SIR RICHARD BLACKBURN LECTURE 1992

"EQUAL RIGHTS AND ANTI-DISCRIMINATION LAW"

by the Hon. Justice Mary Gaudron
High Court of Australia

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Sir Richard Blackburn was revered as Chief Judge, later Chief Justice of the Australian Capital Territory Supreme Court. In that capacity his remarkable intellectual interests, his profound and scholarly knowledge of the law, and his interest in law reform became known to most of us who are gathered here this evening. And we came to know and respect him for his courtesy and warmth of human understanding. I wish to begin tonight's lecture by referring to a case which involved Sir Richard as a judge of the Supreme Court of the Northern Territory, an office he held from 1966 to 1971, when appointed to the Supreme Court of the A.C.T.

The case concerned Mr Dexter Daniel\(^{(1)}\), a noted Aboriginal leader in the Northern Territory who, in 1968, was convicted of having insufficient visible lawful means of support. He pleaded guilty and was sentenced to fourteen days

imprisonment. An appeal was lodged, including against conviction. It came before Sir Richard who allowed the appeal, pointing out that, although the law applied to whites and to Aborigines, it was "an error to assume that there is some one standard of living which is regarded as the norm for all persons in the community" (2). Instead, his Honour ruled, the Court must have regard to Mr Daniel's "actual standard of existence and address itself to the means that he has for support at that standard" (3).

It would be nice to think that the particular problem which Sir Richard had to confront in 1968 had passed into history. And there are reasons why it might be thought to be a problem of a by-gone age. After all, much has changed since 1968.

(2) ibid., at p.104.
(3) ibid.
Some indication of the position of Aborigines in the period when Sir Richard was a judge of the Supreme Court of the Northern Territory can be found in the studies conducted by Elizabeth Eggleston whilst studying for a PhD at Monash University. She undertook extensive field work in the 1960s. That work forms the basis of her book *Fear, Favour or Affection* (4), published in 1976 when she had become the Director of the Centre for Research into Aboriginal Affairs at Monash University. In that book she quoted a study done in 1966 (5) to the effect that "probably 90 per cent of the people of Aboriginal descent in Australia [were] living in poverty, some to a degree matched only in the most backward of the poverty stricken areas of Asia, Africa and Latin America". She pointed out that the consequences of poverty were limited educational attainment and low occupational status (6). She recorded the impact of these factors as they affected Aboriginal people in their contact with the

(4) *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, A.N.U. Press, 1976.
(6) *Fear, Favour or Affection*, pp.7-8.
criminal justice systems in Victoria, South Australia and Western Australia. For example, she wrote from information supplied by the Commonwealth Statistician that, in 1965-1966, "offences against good order represented 68 per cent of charges against Aborigines [but] only 12 per cent of those against whites\(^{(7)}\). She wrote, too, that there was a "contrasting pattern ... for Aborigines and whites"\(^{(8)}\) with respect to imprisonment. She noted, for example, that in 1965 in Western Australia, "Aborigines, forming 2.5 per cent of the population ... and being convicted of 11 per cent of offences, made up 24 per cent of the prison population"\(^{(9)}\).

Much has changed since 1965. More than a quarter of a century has passed, more than a full quarter of the life of the Australian nation. In that time men have walked on the moon and travelled in space; international communism has collapsed and communications technology has brought in its train what Marshall McLuhan

\(^{(7)}\) ibid., p.14.  
\(^{(8)}\) ibid., p.15.  
\(^{(9)}\) ibid.
described\(^{(10)}\) as "the global village", the events of the day, no matter in what remote part, being visible, almost as they happen, on the television screens in our lounge rooms. And "Human Rights" has claimed much of the international agenda, not just in terms of broad propositions, as in the *Universal Declaration of Human Rights* of 1948, but in terms of specific obligations, assumed by independent sovereign states and supervised by the international body concerned - obligations such as are to be found in the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966)\(^{(11)}\).

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\(^{(10)}\) In works such as *Explorations in Communication* (1960) and *Gutenberg Galaxy* (1962).

\(^{(11)}\) See also, with respect to discrimination, provisions in the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social and Cultural Rights* (1966), the *Convention on the Political Rights of Women* (1953), various International Labour Organisation Conventions, including the *Convention Concerning Discrimination in Respect of Employment and Occupation* (1958) and other international instruments, for example, the *Convention Against Discrimination in*
Over that same period, things have changed for Aboriginal people. Perhaps the turning point was the Gurindji protest of 1966, which followed the decision of the Conciliation and Arbitration Commission on the claim for equal pay for Aboriginal stockmen\(^{(12)}\). In its decision, the Commission held that "[t]here must be one industrial law, similarly applied to all Australians, aboriginal or not" but, because most Aboriginals "[were] unable to work in a way which employers would expect of white employees"\(^{(13)}\), equal pay should be deferred for three years. Certainly, the Gurindji brought what was blatant and unmistakable discrimination to public attention. In 1967 the Constitution was amended: s.127 which had excluded Aboriginals from the official population in census taking was deleted; s.51(\text{xxvi}) was amended to include Aboriginals

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\textit{Education} (1960). Note, further, Australia's ratification of the Optional Protocol to the \textit{International Covenant on Civil and Political Rights} which recognizes the competence of an international forum to assess the claims of individuals alleging a breach by Australia of its international obligations under the Covenant.


\(^{(13)}\) ibid., at p.669.
within the scope of the power to legislate for the "people of any race for whom it is deemed necessary to make special laws." In 1975, Australia ratified the U.N. Convention on the Elimination of All Forms of Racial Discrimination and, in the same year, the Commonwealth Parliament legislated to ban racial discrimination\(^{14}\). Since then, discriminatory State and Territory laws have been relegated to the past, often as a matter of government will, but otherwise and to the extent of inconsistency with the Commonwealth Act, as a matter of constitutional dictate\(^{15}\).

Constitutional and legislative changes notwithstanding, many Aboriginal people still live in poverty. The Toomelah Report\(^{16}\) of 1988 describes a "community of 500 Aboriginal people

\(^{14}\) Racial Discrimination Act 1975 (Cth).


enduring appalling living conditions". The report goes on (17):

"Their houses are substandard and overcrowded, actually contributing to a range of diseases".

The connection between poverty and other disabilities is made in these terms (18):

"Community Members display higher than average rates of a range of debilitating diseases for which they cannot get adequate treatment. They suffer from a lack of education and chronic unemployment."

The problem is not confined to Toomelah, nor to 1988. In 1991, the Report of the Royal Commission into Black Deaths in Custody noted the "disadvantaged and unequal position in which Aboriginal people find themselves in [our] society ... socially, economically and culturally" (19).

(18) Finding 9.2
(19) Paragraph 1.7.1.
The Royal Commission described these inequalities as the "more significant factors"\(^{(20)}\) causing Aboriginal people to come into contact with the criminal justice system.

And, it seems that, when Aboriginal people do come into contact with the criminal justice system, very little has changed from the position recorded by Elizabeth Eggleston. In 1991, McRae, Nettheim and Beacroft, writing in *Aboriginal Legal Issues*, observed that "Aborigines are, overall, 20 times more likely to be apprehended by the police and placed in police cells than non-Aborigines, mostly for trivial offences, whose criminal status is controversial."\(^{(21)}\) They refer to a 1988 survey\(^{(22)}\) showing that "64 per cent of Aborigines were in custody as a result of drunkenness or 'good order' offences", a proportion only marginally different from that noted by Elizabeth Eggleston for 1965.

\(^{(20)}\) ibid., vol.4, p.1.
Additionally and acknowledging the difficulties of obtaining accurate statistics, they quote various surveys of imprisonment rates showing that Aborigines are more likely to be gaolied than whites by factors ranging from 10% to 23%\(^{(23)}\). They cite Clifford\(^{(24)}\) as estimating in 1982 that "Aborigines [were] the most gaolied group in the world, even exceeding blacks in South Africa".

No one pretends that the position of women is truly comparable with that of the Aborigines of our society, but certain parallels may fairly be noted. Women too campaigned for equal pay and equal rights. Equal pay was won, but not for the first time, in 1972\(^{(25)}\). It had been won before in 1969\(^{(26)}\). And it may be that it may have to be won again. In 1992, average male and female earnings were far from equal, with women earning


\(^{(26)}\) *Equal Pay Case* (1969) 127 C.A.R. 1142 established the basic principle that those doing the same work should be paid the same wage.
only 84 per cent of the average ordinary time weekly wages of Australian men.\(^{(27)}\)

As a result of their campaign for equal rights, Australian women were early beneficiaries of anti-discrimination legislation, with legislation proscribing sexual discrimination being enacted in South Australia in 1975 and New South Wales and Victoria in 1977. And in 1984 the Commonwealth Parliament enacted the \textit{Sex Discrimination Act}, the 8th Anniversary of which is to be celebrated on Saturday next, 1 August.

Modern anti-discrimination legislation operates across a broad spectrum, but one might think that its effects would be noticeable, if at all, in the field of employment - the more so,

\(^{(27)}\) See Australian Bureau of Statistics, \textit{Average Weekly Earnings, States and Australia}, February 1992, Catalogue 6302.0. If total earnings (including overtime rates) are considered the figure falls to 80%. For a description of the comparable position in Britain, see Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain", (1991) 18 \textit{Melbourne University Law Review} 277, at pp.278-279.
because individual rights in that area are, in many cases, supplemented by legislative provisions directed to ensuring some measure of affirmative action\(^{(28)}\). However, there is little reason to think that this legislation has had much bearing on the position of women in the workforce. It is generally accepted that, notwithstanding their greater participation and notwithstanding some individual achievements in male dominated areas, the general pattern of women's employment has not changed greatly since 1970, with women still clustered in the lower paid jobs and, increasingly, in part-time or casual

employment (29).

Of course, nobody expected anti-discrimination legislation to transform society; no one would criticize it for not doing so. Indeed, it would be a very large step to even suggest that the legislation has failed, assuming, for the moment, that one could identify the criterion by which

(29) With respect to the sex segregation of the workforce, a 1980 O.E.C.D. study, Women and Employment, showed that Australia had the highest degree of such segregation of all the countries surveyed, cited in Thornton, "Comment on Linda Dickens' Road Blocks on the Road to Equality: The Failure of Sex Discrimination Legislation in Britain", (1991) 18 Melbourne University Law Review 298, at p.299. By 1992 the situation seems not to have improved greatly. According to The Labour Force in Australia, Australian Bureau of Statistics, May 1992, Catalogue No.6203.0, 55% of women were employed as clerks, sales-assistants and personal-service workers; 67% of all teachers are women while women constitute 93% of all registered nurses. In total, 70% of all women workers still cluster in the relatively poorly paid areas of clerical work, teaching, nursing and personal services. With respect to part-time employment, Burton, in The Promise and the Price, Allen and Unwin, 1991 cites studies which suggest that the overall changes in women's employment can be accounted for, to a significant degree, by the rise in part-time employment of women. In 1992, 42% of women worked part-time compared with only 10% of men, The Labour Force in Australia, ibid. pp.148-149.
success or failure should be measured. But the fact that many things remain much as they were twenty-five years ago must give cause for concern. And it may be that modern anti-discrimination legislation has influenced, or, perhaps, shaped our current attitudes, and not entirely for the good. In particular it may have entrenched some inexact, if not inaccurate, notions of equality; and it may be blinding some of us to what justice or equality demands in the particular case.

There is a temptation to regard modern anti-discrimination legislation as the answer, if not to all problems of prejudice, at least to those core problems which result in discrimination against members of the less powerful groups.(30)

(30) The coverage of the various pieces of legislation varies from jurisdiction to jurisdiction. In general groups which can utilise the legislation are women, Aboriginal people, ethnic minorities, people with physical or intellectual disabilities and, in some cases, homosexuals and the aged. Some jurisdictions proscribe discrimination on the basis of religious or political conviction. It must, of course, be noted that the legislation is of general application. It prohibits discrimination on

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in the various areas of public life\(^{(31)}\) in which the legislation operates. There is a temptation to say, particularly of women, that there is now no barrier to success; that, with the passage of time, equality will be achieved if women avail themselves of the opportunities that have been opened up. Of course, there are some interesting, perhaps, subtle variations of that attitude including the notion of "the glass ceiling" - a euphemism which suggests that women are held back, not by reason of discriminatory practices or unequal treatment, but on account of some mysterious indefinable \textit{"je ne sais quoi"}, some phenomenon not quite capable of explanation. It is a notion that suggests, ever so delicately, that women have achieved all the equality of which

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the basis of "sex", for example, and can, theoretically, be used by men as members of a more powerful group.

\[\text{(31) Again the legislation differs from jurisdiction to jurisdiction. The \textit{Sex Discrimination Act 1984} (Cth), for example, prohibits discrimination in employment, partnerships, qualifying bodies, registered organizations, employment agencies, education, the provision of goods, services and facilities, accommodation, land and clubs.}\]
they are capable or, perhaps, all the equality that they desire(32).

The notion of equality that invests and informs modern anti-discrimination legislation is, in many respects, a very blunt instrument. It proceeds, for the most part, on the basis that equality requires identical treatment, or, in some cases, identical outcomes. It confines the notion of discrimination within two narrow categories, called "direct discrimination", where there is different treatment, and "indirect discrimination" where, despite the same treatment, there is a different outcome.

(32) Taking the notion one step further, the central thesis in a number of recent books is that a "backlash" is occurring because women are perceived as having achieved too much equality, that this has transgressed their "fundamental natures" and has left them mentally and physically ill, barren, unwed and unhappy. Faludi, in Backlash: The Undeclared War Against Women, Chatto & Windus, 1992, exposes these "myths" and argues that the idea that feminism has achieved equality for women which they don't want is in reality a "rising pressure to halt, and even reverse, women's quest for ... equality". See also French, The War Against Women, Hamish Hamilton, London, 1992.
The notion of "indirect discrimination" derives from the decision of the Supreme Court of the United States of America in *Gribs v. Duke Power Co.* (33), where a uniform educational standard resulted in fewer blacks than whites being employed in particular trade categories, the standard having no direct relevance to the work to be performed. That notion and its derivatives found in modern anti-discrimination legislation (34) seem to proceed on the basis that

(33) 401 U.S. 424 (1971).
(34) See, for example, s.5(2) of the *Sex Discrimination Act 1984* (Cth):

"For the purposes of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition -

(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

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what is involved is a test which, although it looks as though it is measuring something else, is really measuring some characteristic or attribute which is different in each of the different groups affected - hence the expressions "facially neutral" and "adverse effect discrimination" (35). If the rationale for the notion of "indirect discrimination" is, as I suggest, that some neutral test or standard is really measuring some characteristic or attribute which is found in the group affected, then it is, in essence, concerned with different treatment on a ground that the law says is not to be taken into account. In other words, it is concerned with direct discrimination, albeit direct discrimination that is artfully or, perhaps, not so artfully disguised. Despite this, there is a tendency for people to think that indirect discrimination is not real discrimination, not real injustice, but a

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(c) with which the aggrieved person does not or is not able to comply."

statutory fiction or deemed discrimination - perhaps, even, reverse discrimination.

The notion that equality or equal treatment requires the same or undifferentiating treatment is one which is embodied in our traditional notions of jurisprudence. However and outside the realms of mathematics and physics, it is one that is not easily susceptible of rational explanation. After all, we are all manifestly different, with different abilities, different educational attainments and occupying different positions in the socio-economic hierarchy. And what is society, if not individuals with their individual differences and inequalities, which, the socio-economic indicators suggest, are becoming more and more marked?

Other philosophies and other systems of jurisprudence have developed other concepts of equality - concepts which comprehend individual difference. To go back, more or less to the
beginning, Aristotle\(^{(36)}\) spoke of equality in this way:

"... if the people involved are not equal they will not justly receive equal shares; indeed, whenever equals receive unequal shares or unequals equal shares in a distribution, that is the source of quarrels and accusations."

Similarly, the French Declaration of Human Rights 1789 proclaimed a doctrine of equality which allows for individual difference. It provided:

"... all ... are equally eligible for all honours, places and employments according to their different abilities, without any other distinction than that created by their virtues and talents".

Starting from first principles, one would think that a logically coherent doctrine of equality would, like the French Declaration, comprehend the different abilities, the different

\(^{(36)}\) *The Nichomachean Ethics*, Book V.
virtues and the different talents of the individuals who make up society. But, our jurisprudence developed differently. Jeremy Bentham, the founder of traditional English jurisprudence, contemptuously dismissed the theory behind the French Declaration of Rights, describing it as "nonsense on stilts"(37).

And, a theory of equality which takes no account of difference is not only vulnerable to logical attack, it is also productive of injustice. So much emerges clearly from the writings of Sir James Fitzjames Stephen Q.C.(38) directed to answering the outrageous notion propounded by John Stuart Mill that(39) "the principle which regulates the existing social relations between the ... sexes ... ought to be replaced by a principle of perfect equality." Not surprisingly, the idea of "perfect equality" was

(38) Author of Stephen's Commentaries, draughtsman of the Stephen Criminal Code, upon which the Criminal Codes of Queensland, New Zealand and Canada (amongst others) are based.
understood to mean undifferentiating treatment, and Stephen asked whether the law should regard marriage as "a contract between equals" or as "a contract between a stronger and weaker person". He answered this question saying *(40)*:

"... a law which proceeded on the former ... would be founded on a totally false assumption, and would involve injustice ... especially to women".

He explained that a contract of that kind "would make women the slaves of their husbands" for a husband "does not in any degree impair his means of earning a living", whereas, "[w]hen a woman marries she practically renounces in all but the rarest case the possibility of any profession but one ..." *(41)*.

Fortunately, some things have changed since 1873 when Stephen wrote his answer to John Stuart Mill. Notably, social values have changed so that

*(40)* *Liberty, Equality and Fraternity*, Holt and Williams, 1873, p.214.
*(41)* ibid., p.215.
we now proclaim the equality of the sexes, although often without any very precise idea of what equality is or what it entails. Because social values have changed in that way, it is easy to dismiss what Stephen said. But what he said contains a large measure of truth for, where there is underlying inequality, undifferentiating treatment is likely to be productive of cruel injustice: it is likely to compound or exacerbate existing disadvantages; and even though the contrary be intended, it is likely to carry forward the continuing effects of past discrimination. So much is clearly illustrated by Stephen for, so long as women had no means of gaining a livelihood by their own economic endeavours, "protective" laws and "protective" attitudes which entrenched economic dependence were preferable to the known alternatives, prostitution and slavery.

If inequality of a particular kind, including that resulting from past discrimination, is confined to a particular group, undifferentiating treatment which compounds that inequality may be revealed by the "indirect discrimination"
provisions of our anti-discrimination laws. They may reveal that so-called undifferentiating treatment is, in effect, another way of differentiating to the detriment of the members of the group affected\(^{(42)}\). But most times, the underlying inequality will not be quite so specific and undifferentiating treatment, masquerading as equal treatment, may well add to the disadvantages already present.

In recent years there has been a tendency for our law to develop more sophisticated notions of equality and discrimination, particularly in the constitutional field\(^{(43)}\), and to recognize that, on occasions, difference must be taken into account. As was explained by Brennan J. in *Gerhardy v. Brown*\(^{(44)}\), different treatment may be "justified by special circumstances." In general

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\(^{(42)}\) See, for an example of undifferentiating treatment which carried forward the effects of past discrimination and was struck down as "indirect discrimination", *Australian Iron and Steel v. Banovic* (1989) 168 C.L.R. 167.


\(^{(44)}\) (1985) 159 C.L.R. 70, at p.127.
terms, the law now tends to recognize that true equality of treatment requires that artificial and irrelevant distinction be put aside, but that distinctions which are genuine and relevant be brought to account.

When equality is expressed in these terms, traditional jurisprudential notions notwithstanding, it is revealed, not as a new idea, but as something quite old. It is the old, familiar duty to act judicially, given expression in a slightly different context. The duty to act judicially has always required that relevant factors be given their proper weight and that irrelevant considerations be put out of mind. Of course, it has always been and will continue to be difficult to determine what is and what is not relevant to the attainment of equality.

To the extent that questions of relevance involve subjective assessments or value judgments, there is always a risk that our own preconceptions and prejudices, often unrecognized and mostly unstated, will produce decisions which suggest,
contrary to what was said by Sir Richard Blackburn in *Daniel v. Belton*\(^{45}\), that there is only one social norm. But we must realize that where difference becomes disadvantage, whether economic, social or cultural, failure to look beyond our preconceptions of the social norm will, almost certainly, produce further disadvantage and, thus, work further injustice.

We cannot ignore the fact that there are disadvantaged groups in our society. The task of determining what are or are not relevant differences is thus an important one. And some who are already disadvantaged are further disadvantaged because they are shut out from legal advice and legal representation. That, it seems, grows more and more likely as increasing demands are made on the limited resources of our legal aid schemes. Thus what is already an important task is likely to become an increasingly difficult one.

\(^{45}\) Supra.
The identification of artificial and irrelevant distinctions is the first task in ensuring equality, for distinctions of that kind lead inevitably to injustice\(^{(46)}\). That has been emphasized by modern anti-discrimination legislation and by the modern discourse of equality. We know that, on this account, we must confront our preconceptions and our prejudices. We know that we must reject notions of inherent inferiority on account of membership of some group or on account of some characteristic that defines that group. That is the focus of modern anti-discrimination legislation. But I wonder if that focus with its emphasis on uniform treatment and uniform outcomes has not obscured the "special" needs of those who are suffering disadvantage, whether because of past discrimination or otherwise. I wonder if we are failing to recognize genuine and relevant differences flowing from economic, social and

\(\text{\(46\) For a critical and persuasive English account of the injustice of artificial distinctions, see M. Wollstonecraft,}\) 

\(\text{\textit{Vindication of the Rights of Women, 1792, Ch.9 - "Of the Pernicious Effects which Arise from the Unnatural Distinctions Established in Society".}}\)
cultural disadvantage created and, perhaps unwittingly, perpetuated by society.

It is quite beyond my ability to explain why it is that the pattern for conviction and imprisonment of Aborigines remains much the same as it was twenty-five years ago or, for that matter, why there have not been greater gains made by women. But I cannot help wonder if the discourse of equal rights, which rightly disparaged "paternalism" and "patronising behaviour" and the notions of uniform treatment and uniform outcomes which lie behind modern anti-discrimination legislation have not led us back to old jurisprudential notions that decreed, in effect, that equality was uniformity. I wonder whether we think that uniform treatment is necessary or, if not necessary, the easier and the safer course of action. I wonder if we have, to some extent, forgotten what Sir Richard Blackburn said in Daniel v. Dexter about there being no one social norm, about the necessity to look to the circumstances of the individual.