

A Critique of the Culture of Complaint: Trends in Complaints of Sex Discrimination in University Employment

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Abstract

This article has three inter related aims. Its object is in part to identify the context and character of discrimination in employment complaints against Australian universities. These features are illustrated by reference to the most recent decision of the Human Rights and Equal Opportunity Commission in a complaint under the *Sex Discrimination Act* 1984. Recent sex discrimination complaints against universities challenge the boundaries of current definitions of unlawful discrimination in employment. The argument traces perceptible trends in the formulation of complaints, particularly as they are informed by current theoretical perspectives on sex discrimination and suggests a role for the inclusion of new perspectives in the development of equal opportunity jurisprudence.

Introduction

Now, what peculiarly signalizes the situation of woman is that she - a free and autonomous being like all human creatures - nevertheless finds herself living in a world where men compel her to assume the status of the Other.

Simone de Beauvoir *The Second Sex* (1949) (tr HM Parshley 1953)

Soon after the decision of the Human Rights and Equal Opportunity Commission in *Bailey v Australian National University*, the unsuccessful complainant was reported in the press as saying: 'I wanted to show women can get a fair deal. In fact what I have succeeded in showing is that there is just no way women can get a fair deal.'ⁱ In her disappointment at the outcome of five complaints of sex discrimination and victimisation against her institutional employer, this complainant neatly voiced the frustration of many concerning the strictures of the current legal boundaries of unlawful discrimination in Australia. *Bailey v Australian National University*ⁱⁱ is the most recent in a series of sex discrimination complaints against Australian university employers which have culminated in a tribunal hearing, and have raised issues of 'systemic' sex discrimination. The particular significance of this case lies in its concerted challenge to the institutional culture of universities, the nature of the evidence employed to prove unlawful discrimination and the deeper challenge it provides to the current legal categorisation and definition of unlawful discriminatory behaviour.

Discrimination in Employment Complaints Against Universities

Since the introduction of anti-discrimination and equal opportunity laws by federal and state legislatures in Australia in the last three decades, universities have figured regularly in complaints and litigationⁱⁱⁱ on a range of grounds including sex,^{iv} sexual harassment,^v race,^{vi} ethnicity,^{vii} religion,^{viii} victimisation^{ix} and disability.^x More recently, the earliest invocations of the protection afforded under the compulsory retirement amendments to the New South Wales *Anti-Discrimination Act 1977* were made by academic employees.^{xi} Recent evidence suggests that the trend is unlikely to diminish.^{xii} In assessing the character of employment disputes and litigation in higher education in Australia, the impact of work place culture on dispute resolution policies and processes, the nature of complaints and the litigants, and the effects of complaints upon employees and employers are of particular importance. In some discrimination complaints university employment is merely the factual background to the complaint,^{xiii} while in others the arguments raised rely on perceived distinctive characteristics of university life, including collegiality, academic freedom and academic professionalism.^{xiv} The consequence for universities of involvement in discrimination complaints throughout the 1970s and 1980s has been a heightened institutional awareness of issues of formal equality as reflected in existing discrimination statutes.^{xv}

Australia's anti-discrimination laws prohibit two established types of discrimination: direct discrimination^{xvi} and indirect discrimination.^{xvii} The essence of direct discrimination is less favourable treatment of a person on the ground of a prohibited characteristic, attribute or status. In order to succeed in a discrimination complaint the complainant must be able to prove that he/she has suffered detriment and that there is a causal nexus between the less favourable treatment and a prohibited ground of discrimination. This is one formulation of the 'detriment concept of discrimination' which has been adopted by Australian legislators as the basis for equal opportunity laws.^{xviii} This approach to discrimination focuses primarily on the consequences or outcomes of discrimination. It has been argued that the legal concept of direct sex discrimination is inherently flawed as it requires a comparison against a male norm.^{xix}

The concept of indirect discrimination has been incorporated in Australian statutory definitions as a direct response to the landmark decision of the United States Supreme Court in *Griggs v Duke Power Company*,^{xx} which established the concept of 'disparate impact' discrimination in order to overcome the continuing discriminatory effects of past prejudice and disadvantage. Proof of indirect discrimination has proved difficult in practice in Australia as the legislation requires the complainant to satisfy a highly formalised legal test. In order to succeed in a complaint of indirect discrimination the complainant must show firstly that a requirement or condition was imposed. Further, a substantially higher proportion of persons of a status different from the complainant must be able to comply with the requirement or condition. The complainant must not as a matter of fact be able to comply with the condition, and the condition or requirement must be not reasonable in all the circumstances.^{xxi} It is arguable that the formalism associated with the legal tests for proof of discrimination in Australia has not assisted the general legislative objective of substantive change in

discriminatory policies and practices and has indirectly fuelled the arguments which challenge existing legal categorisations of prohibited discrimination.^{xxii}

Pattern of Sex Discrimination in Employment Complaints

A perceptible trend is emerging from the decision reached in sex discrimination complaints against universities. These complaints challenge key aspects of work place culture in universities, including appointment and promotion policies and, more significantly, the criteria for determining academic merit. The complaints are formulated and pursued in an way which taxes the established categories of unlawful discrimination and confronts legislative formulations of direct and indirect discrimination with new and heterodox perspectives, particularly those deriving from broader theoretical and epistemological considerations. It is strongly arguable that arguments of ‘systemic discrimination’ in university sex discrimination cases reveal very subtly the influences of recent developments in feminist legal theory, especially feminist theories of legal equality.^{xxiii} Whilst this is a salutary development in approaches to prohibited discrimination, the practical outcome for complainants for such arguments has been disappointment. Despite the lack of success of systemic sex discrimination arguments to date there is a sense of perverse fitness that they emanate from a university context.^{xxiv} There is, however, a deep intrinsic irony in the inflexibility of an existing statutory regime which offers the possibility of redress against discrimination only in circumstances where the discrimination is legally recognisable according to restricted and formalised criteria.^{xxv}

The genesis of the approach can be seen in the 1984 case of *Davies v University of New England*. Dr Davies’ complaint of sex discrimination against the University of New England and her immediate supervisor, Professor Fitzgerald, contains some distinct features. Her charge of ‘systematic’ sex discrimination in the failure to appoint her to a tenured university post marks perhaps the first formal inkling of dissatisfaction with the established boundaries of prohibited discrimination in a university context. The complaint was pursued in the context of a academic job freeze in 1981 and this factor hints at the perception of systemic disadvantage experienced by women in access to university employment. The job in question had been advertised by the university with the effect of excluding the complainant from applying as it contained a requirement for a particular area of specialisation and expertise.^{xxvi} Some significant motifs emerge from the treatment of the complaint. The economic plight of universities, institutional autonomy and responsibility, and the collegiality of the academic work place were all factors which were highlighted by the Equal Opportunity Tribunal in making its interim order. Barbour J considered the matter of interim relief upon the application of the Equal Opportunity Counsellor. He was quick to confirm the independence of universities in the internal allocation of resources and the recognition of merit.^{xxvii} However, the combined effects of an era of financial stringency and the requirements of the anti-discrimination legislation dictated some intervention.^{xxviii} Barbour J appealed directly to the collegial tradition in urging resort to conciliation and amicable settlement.^{xxix} His recommendation to the university in this case was indicative of attention to the special difficulties of university employment. In order to avoid hardship and to preserve the rights of the parties, he recommended that Dr Davies be offered a fixed term lectureship

at the expiration of her contract of employment to preserve the status quo until the merits of the claim had been heard. The significance of the decision in *Davies* extended beyond the result for the complainant. The delicate balancing of complex and multiple interests involved in equal opportunity decisions was maintained in this case by reference to established work place norms. The unresolved question in the case concern the character and effect of established patterns of behaviour. More particularly, whether established collegial and managerial culture in Australian universities is gendered by reference to male standards.^{xxx} As Barbour J considered the question of interim relief only and did not pursue the legal merits of the sex discrimination complaint, the ‘systematic’ sex discrimination argument remained unaddressed.

Empson and Gray

In 1995 two female academics pursued complaints of sex discrimination against their university employers.^{xxx} Both complainants were unsuccessful in arguing ‘systemic’ sex discrimination in university employment, particularly in relation to appointment and promotion. There is some evidence to support the argument that the emergence of systemic discrimination complaints at this time reflects an embryonic pattern of challenges by professional women to corporate cultures generally.^{xxxii} Significantly the Human Rights and Equal Opportunity Commission in *Empson* admitted difficulty in categorising the ‘systemic discrimination’ argument in terms of the statutory definitions of unlawful discrimination.^{xxxiii} This type of complaint perhaps suggests a developing consciousness amongst interested groups in the community of the expanding boundaries of unacceptable discriminatory behaviour, which should be reflected in appropriate amendments to the legal regime. The inability to establish discrimination according to the orthodox legislative formula was costly for the complainants. The manner in which the complaints were conducted and the approach to proof is highly instructive as both complainants had difficulty in providing adequate evidence acceptable to the tribunals as proof of unlawful discrimination.

The complainants in *Empson* and *Gray* were confronted with several difficulties in the formulation of a sustainable argument to support a case of ‘systemic discrimination’. The response of the tribunals was to look for a compilation of empirical statistical evidence to prove the institutionalised claims of discrimination, in particular in respect of the application of institutional policies and practices on appointment, tenure and promotion. It is significant that the tribunals sought proof by reference to statistical data and the complainants’ failures were evidentiary. In *Gray*, the oral evidence provided by the University’s EEO Officer in support of the complainant was held to be insufficient to assist in establishing systemic sex discrimination. One of the reasons for this was the anecdotal and unsystematised nature of the evidence provided.^{xxxiv} This illustrates distinctly the considerable burden faced by complainants in proving discrimination under the existing statutory scheme. The treatment of the complaints in *Empson* and *Gray* arguably would have benefited considerably from a more policy oriented approach,^{xxxv} which sought to synthesise some contemporary theoretical approaches to discrimination in order to develop a richer, more inclusive jurisprudence of equality. A dynamic and perhaps irresolvable tension exists between the procedural

justice afforded by the existing discrimination complaint mechanism and the desire for substantive justice inherent in the feminist theoretical approaches to discrimination.^{xxxvi}

There is a heightened significance in these complaints when the circumstances of Dawkins' era reorganisation are included. Both complaints emerged from a context in which former Colleges of Advanced Education had amalgamated with existing universities to produce expanded 'universities'. In the context of balancing the rights and interests of the parties in the complaints the Equal Opportunity Tribunal in *Gray* recognised the dramatic effects of reform to the higher education sector in the 1980s and the instability produced by rapid change in the status of many institutions.^{xxxvii} It accepted as legitimate management aspirations of the CEO of a 'post Dawkins' University 'to ensure that his new university achieves a level of excellence in its standards consistent with its new status.'^{xxxviii} The ambition of the former Gippsland CAE to conform to Monash University norms was also accepted in *Empson*.^{xxxix} This approach left unanswered the deeper question posed by the systemic discrimination argument concerning the underlying merit and effect of managerial policy.

The theoretical challenge posed in *Empson* and *Gray* is beginning to be matched by empirical evidence which illustrates the employment patterns of male and female academics in Australian universities.^{xl} However, this data draws also upon a complex theoretical framework in synthesising the evidence collected. For example, the NTEU Report in addition to producing statistics concerning women's participation in university employment, discusses a number of personal and institutional factors which it is argued combine to provide men with a career advantage in academia. The factors which are identified as accruing advantages to male academics include greater career continuity, lack of family responsibilities, personal styles and organisational culture and network connections.^{xli} The most controversial element of the report relies inherently upon feminist epistemological theory in raising the question whether there is a spurious objectivity in the concept of academic merit which culturally has concealed gender bias which disadvantages women.^{xlii} The nature of this evidence begs the question of whether academic women will have more effective resources in future to prove claims of 'systemic' sex discrimination.

Dr Bailey's Complaints

The facts in the *Bailey* case arose out of the complainant's employment at the Australian National University in research positions and an application for a position as a lecturer in the Faculty of Arts. The complainant had a research specialisation in pre-modern Japanese history and was appointed to a research fellowship in the School of Pacific Studies in 1989. The essence of the complaints of sex discrimination, although couched in terms of the statutory definition of direct discrimination, lay in the belief that the institutional employer intrinsically undervalued research work completed by women. This attitude it was claimed manifested itself in practice by means of differential treatment of male and female candidates for appointment and promotion. Dr Bailey claimed that a 'culture of discrimination' existed against women in the Institute for Advanced Studies. Unlike most Australian universities, the Australian National University is divided into two areas of operation, the Faculties, which are devoted to traditional teaching and research activities and the Institute for Advanced Studies

which consists of several research schools. The difficulties experienced in the Bailey complaints were, in common with the complainants in *Empson* and *Gray*, evidentiary. Commissioner Basten with considerable acuity characterised the complaint as one in which the complainant was required to rely upon inferences to establish impugned discriminatory behaviour.^{xliii} He recognised the complexity of the resulting decision making process and the burden of proof resting on the complainant.^{xliv}

The painstaking and critical assessment by Commissioner Basten of the evidence adduced to prove the complaints in Bailey is a model of its type and clearly illustrates the limitations inherent in present definitions of prohibited discrimination. In the first complaint against the University Dr Bailey claimed discrimination in the university's failure to fund a 'bridging' position for six months between fellowships. The Commissioner found that there was no direct evidence to support the premise of the complaint that a sex discriminatory policy of providing bridging employment male fellowship holders existed. Further, the whole context within which appointments were made was scrutinised and it was found that the evidence of other appointments and the fact that the Institute was experiencing a period of budgetary constraint and structural change indicated that shorter appointments had been made in contrast to the previous pattern. This evidence was held not give rise to inferences of prohibited sex discrimination sufficient to support the complaint.^{xlv} Factual considerations concerning transitional difficulties consequent upon structural change also played a role in the assessment of the second complaint concerning Dr Bailey's appointment to a second eighteen month research fellowship.

In the second complaint, the complainant in essence challenged the post-appointment practices of the Research School, particularly as reflected in practical and financial support for fledgling female academic careers. It also raised issues of the complainant's relationship with a number of colleagues and her treatment by senior colleagues during her appointment to what was characterised as a 'special' appointment. Commissioner Basten was required to make careful assessments of the credibility of a number of academic witnesses and attempted to view their replies to questions about Dr Bailey's treatment in the 'cultural' and institutional context of the research school. Significantly he noted that a measure of tension seemed to have arisen between the complainant and her colleagues in the Research School which was relevant to the analysis of oral testimony. He refused to view answers to questions in isolation and recognised the relevance of personalities and individualism in the context of academic employment.^{xlvi} In addition the Commission considered the evidence of gender imbalance in the Research School in order to address the complainant's contention that women were treated as 'expendable'. The statistics compiled by the ANU concerning the marked gender imbalance particularly in research positions,^{xlvii} were powerful and supported the contention of the complainant. The Commissioner concluded that the totality of the evidence supported the complaint of sex discrimination made by Dr Bailey. This finding did go some way towards addressing the systemic sex discrimination argument of the complainant, but little weight was given to the critical theoretical evidence of the witness 'Dr U', which introduced concepts such as 'homosocial reproduction'.^{xlviii} The treatment of this evidence was equivocal.^{xlix}

Dr Bailey's third complaint concerned a failure to secure promotion in the Research School and the final two complaints concerned unsuccessful applications for promotion to research and academic posts. These complaints were also based on grounds of sex discrimination and victimisation

and were unsuccessful. Evidence similar to that presented in relation to earlier complaints was considered by the Commissioner, but the general evidence of concern over the lack of success by female candidates in promotion was held not to support inferences of discrimination in respect of a single application. The complainant in this case was without the benefit of the detailed statistical evidence available in the second and successful complaint. The Commission then considered the evidence of actual practice of the promotion committee in order to ascertain the existence of unfairness amounting to victimisation. Whilst the Commission found no evidence that the promotion process was tainted by prejudicial and prohibited discriminatory behaviour, the complex task undertaken by an academic promotions' committee¹ and the strained relationship between the complainant and some of her senior colleagues was again a source for comment.ⁱⁱ Similarly the complaints concerning unsuccessful applications for appointment failed to reveal evidence that the appointment decisions were infected by prohibited discriminatory considerations. The issue of proof in these complaints was resolved by reference to the issue of causal nexus between the impugned conduct and the prohibited grounds of discrimination. The presentation of the proof was characterised by the degree of personal passion of the complainant which is commonly discernible in discrimination complaints and raised intractable issues of temperamental differences.

Conclusion: Messages and Mutation

...an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which - as power succeeds in constructing social perception and social reality - derivatively becomes a categorical distinction, a difference. ... Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power...

Catherine McKinnon *Feminism Unmodified* (1987)

There are several practical and jurisprudential lessons to be learnt from these cases. At one level it is clear that the complainants' arguments are beginning to reflect the fruits of feminist jurisprudence in the last decades as a meaningful expression of women's experience of academic work in universities. Their complaints mirror the jurisprudential thesis that sex discrimination is a function of the distribution of power and sex inequality cannot be eradicated by reference to criteria of formal equality as embodied in existing equal opportunity statutes.ⁱⁱⁱ Complainants in sex discrimination cases against universities are beginning to challenge the power structures which propagate and fortify inequality of professional experience between the sexes. There is an inherent paradox in this approach: in proposing an argument based on 'systemic sex discrimination' within the existing statutory complaints structure, a complainant challenges orthodoxy at a number of levels. The risk for a complainant in seeking redress in this way is that the tribunal in responding to a novel argument will continue to uphold and entrench the legal status quo. Arguably this occurred in *Empson* and *Gray*.

However, the careful and considered approach of the Commissioner in *Bailey*, particularly in the second complaint, provides a ground for expectation.

There is yet no critical appraisal in the case law of the arguments advanced over the concept of 'academic merit'. Determinations under the existing anti-discrimination complaints mechanisms leave a measure of discretion to the institutional employer in the formulation of appointment and promotion policies. Commissioner Basten in *Bailey* recognised the inherent tension involved in employment-related assessments based on academic merit. He saw the issue in terms of the tension between objective and subjective criteria in employment decisions.^{liii} The complainants' perspectives on this issue appear to accord more closely with both feminist jurisprudential and recent feminist empirical data. The challenge to the concept of academic merit by scholars of feminist jurisprudence has been visible since the 1980s.^{liv} Historically the emergence of this new approach is referable directly to women's empirical experience in university employment after a period of rapid growth in the tertiary education sector and a period of incremental social change in western societies.^{lv} The arguments challenge in particular the notion that 'academic merit' measures an objective standard and that it is conceptually apolitical.^{lvi} This latter proposition builds on the foundation of inequality as a function of power as already discussed.

The broad message to be drawn from the emerging trends in sex discrimination complaints in university employment is that existing parameters of unlawful discrimination as defined in statutes are inadequate to redress women's experience of inequality in the work place. There are strong reasons to suggest that the formal equality paradigm should be reassessed and complemented by new definitions of unlawful discrimination which incorporate developing theoretical perspectives on equality. Unsuccessful complaints of sex discrimination in employment of the type discussed here should act as a catalyst for a deep seated reappraisal of the appropriate boundaries of unlawful discrimination and the legal elements of proof of discrimination under state and federal statutes.

Keywords

Universities

Academic Employment

Sex Discrimination

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Endnotes

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- i. See Chan, G. (1995) Discrimination Academic Told to Pack Up. *Australian (Higher Education)*, 11 October 1995, 11.
- ii. (1995) EOC ¶ 92-744.
- iii. This pattern is also replicated in other common law jurisdictions. See La Noue, G.R. & Lee, B.A. (1987).
- iv. For example, *Langley v University of New South Wales* (1984) EOC ¶ 92-018; *Ross v University of Melbourne* (1990) EOC ¶ 92-290; *Bogie v University of Western Sydney* (1990) EOC ¶ 92-313.
- v. *Morrison Liddy v Director, Department of Technical and Further Education* (1989) EOC ¶ 92-246.
- vi. These include the most notable case involving complaints of race discrimination against a university by a postgraduate student in *University of Wollongong v Metwally* (1984) EOC ¶ 92-030; 158 CLR 447. See also Human Rights and Equal Opportunity Commission (1993), 208.
- vii. *Fares v Box Hill College of TAFE* (1992) EOC ¶ 92-391.
- viii. See above *Metwally's* case.
- ix. For example, *Langley v Niland* (1981) 2 NSWLR 104.
- x. *Bogie v University of Western Sydney* (1990) EOC ¶ 92-313
- xi. The first two complaints testing the operation of the mandatory retirement prohibitions in the NSW *Anti-Discrimination Act 1977* were brought by tenured academics. See *White v University of Sydney* (1992) EOC ¶ 92-473; *Christley v University of Newcastle* (1992) EOC ¶ 92-474.
- xii. See Illing, D. (1996) Lecturer wins forced retirement reprieve. *The Australian (Higher Education)*, 3 July 1996, 34.

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- xiii. In *Langley v University of New South Wales* above, the complaint of discrimination on the ground of sex, was based on actions of the employees of the University of New South Wales in refusing to use the complainant's preferred form of address (Ms), but used the title Mrs. In this case, the fact of university employment is merely incidental to the complaint.
- xiv. *Davies v University of New England* (1984) EOC ¶ 92-013.
- xv. The *Bailey* case itself serves as a prominent example of changing institutional attitudes. The Australian National University readily conceded an historical pattern of sex discrimination at the university and provide evidence of the institution of policies to overcome past discriminatory policies.
- xvi. See, for example s 5(1) *Sex Discrimination Act* 1984 (Cth).
- xvii. See, for example s 24(1)(b) *Anti-Discrimination Act* 1977 (NSW).
- xviii. See *Boehringer Ingleheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 at 20 per Mahoney JA.
- xix. For example, Scott, J. (1988).
- xx. 401 US 242 (1971).
- xxi. See *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165.
- xxii. The Commonwealth legislature has responded to pressure concerning the formulation of the concept of indirect sex discrimination by amending the Commonwealth *Sex Discrimination Act* 1984 to include a modified test for indirect sex discrimination in s 5(2) in the following terms: '...a person ("the discriminator") discriminates against another person ("the aggrieved person") on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have the effect of disadvantaging persons of the same sex as the aggrieved person.'
- xxiii. See Graycar, R. & Morgan, J. (1990), 30-62; especially 56-62.
- xxiv. In the exaltation of universities as places of 'light, liberty and learning' in the House of Commons on 11 March 1873, Benjamin Disraeli expressed a rosy ideal not recognisable in the era of mass higher education over a century later and perhaps never truly applicable to the Australian tertiary education system. See Marginson, S. (1993), 3-28.
- xxv. This reflection is reinforced by the arguments of Mary Jane Mossman who has argued that traditional legal and judicial method (which is employed in equal opportunity tribunal decisions) is inherently impervious to challenge from feminist perspectives. See Mossman, M.J. (1986), 44-45.
- xxvi. This is a thorny issue not addressed directly by Barbour J. The process of specialisation and development of expertise is integral to academic work. However, the decision by universities to advertise employment in particular fields of expertise to the exclusion of others has not been subject to systematic challenge.
- xxvii. Above n 14, at 75, 414.
- xxviii. Above n 14, per Barbour J: 'It must be obvious to anyone who keeps any eye on the educational news in the present situation that there are real problems facing tertiary education institutions, not only because of the stringent financial position but because these are times of change when all sorts of modifications to attitudes have to be made. On(sic) such is the modification of attitude which must necessarily be made to meet the requirements of the anti-discrimination legislation. Perhaps as a by-product in part of the

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- financial stringency there is a very real problem in the question of these temporary appointments of one sort or another. That is a matter which I know is being discussed at various levels and very responsibly so.'
- xxix. Above n 14.
- xxx. It is arguable that fundamental changes to professional culture are required of the tertiary education sector in Australia in view of both its transformation to a mass system of higher education, and the vast metamorphosis in the number and composition of the work force. In light of these factors it is clear that change cannot be achieved through dilettante tinkering with existing work place norms. Feminists have advocated systemic change which encompasses feminist perspectives. For example, see Yeatman, A. (1993) The gendered management of equity-oriented change in higher education. In D. Baker & M. Fogarty (eds) (1993) 14-27.
- xxxii. *Empson v Monash University* (1995) EOC ¶ 92-694; *Gray v Charles Sturt University* digest in (1995) 5, 8 *Campus Review* 3.
- xxxiii. See Bagwell, S. (1995) When equality is not academic. 22 February *Australian Financial Review*, 15.
- xxxiiii. See *Empson*, above n 35, at 78,226. The Human Rights and Equal Opportunity Commission commented upon the complaint of 'systemic discrimination', describing it as 'a form of discrimination which is conventionally described as 'indirect discrimination'. But in this instance the allegations are not of a kind which can readily be fitted into the terms of the provision usually seen dealing with indirect discrimination...s 5(2) [*Sexual Discrimination Act* (Cth)].'
- xxxv. The Tribunal described the evidence provided by the equal opportunity officer as 'Speculative in the absence of expertly produced empirical evidence.' See above n 33.
- xxxvi. The landmark decision of the US Supreme Court in *Griggs v Duke Power Co* (above) was noticeably informed by broad policy considerations concerning the negative effects of past disadvantage and stereotypical prejudice upon particular groups. In the *Griggs* case the disadvantaged group was African Americans. However, even in this case the court had recourse to statistical data to establish patterns of disadvantage.
- xxxvii. Cf Gleeson, M.A. (1995).
- xxxviii. See DEET (1993), 23-43.
- xxxix. Above n 31.
- xl. Above n 31.
- xli. Castelman, T. *et al.* (1995) *Limited Access: Women's Disadvantage in Higher Education Employment*. Melbourne: NTEU, 1995.
- xlii. Above n 40, at 100-101.
- xliii. Above n 40, at 113-115.
- xliiii. at 78, 526 'In such cases [as this], the employee will, in the absence of direct evidence of discriminatory attitudes, be forced to rely on indirect inferences to establish discriminatory behaviour. Such cases often involve complex evidence of primary facts and a sophisticated process of drawing inferences from those facts.'
- xliv. at 78,526.

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- xliv. Similar evidence was considered in the *Davies* case above. Bona fide evidence of financial stringency can give rise to the inference that the impugned decision was based on a non-discriminatory reason.
- xlvi. at 78,538.
- xlvii. at 78,540.
- xlviii. This concept was defined in Dr U's report in respect of retention and promotion of individuals within an institution in the following terms: 'Senior members of the organisation will tend to groom their likely successors and select those with whom they communicate easily, whose behaviour is predictable to them, and who can be relied upon to share the values of top management.' The further suggestion was that this process operated on gender lines.
- xlix. At 78,541: '...it is obvious that too much weight must not be placed upon such broad and general propositions in an institution and context where attempts are being made to change the pattern of employment, and one hopes, attitudes are changing. By the same token, the processes of socialisation are subtle and can be deeply imbedded (sic): one should similarly not assume that identification of the problem has resulted in its speedy correction.'
- l. In view of the systemic challenge to university policies, it is significant that Commissioner Basten found at 78,545 that 'the Commission is not persuaded that any benefit is to be achieved by entering the debate as to the appropriate method of assessing academic merit based on publications. There is, as always in such matters, a tension between the desire to establish an objective test...and the inevitable subjectivity in assessing the quality and even the quantity of the work.'
- li. At 78,544.
- lii. See above n 23; McKinnon, C. (1987).
- liii. See above n 50.
- liv. See Thornton, M. (1985).
- lv. See above n 37.
- lvi. See above n 23; Thornton, M. (1985), 36-7: '...the concept of merit is deprived of meaning when considered in isolation from the political lattice in which it is experienced, that is, without regard to the essential referents of sex, race and social class, which remain fundamental determinants of an individual's 'place' in society ... Thus, the merit principle acts as a cipher to compress seemingly race or sex-conscious activity into seemingly neutral personnel decision-making which comports with the status quo.'