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Reducing the complainant's evidentiary burden of proving indirect sex discrimination in the workplace claim – Easier said than done?

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Abstract

In Australia, the Federal Parliament enacted the Sex Discrimination Act 1984 (Cth) (SDA) in 1984, which aimed to eliminate discrimination and promote the concept of gender equality in various social spheres. The SDA outlawed both direct and indirect sex discrimination in employment. The indirect sex discrimination provisions were amended substantially in 1995, in the attempt to reduce the burden of proof on the complainant and better reflect the SDA's legislative purposes. However, it is evident that current relevant provisions still fall short of this optimistic expectation.

This paper seeks to unveil the shortcomings of the elements in the complainant's evidentiary burden through analysing the judges' interpretation in cases relating to workplace disputes. The legislative limitation results from the opaque language of the provision, the lack of guidance to assist the courts in interpreting the elements of the test, and the inconsistency in the judges' approach when conveying the beneficial purposes of the legislation. Based on the analysis, this paper suggests greater clarity to the interpretation of the test in resolving indirect sex discrimination cases.

I. The Complainant's Evidentiary Burden of Proving Workplace Indirect Sex Discrimination

In Australia, the Federal Parliament enacted the first federal act in 1984, which was the Sex Discrimination Act 1984 (Cth) (SDA),[1] as part of its international obligation after signing and ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[2]. The legislative purposes of the SDA are stipulated under section 3, which focusses on eliminating discrimination to the maximum extent in various social spheres and promoting the notion of gender equality.[3] In the light of these purposes, the SDA prohibits direct and indirect discrimination on the ground of sex.[4] While direct discrimination focusses on mitigating the detriment suffered by an individual by reason of unfair treatment, the concept of indirect discrimination was introduced to combat more structural disadvantages suffered by a wider range of vulnerable women.[5] When reviewing the effectiveness of the indirect sex discrimination

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[1] "Milestones for Australian Women since 1975" (24 September 2015) ABC News <abc.net.au>.
[2] Margaret Thornton and Trish Luker "The Sex Discrimination Act and Its Rocky Rite of Passage" in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (The Australian National University, Canberra, 2010) at 27–28.
[3] Sex Discrimination Act 1984 (Cth), section 3 [SDA].
[4] Section 5.
[5] Romary Hunter *Indirect Discrimination in the Workplace* (The Federation Press, Alexandria (NSW), 1992) at 11–12.

legislation of the SDA,[6] many academic commentaries agreed that these provisions fall short from achieving the SDA's legislative aims. This results from the vagueness of the language of the current section 5(2) and the lack of guidance for interpretation from the federal judges.[7] This paper focusses on evaluating the current indirect sex discrimination provisions under section 5(2) of the SDA through the undirected language of the current provision, and the federal court's judgments relating to indirect sex discrimination in employment.

As introduced in 1984, the indirect discrimination test in the SDA required complainants to bear the entire burden of proving the elements of indirect discrimination. Under this version, the burden of proof included proving:

1) the existence of the condition or requirement;
2) that there was a substantially higher proportion of the people of the same sex as the aggrieved person that did not or cannot comply with the requirement;
3) that the aggrieved person did not or cannot comply with such requirement; and
4) that the requirement was not reasonable having regard to the circumstances.[8]

Report 69 – Equality before the Law of the Australian Law Reform Commission[9] criticised the original SDA for imposing heavy evidentiary responsibility on the complainant and suggested that certain legislative reforms should be adopted to mitigate this. In response to this report, the government proposed to amend section 5(2) of the SDA, as well as adding sections 7B and 7C, which shift the onus of proving the reasonableness test to the respondent.[10] These reforms were expected to "fundamentally alter the way in which claims of indirect discrimination are to be handled".[11]

In relation to the complainant's burden of proof, the amended section 5(2) of the Sex Discrimination Amendment Act 1995 (Cth) stipulates that indirect sex discrimination will be proved when:

> … 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.

[6] Australian Human Rights Commission *Free and Equal - An Australian Conversation on Human Rights* (2019) <humanrights.gov.au>; see also Australian Standing Committee on Legal and Constitutional Affairs *Effectiveness of the Sex Discrimination Act 1984 In Eliminating Discrimination And Promoting Gender Equality* (12 December 2008); Belinda Smith "It's about Time - For a New Regulatory Approach to Equality" (2008) 36(2) FL Rev 117; and Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (The Australian National University, Canberra, 2010).
[7] Beth Gaze " The Sex Discrimination Act After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives" (2004) 27(3) UNSWLJ 919–920.
[8] SDA, section 5(2).
[9] Australian Law Reform Commission *Equality Before the Law: Justice for Women* (25 July 1994); and Australian Law Reform Commission *Equality Before the Law: Women's Equality* (21 December 1994).
[10] Explanatory Memorandum, Sex Discrimination Amendment Bill 1995 (Cth) 1, at 4–6.
[11] (28 June 1995) AUPD HR 2499.

Under this revised provision, the complainant now only has to prove:

1) the existing or proposed condition, requirement or practice; and
2) which has or likely to create the disadvantaging effects on the people of the same sex as the aggrieved person.

Further discussion in sections IIB and IIC below show that the elements belonging to the complainant's burden of proof, though being substantially amended, bring ambiguity and unpredictability when used to decide workplace disputes.

II. Evaluating the Complainant's Evidentiary Burden in Proving Indirect Sex Discrimination Claim in the Employment Area

A. Limited Number of Cases and Low Success Rate

Under the SDA, there is no legislative guidance assisting the interpretation of section 5(2) and the understandings of this provision rely mostly on the federal courts' judgments. However, during the period from 1984 to 2019, the total number of indirect sex discrimination claims heard by the federal courts was low and very few of them were ultimately successful. There were only seven court decisions that determined indirect discrimination claim in employment, amongst which only three were in favour of the complainants.[12] The analysis in the next section will also show that, in the last decade, the federal decisions leave the complainant and the federal judge in future cases with blurriness and unpredictability in the outcome of future complaints.

Moreover, as seen in the relevant annual reports from the Australian Human Rights Commission,[13] most of the sex discrimination complaints have been resolved during the conciliation process because of its benefits[14]. This contributes to the fact that there are only a small number of claims reaching the courts and tribunals for formal hearings.[15] It is uncertain in the future whether there will be more complaints that are settled by the Court in a formal hearing, to add to the four cases concerning indirect sex discrimination in employment that have already been heard.[16] As a result, the facts in future relevant claims might be read by the judges and the parties with little guidance. A closer look at the basis of the indirect discrimination complaints reveals that, although the SDA does not include protection against indirect discrimination on the grounds of family responsibility, all four complaints applying the amended SDA involved the matter of family responsibility. They were based on the fact that their request for flexible working arrangements was denied by their

[12] *Commonwealth of Australia v Human Rights And Equal Opportunity Commission* (1997) 80 FCR 78 [*Commonwealth Bank Case*]; *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 [*Escobar*]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209 [*Mayer*]; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 [*Kelly*]; *Howe v Qantas Airways Ltd* [2004] FMCA 242 [*Howe*]. There are seven decisions delivered by different court levels following the federal jurisdiction. However, two of them were rendered by different court levels and concerned one indirect sex discrimination claim. Therefore, in calculating the cases, these decisions were regarded as a single case.

[13] Australian Human Rights Commission *Australian Human Rights Commission Annual Report 2017–2018* (Australian Human Rights Commission, Sydney, 2018).

[14] Smith, above n 6, at 134.

[15] Dominique Allen "Behind the Conciliation Doors" (2009) 18(3) GLR 780–781.

[16] *Escobar*, above n 12; *Mayer*, above n 12; *Kelly*, above n 12; and *Howe*, above n 12.

employers. Because of the similarities in the substances of the claims, later indirect discrimination complaints involving the matters of domestic responsibility could refer to these precedents to initiate how the elements of section 5(2) may be understood. However, in future situations where other sex-related attributes, such as physical features, constitute the basis of the claim, it is difficult to predict how the claim will be assessed against the elements under section 5(2). In the social context where more working women are attending the workforce, which deepens the needs for working flexibility,[17] this represents a legislative gap of the current indirect discrimination legislation.

B. Proving the "Requirement, Condition or Practice"

This element under the current section 5(2) is different from its original version in two aspects. First, instead of outlawing the existing requirement or condition, the current SDA allows the claims against a proposed employment policy from the employer. For each of the four cases resolved under the amended section 5(2), the matter of consideration was the existing practice of denying a part-time work request from employees. This means how the proposed requirements, conditions or practices should be proven, and whether proving this element requires a higher standard of proof, are undetermined.

Second, the form in which indirect discrimination is presented includes, not only a requirement or condition, but also "practice" of the employer. This additional term "practice" contributes to clarifying that the intention of the legislation is to allow a broad interpretation of what is determined to be a "condition, requirement or practice" and lessens the impression that the subject of this section is only the policy that requires the employee to do something.[18]

Despite the attempt to expand the protection of the current indirect sex discrimination test under section 5(2) through the change in the language, there is a lot to say about the problematic interpretation of the test through analysing four Federal Magistrates' judgments[19]. Among these, three were heard by the same judge, Driver FM.[20] The first indirect sex discrimination case applying the amended test was *Escobar v Rainbow Printing Pty Ltd (No 2)*.[21] The complainant, Ms Escobar, was returning to work after maternity leave and requested a part-time position to accommodate her family responsibilities. However, her employer denied the request and dismissed her on the basis that she was unavailable to work full-time.[22] Driver FM's reasoning contributed to setting out the primary approach to this kind of claim, by reasoning that such denial is indirect discrimination on the ground of sex. Additionally, his Honour also asserted that it is commonly accepted that women bear the dominant role as caregivers. Therefore, it is general knowledge that they will be adversely impacted by this denial. This view was again adopted by Driver FM in ruling in favour of the complainant in *Mayer v Australian Nuclear Science & Technology Organisation*.[23]

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[17] John Von Doussa and Craig Lenehan "Barbequed or Burned – Flexibility in Work Arrangements and the Sex Discrimination Act" (2004) 27(3) UNSWLJ 892; and Beth Gaze "Quality Part-Time Work: Can Law Provide a Framework?" (2005) 15(3) Labour & Industry 89.
[18] Hunter, above n 5, at 196.
[19] *Escobar*, above n 12; *Mayer*, above n 12; *Kelly*, above n 12; and *Howe*, above n 12.
[20] *Mayer*, above n 12; *Escobar*, above n 12; and *Howe*, above n 12. All of these cases were heard by Driver FM.
[21] *Escobar*, above n 12.
[22] At [37].
[23] *Mayer*, above n 12, at [70]–[71].

This approach began to diverge in the last two decisions of the Federal Magistrates Court, where relatively similar facts were presented. In *Kelly v TPG Internet Pty Ltd*,[24] there was an offer that Ms Kelly be promoted to billing manager of the company. After returning from maternity leave, Ms Kelly requested a part-time working arrangement which the employer refused to accommodate. Instead, her employer, TPG Internet, offered her the choice of either a full-time position or a casual position that had limited benefits. Shortly after considering herself to be constructively dismissed, she filed claims of both direct and indirect discrimination against the employer. In rejecting her indirect discrimination claim, Raphael FM distinguished the refusal of a request for a benefit that is not currently provided from what was "generally available" for access.[25] There was no part-time position generally granted within the company and, for that reason, the refusal to accommodate this request could not be perceived as putting Ms Kelly under a detriment.[26]

In *Howe v Qantas Airways Ltd*,[27] Driver FM contradicted the reasoning of Raphael FM on many aspects, including Raphael FM's argument regarding the legitimacy of the employer's denial of working flexibility request. Ms Howe, a previously full-time flight customer service manager, upon returning to work after maternity leave, sought more flexible working arrangements. However, her application for a part-time customer service manager role was declined and, eventually, she was granted a flexible working arrangement as a flight attendant on a long-haul flight which involved demotion and a reduction in pay. Ms Howe claimed that she was forced to transfer to a position with lower seniority and remuneration, which resulted in her being indirectly discriminated against on the ground of her sex. Driver FM found that her claim for indirect discrimination was not substantiated, as Qantas was not in control of providing a part-time arrangement for her proposed position. Additionally, she was offered the alternative part-time position, which was a flight attendant, though it was at a lower rank than her then position being customer service manager. His Honour favoured the respondent on the basis that Ms Howe did not suffer from detriment when accepting the flight attendant position to accommodate her family responsibilities.[28]

The ruling of Raphael FM in *Kelly* sparked concerns because it did not encourage employers to adjust working conditions to accommodate domestic responsibility. In contrast, it allowed possible mischief where the respondent may eschew providing a flexible working policy on a regular and reasonable basis without facing legal compliance risks. Driver FM's judgment in *Howe* also failed in conveying the SDA's intention to promote equal opportunity because it validated the employer's insistence on full-time working requirement by ignoring that the fact an employee with family responsibilities was forced to choose among restricted options.[29] This inconsistence in the way the judges in these cases interpreted the provisions impedes the promotion of positive accommodation for working women and the enhancement of gender equality, which belongs to the SDA's legislative aims.[30] Additionally, all four indirect sex discrimination cases using the SDA following the 1995 amendment were heard by only two judges, who had different approaches from each

[24] *Kelly*, above n 12.
[25] At [80].
[26] At [82].
[27] *Howe*, above n 12.
[28] At [130]–[131].
[29] At [102]; K Lee Adams "Indirect Discrimination and the Worker-Carer: It's Just Not Working" (2005) 23(1) LIC 27; Gaze, above n 17, at 100; and Doussa and Lenehan, above n 17, at 903–904.
[30] Doussa and Lenehan, above n 17, at 903–904.

other in evaluating the denial of a benefit in employment. It is not possible to predict whether Driver FM or Raphael FM's approach regarding the denial of flexible working arrangements in the workplace will be adopted in later cases.[31] This deters the indirect sex discrimination test under section 5(2) from properly responding to social changes.

C. The Introduction of "Disadvantaging Effects" as an Element of Indirect Discrimination

As shown above, one of the elements of the original indirect sex discrimination test under section 5(2) was the proving of the discrepancy in compliance rate between sexes. This element was then removed from the test in the 1995 amendment. Instead, the disadvantaging effects of the condition, requirement or practice constitutes one element of the test.[32] At first sight, the complainants are released from the responsibility to prove a "substantially higher proportion" of men than women can comply with the requirement, which means the complex statistical analysis[33] for disparate compliance rate associating with the test was no longer necessary.[34] Yet there is uncertainty surrounding the interpretation of this element about which types of evidence the complainants could use to demonstrate that the requirement has the effect of disadvantaging them, and how the evidence is to be analysed by the judges.

In the cases *Escobar*, *Mayer*, *Kelly,* and *Howe,* discussed above, statistical data was not required by the federal courts for the establishment of the disadvantaging effects of the requirement. The federal judges consistently maintained the assumption of women's "disproportionate responsibility for the care of children" when considering the adverse impacts of the impugned policy.[35] It could be seen that the use of common knowledge made it fairly straightforward to set out the disadvantage of women in cases involving matters relating to domestic responsibility. However, there is indeed a limit in using common knowledge in substitution for statistical data in proving the disadvantaging effects of the requirement. Common knowledge may only be used in some circumstances where it involves information that is widely accepted among the public sphere and fits the factual findings of the case,[36] which, in the presented cases, is the imbalance in bearing domestic responsibility. In the employment area, indirect discrimination on the grounds of sex can arise from assorted kinds of conduct of the employer. In the recruitment process, a claim may be prompted against a company insisting that its employees meet a minimum standard of height and weight. Gender traits hinders a considerable number of female workers from satisfying physical requirements and this criterion may be deemed indirect discrimination, unless it is proved to be reasonable following the reasonableness test. Hence, both the parties and the courts must refer to a range of evidence that is well established when assessing the disadvantaging impacts of the requirement of a specific gender.

Moreover, section 5(2) stipulates that the complainant only needs to argue that the policy brought the "disadvantaging effect" to those with the same sex as the aggrieved person. There are not enough decisions to suggest whether it is necessary for the detrimental effects to be the result of

[31] Gaze, above n 17, at 100.
[32] Sex Discrimination Amendment Act 1995 (Cth), section 5(2) [SDA 1995].
[33] Beth Gaze "The Sex Discrimination Act at 25: Reflections on the Past, Present and Future" in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (The Australian National University, Canberra, 2010) at 116–117.
[34] At 117.
[35] *Escobar*, above n 12, at [37]; *Mayer*, above n 12; *Kelly*, above n 12; and *Howe* above n 12.
[36] Evidence Act 2008 (Cth), section 144.

the comparison between the effects on people of the opposite sex. Therefore, in future cases where common knowledge is not available to support the proving of disadvantaging effect, the federal judges are assigned with great discretion to decide the analytical method to evaluate the disadvantaging effects of the impugned requirement. On one side, this means instead of imposing a rigid requirement on how to establish the impacts of the requirement, as in the pre-amendment provisions, the current language facilitates the courts and tribunals' flexibility in exercising their discretion in interpreting the statistical evidence where necessary. On the other side, this hinders the future parties and judges from navigating how and to what extent the disadvantage impact should be established. The next section will discuss possible legislative reforms to the elements of section 5(2) that could contribute to enhancing clarity and assist interpretation of the legal provision.

III. Mitigating and Overcoming the Ambiguity of the Complainant's Burden of Proof

D. Additional legislative guidance following section 5(2)

In terms of improving the SDA, the Australian Human Rights Commission recently suggested in the national conversation that federal legislation should be "clear",[37] "consistent", "comprehensive", "intersectional", "remedial", "accessible" and "preventative".[38] The following proposals for legislative reforms in this paper serve to enhance a more "comprehensive" and (clearer) legal framework to redress substantive inequality. The legislative supports for comprehensive legal provisions range from additional legislative guidance and practical illustrations to the non-statutory resource assisting the interpretation of the law.[39]

For the purpose of ameliorating the unpredictability of the test for disadvantageous effect under section 5(2), an extra explanation could be included as a subsection to section 5(2) or in form of a stand-alone provision. One example of the existing legislation guidance is section 7B(2) of the SDA. This section provides a list of factors that could be used in determining reasonableness of the alleged discrimination. The value of section 7B(2) is that it codifies the most general factors constituting the basis for the assessment of reasonableness. In future cases, regardless of the basis of the complaint, this legislative guidance serves as the starting point to suggest the adjudicators in customising the criteria against which the reasonableness test in the present case could be assessed.

Provided that a similar legislative explanation is included as a statutory mechanism explaining the complainant's evidentiary burden under section 5(2), it could help set out the general range of decisions from the employer that could fall into the scope of indirect discrimination legislation. For example, under section 11 of the Anti-Discrimination Act 1991 (Qld), the equivalence to the SDA's "condition, requirement or practice" is defined as "term". This definition is further explained under section 11(4) of this Act to include "condition, requirement or practice, whether

[37] Australian Human Rights Commission, above n 6.
[38] At 6–7.
[39] The suggestion regarding real-life examples that could be included into the provisions will be discussed in section E below.

or not written".[40] This type of additional legislative guidance proves its value best in formulating the evidentiary standards of the test for disadvantaging effects. This guidance may be used to explain the necessity of using statistical analysis and the need for proving disparity in disadvantaging effects suffered by people of the opposite sex. As a result, the vagueness of the current section 5(2) could be substantially reduced.

However, it is likely that this guidance may adhere to the existing challenges possessed by the current legislative guidance under section 7B(2). The standardised test could create a false impression of a restricted set of criteria used in future judgments, which may deter the judges from flexibly interpreting the meaning of the law. In an ever-changing society with diverse scenarios of conflicts in the workplace, this could be a challenge to future legislative development. To mitigate the legislative risk borne by this suggestion, apart from requiring a careful drafting process to transfer the beneficial purposes of the anti-discrimination law into the criteria included in this legal provision, it is also helpful to encourage judges' flexible interpretation through a directive clause. For instance, the directive clause may stipulate that: "The court should be, without being restricted by the expressed matters in this provision, flexible in referring to other aspects to determine reasonableness". This model gives express permission for the judges to depart from the consistently narrow approach which they deem appropriate.[41]

E. Additional Illustration Following Legal Provision

Besides additional legislative clarification, the examples of how the provisions may appear in a practical context have been incorporated into different pieces of federal and state legislation. At the federal level, the Fair Work Act 2009 (Cth)'s provision allowing the request for flexible working arrangements stipulates that:[42]

1) An employee who is a parent or has responsibility for the care of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:
    a. is under school age; or
    b. is under 18 and has a disability.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

At the state level, there is also a similar interpretation aid that was incorporated in the state anti-discrimination law.[43] In both federal and state legislation, the examples do not seek to impose a rigid restriction on how the judges should read the provision. Rather, they act as suggestions for the judges in reasoning the case presented before them.

[40] Anti-Discrimination Act 1991 (Qld) [ADA Qld], section 11(4).
[41] Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination & Equal Opportunity Law* (3rd ed, The Federation Press, Canberra, 2018) at 156.
[42] Fair Work Act 2009 (Cth) section 65.
[43] Equal Opportunity Act 2010 (Vic), section 9. Note that similar provisions with examples are also provided under section 11 of the ADA Qld.

Furthermore, the problematic approach from federal judges, such as those in *Mayer* and *Howe*, could be avoided in future decisions by using examples to alert adjudicators. For example, the illustrations given in the future version of the SDA could suggest that insistence on imposing strict attendance requirements on working parents may constitute indirect discrimination. This supports the promotion of a more proactive approach toward creating a family-friendly workplace for working parents. The downside of additional illustrations and legislative guidance is that the law cannot address all indirect sex discrimination in a limited number of examples to avoid lengthy provisions. A considerable effort is required in the legislation process to determine which circumstances should be reflected in the examples. To compensate for these cons, the proposal in the upcoming section IIIC below will present its value in improving further flexibility and adaptability of the legal interpretation without requiring substantial reforms of indirect sex discrimination provisions.

F. Timely Updated Mechanism for Complementary Guidance

Besides giving the judges and parties a clearer set of provisions and statutory examples, a non-statutory mechanism with detailed interpretation of the law could add value to understanding the meaning of the legal provisions throughout, and better reflect the legislative aims. This section proposes the application of non-statutory resources, replicating the model of the Victorian *Charter of Human Rights Bench Book* and the Victorian Discrimination Law resource.

In 2016, the Judicial College of Victoria published the *Charter of Human Rights Bench Book* (*Bench Book*) as a comprehensive system,[44] supporting the interpretation of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter).[45] This system takes a form of a web page which contains further explanations of the undefined concepts and operative provisions under several provisions of the Charter. Some of the purposes of the *Bench Book* are that it attempts to support educational purposes as well as the interpretative practice of the "judges and lawyers who practice in Victoria, for whom the Charter is an important, if neglected, part of the law".[46] Relevantly, the Judicial College said of the publication that it was not published as a piece of legislation that served as a compulsory source for the judge's reference.[47] However, it is still welcomed as a supporting mechanism for its merits.[48]

Another model for the application of an online resource is the Victorian Discrimination Law published by the Victorian Equal Opportunity and Human Rights Commission in 2013 to support the interpretation of some provisions of the Equal Opportunity Act 2010 (Vic).[49] Recently, in 2019, this resource was updated with the inclusion of the mechanism supporting the understandings of the Victorian Racial and Religious Tolerance Act 2001 (Vic).[50] Similar to the *Bench Book*, the

[44] Judicial College of Victoria *Charter of Human Rights Bench Book* [*Bench Book*] <www.judicialcollege.vic.edu.au>.
[45] Charter of Human Rights and Responsibilities Act 2006 (Vic).
[46] Katy Thorpe "New Bench Book Will Help Bolster Human Rights in Victoria" *Human Rights in Australia* <rightnow.org.au>.
[47] Judicial College of Victoria, above n 44.
[48] Michael Brett Young *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and* Responsibilities *Act 2006* (2015) at 50–51.
[49] Victorian Equal Opportunities and Human Rights Commission "Victorian Discrimination Law" (28 June 2019) AustLII Communities <austlii.community/wiki>.
[50] Victorian Equal Opportunities and Human Rights Commission "Explaining the Types of Discrimination" (28 June 2019) AustLII Communities <austlii.community/wiki>.

Victorian Equal Opportunity and Human Rights Commission made it clear that case law from other jurisdictions and decisions of the Victorian Civil and Administrative Tribunal (VCAT), without being strictly binding, also contributes to the comprehensive guide on how the Victorian law could be understood.[51] This resource was expected to offer a reliable resource with insights on the suitable interpretation of the law to which the judges and tribunal members can discretionarily refer when making decisions.

These online resources were researched and drafted thoroughly with high academic quality in order to be an "accurate and reliable" document. Yet, compared to proposals about adding legislative guidance and practical illustrations to the legal provisions, the additional mechanism in an online form does not require complex legislative passage procedures to incorporate any provisions anew to the existing document. This mechanism can be introduced in the form of an online web page or printed handbook,[52] which is sufficient for timely updates and public education. As a result, this mechanism could also help avoid lengthy statutory provisions. Additionally, as a non-statutory mechanism, this mechanism mitigates the risk of having a rigid nature borne by the proposals in sections IIIA and IIIB above.

Probably the most important value of this mechanism is that it assists the interpretation of the legal provisions, in conjunction with various aspects including, for example, the undefined words of the legislation,[53] the legal principles, and the context of domestic and international jurisprudence.[54] In clarifying section 17(1) of the Charter, for instance, the *Bench Book* introduces the provision in its legislative context, which supports the practice of this provision when read together with other provisions of the Charter.[55] From this basis, the adjudicators and parties to the indirect discrimination claim will be given suggestions for clearer meanings of the law within the historical and legal context in which the provisions were passed. Hence, the provisions will be read to better reflect the purposes of the legislation which the law primarily sought to pursue.[56] This is where the *Bench Book* and the Victorian Discrimination Law resource differentiate themselves from other guidelines that are currently used by the Australian Human Rights Commission and the states' equal opportunity commissions, which are usually limited to providing only simple explanations and examples on the general concept of indirect discrimination.[57]

Finally, this mechanism can be presented in web page form, which enables it to be flexibly amended in order to keep the information speedily updated to reflect legislative evolution.[58] The *Bench Book* and the Victorian Discrimination Law resource can be revised regularly to assist the

[51] Victorian Equal Opportunities and Human Rights Commission, above n 50.

[52] Victorian Equal Opportunities and Human Rights Commission, above n 49. This resource was previously provided in a PDF version. Currently, any updates of this resource will be incorporated into the online source.

[53] Victorian Equal Opportunities and Human Rights Commission, above n 50.

[54] Judicial College of Victoria, above n 44; and Victorian Equal Opportunities and Human Rights Commission, above n 49.

[55] "6.11.2. Families (s 17(1))" in Judicial College of Victoria, above n 44.

[56] Beth Gaze "Context and Interpretation in Anti-Discrimination Law" (2002) 26 MULR 330.

[57] See Australian Human Rights Commission "Guides" (Sex Discrimination) <www.humanrights.gov.au>. For example, the guidelines given by the AHRC do not focus on providing legislative explanation on how the elements of the test have been read by the judges through cases. Rather, they tend to focus on enhancing public awareness on the practice of the AHRC in conciliating and educating the business on ethical practices with regard to sex discrimination in the workplace.

[58] As an online source, there is information on the date of the last update. This supports the tracking purposes of the updating of legal knowledge on this web page.

courts in adapting to social and legal changes.[59] Considering the unpredictability and unlikelihood of having future judgments interpreting the SDA's indirect sex discrimination test,[60] the mechanism would contribute to advancing public knowledge of the meanings of the law.

IV. Conclusion

After the enactment of the Sex Discrimination Act 1984 (Cth) and its amendment in 1995, there have been academic and practical concerns that the SDA has not been effective in tackling structural discrimination and promoting gender equality in the social sphere. The challenges of the current provisions resulted from the vague wording of the provisions as well as inconsistency in the judicial approach to interpreting the elements of the test.

To mitigate problems in the interpretation of the elements of section 5(2) of the SDA, this paper suggests the addition of legislative guidance, practical illustrations and a non-statutory explanatory resource of the meanings of the provisions. It is important that these proposals should be adopted together to maximise their value. This combination would help each proposal compensate for the legislative shortcomings borne by another. While the additional legislative guidance sets out primary aspects that could be more likely to be referred to by federal judges in resolving indirect sex discrimination claim, its rigid nature is, in turn, mitigated by the application of additional practical examples and explanation by online resources. The examples are valuable because they prevent the judges from adopting problematic precedents and suggest a more flexible approach. The legislative guidance, among other relevant statutory provisions, provides the legal basis for the establishment of the online resource that helps further elaborate the meanings of the law.

The recommendations, when working in conjunction with one another, support the comprehensive understandings of the evidentiary standards. They give greater clarity in suggesting how the complainant can evaluate their own complaint and meet their burden of proof in an indirect sex discrimination complaint. This would also be beneficial for the judges in interpreting the meaning of the law in the light of the legislative aims of the SDA when deciding the case presented before them.

[59] Judicial College of Victoria, above n 44; Victorian Equal Opportunities and Human Rights Commission, above n 49. The latest update of the *Bench Book* was published on 10 October 2018. The latest update of the Victorian Discrimination Law resource was published on 12 Sep 2019 and there has been an inclusion of further guidance on the Racial and Religious Tolerance Act 2001 (Vic).

[60] See section IIA.