

ROAD BLOCKS ON THE ROUTE TO EQUALITY: THE FAILURE OF SEX DISCRIMINATION LEGISLATION IN BRITAIN¹

BY LINDA DICKENS*

INTRODUCTION

An examination of women's aggregate pay and employment position in Britain over the twenty years of equality legislation reveals some positive changes but also major continuities in disadvantage. At the micro level of the workplace there have been voluntary initiatives which may be seen as positive indirect effects of the legislation, but they too have been limited in extent and impact.

I offer explanations for this relative failure of the legislation and voluntary initiatives to impact more positively on women's employment position at two levels. First I argue that the limited direct impact of the law rests on weaknesses in the legal provisions, procedures and enforcement mechanisms. These could be overcome through legal reform but such reform would be limited by the more fundamental weaknesses in the underlying assumptions and principles of the legislation. These weaknesses — in the concept of equality, the adoption of the male as the standard and the narrow perception of discrimination — are also reflected in, and undermine, voluntary initiatives. In exploring these flawed underlying principles, I seek to bring out the inappropriateness of the legal measures and the ideology of the current approaches to equality as a way of remedying women's employment disadvantage.

THE BRITISH LEGISLATIVE FRAMEWORK

On the face of it there has been a widening legislative assault on women's disadvantage in employment in Britain. The Sex Discrimination Act 1975 (U.K.) (together with the Sex Discrimination Act 1986 (U.K.)) outlaws discrimination on the grounds of sex and married status in all aspects of employment, whether the discrimination be direct (different treatment) or indirect (same treatment but with a disproportionate adverse impact on women, whether intentional or not). The Equal Pay Act 1970 (U.K.), as amended by the Equal Pay (Amendment) Regulations 1983 (U.K.), provides for equal pay and other contractual terms for women in several regards: when doing the same or broadly similar work to men; when doing work rated as equivalent by job evaluation; or where, however

* B.A.(Hons) (Kent at Canterbury), M.A.(Warwick). Professor, Warwick Business School.

¹ This article is based on a seminar I gave when I visited the Melbourne University Law School in March 1991. The evidence and ideas in it are discussed further in Dickens, L., 'Anti-discrimination Legislation: Exploring and Explaining the Impact on Women's Employment', in McCarthy, W. (ed.), *Legal Intervention in Industrial Relations* (forthcoming).

different the jobs, a woman is doing work of equal value to that of a man in the same employment in terms of such qualities as skill, effort and decision making. Maternity rights, embodied in other legislation, include the right not to be dismissed on account of pregnancy; the right to time off for ante-natal care; the right to a period of absence, some of it with pay, and the right to return to work after maternity leave.

This considerable amount of domestic legislation operates in the context of European legislation.² Although European Community (E.C.) influence was not dominant in the initial enactment of the Equal Pay Act and Sex Discrimination Act, it has provided an impetus for the strengthening of British equality legislation and provides a supra-national standard against which the domestic legislation can be measured. The European jurisprudence has introduced new methods of interpreting equality legislation, as well as allowing a party in proceedings to argue that his/her rights and duties should be determined by reference to Community law. Although the European legal framework shares some of the weaknesses discussed below, decisions of the European Court of Justice indicate that the potential for tackling discrimination within the E.C. framework is often greater than that provided by the provisions (and the interpretation they have been given) of our domestic legislation.

In Britain there is both individual and agency enforcement of the anti-discrimination legislation. Individuals can enforce their rights by accessing the tripartite Industrial Tribunals (with initial appeals to the Employment Appeal Tribunal and subsequent appeals to the ordinary courts). The Equal Opportunities Commission, a publicly funded agency established under the Sex Discrimination Act 1975, can aid individuals to bring claims and can also initiate tribunal proceedings in limited, specified circumstances. It has formal investigative powers and the ability to issue non-discrimination notices, enforceable in the courts. This allows structural discrimination to be tackled in circumstances in which there may be no individual victim in a position to bring a complaint.

CHANGE AND CONTINUITY IN WOMEN'S PAY AND EMPLOYMENT

During the period of legislative activity from 1970, women's share of employment continued its post-war increase. In 1971 women constituted 38% of employees in Great Britain; by 1987 they constituted 46%.³ Further, this employment growth for women has been matched by gains in relative pay. In 1989 among full-time employees women's average gross earnings per hour were 76% of men's, compared with 63% in 1970. Subjecting this picture of increased employment opportunities and higher pay for women to closer scrutiny, however, exposes some of the gains as illusory or, if real, limited.

The growth in female participation in the labour force has been uneven and of

² Art. 119 of the Treaty of Rome provides that 'men and women should receive equal pay for equal work' and the Equal Pay Directive of 1975 aimed to facilitate the practical application of the principle outlined in that Article. An Equal Treatment Directive was issued in 1976 concerning access to employment, vocational training, and working conditions; Social Security Directives followed.

³ Equal Opportunities Commission, *Women and Men in Britain 1990* (1990), 13.

a particular nature: part-time work predominantly in the service sector. Women's share of employment in manufacturing has been declining over a long period. Women's full-time employment, which remained fairly constant in the 1970s, declined in the early 1980s and it is growth in female part-time employment which drives up the aggregate statistics.⁴ This increase in part-time work can be seen to a large extent as a sharing, rather than an increase, of total female labour-hours over an increasing number of women, because the hours packages constituting part-time jobs have been getting smaller.

Women make up a large proportion of groups such as homeworkers and temporary workers which, together with part-time workers, constitute the growing so-called 'atypical' or 'flexible' workforce. The growth in their numbers owes little to women being presented with greater employment opportunities as a result of the removal of employment discrimination. In reality these 'flexible' workers are often disadvantaged in terms of their pay and other conditions of employment.

The gender segregation of the workforce has remained remarkably constant since 1970. The increased female participation in the workforce has been within areas where women were already well represented. There have been highly publicized cases of individual women entering male-dominated employment areas, and there have been increases in the proportion of women in some higher paid non-manual occupations within the management and scientific-related professional groups. Overall, however, employment continues to be highly gender segregated both vertically, in that more senior and higher status positions are held predominantly by men, and horizontally.

There is considerable crowding of female employment by industrial sector and by occupation. In 1987 the industrial sectors of distribution, hotels, catering and repairs and other services (which include health and education sectors) accounted for two-thirds of all female employment in Great Britain, and four occupational groups (professional and related in education, welfare and health; clerical and related; selling; and catering, cleaning and other personal services) together account for three-quarters of female employment.⁵ Investigations at the micro level have found gender segregation at the workplace to be even more complete than the aggregate survey figures reveal. So, for example, in 1980 in manual occupations 70% of women worked only with other women.⁶

Subjecting women's progress in relative pay to closer scrutiny, it is apparent that male/female wage differentials narrowed following the implementation of the equal pay legislation but the trend halted, declined and plateaued for most of the 1980s. Full-time women's average gross hourly earnings increased from 63% of men's in 1970 to 72% in 1975, and to 75.5% in 1977 but stood at 74% for most of the 1980s. The 1977 peak was not attained again until 1989 when full-time women's average gross hourly earnings reached 76% of men's. The position of women working part-time is worse. Part-time working women earn

⁴ Rubery, J. and Tarling, R., 'Women's Employment in Declining Britain' in Rubery, J. (ed.), *Women and Recession* (1988) 100.

⁵ E.O.C. *loc. cit.* n. 3.

⁶ See Martin, J. and Roberts, C., *Women and Employment — A Lifetime Perspective* (1984).

only 57% of male full-time hourly earnings and 75% of full-time women's hourly earnings. When average gross weekly earnings are considered (rather than hourly earnings) the male/female pay gap widens with women's earnings amounting to only two thirds of men's. Unequal access to pay enhancing opportunities including bonus schemes, overtime and premium (penalty) payments and other benefits which make up the total remuneration package exacerbate the disadvantaged pay position of full-time women compared with men. Women working part-time have even less access to pay enhancing opportunities and benefits than those working full-time.⁷

It would appear then, that the initial picture of a marked improvement in women's employment position following considerable legislative intervention needs modification. It might be argued, however, that developments at micro level which are positive for women's employment position are neglected in these considerations of aggregate employment data. Within employing organizations and within trade unions, through voluntary unilateral action and through collective bargaining, women's equality is being pursued. Such voluntary initiatives may be thought of as indirect effects of the existence of equality legislation.

VOLUNTARY INITIATIVES: DEVELOPMENTS AT THE WORKPLACE

Quite marked changes can be detected in particular areas, often as the result of a clear indication from the legislation or from judicial decision; the latter coming more often from the European Court of Justice than the domestic courts. This has been seen recently, for example, in the area of pensions. European Court of Justice decisions inspired the removal of discrimination in retirement and pension provisions and more widespread inclusion of part-time workers in occupational pension schemes.⁸ It would be naive to assume, however, that court decisions always have a clear, immediate or direct effect on practice in the workplace.

It was always intended that the law should stimulate voluntary action to put flesh on the bones of the equality legislation. There are signs that this has happened and that progress continues, but I would argue that the achievements have been limited and many changes are superficial. This can be seen by a brief consideration of the progress in terms of pay reform, union bargaining priorities and employer equality initiatives.

Pay Reform

Although initial research indicated that a number of employers took avoidance rather than compliance action in the five year implementation period before the enactment of the Equal Pay Act, there was a clear movement in response to the

⁷ Horrell, S., Rubery, J. and Burchell, B., 'Unequal Jobs or Unequal Pay?' (1989) 20 *Industrial Relations Journal* 176; Dickens, L., Townley, B. and Winchester, D., *Tackling Sex Discrimination Through Collective Bargaining* (1988) 46-60.

⁸ *Marshall v. Southampton and South-West Hampshire Area Health Authority (No. 2)* [1988] I.R.L.R. 325; *Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986] I.R.L.R. 317; *Barber v. Guardian Royal Exchange Assurance Group* [1990] I.R.L.R. 240. The important *Barber* case held that pensions under occupational schemes constitute pay within Art. 119 of the Treaty of Rome.

legislation in that 'women only' rates vanished from collective agreements and pay structures.⁹ A large number of women workers gained from changes in collective agreements which raised their pay rates to at least the level paid to the lowest paid male.

This limited de-sexing of agreements and pay structures, however, meant that in many cases women's jobs were still undervalued. Organizations which undertook limited revision of their pay structures following the original equal pay legislation have not necessarily reconsidered them following the Equal Pay (Amendment) Regulations 1983. Pay structures and agreements may no longer be discriminatory on their face but can still reflect and perpetuate indirect discrimination.¹⁰ Pay bargaining tends to be concerned with pay increases within existing structures and the existing distribution of jobs — the fairness of which remains unquestioned.

There have been successful attempts by unions to use or threaten legal action to improve women's pay (and low pay generally).¹¹ An equal value claim by a checkout operator in a large food supermarket who compared her job to a warehouseman was withdrawn after a regrading exercise resulted in substantial pay increases for checkout staff. This provided a catalyst for similar pay reviews in other large retailers. Other major regrading exercises and revision of pay structures, often based on job evaluation, have been undertaken with conscious attention to equal value issues. The example of the regrading exercise for manual workers in local authorities, however, indicates that problems may remain for women even following a rigorous regrading exercise.

Equal value principles were incorporated into the new local authority grading structure. For example, value was attached to caring skills and responsibility for people, which are features of women's jobs often ignored in job evaluation. A number of women's jobs, such as home help, moved up the grading structure relative to jobs held by men, particularly those with high physical content but low skill such as refuse collector.¹² Although large increases were awarded in the basic rates for some women's jobs following this exercise, the basic rate differentials have not necessarily fed through to earnings differentials. Women are still likely to earn less than men doing work of equal or lesser value because men still have greater access to bonus, overtime and other premium payments. It remains the case that an employee's sex is a better indicator of their earnings than their grade or basic rate.¹³ It is also clear from this and other studies that payment of bonuses cannot be taken to be unproblematically indicative of higher productivity or performance.

Union Bargaining Priorities

Unions are important as mediators of the legislation and as key actors in promoting change independently of the legislation. Certain British unions have

⁹ Snell, M., Glücklich, P. and Povall, M., *Equal Pay and Opportunities* (1981) 18.

¹⁰ Dickens, L., Townley, B. and Winchester, D., *op. cit.* n.7, 35.

¹¹ Turner, D., 'Equal Value as a Bargaining Lever' (June 1986) *Personnel Management* 27-31; 'Unions' Experience of Equal Value' (Nov./Dec. 1985) *Equal Opportunity Review* 12-17.

¹² Lodge, D., 'Working Equality into Manual Job Evaluation' (Sept. 1987) *Personnel Management*.

¹³ London Equal Value Steering Group, *A Question of Earnings — a Study of the Earnings of Blue Collar Employees in London Local Authorities* (1987) 11.

undertaken extensive surveys of terms and conditions in their areas in order to document and detail women's pay disadvantage as a first step to tackling it through negotiation. Other unions have not even begun to 'map' the problem as it faces their membership; the few who have done so have not gone beyond the mapping to drawing new contours.

Even in those unions which have documented the disadvantage of their women members, where there is leadership commitment to improving women's position, and where equality structures have been established within the union, problems remain in translating intention into action. They include the predominantly male culture and structure of power within unions, and the separation of union equality structures from negotiation structures.¹⁴

The extent of the challenge which equality issues present to the trade unions should not be underestimated. Long fought-for gains which have been achieved against management opposition may in fact need to be abandoned. The defence of skill and skill differentials (skill historically having been defined against women¹⁵) and the concept of the family wage, are cases in point. The family wage approach (claiming a man should earn a wage sufficient to support a wife and children) has helped to underpin male wages, yet it also serves to legitimate low wages for women and help justify the widely held belief that women should not take jobs when men are unemployed.¹⁶

If unions are to be part of the solution rather than the problem in respect of women's disadvantage, the whole agenda and priorities of collective bargaining must come under question. There are signs that this is beginning to happen within some unions. Unions with high proportions of female part-time workers as members or potential members have run recruitment and retention campaigns about the issue of full-time rights for part-time workers and have bargained for better treatment of such workers. Issues such as child care and cancer screening are being prioritized by negotiators in some sectors, and unions have used the statutory maternity provisions as a floor to negotiated improvements, in some cases going beyond the narrow legislative scope to agreed paternity leave.

In other areas, however, bargaining agenda are characterized by their narrowness and stability over time. This is so despite the paucity of terms beneficial to women in agreements facilitating their participation in the workforce. Recent research in the manufacturing sector found scant sensitivity on the part of negotiators to the implications for women of commonplace bargaining agenda items such as pay and pay opportunities, or to the reform of a grading structure. Many managers and union negotiators were found to be poorly informed on the equality law framework.¹⁷

The extent to which trade unions bargain for equality will be affected by a complex range of factors, but among them will be the identity and priorities of

¹⁴ Colling, T. and Dickens, L., *Equality Bargaining — Why Not?* (1989) 41-2.

¹⁵ Phillips, A. and Taylor, B., 'Sex and Skill: Notes Towards a Feminist Economics' (1980) 6 *Feminist Review* 79.

¹⁶ Barrett, M. and McIntosh, M., 'The Family Wage: Problems for Socialists and Feminists' (1980) 11 *Capital and Class* 51-2.

¹⁷ Colling, T. and Dickens, L., *op. cit.* n. 14.

those who help determine negotiating agenda and bargaining objectives. The increasing proportion of women in trade union membership and on trade union bodies is encouraging in this respect, as is the creation of equal opportunity structures within trade unions.¹⁸ Nonetheless, the continued under-representation of women, particularly among full-time officials and other negotiators is a brake to progress.¹⁹

Employer-led Equal Opportunity Initiatives

Enhanced maternity provisions, career break schemes, flexible working patterns, workplace nurseries and other provision of childcare figured centrally in a number of recent employer-led initiatives targeted at the recruitment and retention of women in a time of declining youth labour markets and skill shortages. Such initiatives, however, are being implemented only by a minority of employers, and generally in areas where women are already predominant. They do not represent a way of breaking down gender segregation. In the workplace the actual provision often falls short of the declared intention, and where such measures are taken they may be confined to selected groups of women. For example, career breaks are often targeted at female 'high flyers' (those women deemed to have career potential who can meet various requirements about future employment), while lower down the occupational scale restructuring of employment within the same organization or sector does little to enhance women's employment opportunities.

In Britain, an obvious development over the last twenty years has been the self-declaration by a number of organizations that they are 'equal opportunity employers'. There are no requirements which have to be met before this label is adopted but it is generally taken to denote the adoption of an equal opportunity policy and the review and revision of procedures and policies to eliminate discriminatory practices and to promote equal treatment for women and other disadvantaged groups within the organization. A British Institute of Management Survey of 70,000 of its members in January 1989 revealed that 22% of private sector respondents and 42% of public sector respondents claimed to have a formal, coherent policy on equal opportunities.²⁰ Some real progress in organizations with a commitment to equal opportunity can be seen, but research into self-declared equal opportunity organizations shows this is not always the case: personnel managers in some organizations were unaware of any equal opportunity policy, and there was little evidence of any impact of the policies on practice within them.²¹

¹⁸ Ellis, V., 'Current Trade Union Attempts to Remove Occupational Segregation in the Employment of Women' in Walby, S. (ed.), *Gender Segregation at Work* (1988) 135; 'Union Reserved Seats — Creating a Space For Women'; Note, *Labour Research* (1990). The British legislation specifically allows unions to create reserved seats for women on their governing bodies.

¹⁹ Heery, E. and Kelly, J., 'Do Female Representatives Make a Difference?' (1988) 2 *Work Employment and Society* 428-8; Colling, T. and Dickens, L., *op. cit.* chs 5-6.

²⁰ (1989) 24 *Equal Opportunities Review*.

²¹ Hitner, T., Knights, D., Green, E. and Torrington, D., 'Races at Work: Equal Opportunity Policy and Practice' (1981) 89 *Employment Gazette* 404.

Local Government has often been seen as in the vanguard of equal opportunity policies, yet even here the extent and achievements of these efforts have been uneven. A 1986 survey of 514 local authorities in Britain (of which 446 responded) found just over half had an equal opportunity policy. Eighteen of the authorities without a full policy nonetheless declared they were 'equal opportunity employers' in their advertisements. Only just over half of the authorities with a policy had issued a statement of it to their employees; less than half provided any training on avoidance of sex discrimination for their employees; and less than a quarter provided any written guidelines on this issue. A quarter of those with a policy employed an equal opportunities officer.²²

Assessment

Clearly gains have been made, and the aggregate picture of limited change does conceal particular pockets of progress. Generally, however, change has not gone very deep. Women remain disadvantaged in the employment context. Further, women are still being discriminated against at work — even in the most fundamental areas such as recruitment.²³ For these reasons I see the task at hand as accounting for relative failure of measures addressing sex discrimination, rather than explaining their success.

FIRST LEVEL OF EXPLANATION: LAW, PROCEDURES AND INSTITUTIONS

Positive impacts on women's employment position may come about through the direct use of law; it may result in improvements for particular women or groups of women. At the same time, the direct use of law may foster voluntary initiatives elsewhere, through educational effects or through the threat of direct legal action. There are, though, considerable weaknesses in the legislation which hinder its direct impact. I argue that the legislation is weak in that it is difficult to use, is little used and is used only with little success. Its remedies are insufficient to generate cases or ameliorate the damage caused, and the threatened or actual use of law generates insufficient *in terrorem* effect to encourage voluntary action to promote equality. These weaknesses arise from the provisions of the legislation and their interpretation, and from the procedures and mechanisms for their enforcement.

Use of Law and Remedies

From a workforce of around 24 million, all the applications made under the Equal Pay and Sex Discrimination Acts since they first came into force until the end of financial year 1988/90 total just over 12,000 (6525 under the Equal Pay

²² See Equal Opportunities Commission, *Local Authority Equal Opportunities Policies: Report of a Survey by the Equal Opportunities Commission* (1988).

²³ Collinson, D., *Barriers to Fair Selection: A Multi-Sector Study of Recruitment Practices* (1988); Curran, M., 'Gender and Recruitment: People and Places in the Labour Market' (1988) 2 *Work Employment and Society* 335, 344-5.

Act, including multiple claims against the same employers, and 5706 under the Sex Discrimination Act.) The annual rate for applications alleging unfair dismissal is greatly in excess of this fourteen year total.

Applications do not usually succeed. In 1989-90, the success rate of discrimination cases brought before the tribunal was less than one third.²⁴ The majority of cases do not reach a hearing, being settled or withdrawn after conciliation or otherwise. In 1989-90 only 14% of equal pay cases and 27% of sex discrimination claims reached a tribunal hearing. Indeed, the low success rate of applicants is likely to be one of 'facts of the situation' conveyed in conciliation leading to withdrawal of applications.²⁵

The available tribunal remedies are declaration of rights, action recommendation and compensation. Equal pay awards may be backdated up to two years. There is a maximum level of compensation, currently 8,925 pounds (A\$19,635), but no minimum. In 1989-90, 55 sex discrimination applicants were awarded compensation: 62% received less than 1,500 pounds (\$A3,300) and 2% (1 person) received over 8,000 pounds (A\$17,600). More recent cases indicate some positive trends in compensation awards but compensation attaches only to the individual case.²⁶ Although representative actions are allowed, there is no group compensation provision whereby others affected adversely by the practice now revealed as discriminatory may be compensated by a tribunal award. More generally, the remedies are limited because tribunals cannot order remedial action. The action recommendation provision does not allow, for example, an industrial tribunal to order promotion in a case where someone has been denied it through sex discrimination; it can only order that the applicant be considered for the next promotion vacancy.

As well as there being limited use made by individuals of the industrial tribunals, the Equal Opportunities Commission itself has not greatly used its legal powers. Limitations of the individual route were anticipated to some extent in giving powers to the Equal Opportunities Commission to aid applicants and to act on its own initiative. The former power has been important in allowing the Equal Opportunities Commission to support test cases, especially to the European Court of Justice, but the requests for assistance are greater than the Commission's ability to meet them. The Commission has used its legal powers sparingly, undertaking few Formal Investigations and issuing even fewer non-discrimination notices.²⁷

The lack of high profile action by the Equal Opportunities Commission in the early days of the legislation may have served to lessen rather than enhance any *in*

²⁴ 'Industrial Tribunals — An Update' (1991) 99 *Employment Gazette* 303-7.

²⁵ Dickens, L., 'Tribunal Conciliation: Cause for Concern?' (Summer 1986) *Trade Union Studies Journal* 13, 13-15. Conciliation is offered by the Advisory Conciliation and Arbitration Service, a public body independent of the industrial tribunals.

²⁶ *Alexander v. Home Office* [1988] I.R.L.R. 190 (Court of Appeal); *Noone v. North West Thames Regional Health Authority* [1988] I.R.L.R. 195 (Court of Appeal). In these two race discrimination cases the scope for awards of injury to feelings and aggravated damages was widened. See also *City of Bradford Metropolitan Council v. Arora* [1991] I.R.L.R. 165.

²⁷ Applebey, G. and Ellis, E., 'Formal Investigations: the C.R.E. and E.O.C. as Law Enforcement Agencies' (1984) *Public Law* 236.

terrorem effect of the law in stimulating voluntary action, as managers failed to get the expected knock on the door from the Commission. But the Formal Investigation procedure, particularly following judicial interpretation of the statutory powers, is cumbersome, complex and costly and what might be achieved as a result of such an investigation is limited.²⁸ There is no power in the Commission to secure compensation for victims of what the Formal Investigations show to be unlawful practices. Further, the Equal Opportunities Commission cannot order changes in such practices; it can only make unenforceable recommendations.²⁹

Institutions, Law and Procedures

Sachs argues that 'the enforcement of the law by a state agency educates the community both as to the law itself and on the importance accorded by the state to the elimination of discrimination.'³⁰ The Equal Opportunities Commission's cautious use of its legal powers has been castigated as a 'culpable limitation on implementation' of the legislation.³¹ As noted, the Commission has problems arising from the complex legislative framework within which it operates, but there are other problems caused by insufficient funding (the Commission's budgets do not keep pace with inflation); sub-optimal levels of staffing within a civil service structure; location away from London (in Manchester); and its tripartite composition. Although recent appointments have given some cause for optimism, the centrality of representatives from the unions and employer organizations on the Commission, the absence of anyone in early appointments to the Commission who was closely associated with the women's movement, and the choice of Equal Opportunities Commission Chairmen (as they are termed in the Sex Discrimination Act), combine to engender caution rather than trailblazing, and consensus-seeking rather than courageous action on the part of the Commission. At various times these attributes have allowed partisan interests to block initiatives.³² Quasi-autonomy from government can be a double edged sword: the Commission can be both ignored, since it is not part of government, and yet controlled via appointments and funding.

Criticism of the agency is matched by criticism of the individuals' enforcement mechanism, the industrial tribunals. Research into the tribunals' handling of sex discrimination and equal pay claims revealed tribunals making legal errors; applying incorrect legal standards; subjecting employers' explanations to only superficial investigation; and placing reliance on irrelevant or subjective

²⁸ *R. v. C.R.E. ex parte London Borough of Hillingdon* [1982] A.C. 779 (House of Lords); In *Re Prestige Group Plc.* [1984] I.C.R. 473 the House of Lords held that the Commission for Racial Equality (operating under analogous provisions to those governing the E.O.C.) may not conduct a general exploratory investigation but must have a reasonable belief that unlawful discrimination has occurred.

²⁹ Pannick, D., *Sex Discrimination Law* (1985) 283.

³⁰ Sachs, V., 'The Equal Opportunities Commission — Ten Years On' (1986) *Modern Law Review* 560, 568.

³¹ Forbes, I., 'Unequal Partners: The Implementation of Equal Opportunity Policies in Western Europe' (1989) *Public Administration* 29.

³² Meehan, E., *Women's Rights at Work* (1985) 142-3; Applebey and Ellis, *op. cit.* n. 27, 261.

evidence, all to the detriment of applicants and any consistency of approach.³³ Applicants face many problems in effectively bringing and presenting cases to industrial tribunals, in particular problems of unequal legal representation in an adversarial system where no legal aid is available. These problems are acute because applicants bear the initial burden of proof and because the procedures (especially those for equal value claims) are tortuous and complex and require considerable investment of time and often money.³⁴

A number of observers have noted the inability of British courts to deal with problems requiring consideration of issues other than those raised in individual cases, or so-called polycentric disputes. McCrudden notes that the United States courts, in order to address this issue, have adapted their procedures in a number of ways not found in Britain, or found to only a limited extent.³⁵ By contrast, in the United Kingdom the applicant has to produce evidence, but the lack of a right of class action limits the scope of inquiry. Furthermore there is only a narrow range of discovery of documents and pre-trial interrogatories; employers are not required to keep workforce statistics which might aid the tribunal; the tribunals are not expert at handling statistical material; and the British judicial process, with no power of independent investigation, is not equipped to discover and assess social facts.³⁶ Moreover, British judges are trained to interpret statutes in relation to pre-existing legal rules rather than with an eye to social policy objectives. The equality legislation was needed because the common law allowed an absolute right on the part of the employer to discriminate, but the judiciary, steeped in the common law traditions, has to interpret the statutes. Consequently, 'the processes and rationalisations which in the past denied claims to equal treatment remain part of judicial techniques.'³⁷

As noted, after a conciliation officer intervenes, most discrimination and equal pay cases are withdrawn without being heard by an industrial tribunal. Questions may be raised here concerning the 'fairness' of bargaining and compromise between non-equals and the extent to which the conciliation officer, in fulfilling the required impartial role, becomes a channel through which inequality is perpetuated.³⁸ A public policy issue arises as to whether it is appropriate to allow discrimination to be treated as an individual issue to be compromised privately when this may result, for instance, in equal pay claims being settled on an individual basis at less than parity.

Not surprisingly, criticisms such as these have spawned long lists of suggested

³³ Leonard, A. M., *Judging Inequality: The Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases* (1987) ch. 2.

³⁴ Dickens, L., Jones, M., Weekes, B. and Hart, M., *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (1985) 85-96; Hepple, B., 'The Judicial Process in Claims for Equal Pay and Equal Treatment in the UK' in McCrudden, C. (ed.), *Women Employment and European Equality Law* (1987) 143.

³⁵ McCrudden, C., 'Anti-discrimination Goals and the Legal Process' in Glazer, N. and Young, K., *Ethnic Pluralism and Public Policy* (1983) 55, 64.

³⁶ Social facts as opposed to historical facts. The distinction is made by Horowitz, D., *The Courts and Social Policy* (1977). Historical facts concern the events which have transpired between the parties to the law suit; social facts are the facts which help ascertain the current patterns of behaviour on which policy should be based.

³⁷ O'Donovan, K. and Szyszczak, E., *Equality and Sex Discrimination Law* (1988) 27.

³⁸ Dickens, L., Jones, M., Weekes, B. and Hart, M., *op. cit.* n. 34, 170-96.

reforms. For example, the individualistic, legalistic, non-expert and, at times, unsympathetic nature of the industrial tribunals and the appellate courts have led to calls for procedural change, greater training of tribunal members, specialization of tribunals to facilitate the building up of expertise, and more attention to selection of members, including appointing more women onto tribunal panels.³⁹ Other suggestions have been targeted at perceived inadequacies in the statutory provisions, and still others are designed to overcome gaps in the legislation exposed by judicial interpretation which has narrowed the scope of the protection ostensibly afforded. The risk of judicial interpretation limiting the potential of statutory provisions may be seen, for example, in the way that employers have been allowed to 'justify' unequal pay by reference to 'market forces',⁴⁰ and in the way that the legislative concept of indirect discrimination has been handled by the tribunals and courts.

The importance of the indirect discrimination concept is its acknowledgment of structural discrimination. It facilitates a move beyond the individual nature of the claim; making employers take into account the effects of social and economic discrimination for which they are not directly responsible. Their intention is irrelevant, it is the effects of their action which are important. The question to be asked is: does the measure have an adverse impact on women? The Sex Discrimination Act's (1975) definition of indirect discrimination is 'so vague . . . that the effective use of the concept still depends on sympathetic judicial interpretation.'⁴¹ This sympathetic interpretation has not always been forthcoming, as may be seen, for example, in the way British courts have determined when indirect discrimination may be 'justifiable', and thus not unlawful.

'Justifiable' discrimination was initially interpreted as meaning necessary, as opposed to merely administratively convenient discrimination. The concept was weakened, however, in a series of judgments until the low point of interpretation was reached with the Court of Appeal holding that 'justifiable' meant a lower standard than 'necessary' and that its meaning was what was 'acceptable to right thinking people as sound and tolerable reasons.'⁴² Tribunal interpretations of 'justifiable' began reflecting business necessity and the employer's economic interest rather than the impact of the discrimination on the victim. Small advantages to the employer would suffice to make the discriminatory requirement 'justifiable' and this would be a matter of fact — resulting in a judicial lottery as to which practices in particular cases would be unlawful.⁴³ There was some retrieval of the situation by the Employment Appeal Tribunal and now a more robust interpretation has emerged, with a lead being given by the European Court of Justice insisting that the indirectly discriminatory practice must be in pursuance of a real business objective and that it must be appropriate and

³⁹ E.g. Justice Committee (Chair Committee Bob Heppie) *Industrial Tribunals* (1987); E.O.C. *Equal Pay for Men and Women: Strengthening the Act* (1990).

⁴⁰ Most recently in *Enderby v. Frenchay Health Authority and Secretary of State for Health* [1991] I.R.L.R. 44.

⁴¹ Pannick, D., *op. cit.* n. 29, 40.

⁴² *Steel v. Union of Post Office Workers* [1977] I.R.L.R. 288; *Singh v. Rowntree MacIntosh* [1979] I.R.L.R. 199; *Ojutiku v. Manpower Services Commission* [1982] I.R.L.R. 418.

⁴³ *Kidd v. D.R.G. (U.K.) Ltd* [1985] I.R.L.R. 190.

necessary to meet that objective.⁴⁴ Indirect discrimination cases which were lost would now be won under this more robust definition, although other problems in judicial interpretation of the concept remain.⁴⁵

Many reforms of existing procedures are necessary to address the obvious problems which have been encountered: reforms designed to amend the British legislation to overcome weaknesses in the statute and in the law as interpreted; to improve or change the individual complaint procedure; to provide assistance to applicants; to provide tougher sanctions; and to give more resources and power to the Equal Opportunity Commission. Rethinking the nature, composition, procedures and role of the institutions responsible for operating the legislation would go still further in strengthening the likely direct impact of the law. Nonetheless more fundamental weaknesses would remain.

These weaknesses concern the interrelated assumptions or principles underlying the legislation: the concept of equality, the adoption of male as the standard, and the blinkered perception of discrimination. These principles not only underpin the legislative package, they are also reflected in voluntary initiatives. They help explain the relative lack of positive impact of the legislation and voluntary initiatives on women's employment position.

SECOND LEVEL OF EXPLANATION: UNDERLYING ASSUMPTIONS

The Concept of Equal Opportunity

The legislation, the guidance of the Equal Opportunity Commission, and voluntary Equal Opportunity Policies all embody a concept of equality conceived in terms of liberal notions of equality of opportunity with an emphasis on formal, procedural equality. In equal opportunity organizations this tends to lead, for example, to the formalization of procedures, such as those of recruitment and selection. The practical impact of procedural measures, however, may be limited because of their restricted implementation, and the false assumption of an automatic link between implementing the procedure and producing a more equal outcome. Even if the formal recruitment and selection model, for example, is a non-discriminatory one, discriminatory practices may continue, there being a condoned or unintentional gap between the policies espoused and those in operation.⁴⁶ Among the explanations for such a gap is the fact that organizational benefits may accrue from discriminatory practices, and that discriminatory rules will have served the interests of many within the organization. These results of

⁴⁴ *Bilka Kaufhaus v. Weber von Hartz* [1986] I.R.L.R. 317; *Rainey v. Greater Glasgow Health Board* [1987] I.R.L.R. 26; *Rinner Kühn v. F. W. W. Spezial-Gebäudereinigung GmbH and Co. K.G.* [1989] I.R.L.R. 493; *Handels-og Kontorfunktionaernes Forbund I Danmark v. Dansk Arbejdsgiverforening* (acting for Danfoss) [1989] I.R.L.R. 532.

⁴⁵ For example, problems remain in how tribunals approach their determination of whether the proportion of women who can comply with a requirement is 'considerably smaller' than the proportion of men who can comply. The selection of the appropriate pool for comparison is crucial here. Recent guidance on this was given in *Jones v. Chief Adjudication Officer* [1990] I.R.L.R. 533.

⁴⁶ Jenkins, R. and Parker, M. S., 'Organisational Politics and the Recruitment of Black Workers' in Lee, G. and Loveridge, R. (eds), *The Manufacture of Disadvantage* (1987) 64-7.

discrimination are often neglected in the assumption that discrimination is the act of misguided or prejudiced individuals.

The liberal equality of opportunity approach has great problems accommodating the structural sources of social inequality.⁴⁷ It assumes that attributes upon which success depends are neutral ones, whereas in fact they are socially determined and transmitted and, as will be argued below, based on the adoption of a male standard as the neutral standard. 'Merit' is not a neutral concept.⁴⁸

The liberal procedural approach to equality leads to an essentially negative conception of the objectives to be gained: an end to discrimination, a removal of barriers. The form of the British legislation is 'thou shall not'. It is concerned with preventing discrimination rather than promoting any positive action. It is concerned with halting present discrimination rather than attempting to help overcome the present effects of past discrimination. The Sex Discrimination Act, 1975 (U.K.) prevents any favourable treatment of women, other than in very limited circumstances: in relation to pregnancy and childbirth and in encouraging and training women to take up opportunities where they have been under-represented. Little use has been made of these latter provisions; the Act permits voluntary positive action of this limited kind, as does the Equal Treatment Directive of the European Community, but neither British nor European law requires it.

There is an alternative concept of equality, termed 'radical' by Jewson and Mason,⁴⁹ which is not concerned so much with procedures as with outcomes, and thus conceives equality as a fair distribution of rewards. This approach focuses on substantive equality rather than formal equality; on 'equal shares' rather than 'equal treatment'. It is concerned with the outcome of the game rather than the rules of play. The fair distribution of rewards approach calls for direct intervention in workplace practices to achieve a fair distribution of outcomes. This usually means the proportional representation of disadvantaged groups according to their representation in the labour force or wider society. It adopts a group perspective, taking the absence of a fair distribution of rewards as evidence of unfair discrimination. This approach leads to quotas and to policies such as preferential hiring and promotion of disadvantaged groups which at present have no part in the British legal framework and would be unlawful.⁵⁰ Positive action of this kind would be unlawful because the legislation outlaws discrimination on the grounds of sex rather than against women. Thus, as Lacey notes, although sex discrimination is an asymmetrical social problem, in that it is predominantly against women, the law adopts a symmetrical approach and says men and women are to be treated equally.⁵¹ It is thus unlawful discrimination against men to

⁴⁷ Jewson, N. and Mason, D., 'The Theory and Practice of Equal Opportunity Policies: Liberal and Radical Approaches' (1986) 34 *Sociological Review* 307, 314.

⁴⁸ Burton, C., *Redefining Merit* (1991).

⁴⁹ Jewson and Mason, *op. cit.* 315.

⁵⁰ *Hughes v. London Borough of Hackney* 1986, cited by Lacey, N., 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411. As she notes, the social problem was acknowledged in terms of married people. The British legislation outlaws discrimination on the grounds of *married*, not *marital* status.

⁵¹ *Ibid.* 415-16.

take positive action in favour of women, even if designed to overcome past discrimination.

The conceptualization of equal opportunity in the legislation helps shape its educational message. There have been some positive educational effects but the general educational message of the legislation is that minimum compliance is enough; mere non-discrimination against men and women is required, rather than positive action to address women's disadvantage. Artificial discriminatory barriers are to be removed to enable women to compete equally with men. Women are to be given an equal chance to compete on the same terms as men for existing jobs within existing organizational structures. In practice this means the competition is to be conducted on male terms and within male structures for jobs shaped already by notions of masculinity and femininity. Men provide the standard for what is accepted and perceived as normal. They are the template for the employment patterns to which women are to be granted equal access: the male is the standard.

Male as the Standard

Thus, a further weakness in the formulation of equality implicit in the legislation is that women are at best to be offered equality on male terms and within male structures. The attempt is to construct the idea of equal opportunities within the framework of traditional work patterns of male employees, trying to improve women's relative position while leaving men's situation unchanged. Women are being offered equality in terms of a norm set by and for men and no real challenge to male power or masculinity is being mounted.⁵²

An aspect of this approach is the nature of the comparative focus which the legislation requires, with the male as the norm against which the treatment of the woman is judged. It is not unfavourable treatment of women which is outlawed but less favourable treatment when compared to the treatment of a man, similarly situated. One major problem with this approach is demonstrated by the attempts of British tribunals and courts to deal with the requirements of pregnancy which is an issue where there are clearly differences between men and women arising from biology.

There is no explicit provision in the Sex Discrimination Act 1975 (U.K.) outlawing discrimination on the grounds of pregnancy. Discrimination against a pregnant woman must be shown to be discrimination on the grounds of sex. The European Court of Justice recently held that unfavourable treatment on grounds of pregnancy constitutes direct discrimination under the 1976 Equal Treatment Directive.⁵³ Until this important clarifying judgment the British tribunals and courts attempted to determine the matter by considering how a man in 'similar circumstances' would be treated. Having at first decided that discrimination on the grounds of pregnancy was not sex discrimination because there could be no

⁵² Atkins, S., 'The Sex Discrimination Act 1975: The End of a Decade' (1986) *Feminist Review* 63; Lacey, *op. cit.* 417; O'Donovan and Szyszczak, *op. cit.* 44-5.

⁵³ *Dekker v. Stichting Vormingscentrum voor Jonge Volwassenen (V.J.V. Centrum) Plus* [1991] I.R.L.R. 27; *Hertz v. Aldi Marked K/S* [1991] I.R.L.R. 31.

male comparator, the courts then decided that a comparator male would be one suffering from an incapacitating condition.⁵⁴ Thus, pregnancy discrimination could constitute sex discrimination where the treatment accorded to a pregnant woman was less favourable than that accorded to a man who was in a 'similar' position through ill-health. This was a less than satisfactory solution. Similar difficulties have been encountered when dealing with sexual harassment, which also is not explicitly outlawed by the Sex Discrimination Act. Sexist behaviour towards women which has no real analogue in terms of behaviour towards men raises problems when such a directly comparative approach is taken.⁵⁵

Somewhat ironically, many women are denied access to statutory maternity rights because of the need to conform to the male model of employment in order to fall within such employment protection provisions requiring two years' continuous service at a minimum number of hours a week. Women are more likely than men to fall through the net because their employment patterns tend to deviate from the (male) full-time continuous employment model.⁵⁶

The equal value legislative provisions also take the male as their standard for comparison. The legislation requires comparison between a man and woman in the same employment. This poses problems for women segregated into women-only occupations and low paying sectors where comparator males are scarce. A further limitation of taking the male as the norm is provided by experience of comparable worth (equal value) in the United States where it has been found that, rather than revalue women's work, comparable worth exercises have tended only to reward women for what is already considered valuable in men's work.⁵⁷

Some cases involving claims to job-share or to work part-time after maternity leave have recognized that women's juggling of domestic and paid work commitments may prevent their participation in the labour market on male terms, but other attempts to break away from the male standard as the norm have fared less well.⁵⁸ It is rarely recognized that perceptions of what is normal or usual or the 'best way' of doing things have arisen in a context where organizational structures and processes have developed around the typical life patterns of men. Packaging of jobs on a full-time basis and the requirement to perform certain duties 'after hours' have been judicially accepted as how things must be, mitigating against more flexible arrangements which could improve women's employment prospects in such jobs.

⁵⁴ *Turley v. Alders Department Stores Ltd* [1980] I.R.L.R. 4; *Hayes v. Malleable Working Men's Club and Institute* [1985] I.R.L.R. 367. In *Webb v. E.M.O. Air Cargo (U.K.) Ltd* [1990] I.R.L.R. 124, the E.A.T. reaffirmed that the correct approach was to compare the treatment of the woman with that which would be accorded to a man in comparable circumstances.

⁵⁵ Lacey, *op. cit.* 417.

⁵⁶ Those working fewer than 16 hours a week need five years' continuous service to qualify; those working fewer than 8 hours a week are excluded altogether. At the time of writing the E.O.C. is seeking judicial review of these statutory qualifications arguing that they constitute unjustifiable indirect sex discrimination, a view which appears in keeping with recent E.C.J. decisions, such as *Rinner-Kühn v. F.W.W. Spezial-Gebäudereinigung GmbH and Co. KG*. [1989] I.R.L.R. 493.

⁵⁷ Steinberg, R., 'The Unsubtle Revolution' in Jenson, J., Hagen, E. and Reddy, C. (eds), *Feminization of the Labour Force* (1988) 189, 206.

⁵⁸ *Home Office v. Holmes* [1984] I.R.L.R. 299; *Clymo v. Wandsworth London Borough Council* [1989] I.R.L.R. 241; *Briggs v. North Eastern Education and Library Board* [1990] I.R.L.R. 181.

The legislative package offers no encouragement to employers to rethink the structure and requirements of the jobs they offer, nor to explore the ways in which jobs are gendered rather than neutral entities, as they incorporate in their design assumptions about the typical job occupant.⁵⁹ Opening male-structured employment to women on the same terms as to men is all that is deemed necessary.

In the previous section the limitations of the liberal, procedural concept of equality underpinning the legislation were discussed. Noting the implicit assumption of the male as the standard raises the question of what positive action would be required were a more interventionist approach to be adopted. It is not simply a matter of quotas and preferential hiring, nor even of childcare and other facilities designed to help women compete on male terms. Positive action needs to address the structures within which disadvantaged groups are to be promoted. As Cockburn argues, the radical approach as outlined by Jewson and Mason 'seeks to give disadvantaged groups a boost up the ladder, while leaving the structure of that ladder and the disadvantages it entails just as before . . . It is about gaining power, not changing it'.⁶⁰

If positive action does no more than offer women equality within structures defined by or for men, its outcomes will be limited. Real progress for women rests not on attempting to construct the idea of equal opportunities within the framework of traditional work patterns of men and within structures designed around men, but rather attempting to transform those traditional patterns and structures. Similarly, instead of attempting to give some women access to what is currently valued in society (that is, what men do), we should consider how to obtain recognition for the skills and merits which women currently possess but which are currently undervalued. As this discussion has revealed, however, the legislative package provides little assistance to a broader project of this kind. In fact the perception of discrimination underlying the legislative package is a narrow one: the assumption underpinning the British legislation is that discrimination is an individualized, compartmentalized phenomenon.

Perception of Discrimination

The perception of discrimination and disadvantage implicit in the British equality legislation is that it is a problem experienced by individual women within selected areas of their lives. The concept of indirect discrimination contained in the legislation has not been developed to spearhead an assault on structural discrimination. Generally therefore, and certainly in practice, the legislative package fails to recognize the structural, group nature of discrimination and the social importance of the legislation.

Apart from the little-used powers of the Equal Opportunities Commission to

⁵⁹ Davies, C. and Rosser, J., 'Gendered jobs in the Health Service' in Knights, D. and Wilmot, H. (eds), *Gender and the Labour Process* (1986), 94-116.

⁶⁰ Cockburn, C., 'Equal Opportunities: the Short and Long Agenda' (1989) 20 *Industrial Relations Journal* 213, 217.

uncover institutional discrimination, the law only provides a mechanism for those individuals who have suffered discrimination to seek redress. Rights are conferred on individuals to challenge discriminatory behaviour instead of responsibilities being imposed upon employers to take action to tackle disadvantage. The emphasis is on action by victims rather than action by those who wield power. In this respect the restriction on contract compliance which was imposed by the Local Government Act 1988, constituted a retrogressive step since the use of commercial and state discretionary power to promote equality could form part of an alternative, 'administrative', approach and a number of local authorities were attempting to promote equal employment opportunity in this way.⁶¹

In equal pay cases, where the treatment of any one woman will reflect the pay position of women in general, where inequality in pay connects with other inequalities in women's employment and where, inevitably, whole pay structures may be affected by the outcome of a single claim, the legislation nonetheless constructs the issue as one of an individual grievance. The British legislation provides no collective route for tackling pay inequity and no collective remedies.

As noted earlier, one cannot remedy women's employment inequalities without considering other inequalities, but the British sex discrimination legislation embodies a compartmentalized approach to discrimination. The Sex Discrimination Act does cover education, premises, supply of goods, facilities and services as well as employment, but nonetheless it adopts a blinkered approach. Like European law, it fails to acknowledge the two-way link between women's domestic and wage labour roles and displays little appreciation of the process of gendering. Importantly, it attempts to divide the public from the private sphere.

Women's disadvantaged position in the labour market is not solely due to their domestic responsibilities — such an argument neglects the exclusionary behaviour against women of unions and employers in the structuring of the division of labour. But the form of women's and men's participation in the labour market and their relative pay positions cannot indeed be understood without examining their domestic roles. The employment situation of women will be little changed unless those factors which produce the specificity of women's position in paid employment are recognized and addressed. It has to be recognized that women's 'underachievement' in the world of work is linked to men's 'underachievement' in the domestic sphere. Women bear the brunt of childcare and household responsibilities; their participation in the public world of work is mediated by relationships in the 'private' world of the home. Yet the anti-discrimination legislation excludes from its scope important areas like social security and taxation which serve to underpin domestic inequalities. It also fails to affect other areas of government policy. In Britain in the 1980s there has been a clear contradiction between seeking women's employment equality through anti-discrimination legislation while simultaneously undermining this goal in other areas of legal and social policy which fall outside the scope of the legislation.

⁶¹ The administrative approach is discussed in Lustgarten, L., 'Racial Inequality and the Limits of Law' (1986) 49 *Modern Law Review* 68.

Attempts to remedy women's employment disadvantage through equality legislation require broader legislative, social, political and economic measures in order to succeed. At present not only is the anti-discrimination legislation contradicted by the images of women presented in other areas of law, for instance in family law, property law and criminal law, which rest on femininity, domesticity and dependence,⁶² but it is also undermined by the 'male breadwinner' assumptions embodied in social security and taxation provisions, by the attack on women's employment through deregulation policies in other areas of labour law and by social and welfare policy which ties women more closely to domestic labour.

The deregulation initiatives include a reduction in the role of Wages Councils which set minimum wages in certain sectors covering some three million, predominantly female, workers. Given the limitations of the equal pay legislation noted above, a minimum wage approach to tackling women's pay disadvantage of the kind reflected, albeit inadequately, in the wages council machinery, may be a better prospect for many women in Britain. The scope of Wages Councils' orders, however, has been reduced, young workers have been removed from their coverage and even their continued existence has been threatened. Deregulation has also involved the reduction of various employment protections, with more women in particular falling outside their coverage as a result,⁶³ while the repeal of measures to generalize agreed or minimum employment standards has facilitated an attack on women's jobs and conditions of employment through contracting out work from the public sector.⁶⁴ Further, the United Kingdom government has opposed European Community initiatives on such issues as parental leave, maternity provisions and provisions for 'atypical' workers, where improved rights for workers would run counter to the deregulation ethos of domestic policy.

In other areas of state policy the erosion of state-provided care for the elderly and infirm, the lack of state-funded childcare and changes in the approach to income support all act implicitly to encourage women to concentrate on domestic labour.⁶⁵ Childcare has been seen by recent governments as a private matter and the United Kingdom compares very poorly with other European states in public provision of childcare. This defect is not compensated for by private provision.⁶⁶ Not surprisingly, the number of women taking advantage of the legal right to return to work after maternity leave has been small. Importantly, the absence of paternity and parental leave rights in the British legislation also perpetuates the notion of women as sole carers of children, hindering equality in childcare and, thus, in work. Equal access for men to unpaid work has to be part of achieving equal access for women to paid work.

⁶² Millar, E. and Phillips, J., 'Evaluating Anti-discrimination Legislation in the UK: Some Issues and Approaches' (1983) 11 *International Journal of Sociology of Law* 417-19.

⁶³ Dickens, L., 'Falling Through the Net: Employment Change and Worker Protection' (1988) 19 *Industrial Relations Journal* 139, 144-6.

⁶⁴ Coyle, A., 'Going Private: The Implications of Privatisation for Women's Work' (1985) 21 *Feminist Review* 5, 20.

⁶⁵ Walker, J., 'Women, the State and Family in Britain: Thatcher Economics and the Experience of Women' in Rubery, J. (ed.), *Women and the Recession* (1988) 231-8.

⁶⁶ Moss, P., *Childcare in the European Communities 1985-1990* (1990) 11.

CONCLUSION

In this paper I have explored the British experience of anti-discrimination legislation and sought to explain its relative lack of impact on women's employment position. I do not think that the problems identified here, however, are unique to Britain. When I visited Australia early in 1991 I wondered if there were aspects of the legal framework which might suggest a way forward for Britain. To some extent this was the case. The Affirmative Action (Equal Employment Opportunity for Women) Act 1986, for example, would be welcomed by those in Britain who are critical of the complainant-based approach (although perhaps greater powers and resources for agency monitoring and investigation, a tighter notion of compliance and tougher sanctions would be preferred). In the broader industrial relations sphere, national award setting provides a floor to women's earnings and a potential for generalizing improvements which is lacking in Britain.

What struck me, however, was the extent to which women's employment disadvantage was similar in the two countries and the way in which, despite some apparently better legislative provisions in Australia, similar problems were being encountered to those I described as the British experience. Although the Australian framework may contain greater potential to bring about change, once one delves beneath differences in legal provisions, institutions and procedures in the two countries to consider what I have termed the 'second level' of problems (the underlying assumptions of anti-discrimination legislation) perhaps the two countries might be seen to be confronting similar road blocks on the route to equality. The analysis in this paper suggests those road blocks are constructed around inadequate concepts of equality which rule out positive action; around attempts to construct the idea of equal opportunity for women within processes and structures which, although presented as neutral, have been designed around men; and around legal approaches which individualize and compartmentalize women's experience and the reality of women's lives.

Clearly, the project of tackling women's employment disadvantage which emerges from the second level of explanation for the relative failure of the current approach, is a far-reaching one calling for radical change in the private as well as the public sphere. It might appear that any immediate reform agenda addressing problems experienced with the provisions, procedures and institutions of Britain's current equality legislation has little place within such a project. Indeed, attention paid to legislative reform of the Sex Discrimination Act might be seen as a diversionary tactic, since much of the problem lies in areas falling outside of the Act.⁶⁷ Arguing for radical or revolutionary social change in order to bring about equality, however, is not necessarily to deny a role for progressive reforms in legislation, or in social policy. Interaction of law and collective action may provide a path forward towards more radical change, in which case the nature of the legislation is important and legal reform imperative.

⁶⁷ A view forwarded, for example, by Atkins, *op. cit.* n. 52.

What has to be acknowledged, however, is that anti-discrimination legislation can only be a part, perhaps only a very small part, of what must be a more broadly-based challenge to gender relations as they are presently constituted. Legal reform in this area, although necessary, is far from sufficient to bring about fundamental changes to the employment position of women. Legal reform cannot be seen as an end in itself but as part of a wider struggle for more fundamental social and political change.