

Asking the important questions: Beth Gaze's scholarship on discrimination law enforcement

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For a decade, from the early 1980s to the early 1990s, Beth Gaze was an editor and sometime business manager of what was the *Legal Service Bulletin* (LSB), now the *Alternative Law Journal*. Originally the newsletter of Fitzroy Legal Service, the LSB grew to become a forum for progressive lawyers, law academics and other professionals to write about socio-legal issues, at a time when community legal centres were leading the legal profession towards awareness, concern and action about social injustices and inequality. It is unsurprising that Beth was an integral part of the LSB's operations.

In that early period of her academic career, Beth was writing about a range of rights-related issues, such as copyright, privacy, and women's reproductive rights. This was the beginning of what, since the late 1990s, has been Beth's research focus: inequality, human rights and anti-discrimination law, with consistent regard to the rights of women, issues of work and family, and the vexed questions of enforcement and effectiveness.

From the mid-1990s, Beth was herself 'practicing the work-family juggling act', on which she reflected in 2001, saying that 'the work family juggling act ... is my everyday practice as a part time legal academic [and] it is something that needs practice: the balance is never quite stable and needs constant attention'.¹ One of the commitments Beth was juggling was her PhD, awarded in 2005, which interrogated the question 'Equality for women through legal change: progress or problem?'.

The PhD title is significant in two ways: it flags a principal theme of Beth's scholarship – pursuing equality for women through legal change – and it poses a question that Beth seeks to answer. Posing a question to be answered is a notable feature of Beth's research; her articles have titles such as: 'Will changes to HREOC solve the problem of anti-discrimination law enforcement?', 'Has the Racial Discrimination Act contributed to eliminating racial discrimination?', 'Can law provide a framework [for quality part-time work]?', '[is the right to non-discrimination in workplace law] towards substantive equality at work in Australia?', 'Do women enjoy human rights in Australia?', and '[is] equality thwarted [by the Fair Work Act's adverse action provisions]?'. These are important questions because they are concerned with a major contemporary issue of social and legal policy, best expressed in Beth's PhD title: is pursuit of equality for women through legal change making progress, or proving

¹ Beth Gaze, 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act' (2001) 1 *Queensland University of Technology Law and Justice Journal* 199.

problematic? In the scholarship I discuss here, Beth's focus is on the problematic issue of enforcement of the equality rights promised by anti-discrimination legislation.

On the twentieth anniversary of the *Sex Discrimination Act 1984* (Cth) ('SDA'), Beth reflected on achievements, disappointments and alternatives,² with particular attention to the experiences of working women that continued the theme of her earlier work on the implications for women of part-time work,³ and on workplace measures that pursue women's equality.⁴ Central themes of Beth's work are present in her analysis of the SDA: the inadequacy of anti-discrimination legislation as a measure for achieving equality for working women and, in particular, the technical and practical obstacles to women achieving a remedy under the legislation.

On achievements, Beth remarked that '[a]ssessing the SDA's concrete achievements in reducing women's inequality is difficult, as so many factors influence women's position in the workforce and it is therefore almost impossible to identify any particular cause of identified progress'.⁵ But, Beth acknowledged, '[t]he removal of legal barriers has ensured women greater access to employment, and women have moved into the workforce in such great numbers that we now take for granted many basic rights that did not exist before sex discrimination laws'.⁶

On disappointments, Beth commented that the SDA's 'substantive provisions are relatively weak';⁷ that the SDA 'fails to acknowledge diversity among women', that is, intersectionality;⁸ and that '[t]he enforcement mechanism in the SDA has structural problems' with 'virtually no teeth'.⁹ Weighing the positives and negatives, Beth concluded that 'we should have serious doubts about how adequately [the SDA] protects working women's rights and, in particular, about how effectively it is helping systematically to change practices in the workforce that limit women's ability to participate on an equal basis'.¹⁰ On alternatives, Beth argued that '[s]ex discrimination laws are not the full answer to women's disadvantage in the workforce', and then went big, saying that what is needed is '[s]ome reshaping of social institutions to suit women as well as men'.¹¹

² Beth Gaze, 'The SDA after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives', (2004) 27 *University of NSW Law Journal Forum* 914 ('Gaze 2004'); Beth Gaze, 'Twenty Years of the Sex Discrimination Act: Assessing its Achievements', (2005) 30(1) *Alternative Law Journal* 3.

³ Gaze (n 1); Beth Gaze, 'Quality Part-time Work: Can law provide a framework?', (2005) 15(3) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 89.

⁴ Beth Gaze, 'Gender equality reporting and the future of equal opportunity at work', (2014) 66 (10) *Governance Directions* 621; Beth Gaze, Anna Chapman and Adriana Orifici, 'Substantive equality at work: still elusive under Australia's Fair Work Act', (2017) 30(3) *Australian Journal of Labour Law* 214; Beth Gaze, Anna Chapman and Adriana Orifici, 'Evaluating the adverse action provisions of the Fair Work Act: equality thwarted?' in *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions*, Federation Press, 2017.

⁵ Gaze 2004 (n 2) 916.

⁶ *Ibid* 921.

⁷ *Ibid* 918.

⁸ *Ibid*.

⁹ *Ibid* 918-919.

¹⁰ *Ibid* 920.

¹¹ *Ibid* 921.

Beth's subsequent reflections on the SDA's twenty fifth anniversary are an ideal primer on the history and jurisprudence of the SDA, in which she again considered its achievements, disappointments and alternatives. Beth observed that despite women's victories under the SDA,

[t]raditional attitudes, practices and social patterns did not disappear, but found other avenues of expression. The social structures of gender, race, sexuality and ability all continued (and still continue) to affect opportunities and expectations, while the target became less overt and hence more difficult to identify. Discrimination turned out to be a stronger and more subtle phenomenon than the law had anticipated and the law a correspondingly weaker tool against it'.¹²

She concluded that 'after 25 years of the SDA, workplaces still operate on the assumption that the 'normal' employee is a full-time worker with no domestic caring responsibilities or that they have someone to fulfil those responsibilities for them. Sex discrimination law has not been effective to challenge this model, which fits men's but not women's lives'.¹³

Beth's particular attention in her research to enforcement (or not) of anti-discrimination laws is important; she has addressed technical issues such as the absence of a shifting onus of proof;¹⁴ the deterrence effect of legal costs;¹⁵ the absence of a positive duty to promote equality;¹⁶ the limited powers to make systemic remedial orders;¹⁷ and the weakness of affirmative action legislation,¹⁸ and she has done rare empirical work to expose low rates of use and success in discrimination claims.¹⁹ Beth has repeatedly examined more broadly the questions that she asked of the SDA:²⁰ 'Has the legislation been understood, and been given its intended effect, by the (male-dominated) courts? Have individuals been able to use it to seek redress for unfair treatment?'. Consistently, her considered answer to these questions has been 'no'.

In the year 2000 Beth asked whether changes to the then Human Rights and Equal Opportunity Commission – giving the complaint hearing function to the federal courts – would solve the problem of anti-discrimination law enforcement;²¹ she thought it unlikely: 'the changes may not reduce, and may instead increase, the already high barriers to bringing a

¹² Beth Gaze, 'The Sex Discrimination Act at 25: reflections on the past, present and future' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times*, ANU Press, 2010, 107-132, 110.

¹³ Ibid 121.

¹⁴ Beth Gaze, 'Can You Prove it's Discrimination? A Comparative Review of Direct Discrimination and the Shifting Onus of Proof', paper to *Berkeley Comparative Equality & Anti-Discrimination Law Study Group 2018 Conference at Melbourne Law School at the University of Melbourne*, June 2018; Beth Gaze, 'Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000–04', (2005) 11(1) *Australian Journal of Human Rights* 171 ('Gaze RDA').

¹⁵ Beth Gaze, 'The costs of equal opportunity', (2000) 25(3) *Alternative Law Journal* 125; Gaze RDA (n 14).

¹⁶ Gaze RDA (n 14).

¹⁷ Beth Gaze, 'Damages for discrimination: Compensating denial of a human right', (2013) 116 *Precedent*, 20.

¹⁸ Beth Gaze, 'The Ambiguity of Affirmative Action in Australia', (1999) 15(2) *Law in Context* 136.

¹⁹ Caroline Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face', (2010) 34 *Melbourne University Law Review* 392; Gaze RDA (n 14); Gaze (n 12); Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime*, Themis Press, 2010.

²⁰ Gaze 2004 (n 2) 916.

²¹ Gaze (n 15).

successful claim of discrimination in the federal jurisdiction'.²² Later, working with Rosemary Hunter, Beth followed up on this prediction, undertaking 'an empirical study to determine the impact of the shift of hearing functions from HREOC to the federal courts'.²³ Their research – gathering statistics, looking at decided cases, and interviewing parties and lawyers involved in claims under the old and new²⁴ – led them to conclude that 'the Australian federal system for dealing with discrimination complaints fails at every turn to provide access to justice for complainants seeking to enforce their rights under the legislation'.²⁵

If, despite system's failure to provide access to justice, a complainant succeeds, '[b]y far the most common remedy in discrimination cases is damages',²⁶ even though, as Beth has pointed out, '[f]or many complainants, money is not the sole point of their action'.²⁷ Damages could have a deterrent function – as is the case in the US 'through damages awards that are large and can include punitive damages'²⁸ – but, Beth has argued

Australian courts have been unable or reluctant to acknowledge the need for deterrence in a discrimination claim through the damages award. In choosing a remedy and in assessing damages, little attention is given to the systemic effects of discriminatory behaviour and the need to deter conduct which breaches human rights'.²⁹

This indictment of the courts' approach was borne out in the 'landmark'³⁰ decision in *Richardson v Oracle Corporation Australia Pty Ltd*,³¹ a case in which a working woman was compensated for being subjected to 'a humiliating series of slurs, alternating with sexual advances ... which built into a more or less constant barrage of sexual harassment'.³²

Richardson v Oracle seemed at the time 'the dawning of a new era'³³ in assessing damages for workplace sexual harassment. Justice Kenny, with whom Justices Besanko and Perram agreed, cited Beth's work to support the view that 'the level of damages awards in [sex discrimination and harassment] cases runs counter to the beneficial intent of the SDA, impeding the deep social reform intent that expressly accompanied its introduction and informs the legislation as a whole'.³⁴ But Justice Kenny then '[left] the academic literature aside',³⁵ relying on it to say only that 'it indicates that the question [of damages] may be a

²² Ibid 125.

²³ Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation', (2009) 32 *University of NSW Law Journal* 699, 704.

²⁴ Ibid 704.

²⁵ Ibid 722.

²⁶ Gaze (n 17) 21.

²⁷ Ibid 23.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Therese MacDermott, 'Reassessing Sexual Harassment: It's Time', (2016) 40(3) *Alternative Law Journal* 157, 158.

³¹ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 ('*Richardson v Oracle*').

³² Ibid [7] (Kenny J).

³³ Alex Manos, 'How do you compensate a victim of discrimination?: The dawning of a new era following *Richardson v Oracle*', (2014) 36(10) *Bulletin (Law Society of South Australia)*, 24.

³⁴ *Richardson v Oracle* (n 31) [87] (Kenny J).

³⁵ Ibid [88].

significant one’.³⁶ Justice Kenny addressed what she said was ‘[t]he real issue’³⁷ to focus on: ‘the appellant’s ... contention that the award was so low as not to compensate her for her loss and damage, rather than on the appellant’s submissions about diminishing respect for the public policy of the SDA’.³⁸ In doing so, Justice Kenny chose to treat sexual harassment not as distinct conduct, internationally condemned as a threat to gender equality,³⁹ but as analogous to a personal injury claim.⁴⁰

This approach leads to a facts-based award of damages, without an underlying rationale. What Beth’s scholarship repeatedly offers the courts is a principled, purposive, policy-based basis for addressing awards of damages for sexual harassment. In an article that Justice Kenny ‘left to one side’, Beth wrote ‘While the tort analogy is valuable, discrimination law involves a breach of a human right and has public significance in addition to private civil compensation’.⁴¹ This, Beth argues, demands a damages award that is sufficiently sizeable to have a deterrent effect, and not to be merely a part of an organisation’s risk management budget.⁴²

The absence of that principled driver for damages awards has mitigated the effect of *Richardson v Oracle*, dimming the light of the new era: ‘although *Richardson* has been widely cited in areas outside of sexual harassment, this has largely not resulted in significant damages awards’.⁴³ Absent a principled basis for assessing damages such as Beth has argued for, *Richardson v Oracle* has been distinguished on its facts,⁴⁴ and has been not followed on Federal/State jurisdictional grounds.⁴⁵ By leaving aside arguments such as Beth’s, and resorting personal injury principle to assess damages for sexual harassment, a central consideration has been lost from the calculus: a person’s individual humanity and vindicating their rights and dignity.⁴⁶

The court’s approach in *Richardson v Oracle* – having little regard to the aims of the legislation, and treating an anti-discrimination law as any other remedial statute – calls to mind what is perhaps Beth’s most cited article, ‘Context and interpretation in anti-discrimination law’.⁴⁷ In that article Beth posed her trademark questions, including: What is the aim of anti-discrimination law? What does it mean if a high proportion of cases brought to adjudication under anti-discrimination laws fail? If the requirement to prefer a purposive

³⁶ Ibid [87].

³⁷ Ibid [93].

³⁸ Ibid.

³⁹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, Australian Human Rights Commission, 2020, 72 and the documents cited there at n 31.

⁴⁰ *Richardson v Oracle* (n 31) [95]-[110].

⁴¹ Gaze (n 17) 21.

⁴² Ibid 22.

⁴³ Madeleine Castles, Tom Hvala and Kieran Pender, ‘Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era’, (2021) 49(2) *Federal Law Review* 231, 251.

⁴⁴ Ibid 253.

⁴⁵ Ibid 251-255.

⁴⁶ Alice Taylor and Joshua Taylor, ‘What’s Your Damage? Assessing the Harms of Sexual Harassment From the Perspective of the Victim and the Accused’, (2024) 52(4) *Federal Law Review* 435, passim.

⁴⁷ Beth Gaze, ‘Context and interpretation in anti-discrimination law’, (2002) 26(2) *Melbourne University Law Review* 325.

interpretation was to be taken seriously, what might it mean? Who are the judges, what is their experience, and how can and do they approach this law? To what extent can this explain judicial interpretations of anti-discrimination law, and in particular those interpretations that prefer a process to a results perspective, or a perpetrator to a victim perspective?

These are significant questions about the law's effectiveness, going to the heart of why we have anti-discrimination laws. Beth approached the questions through an analysis of justice Harper's decision in *Victoria v Schou*,⁴⁸ another case involving a working woman. Ms Schou had been compensated at first instance for being discriminated against, but that was set aside in the decision of the Victorian Supreme Court that Beth analysed.⁴⁹

Beth argued that the decision's 'value-laden aspects ... cannot be accounted for in legal terms';⁵⁰ among her scathing observations⁵¹ were that the decision 'displays little understanding of the issues of discrimination and difference that anti-discrimination legislation must deal with', 'shows little familiarity with previous case law in the area', and 'did not look at the words of the legislation and explain how the propositions discussed are derived from them, or consider the precedents in the area'.

Beth's conclusion on *Victoria v Schou* captures an aspect of her consistent critique of the enforcement of Australian anti-discrimination law: 'the key to the effect of anti-discrimination legislation is in the understanding of the tribunal member or judge hearing the case or appeal. Some approaches lead to tokenism while others enliven the legislation as a prescription for change'.⁵²

This brings us back to one of Beth's confrontingly simple questions: 'What is the aim of anti-discrimination law?'.⁵³ Knowing a statute's aim is essential to effective enforcement; Beth points out that, properly understood, a court's statutory interpretation obligation⁵⁴ is 'to discover the underlying purpose or object of the provision in question and, if possible, to adopt the interpretation of that provision that furthers the purpose or object'.⁵⁵ But as cases such as *Richardson v Oracle* and *Victoria v Schou* illustrate – as do more recent cases such as *Lyons v Queensland* [2016] HCA 38 and *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 12 – 'Australian judges have generally approached interpretation of anti-discrimination statutes as being similar in kind to other statutes: a matter of giving effect to the words', unlike in Canada where 'anti-discrimination laws have been treated as having a higher status than other legislation because of their subject matter, which ensures the most fundamental of human rights: the right of everyone to be treated equally and not to be subjected to discrimination'.⁵⁶

⁴⁸ [2001] 3 VR 655.

⁴⁹ Ms Schou was again successful when her complaint was remitted to the Victorian Civil and Administrative Tribunal, a decision that was again set aside on appeal: *State of Victoria v Schou* [2004] VSCA 71.

⁵⁰ Gaze (n 47) 327.

⁵¹ Ibid 351.

⁵² Ibid 327.

⁵³ Ibid 300.

⁵⁴ See, eg, *Acts Interpretation Act 1901* (Cth) s15AA.

⁵⁵ Gaze (n 47) 331, citing D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) 27.

⁵⁶ Ibid 332, citing *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 536; Thomson Professional Publishing, *Racial Discrimination: Law and Practice*, Vol 3, 3-32.

The fault lies not only with Australian judges, who ‘most often give a literal or a narrow reading of specific provisions or terms they are construing, using only textual methods to reach a decision’;⁵⁷ the legislation itself is found wanting. As Beth points out, most Australian anti-discrimination laws include formulaic objects clauses that ‘frequently repeat the motherhood statements of commitment to equality and elimination of discrimination, without addressing the harder issue of to what degree this commitment is to be enforced’.⁵⁸

Academic scholarship such as Beth’s cannot be left aside if Australia’s anti-discrimination laws are to be effective. It offers soundly reasoned, extensively researched arguments for enforcing Australia’s laws in a way that ‘ensures the most fundamental of human rights: the right of everyone to be treated equally’.⁵⁹

⁵⁷ Ibid 333.

⁵⁸ Ibid 330; and see the discussion in Alysia Blackham, ‘Defining ‘Discrimination’ in UK and Australian Age Discrimination Law’, (2017) 43(3) *Monash University Law Review* 760, 771-5.

⁵⁹ Gaze (n 47) 332.