# BOOK REVIEWS

*The Liberal Promise: Anti-Discrimination Legislation in Australia* by Margaret Thornton (Oxford University Press, Melbourne, 1990) pages viii-xi, 1-332, table of statutes 333-40, reported decisions 341-9, bibliography 350-83, index 384-8. Price $45.00. ISBN 0 19 553204 X.

All states except Queensland and Tasmania have some form of anti-discrimination legislation which operates in conjunction with Commonwealth legislation. There is a common model to these Acts: they proscribe less favourable treatment on certain grounds. The grounds vary across jurisdictions and include race, sex, marital status, physical and intellectual impairment, homosexuality, and political or religious conviction.[1] Discrimination on these grounds is only unlawful in certain areas (for example in employment, education and the provision of goods and services) and some areas are excepted from the requirements of the legislative schemes.[2]

When less favourable treatment occurs because of one of the above grounds, or a characteristic appertaining or imputed to the ground, the result is 'direct' discrimination.[3] Indirect discrimination occurs when a requirement or a condition is imposed that, because of one of the above grounds of discrimination, unreasonably and disproportionately affects a particular group of persons in an unfavourable way. The distinction lies in the difference between disparate treatment and disparate impact; the legislation focuses largely on the former. Professor Thornton cites height and weight requirements as 'the paradigmatic instance of a requirement or condition, neutral on its face, which has a disproportionate impact on women'.[4]

Some legislative schemes provide guidelines for affirmative action programs. They also include provisions allowing 'special measures' to be taken in particular cases, which render lawful discrimination designed to redress disadvantages suffered by particular groups.[5] The most common legislative object, however, is to provide a generally available process for people to lodge complaints and seek a remedy for discrimination. In the initial stages of the process, adversarial methods take a back seat to an alternative dispute resolution process in which a conciliator meets privately with the parties. If the dispute cannot be resolved in this way, a public hearing before a quasi-judicial board or tribunal may be held.

In *The Liberal Promise* Professor Thornton evaluates the effectiveness of dealing with discrimination in this way. Neither a casebook nor a manual, this work explores the relationship between liberal values and the discrimination they inevitably produce, and documents the law's attempts to negotiate the relationship between the two.

1 In Victoria, discrimination on the basis of HIV infection (which leads to the development of AIDS) has been proscribed by an amendment to the Equal Opportunity Act 1984 (Vic.). See Buchanan, D. and Godwin, J., 'AIDS — The Legal Epidemic' (1988) 13 *Legal Service Bulletin* (1988) 111. A range of additional grounds (*e.g.* age, sexuality, irrelevant criminal record) have been proposed in the context of an overall review of the Victorian Act. See Law Reform Commission of Victoria, *Review of the Equal Opportunity Act: Report No. 36*, (1990).

2 Examples include: acts done under statutory, judicial or arbitral authority, by charitable bodies, in armed combat, and in sport. Additionally, organizations can apply for exemptions under provisions in the legislation. See ch. 2, Equal Opportunity Board, *Thirteenth Annual Report 1989/1990*. (See also *infra* n. 13.)

3 For example, a policy not to hire female pilots: *Ansett Transport Industries (Operations) Pty Ltd v. Wardley* (1979) 54 A.L.J.R. 210.

4 Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 188.

5 *E.g.* the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth). In relation to race discrimination, see Sadurski, W., '*Gerhardy v. Brown* v. The Concept of Discrimination: Reflections on the Landmark Case that wasn't' (1986) 2 *Sydney Law Review* 5.

Professor Thornton summarizes the state of anti-discrimination law in Australia, making extensive use of reported decisions (up to and including 1989), in Australian and some overseas jurisdictions. She analyses the liberal underpinnings of the legislation, and attempts more generally, to 'deconstruct the myth of law as an autonomous body of knowledge untouched by social and political currents'.[6]

In so doing, Professor Thornton displays a rich and scholarly interest in the human penchant for keeping some people more equal than others. *The Liberal Promise* details the way in which anti-discrimination legislation is a product of its time and a particular way of thinking about social change. It places these measures in the context of a history whose continuing themes are seen to be prejudice and the subordination it engenders. Her critical appraisal of liberalism finds 'the values of individualism and social equality are simultaneously extolled', however, 'it is the untrammelled realisation of the former which inevitably manifests itself as social inequality.[7] An understanding of this relationship, and its sometimes contradictory aims and effects, is central to an understanding of anti-discrimination law.

Professor Thornton draws attention to the way in which the liberal state is inextricably bound to a concept of formal equality. This model is seen to represent 'fairness' and requires that equal persons are treated equally or, to put it another way, that like are treated alike and unlike differently.[8] Anti-discrimination legislation is built on the premise that equal treatment is the primary goal, but, as Professor Thornton illustrates, the equal treatment model can maintain gross inequities. She writes

> to suggest that a recently arrived, non-English speaking, Indo-Chinese refugee should be treated the same as a fifth-generation Australian in seeking access to goods and services, employment, education and accommodation highlights the conceptual difficulty. In such situations, the same treatment is necessarily unequal treatment.[9]

Professor Thornton shows how a language of assumed, not actual equality can be used, in times of economic crises, to legitimize public spending cutbacks on disadvantaged groups.

The focus on equality of *opportunity* rather than *outcome* is a political choice. Professor Thornton explains the resistance to measures which manipulate equality of outcome in terms of the liberal commitment to the tenets of free enterprise and the reward of merit. Engineering for equality of result (or substantive equality) would upset the prevailing order and require a greater degree of regulation than can be justified in liberal individualist thought. Although the liberal philosophy can accommodate the removal of barriers hampering opportunity to maximize individual potential, merit must nevertheless prevail, for it is 'the traditionally accepted means of stratification in liberal society'.[10] Professor Thornton demonstrates that this apparently neutral concept has a differential effect on women and on minority groups. For instance

> regardless of an academic woman's objective qualifications, she may be considered less worthy of appointment or promotion than a man because of paternalistic assumptions relating to her private life, in addition to assumptions concerning the appropriateness of having a woman in a career position which necessitates exercising authority over men.[11]

The liberal distinction between the private and public spheres determines the ambit of anti-discrimination law. This distinction is highly significant in any analysis of what is perceived as 'equality' or as 'merit'. The private sphere 'is perceived to be a refuge from the travail of public life'[12] into which the state should not intrude. Productive work occurs only in the public sphere, and even here intervention should be minimal because the advancement of capitalism is served by maximum competition. Thus in a liberal framework, equality-enhancing measures need only apply in the areas of activity which promote the growth of capitalism. Anti-discrimination laws uphold this

6 Thornton, *op. cit.* ix.
7 Thornton, *op. cit.* 14.
8 See Sadurski, W., 'Equality Before the Law: A Conceptual Analysis' (1986) 60 *Australian Law Journal* 131 for a detailed discussion of this topic.
9 Thornton, *op. cit.* n. 4, 22.
10 *Ibid.* 19.
11 *Ibid.*
12 *Ibid.* 102.

delineation by their restriction to the public sphere. Professor Thornton's discussion of the exceptions available under the Act shows that the 'private' sphere is 'an elastic concept which can be stretched in order to oust intervention when it is politically desirable to do so'.[13]

Readers with an interest in structural explanations of equality will enjoy the book's attention to the effects of a mismatch between theories about how and why people discriminate and the legislation which is designed to curtail its expression. Professor Thornton writes,

> [i]t is inevitable, then, that anti-discrimination measures devised in Australia and elsewhere in the Western world tend to be somewhat schizophrenic for, while their enactment displays an incipient understanding of conflict theory in acknowledging the structural injustice of discrimination based on group membership, such measures are bound to support the tenets of free enterprise and the ideology of individual merit.[14]

Professor Thornton argues that law and its procedures reduce discrimination to an isolated event. It is constructed as a private occurrence between parties, rather than symptomatic of endemic perceptions about the inferiority of those who are not the norm. The focus of the law on the discriminator and the person discriminated against distracts us from structural precipitants and societal chauvinisms.

Professor Thornton's critique shows anti-discrimination measures not to be the protection of difference and pluralism which might have been hoped. The complainant must show less favourable treatment on the grounds of a specific characteristic. The process of comparison[15] and problems of proof are not necessarily simple matters. Nor, according to Professor Thornton, are they ideologically neutral. In Victoria, there is a need to prove that the discriminator *consciously* treated a person less favourably, at least when the basis of race is alleged. This requirement was applied by Fullagar J. in the Victorian direct discrimination case of *Chief General Manager, Department of Health v. Arumugam*.[16] Professor Thornton stresses that the relative status of the parties can affect judicial readiness to infer the necessary 'racism'.[17] The consciousness requirement also necessarily discounts the extent to which discriminatory attitudes are indistinguishably enmeshed with ways of viewing the world. The Law Reform Commission of Victoria has adopted Fullagar J.'s position in their Draft Bill, with three Commissioners dissenting.[18]

Professor Thornton contends that discrimination is assessed against a benchmark of characteristics which are the norms associated with dominance: maleness, an Anglo-Celtic background, physical ability and heterosexuality. The process of seeking a remedy for discrimination becomes a plea to treat differences as irrelevant and invisible, and the status of the above characteristics as the most legitimate aspirations is thus reinforced. Professor Thornton writes that '[a]s individual women and members of minority groups satisfy the entry requirements they can be admitted to the society of

[13] *Ibid.* 107. By way of analogy, Professor Thornton discusses the power of the corporate sector to resist regulation. A variation on this strategy can be seen in government attempts to evade the applicability of anti-discrimination legislation (*supra* n. 2). The recent case of *Public Transport Corporation v. Waters* (Supreme Court of Victoria, unreported decision, 28 August 1990) concerned a dispute between the Corporation and nine people with disabilities over changes to the ticketing system and the introduction of driver-only trams. On appeal before Phillips J. from the Equal Opportunity Board, the Public Transport Corporation successfully argued that its actions were excepted under s. 39(e)(ii) of the Equal Opportunity Act 1984 (Vic.) because the changes were necessary in order to comply with a provision of another Act. The provisions of the Transport Act 1983 (Vic.) imposed a broad obligation for the Corporation to comply with the directions of the Minister. Upon finding that the Corporation's conduct was necessary for compliance with the direction made, his Honour found the exception made out. Such reasoning expands the opportunities for Executive fiat to constrain the ambit of the legislation in Victoria. This accords with Thornton's assertion that exemptions of this kind are 'potentially one of the most devastating' *op. cit.* n. 4, 133. The case has been appealed to the High Court (judgment reserved) which, it is to be hoped, will address this issue.

[14] Thornton, *op. cit.* n. 4, 14.

[15] The problem of comparison can be especially complex with indirect discrimination: see *e.g.* the various methods used by the High Court of Australia in *Australian Iron & Steel Pty Ltd v. Banovic* (1989) E.O.C. 92-271.

[16] (1987) E.O.C. 92-155.

[17] Thornton, *op. cit.* n. 4, 181.

[18] Thornton, *op. cit.* n. 1. For a critical appraisal see Hunter, R., 'Review of the Victorian Equal Opportunity Act' *Australian Journal of Labour Law* (forthcoming).

equals. Admission of a few is ultimately less destabilising than the development of a separate autonomous community.'[19] 'Otherness' then, is constructed as dross, and the norms which are the catalysts for discrimination in the first place can persist unchallenged. A policy of assimilation is seen to cement the norms on which the capitalist state depends.

Professor Thornton also scrutinizes the personnel in the law's response to discrimination. The legislatures which pass anti-discrimination laws, the courts which review first instance decisions, and the legal profession which profits from the adversarial system are seen to particularly embody the dominant norms enshrined by the operation of the Acts. Their stake in the *status quo* of the liberal ideal, and comfort with the model of formal equality suggest that radical change is unlikely from these participants. She is also conscious of the consequences of requiring administering bodies to be primarily concerned with the unfair acts of individuals. This is seen to divert both energy and scarce resources away from addressing the connected social conditions.

*The Liberal Promise* concludes with a rejection of communitarianism as a realistic alternative. Proponents of communitarianism 'believe or hope that an idealised *polis* will be reconstituted between equals'.[20] Professor Thornton warns of the potential for a similarly oppressive emphasis on homogeneity in this model. She notes also that '[i]f it is the superordinates who shape this universe, it will be as warped as the liberal universe with its privileging of particular sectional values over others.[21]

Professor Thornton leaves the reader dissatisfied, not just with the law, but with the meaning of 'equality' when the standard is powerfully protected from challenge. I would have appreciated here further discussion of alternatives to the 'equal treatment' model. It would have been instructive, for instance, to learn Professor Thornton's views on the feminist alternatives proposed by writers such as Liz Sheehy[20] and Catharine MacKinnon[21] as they would be made relevant to discrimination against minority groups.[21] Such models try to make explicit the difference in power held by individuals in their relations with each other, instead of reinforcing these differences, as our legal culture does, by operating on the assumption of a fictitious equality.

In the final analysis, Professor Thornton appeals for informed and tactical social change through a coalition of women and minority groups. She argues that the liberal framework despite its shortcomings, can be changed by a more explicit focus on power. Well prepared lawyers will be essential for this task, and *The Liberal Promise* can serve as an excellent basis for self-examination within the profession.

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19 Thornton, *op. cit.* n. 4, 246.
20 Thornton, *op. cit.* n. 4, 258.
21 *Ibid.*
22 *Personal Autonomy and the Criminal Law*, Background Paper prepared for the Canadian Advisory Council on the Status of Women, September 1987.
23 'Difference and Dominance: on Sex Discrimination' in *Feminism Unmodified: Discourses on Life and Law* (1987), 32.

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