) Sweden.se <<https://sweden.se/society/gender-equality-in-sweden/>>.

⁵⁷ Department of Human Services, *Parental Leave Pay* (3 March 2015) Australian Government <http://www.humanservices.gov.au/customer/services/centrelink/parental-leave-pay?utm_id=10>.

⁵⁸ Department of Human Services, *Dad and Partner Pay* (4 February 2015) Australian Government <<http://www.humanservices.gov.au/customer/services/centrelink/dad-and-partner-pay>>.

⁵⁹ Swedish Institute, above n 56.

⁶⁰ OECD, *Female Labour Force Statistics by Sex and Age* (November 2014) OECD Stat Extracts <https://stats.oecd.org/Index.aspx?DataSetCode=LFS_SEXAGE_I_R>.

⁶¹ Workplace Gender Equality Agency, *Gender Equality Fact Sheets and Statistics* (10 April 2015) Workplace Gender Equality Agency <<https://www.wgea.gov.au/research-and-resources/fact-sheets-and-statistics>>.

The introduction of a generous paid parental leave scheme similar to that seen in Sweden holds enormous potential in its capacity to reduce maternity leave discrimination. By transforming a gendered social structure such as parenting into a more egalitarian model, neither gender is forced into a situation where they must put themselves at a disadvantage by sacrificing their future earning capacity to become the 'primary carer'.

Further, there is less incentive for hiring employers to take into their minds, as they did in *Wardley*, that a female employee might take leave to have children, since under a transformed paid parental leave scheme that promotes male participation in parenting, there is little to prevent a male employee also taking extended leave.

The most immediate concern for the application of a similar paid parental scheme in Australia is the matter of who should bear the burden of cost in its implementation. A distinction between its application in Australia and its application in Sweden is that Sweden's scheme is supported by a very high rate of local and state income tax,⁶² permitting the Swedish government to invest considerably in childcare and parental leave. Australia is unlikely to radically transform its taxation system to effect structural change in paid parental leave, and is therefore just as unlikely to take responsibility for the burden of cost in the implementation of a paid parental leave scheme. But Fredman asserts that the cost factor argument is a poor excuse, given the cost will be incurred by those experiencing the disadvantage: '[w]hatever cost is not borne by employers or the State is left on the shoulders of those who are least able to bear it'.⁶³

The interrelatedness of the transformative and redistributive dimensions now becomes apparent, for the costs of implementation of structural change should be derived from those who benefit from the social structures that perpetuate disadvantage.⁶⁴ To this extent, the State is obliged to play an active role in distributing benefits to the

⁶² KPMG, *Individual Tax Rates for 2009–2014* (2014) KPMG <<http://www.kpmg.com/Global/en/services/Tax/tax-tools-and-resources/Pages/tax-rates-online.aspx>>.

⁶³ Fredman, 'Substantive Equality Revisited', above n 42, 31.

⁶⁴ Fredman, *Discrimination Law*, above n 43, 236.

disadvantaged by acting positively to correct the results of past injustice and disadvantage, in a way that is ultimately beneficial to all.⁶⁵

VI CONCLUSION

The increasingly narrowed interpretation of direct discrimination provisions has led to a lack of protection for women on maternity leave from discrimination in the workplace. This has been demonstrated by the outcome in the *Poppy* case, which, having provided a technical interpretation of the comparator approach, made clear that an employer will avoid liability under the SDA if they demonstrate they were treating like individuals alike, by treating all leave-takers like all other leave-takers. In this suffocating environment, Sandra Fredman's multi-dimensional concept of equality provides a breath of fresh air. It serves as an appropriate framework for Australia to adopt in its gradual shift towards a substantive model of equality. By utilising the dimensions of transformative and redistributive equality to test the viability of schemes such as generous paid parental leave, Australia may step outside the limitations of the judicial approach to protecting the disadvantaged from discrimination, and actively work to change the structures that perpetuate it in the first place.

Christine Todd (BA) is a JD student at Melbourne Law School. This paper states the law as at November 2014.

⁶⁵ Ibid.

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