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Liam A Holt

Macquarie University

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Stigma, Stigmata: Reforming the Sex Discrimination Act to Account for Menstruation as a Protected Characteristic

LIAM A HOLT*

Abstract

This article argues that the Australian Sex Discrimination Act 1984 (Cth) ('SDA'), as Australia's primary source of sex and gender-based protections, fails to protect people who menstruate from discrimination. As the SDA currently neglects to mention menstruation, people who menstruate cannot directly access remedies for menstrual discrimination. The harms of this are worsened by structural problems within the Australian approach to discrimination law, including in the formation of the comparator – as the experience of menstruation lacks a clear analogue. Similar issues regarding menstruation discrimination are present, and likely to become more prominent, in other jurisdictions in coming years.

Combining existing menstrual justice scholarship with emerging legal discourse on menstrual discrimination, this article argues the SDA should incorporate new sections enshrining menstruation and menopause, including both perimenopause and post-menopause, as protected characteristics. These sections should be framed in gender neutral terms and focus on menstruation as a lived experience rather than a medical problem. Further, both menstruation and menopause should be added as categories for which 'special measures' can be made to address specific inequities related to menstruation. By advocating the merits of these reforms, this article aims to provide a policy

* LLB (Hons I)/BA, Macquarie University. liamholt98@gmail.com.

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model which addresses these issues and can be adapted to suit other jurisdictions.

I Introduction: Menstruation, Stigma, and the Conceptual Problem

Stigma refers to any stain or mark that sets some people apart from others.¹

Stigmata is a very relevant miracle...often accompanied by a sacred blood. Although gender does not seem to play a role in this miracle, it has occurred predominantly in women.²

Nearly half of the global population will menstruate during their lifetime.³ The shedding and expulsion of the blood and tissue of the uterine lining is often accompanied by various other symptoms, including abdominal pain, mood changes, and fatigue.⁴ Menstruation is also highly variable, differing between individuals across heaviness, frequency, duration, and painfulness.⁵ These multivariate experiences can represent challenges that people who menstruate (sometimes referred to as ‘menstruators’)⁶ have to navigate in social, professional, and public spheres.⁷ There has been much discourse around what the best term to refer to individuals who experience menstruation should be, with some academics labelling terms such as ‘menstruators’ as dehumanising or reductive,⁸ and other critics denouncing gender-neutral terms as erasing the concept of ‘womanhood’.⁹ Whilst it is the case that the vast majority of people who menstruate are women, this article embraces the terms ‘people who menstruate’ or ‘those who menstruate’ to be as inclusive as possible, acknowledging the myriad presentations of people who menstruate and to recognise that all

¹ Ingrid Johnston-Robledo and Joan C Chrisler, ‘The Menstrual Mark: Menstruation as Social Stigma’ (2013) 68(1–2) *Sex Roles* 9, 9, citing generally Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Simon & Schuster, 1963).

² Maggie Fielding, Pierce Flanigan, and Anne Paulsen, ‘Stigmata’, *Blood in Judaism and Christianity* (Web Page, 1999) <<https://www2.kenyon.edu/Depts/Religion/Projects/Reln91/Blood/mission.htm>>.

³ Andrew M Blanks and Jan J Brosens, ‘Meaningful Menstruation’ (2013) 35(5) *BioEssays* 412, 412.

⁴ Mark E Shoep et al, ‘The Impact of Menstrual Symptoms on Everyday Life: A Survey Among 42,879 Women’ (2019) 220(6) *American Journal of Obstetrics and Gynecology* 569.e1, 569.e3–569.e5.

⁵ Joan C Chrisler, Jane M Ussher and Janette Perz, ‘Introduction’ in *Routledge International Handbook of Women’s Sexual and Reproductive Health* (Routledge, 2019) 1, 10.

⁶ Chris Bobel, *New Blood: Third-Wave Feminism and the Politics of Menstruation* (Rutgers University Press, 2010) 159.

⁷ Annie McCarthy and Kuntala Lahiri-Dutt, ‘Bleeding in Public? Rethinking Narratives of Menstrual Management from Delhi’s Slums’ in Chris Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 15, 15.

⁸ Ruth Kamau et al, ‘Inclusivity Starts with Language’ (2022) 399(10323) *The Lancet* 434, 435.

⁹ Rosie DiManno, ‘Why Can’t We Say ‘Woman’ Anymore?’, *The Toronto Star* (online, 15 October 2021) <<https://www.thestar.com/opinion/star-columnists/2021/10/15/why-cant-we-say-woman-anymore.html>>.

experiences of menstruation are valid. Additionally, the term menopause will be used throughout this article, but this should be read to be inclusive of the totality of experiences which comprise menopause including perimenopause, being the ‘endocrine, biological and clinical features of approaching menopause’¹⁰, as well as the biological and clinical features of post-menopause.

Regrettably, menstruation is afforded no specific protections under Australia’s anti-discrimination framework. The *Sex Discrimination Act 1984* (Cth) (‘*SDA*’)¹¹, whilst affording protections to various other characteristics associated with sex and gender,¹² critically overlooks the significant impacts that menstruation has on the everyday experiences of people who menstruate. By failing to account for menstruation as a ‘protected characteristic’¹³, people who menstruate are left little recourse when experiencing direct and indirect forms of discrimination on the basis of their menstruation. Without making explicit provisions to account for menstruation as a protected characteristic, some of the most vulnerable members of our society remain susceptible to discrimination, and menstruation will continue to be stigmatised as nothing more than a dirty word.¹⁴

It is therefore no surprise, according to Goldblatt and Steele, that menstruation is ‘[equally] invisible at law’.¹⁵ The law appears to go to great efforts to tiptoe around menstruation by ascribing protections to sex characteristics associated with reproduction, including breastfeeding, pregnancy, and potential pregnancy, whilst ignoring the biological process which makes these all possible.¹⁶ As a result, menstruation continues to be seen as something experienced in submissive silence, undeserving of recognition, normalisation, or protection within the law and broader society.

In order to legislate protections for menstruation, there is a need to confront the pervasive societal and political expectations of who people who menstruate should be, how they should conduct themselves, and how they should feel about the process. Patterson sees this process as requiring a violent act of self-reflection that challenges the very conceptual bedrock on which modern social institutions are founded.¹⁷

¹⁰ Wulf H Utian, ‘The International Menopause Menopause-Related Terminology Definitions’ (1999) 2(4) *Climacteric* 284-6.

¹¹ *Sex Discrimination Act 1984* (Cth) (‘*SDA*’).

¹² *Ibid* ss 5–7.

¹³ Alysia Blackham and Jeromey Temple, ‘Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework’ (2020) 43(3) *University of New South Wales Law Journal* 773, 775.

¹⁴ Johnston-Robledo and Chrisler (n 1) 10–11.

¹⁵ Beth Goldblatt and Linda Steele, ‘Bloody Unfair: Inequality Related to Menstruation — Considering the Role of Discrimination Law’ (2019) 41(3) *Sydney Law Review* 293.

¹⁶ *Ibid* 304.

¹⁷ Ashly Patterson, ‘The Social Construction and Resistance of Menstruation as a Public Spectacle’ in D Nicole Farris, Mary Ann Davis and D’Lane R Compton (eds) *Illuminating*

Despite this, the conceptualisation of menstruation is changing globally. For example, Scotland recently became the first country to legislate for the provision of free menstrual care products.¹⁸ In 2022, the New South Wales Government introduced free period products in all government schools.¹⁹ In addition, menstrual leave policies in the private sector are becoming the norm rather than the exception.²⁰ These changes signal a conceptual shift occurring with respect to menstruation, albeit slowly, and represent an opportunity for the ‘red tide’²¹ to turn at a legislative and judicial level.

However, the existing literature is limited in a few key respects. Analysis of the impacts of menstruation discrimination on vulnerable groups and communities, and the limitations of the current anti-discrimination framework in providing recourse to these groups, remains sparse. Goldblatt and Steele’s work remains the sole source of Australian legal scholarship on this issue. However, Goldblatt and Steele’s legal analysis focuses instead on the practical issues that impact people who menstruate, as Australia has not yet considered menstruation discrimination as an issue at law.²² This therefore represents a gap in the existing Australian legal scholarship on this issue; an absence of theoretical analysis on how Australian courts would likely deal with menstruation discrimination. Further, there has been limited academic discourse regarding the possible reforms that could be made to the *SDA* to specifically address the discrimination people who menstruate face. However, a collection of Australian transdisciplinary researchers, activists, and policy makers have recently put together a platform for policy reform to address menstrual and menopausal discrimination; a cause I sincerely hope this article can support through its proposed measures.²³

This article provides greater clarity on the specific barriers to success menstruation discrimination cases face in Australia and avenues of policy reform available to redress them. Further, it represents the first attempt in literature to conceptualise what amendments to the *SDA* should look like and provides a rationale for and defence of such amendments. These contributions add new

How Identities, Stereotypes and Inequalities Matter Through Gender Studies (Springer Netherlands, 2014) 91, 105–6.

¹⁸ Jacqui Thornton, ‘Free Period Products in Scotland’ (2020) 396(10265) *The Lancet* 1793, 1793.

¹⁹ NSW Government, ‘Free Menstrual Hygiene Products for Public Schools’, *Education NSW* (Media Release, 7 March 2022) <<https://education.nsw.gov.au/news/latest-news/free-menstrual-hygiene-products-for-public-schools>>.

²⁰ Rachel B Levitt and Jessica L Barnack-Tavlaris, ‘Addressing Menstruation in the Workplace: The Menstrual Leave Debate’ in Chris Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 561, 562–3.

²¹ Johnston-Robledo and Chrisler (n 1) 12.

²² See generally Goldblatt and Steele (n 15) 309–323.

²³ Mike Armour et al, ‘Menstrual Justice: A Human Rights Vision for Australia’ (Conference Paper, Menstruation, Law and Justice Symposium, 16 February 2023).

dimensions to the current scholarship and provide practical solutions that policymakers or lawmakers may adopt. Whilst designed for the Australian anti-discrimination legislative regime, the features of the proposed reforms provide opportunity for adaptation to the legal and legislative frameworks of other jurisdictions.

Section II explores the complexity of menstruation as an issue at law and highlights some critical issues that people who menstruate would face in litigating menstruation discrimination cases. Section III will assess the relative merits of different models of reform on how best to protect people who menstruate from discrimination and will put forward the case for a new section of the *SDA* including menstruation as a protected characteristic and allowing for it to be included in the 'special measures' provisions. This article concludes that reforming the *SDA* is only the first step of many that needs to be taken to address the discrimination people who menstruate face, with more research needed to explore the complex intersections between the law and menstruation.

II The Legal Problem: Weaknesses in Statute and Case Law Regarding Menstruation Discrimination in Australia

The lack of acknowledgement of menstruation within Australian anti-discrimination frameworks poses significant implications for discrimination case law. To frame how significant this absence is in terms of rights coverage for people who menstruate, some brief observations will be made as to how protections are ascribed in the first place.

Broadly, anti-discrimination law is underpinned by various political and social assumptions about the nature of ascribing and protecting rights. Where rights or protections are ascribed to a particular characteristic, this reflects the moral worth of that trait within broader society.²⁴ For instance, multicultural societies are likely to prioritise protections for individuals on the basis of race. The inverse is also true; traits or characteristics that societies believe to be detrimental to the health of that society are unlikely to afford protection to those traits.²⁵ For example, the French constitutional principle of *laïcité* enforces strict secularism both in governance and in the public sphere. In effect, this principle has been used to prevent government workers from displaying any kind of religious symbolism or iconography, as well as to justify restrictions on Muslims wearing burqas or other headscarves and face coverings in public.²⁶ Due to such an engrained belief in the

²⁴ Sophia Moreau, 'What Is Discrimination?' (2010) 38(2) *Philosophy and Public Affairs* 143, 155–6.

²⁵ Christopher Lingle, 'Interest Groups and Cultural Protectionism: Apartheid and Public Arts Policies' (1991) 18(4) *International Journal of Social Economics* 4, 4–5.

²⁶ Stephanie Hennette Vauchez, 'Is French *Laïcité* Still Liberal? The Republican Project under Pressure (2004–15)' (2017) 17 *Human Rights Law Review* 285, 286.

need to curtail the influence of religious institutions in all aspects of French life, religious protections are significantly weakened and often neglected entirely.²⁷

Menstruation is currently caught in this schism between social taboo and normalised experience worthy of protection. The patriarchal nature of society and social institutions has meant a denial of recognition of menstruation at law.²⁸ This is unsurprising, however, when considering the lack of rights afforded to people who menstruate historically. Women were only able to secure suffrage in the last century and still struggle in securing rights to bodily autonomy over their reproductive systems.²⁹ In fact, there continues to be significant backslides in terms of access to reproductive health rights for women, exemplified in the controversial decision to overturn the Supreme Court precedent of *Roe v. Wade* in the United States in 2022, causing millions of women to lose access to the right to abortion.³⁰

The situation for non-cis people who menstruate is even more precarious. Trans and gender-nonconforming individuals have only received statutory recognition within the last decade,³¹ and yet they face significant policy and legal barriers to being able to live authentically, especially when it comes to access to hormone replacement therapy and gender confirmation surgeries.³² There has also been an increasing wave of anti-trans policy being introduced in Republican controlled states in the U.S. South, as well as greater levels of public hate targeted at trans and gender-nonconforming people including anti-trans rallies organised and supported by the political far right.³³

Both the historical policy lag regarding awarding vulnerable groups appropriate protections at law and the rise in hostile policy designed to curtail or limit any rights that have accrued to these groups intuitively carries across to the issue of menstruation. Where the ability of people who menstruate to meaningfully participate in society is only a recent development, the recognition of their lived experiences trails much further behind as a policy priority.

²⁷ Ibid 286–7.

²⁸ Goldblatt and Steele (n 15).

²⁹ Dorota Gozdecka, 'Backlash or Widening the Gap?: Women's Reproductive Rights in the Twenty-First Century' (2020) 9(1) *Laws* 1, 1–2.

³⁰ Karine Coen-Sanchez et al, 'Repercussions of Overturning *Roe v. Wade* for Women Across Systems and Beyond Borders' (2022) 19 *Reproductive Health* 1, 2–3.

³¹ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth); *SDA* (n 11) ss 4, 5B, 5C.

³² Peter Grieser, 'Administrative Contexts of Access to Gender-Confirmation Surgeries' (2018) 27(3) *Southern California Review of Law and Social Justice* 165, 187–8.

³³ Anne Branigin and Nick Kirkpatrick, 'Anti-Trans Laws Are on the Rise. Here's a Look at Where — and What Kind', *The Washington Post* (online, October 14 2022) <<https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/>>. See also Phillip Bump, 'The Proud Boys Keep Popping Up at LGBTQ Events', *The Washington Post* (online, November 22 2022) <<https://www.washingtonpost.com/politics/2022/11/22/proud-boys-keeping-popping-up-anti-lgbtq-events/>>.

A *The Australian Context: Menstrual Flows and the Status Quo*

Menstruation discrimination in Australia is not dealt with in statute, as is the case in many jurisdictions around the world. As such, the analysis in this Section is chiefly theoretical with respect to menstruation discrimination. Whilst there is a wealth of literature regarding the interpretation of the *SDA* and the nature of resolving sex discrimination complaints in Australia more generally, there is considerably less literature on the nature of menstruation discrimination and where it may intersect with the law.

Menstruation discrimination is more than just the direct shaming and victimisation of people who menstruate; it is the fundamental way in which social norms, institutions, and infrastructure are designed without consideration for the existence of people who menstruate or their needs, or are consciously constructed to exclude people who menstruate.³⁴ These forms of discrimination include the taxation applied to period care products and/or the failure of the state to provide free period products,³⁵ the under-provision of menstrual-friendly toilets in both public and private settings,³⁶ the limited accessibility of period products in public spaces,³⁷ limited recognition of the impacts of menstruation in the workplace in the absence of menstrual leave policies,³⁸ and the failure to ensure critical Water, Sanitation, and Hygiene (WASH) infrastructure in regional, rural, and remote communities.³⁹

Goldblatt and Steele, in particular, provide comprehensive analysis on the ways in which menstruation discrimination manifests in Australia and the compounding effects of this discrimination along

³⁴ Ela Przybylo and Breanne Fahs, 'Feels and Flows: On the Realness of Menstrual Pain and Crippling Menstrual Chronicity' (2018) 30(1) *Feminist Formations* 206, 207, 211; Goldblatt and Steele (n 15) 300, citing Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 25–33.

³⁵ Bhuchitra Singh, Jiahui Zhang and James Segars, 'Period Poverty and the Menstrual Product Tax in the United States [29F]' (2020) 135(1) *Obstetrics and Gynecology* 68, 68; Suzanne Herman, 'A Blood-Red-Herring: Why Revenue Concerns Are Overestimated in the Fight to End the "Tampon Tax"' (2021) 48(2) *Fordham Urban Law Journal* 595, 600–1, 603–4, 614. Cf also with Thornton (n 18); NSW Government (n 19).

³⁶ Margaret L Schmitt et al, 'Making the Case for a Female-Friendly Toilet' (2018) 10(9) *Water* 1193, 1194–5.

³⁷ Ibid; Klara Rydström, 'Degendering Menstruation: Making Trans People Who Menstruate Matter' in Chris Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 945, 952.

³⁸ Levitt and Barnack-Tavlaris (n 20) 561–3.

³⁹ Nina Hall, 'Challenges of WASH in Remote Australian Indigenous Communities' (2019) 9(3) *Journal of Water, Sanitation and Hygiene for Development* 430, 430; Heather Browett, Meryl Pearce and Eileen Willis, 'Cost Implications of Hard Water on Health Hardware in Remote Indigenous Communities in the Central Desert Region of Australia' (2012) 3(3) *Water and Indigenous Peoples* 1, 1; Ross S Baile, Bronwyn E Carson and Elizabeth L McDonald, 'Water Supply and Sanitation in Remote Indigenous Communities: Priorities for Health Development' (2004) 28(5) *Australian and New Zealand Journal of Public Health* 409, 411.

intersectional lines.⁴⁰ Marginalised groups, such as LGBTQIA+ people, people from a low-socioeconomic background, people living with disabilities, and Australian First Nations communities, face additional structural disadvantage when it comes to menstruation. Reduced access to period products, difficulties in practicing period management and care due to insufficient period-friendly WASH infrastructure, social and cultural stigma around menstruation, and increased risk of experiencing violence are all issues that are exacerbated by intersections of social marginalisation.

For instance, approximately 19% of all Indigenous Australians live in remote or very remote areas,⁴¹ with Indigenous people representing 47% of all people living in very remote areas.⁴² In these communities, access to essential goods, services and employment opportunities are limited, and maintenance of crucial civil infrastructure, such as municipally managed bore and reservoir water and sanitation systems, is a rare occurrence.⁴³ As a result, remote Indigenous communities regularly suffer from high turnovers of water treatment and waste management technicians, infrastructure breakdowns, and delayed repairs on essential household ‘health hardware’ such as toilets and sinks.⁴⁴ The natural minerals in bore water calcify taps and pipes, often preventing residents from bathing, washing clothing and maintaining other hygienic practices until repairs can be made.⁴⁵ Residences in these communities are commonly overcrowded and lack privacy, exacerbating experiences of shame within a cultural context that imposes expectations of secrecy surrounding menses.⁴⁶ Further, a lack of functioning ‘health hardware’ disrupts the ability for those who menstruate to wash blood-stained clothing, clean themselves and change out period products hygienically. Underfunding and under-resourcing of remote schools causes critical shortages of hygiene goods such as soap and period products and a neglect of appropriate period product disposal facilities to support people who menstruate in these

⁴⁰ Goldblatt and Steele (n 15).

⁴¹ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Catalogue No 3238.0.55.001, 31 August 2018).

⁴² Australian Institute of Health and Welfare, *Rural and Remote Health* (Web Report Catalogue No PHE 255, 22 October 2019) citing Australian Bureau of Statistics (n 41).

⁴³ Browett, Pearce and Willis (n 39) 3.

⁴⁴ Nina Hall (n 39) 433–4.

⁴⁵ Ibid 434; Browett, Pearce and Willis (n 39) 1–3. See also Ross S Bailie, Bronwyn E Carson, and Elizabeth L McDonald, ‘Water Supply and Sanitation in Remote Indigenous Communities: Priorities for Health Development’ (2004) 28(5) *Australian and New Zealand Journal of Public Health* 409, 411.

⁴⁶ Emily Krusz et al, ‘Menstrual Health and Hygiene among Indigenous Australian Girls and Women: Barriers and Opportunities’ (2019) 19(146) *BMC Women’s Health* 1, 4. See also Elizabeth McDonald et al, ‘An Ecological Approach to Health Promotion in Remote Australian Aboriginal Communities’ (2010) 25(1) *Health Promotion International* 42, 48.

institutions.⁴⁷ As a result, Indigenous people who menstruate often live under a pall of shame regarding their bodily processes.⁴⁸

This example illustrates just one set of complicating factors impacting menstruation discrimination; the ways in which other experiences of inequity or discrimination deepen the harms accruing to people who menstruate within those contexts. A further set of complications arises when considering the various presentations and experiences of menstruation amongst different individuals, or how menstruation exacerbates the negative impacts of other conditions such as polycystic ovary syndrome (PCOS), endometriosis, or hormonal disorders such as pituitary and thyroid dysfunction. Whilst there is scope in the *DDA* to account for the impacts of some of the chronic health conditions listed above, there is no specific mechanism present in the law to address where a bodily process like menstruation (that may not necessarily be disordered) creates additional difficulties which may lead to discrimination. For example, whilst a worker with PCOS may be given reasonable adjustments related to their condition to ensure equitable participation in the workplace, such as the ability to work flexibly from home to help reduce the impact of fatigue, this may be insufficient to cover the worsening of the experiences of PCOS during the duration of that worker's period. There may then be further complications that arise if menstruation is to be framed under the *DDA*, potentially reinforcing harmful conceptions of menstruation as something that is in of itself abnormal or disabling to anyone experiencing it.⁴⁹

Given the level of nuance and complexity that menstruation poses to the current anti-discrimination legislative regime, this Section aims to model how claims for menstruation discrimination would likely play out under the current legislative framework. It will be assumed for this article that menstruation discrimination would most logically fall within the confines of the *SDA*.

The *SDA* prevents an individual from discriminating against another on the grounds of sex, gender identity, sexual orientation, intersex status, and pregnancy or potential pregnancy.⁵⁰ Discrimination under the *SDA* has two forms: direct and indirect discrimination. This Section will focus on the applications of the *SDA* regarding direct discrimination. Direct discrimination has two components: an individual with a protected characteristic receives less favourable treatment than another individual without that characteristic in like circumstances (the

⁴⁷ Krusz et al (n 46) 3.

⁴⁸ Marni Sommer et al, 'Comfortably, Safely, and Without Shame: Defining Menstrual Hygiene Management as a Public Health Issue' (2015) 105(7) *American Journal of Public Health* 1302, 1303, 1309.

⁴⁹ Levitt and Barnack-Tavlaris (n 20) 570.

⁵⁰ *SDA* (n 11).

‘comparator element’), and such treatment is predicated on the existence of the protected characteristic (the ‘causation element’).⁵¹ For instance, in the seminal Australian case of *Ansett Transport Industries (Operations) Pty Ltd v Wardley*,⁵² it was found that a practice of not hiring female pilots because of their potential for pregnancy constituted direct discrimination.⁵³ Wardley outperformed other male applicants in the selection criteria, yet those other applicants were hired, and she was not.⁵⁴ This clearly satisfies the comparator element. The reasoning behind this decision was also explicitly stated to be based on a characteristic that is intrinsically linked to a particular sex (pregnancy), fulfilling the causation element.⁵⁵

In the absence of statutory recognition of menstruation as a protected characteristic, people who menstruate have no remedies available under the *SDA* for discrimination occurring on the basis of menstruation. As a result, people who menstruate who are experiencing discrimination on the basis of menstruation specifically have no choice but to pursue actions for sex discrimination generally.⁵⁶ People who menstruate must first make a complaint to the Australian Human Rights Commission, where the matter undergoes conciliation if it is deemed to have merit.⁵⁷ If the matter is not resolved through conciliation, the matter can be heard in civil tribunals or the Federal Courts.⁵⁸ However, this system of resolving complaints involving sex discrimination, and particularly construing menstruation discrimination as sex discrimination, has several flaws.

Firstly, and most obviously, pursuing legal action on the grounds of sex discrimination for menstruation discrimination relies on courts implying that menstruation is an experience that ‘appertains generally’ or is ‘generally imputed’ to fall within an existing protected characteristic.⁵⁹ From the outset, courts are extremely hesitant to give effect to words that are not present within statute for fear of breaching the separation of powers doctrine.⁶⁰ It is the role of Parliament to exercise legislative functions and correct legislative defects, whilst it is the role of courts to apply these laws ‘according to its terms and

⁵¹ Ibid s 5(1). See also Belinda Smith, ‘From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?’ (2008) 21(1) *Australian Journal of Labour Law* 3, 8.

⁵² *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-003 (Equal Opportunity Board of Victoria).

⁵³ Ibid 75 [264].

⁵⁴ Ibid [261].

⁵⁵ Ibid [260].

⁵⁶ *SDA* (n 11) s 5.

⁵⁷ Dominique Allen, ‘Rethinking the Australian Model of Promoting Gender Equality’ in Kim Rubenstein and Katherine G Young (eds), *The Public Law of Gender: From the Local to the Global* (Cambridge University Press, 2016) 391, 394.

⁵⁸ Ibid.

⁵⁹ *SDA* (n 11).

⁶⁰ *Taylor v The Owners - Strata Plan No 11564* (2014) 253 CLR 531, 549 [39]. See also *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [68]–[70].

purposes'.⁶¹ As such, the courts must assume *prima facie* that Parliament intends to not afford specific protections to menstruation.

Even if the courts were to hypothetically imply these protections in this way, selecting the most suitable characteristic is a near-impossible task. To frame menstruation as a sex characteristic within the *SDA* is to exclude intersex people who menstruate from effectively claiming protection, as their reproductive organs may not neatly fall within female sex characteristics.⁶² Further, forcing intersex people who menstruate to attempt to categorise whether their reproductive organs are sufficiently female to justify protection is to subject them to a gross indignity.⁶³ To frame menstruation as a characteristic of gender identity (presumably feminine gender identities) is to exclude trans people who menstruate, or gender-nonconforming people who menstruate who identify along masculine or non-binary gender spectrums.⁶⁴

Should the Courts go one step further and engage in the most favourable comparison possible when implying these protections, which would be to an existing protected characteristic such as breastfeeding, there are still key nuances that would be unable to be addressed through this approach. Breastfeeding is a favourable comparison to menstruation in that it is a unique reproductive experience ordinarily affecting women or other people who are not cis-men involving the expulsion of fluids from the body, with both experiences being stigmatised bodily processes that are often construed as being disruptive or offensive in civic life. Despite this, breastfeeding and menstruation are ultimately different processes with different constituent experiences and cannot be truly compared.⁶⁵ There are crucial differences between breastfeeding and menstruation which could see menstruation relegated to a lesser tier of protection. Let us assume that the comparable context is in the workplace with one hypothetical parent seeking leave to breastfeed their child and another worker seeking leave to change out their period products. These situations are disanalogous in a few ways. The first key difference relates to the parties affected and the priority of rights of the parties involved. Breastfeeding is a necessity for fulfilling the obligations owed to a dependent third-party, an infant, whose rights are paramount in that situation as they cannot actualise their own needs independently.⁶⁶ As

⁶¹ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ('*Purvis*'), 103 [19] per McHugh and Kirby JJ.

⁶² Morgan Carpenter, 'The OHCHR Background Note on Human Rights Violations Against Intersex People' (2020) 28(1) *Sexual and Reproductive Health Matters* 13, 13.

⁶³ *Ibid* 14–15.

⁶⁴ Margaret E Johnson, 'Menstrual Justice' (2019) 53(1) *UC Davis Law Review* 1, 2.

⁶⁵ Emily Gold Waldman, 'Compared to What?: Menstruation, Pregnancy, and the Complexities of Comparison' (2021) 41 *Columbia Journal of Gender and Law* 218, 220.

⁶⁶ Australian Breastfeeding Association, 'Breastfeeding and the Law', *Australian Breastfeeding Association* (Web Page) <<https://www.breastfeeding.asn.au/resources/breastfeeding-and-law>>.

much as the dignity of people who menstruate should be a priority, the need to change out period products cannot be seen as having the same level of immediate necessity as breastfeeding a child.

Additionally, breastfeeding attracts a different, and more palatable, form of social disgust compared to menstruation; one which already has a large degree of political and social capital allocated towards redressing it.⁶⁷ The stigma attached to breastfeeding is due to the sexualisation of breasts, parts of the body that have been socially coded as improper for display outside of private settings.⁶⁸ The act of breastfeeding in this context is viewed as akin to exposing one's backside or genitals in public.⁶⁹ As such, the disgust levelled at breastfeeding parents is due more to the perceived vulgarity of displaying breasts in a public setting than the act of breastfeeding or expressing milk being considered dirty or disgusting.⁷⁰ With the feminist movement having dedicated considerable social and political capital towards desexualising breasts, such as through the Free the Nipple campaign, there is a greater public consciousness of the irrational basis on which breastfeeding discrimination takes place, including from politicians in Australia making the issue public by breastfeeding in Parliament.⁷¹ This is to say, there is likely to be greater formal lobbying power to improve protections around breastfeeding due to the coordinated and focused political messaging from activist groups on the issue.⁷² Further, there is also likely to be greater social pressure and informal sanctions applied by the general public against discriminators as more progressive attitudes towards breastfeeding filter through into popular discourse.⁷³ Again, this is because the locus of attention regarding breastfeeding discrimination is on breasts themselves and how society should view them, not necessarily the act of expressing milk;⁷⁴ society writ large finds it much more palatable to

⁶⁷ Lula Mecinska, 'Embodied Online Activism: Breastfeeding Activism (Lactivism) on Facebook' (2018) 11(2) *Networking Knowledge: Journal of the MeCCSA Postgraduate Network* 21, 22–3.

⁶⁸ Athena Sheehan, Karleen Gribble and Virginia Schmied, 'It's Okay to Breastfeed in Public but...' (2019) 14(24) *International Breastfeeding Journal* 1, 2.

⁶⁹ See generally Aimee Grant, '"I...Don't Want to See You Flashing Your Bits Around": Exhibitionism, Othering and Good Motherhood in Perceptions of Public Breastfeeding' (2016) 71 *Geoforum* 52, 52–61; Lesley Henderson et al, 'Men and Infant Feeding: Perceptions of Embarrassment, Sexuality, and Social Conduct in White Low-Income British Men' (2011) 38(1) *Birth* 61, 61–70.

⁷⁰ Ibid.

⁷¹ Sheehan, Gribble and Schmied (n 68) 9. See also Marnie Cruickshank and Barbara Pini, 'Fleshy Citizenship: Representations of Breastfeeding Politicians in the Australian Media' (2021) 21 *Feminist Media Studies* 775, 775–790.

⁷² Natacha Chetcuti-Osoroovitz and Sandrine Sanos, 'Contemporary Feminisms and the Secularism Controversies: A Model of Emancipation' in Barbara Molony and Jennifer Nelson (ed), *Women's Activism and "Second Wave" Feminism* (Bloomsbury Academic, 2017) 63, 63.

⁷³ Mecinska (n 67) 23.

⁷⁴ Alison Bartlett, 'Scandalous Practices and Political Performances: Breastfeeding in the City' (2002) 16(1) *Continuum* 111, 113.

discuss tackling a nudity taboo than unpacking our aversion to bodily fluids.

Menstruation, on the other hand, attracts a visceral form of disgust in that it is viewed only in terms of the expulsion of blood and tissue, bodily matter that is considered by its nature to be repulsive.⁷⁵ In comparison to the earlier analogy, menstruation is viewed akin to having soiled oneself, placing it in a category of acts which are disgusting and unclean and make the individual themselves unclean for having done it.⁷⁶ There is considerably less willingness then for society to challenge the basis on which menstruation discrimination occurs, as there is a greater perceived level of rationality behind the act of prejudice. It may not be considered irrational for someone to send a worker home for having bled through their uniform, due to people having a natural aversion to the sight of blood — regardless of whether said blood is perfectly healthy or never comes into contact with anyone or anything else.⁷⁷ The nature of conversation needed to be had to address menstruation discrimination is also less likely to occur due to the nature of the subject matter. People generally have an aversion to talking about topics that make them uncomfortable, especially if those topics also provoke an immediate and potent negative emotional response.⁷⁸ Menstruation, as essentialised to a leaking of bodily fluids, is a phenomena which is coded to provoke such a negative response of repulsion and disgust.⁷⁹ Where vulgarity may be relative and up for debate, particularly where social attitudes shift over time and acts can shift from taboo to acceptable, things that are considered viscerally disgusting are always likely to maintain some aspect of undesirability or ‘unmentionability’.⁸⁰ This makes it a less desirable talking point for activist groups and wider political movements to focus on due to the lack of receptiveness the general public likely has for something they find to be distasteful, and therefore garners a lot less attention and

⁷⁵ Rose Grose and Shelly Grabe, ‘Sociocultural Attitudes Surrounding Menstruation and Alternative Menstrual Products: The Explanatory Role of Self-Objectification’ (2014) 35(6) *Healthcare for Women International* 677, 679.

⁷⁶ Maureen C McHugh, ‘Menstrual Shame: Exploring the Role of “Menstrual Moaning”’ in Chris Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 409, 411.

⁷⁷ Tomi-Ann Roberts et al, ‘“Feminine Protection”: The Effects of Menstruation on Attitudes towards Women’ (2002) 26(2) (June) *Psychology of Women Quarterly* 131, 131–6.

⁷⁸ McHugh (n 74) 409 citing Janet Lee and Jennifer Sasser-Coen, ‘Memories of Menarche: Older Women Remember their First Period’ (1996) 10(2) *Journal of Aging Studies* 83, 83–101.

⁷⁹ Janette Perz and Jane M Ussher, ‘Women’s Experience of Premenstrual Syndrome: A Case of Silencing the Self’ (2006) 4 *Journal of Reproductive and Infant Psychology* 289, 291–4.

⁸⁰ Carl Vogel, ‘Taboo Semantics’ (Conference Paper, 5th IEEE Conference on Cognitive Infocommunications, 1 November 2014) 1.

advocacy.⁸¹ This significantly weakens lobbying efforts for policy reform on menstruation discrimination.

The final thing to note regarding the comparative differences between menstruation and breastfeeding is that the overtness of discrimination against a breastfeeding parent is likely to weigh in favour of more explicit protections. Although often insufficient to address the needs of people who menstruate,⁸² the existence of bathrooms in most public and private spaces provides some opportunity for people who menstruate to change their period products in reasonable safety and privacy.⁸³ Breastfeeding parents often do not have any designated spaces or facilities with which to care for the needs of their child,⁸⁴ and are therefore more likely to need protections because of the direct exposure they are likely to have to discriminatory conduct — such as a refusal to allow a parent to breastfeed in a particular space or being refused service due to breastfeeding.⁸⁵ Because of this, the causation element of breastfeeding discrimination is likely to be much easier to prove, particularly where people who menstruate are likely to obfuscate the reason for their request to go to the bathroom or to request a short break without disclosing a reason in order to avoid the stigma attached to menstruating.⁸⁶ Even though it might be easy to infer through context clues what this person is really asking for when requesting such an accommodation, a discriminator is likely to be able to refuse their request with reasonable certainty that that party will not be able to sufficiently prove the causation element should there be a discrimination complaint — that the reason for the refusal was predicated on that party's menstruation.

Secondly, beyond any of the earlier hypothetical analysis, there is also no guarantee that any case, or interpretation, will be decided in favour of an aggrieved party. At best, an individual case is decided in favour of a complainant but is insufficient on its own to pressure Parliament into reforming the *SDA* to resolve the anomaly between

⁸¹ See generally Chris Bobel, “‘I’m Not an Activist, Though I’ve Done a Lot of It’: Doing Activism, Being Activist and the ‘Perfect Standard’ in a Contemporary Movement” (2007) 6(2) *Social Movement Studies* 147, 147–59.

⁸² Katherine Sang et al, ‘Blood Work: Managing Menstruation, Menopause, and Gynaecological Health Conditions in the Workplace’ (2021) 18(4) *International Journal of Environmental Research and Public Health* 1951, 1952–3.

⁸³ Andrew R Maroko et al, ‘Public Restrooms, Periods, and People Experiencing Homelessness: An Assessment of Public Toilets in High Needs Areas of Manhattan, New York’ (2021) 16(6) *PLOS One* 1, 2.

⁸⁴ Julie P Smith et al, ‘Workplace Support, Breastfeeding and Health’ (2013) 93 *Family Matters* 58, 69; Australian Breastfeeding Association, Submission No DR334 to Productivity Commission, *Workplace Relations Framework Public Inquiry* (18 September 2015) 7; Samantha Rowbotham et al, ‘Using Citizen Science to Engage the Public in Monitoring Workplace Breastfeeding Support in Australia’ (2022) 33(1) *Health Promotion Journal of Australia* 151, 152.

⁸⁵ Australian Breastfeeding Association, ‘Breastfeeding and the Law’ (n 66).

⁸⁶ Sang et al (n 82) 1958.

statute and the common law. At worst, precedent is formed adverse to the interests of those seeking recognition of menstruation as a protected characteristic. This may make achieving any substantive change impossible or at least significantly set back the timeline to achieve those outcomes.⁸⁷

However, a key barrier to seeing any change happen at common law is the lack of cases making it before the Courts in the first place. The negative optics of discrimination complaints for discriminators mean that cases are regularly settled confidentially and do not make it through the courts.⁸⁸ The limited prospects of success due to the onerous burden of proof on the complainant, the vast resource and power asymmetries that exist between discriminators and aggrieved parties, and the costs involved with extended litigation are all contributing factors to the high rates of settlement in discrimination matters.⁸⁹ This means that there is very limited jurisprudence on the interpretation of the *SDA* and on cases of sex discrimination more broadly.⁹⁰ For example, between 2000–2009,⁹¹ the Human Rights and Equal Opportunity Commission received 3623 complaints of sex discrimination.⁹² Over this same period, the Federal Courts heard only 46 substantive sex discrimination matters, of which 34 were successful.⁹³ Among cases exclusively involving sex, pregnancy, or family responsibilities discrimination, 14 were successfully upheld.⁹⁴

Thirdly, the nature of discrimination complaints is both individualistic and fact-dependent.⁹⁵ Cases regarding direct discrimination are centred around the disparate treatment of an individual on the basis of a protected characteristic *within a particular context*. Because the circumstances of discrimination in different cases are never going to be identical, decided cases form a loose web of persuasive precedent to analogise to the facts of the present matter. As such, decision-making in this area of law lacks certainty, especially where menstruation discrimination matters have never been heard in

⁸⁷ Smith (n 51) 27–8.

⁸⁸ Allen, 'Rethinking the Australian Model of Promoting Gender Equality' (n 57) 392.

⁸⁹ Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778, 786–8.

⁹⁰ Allen, 'Rethinking the Australian Model of Promoting Gender' (n 88).

⁹¹ From 2010 onwards, the HREOC no longer includes specific transparency data regarding sex discrimination complaints in their Annual Reports, hence the selected period of reference.

⁹² Australian Human Rights and Equal Opportunity Commission, *Annual Report 2000–2001* (14 October 2001) ch 2; *Annual Report 2001–2002* (14 October 2002) 49; *Annual Report 2002–2003* (13 October 2003) 54; *Annual Report 2003–2004* (9 September 2004) 59; *Annual Report 2004–2005* (9 September 2005) 51; *Annual Report 2005–2006* (18 September 2006) 59; *Annual Report 2006–2007* (18 September 2007) 57; *Annual Report 2007–2008* (18 September 2008) 50; *Annual Report 2008–2009* (25 September 2009) 50.

⁹³ Beth Gaze, 'The Sex Discrimination Act at 25: Reflections on the Past, Present and Future' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, Canberra, 2010) 107, 112.

⁹⁴ *Ibid* 113.

⁹⁵ Allen, 'Rethinking the Australian Model of Promoting Gender Equality' (n 88).

Australia. This discourages victims of discrimination from pursuing further action.⁹⁶ Further, the remedies available to aggrieved persons focus on that individual and not on the wider class of people sharing the same characteristic.⁹⁷ Remedies typically take the form of apologies, monetary compensation, actions to redress loss or damage suffered from discrimination, and undertakings to avoid further discriminatory acts.⁹⁸ None of these remedies provide structural disincentives to discriminators to avoid committing discriminatory acts against classes of protected people.⁹⁹ Regrettably, this means menstruation discrimination is unlikely to ever be considered a collectivist problem under the current complaints model.

Finally, the current test for direct discrimination in Australia set out in *Purvis v New South Wales (Department of Education)*¹⁰⁰ significantly restricts the purpose of direct discrimination provisions to achieving only formal equality.¹⁰¹ The decision in *Purvis* allows for discriminators to divorce manifestations of protected characteristics from the existence of the protected characteristic itself when formulating the comparator.¹⁰² With reference to the facts of *Purvis*, a boy who is expelled due to violent outbursts resulting from severe intellectual disabilities is not deemed to have been discriminated against, where a boy without disabilities exhibiting this same conduct would also have been expelled.¹⁰³ The Court in *Purvis* failed to recognise that protected characteristics often inform, or are causative of, the particular circumstances subject to the disparate treatment. Instead, the majority prioritised uniformity of outcome as a basis for determining whether or not discrimination has occurred.¹⁰⁴ This reasoning means that the comparator becomes an incommensurate measure for determining direct discrimination; it is functionally impossible to have a fair comparison where actions and circumstances are viewed devoid of context.

Whilst *Purvis* was a disability discrimination case, nothing within the majority judgment prevents the *Purvis* approach from extending to

⁹⁶ Quynh Vu, 'Reducing the Complainant's Evidentiary Burden of Proving Indirect Sex Discrimination in the Workplace Claim — Easier Said Than Done?' (2019) 44(2) *New Zealand Journal of Industrial Relations* 74, 76.

⁹⁷ Allen, 'Rethinking the Australian Model of Promoting Gender Equality' (n 57) 397. See also Goldblatt and Steele (n 15) 308.

⁹⁸ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PO(4)(a)–(f).

⁹⁹ Allen, 'Rethinking the Australian Model of Promoting Gender Equality' (n 56) 398; Dominique Allen, 'Against Settlement? Owen Fiss, ADR, and Australian Discrimination Law' (2009) 10(4) *International Journal of Discrimination and the Law* 191, 196.

¹⁰⁰ *Purvis* (n 61). Due to the infrequency of High Court matters interpreting discrimination law, *Purvis* continues to be reliable authority on this issue.

¹⁰¹ Smith (n 51) 25.

¹⁰² Ibid 15, 17.

¹⁰³ *Purvis* (n 61) 97 [2].

¹⁰⁴ Smith (n 51) 22–3.

other forms of discrimination.¹⁰⁵ The concepts of the ‘comparator element’ and the ‘causation element’ for establishing direct discrimination are common to the *SDA*, meaning that High Court reasoning that sets out how these concepts should be applied is likely to form precedent for interpreting anti-discrimination laws.¹⁰⁶ The strength of this precedent is supported by the scarce nature of decided case law on discrimination matters and the relatively homogenous nature of Australian anti-discrimination laws.¹⁰⁷ In fact, several Federal Court decisions have already applied this reasoning to sex discrimination cases.¹⁰⁸

As such, menstruation discrimination could be governed by the *Purvis* approach in formulating the comparator. Where menstruation does not have a clear analogue in terms of a bodily process or lived experience, courts or judicial factfinders are likely to make erroneous or offensive comparisons when determining what a likely comparator would be in the same circumstances. In the recent United States Federal District Court case of *Coleman v Bobby Dodd Institute Inc.*¹⁰⁹, a woman who was fired for soiling company property after two instances of heavy pre-menopausal menstrual flows was deemed not to have been discriminated against on the basis of sex.¹¹⁰ Whilst the Court did acknowledge that it would be sex discrimination for a ‘uniquely female condition’ to be treated less favourably than ‘similar conditions affecting both sexes, like incontinence’¹¹¹, Coleman had failed to demonstrate that the comparator, a male employee *with urinary or faecal incontinence*, would be treated more favourably in like circumstances.¹¹²

This decision provides an excellent simulacrum for the way in which the *Purvis* approach would impact menstrual discrimination cases. As in *Coleman*, the *Purvis* approach would focus on divorcing the unique causative relationship of the characteristic (menstruation) from the specific circumstances (soiling furniture).¹¹³ Further, the process of formulating the comparator in these cases relies on the faulty premise of menstruation having a true analogue, which it quite simply does not. When the Court then has to invent an analogue for menstruation, they often resort to other biological processes that inspire disgust or

¹⁰⁵ Ibid 19.

¹⁰⁶ See *SDA* (n 11) s 5(1); *Disability Discrimination Act 1992* (Cth) s 5(1) (‘*DDA*’).

¹⁰⁷ Smith (n 51) 19.

¹⁰⁸ See *Tyler v Kesser Torah College* (2006) EOC 93-425; [2006] FMCA 1; BC200600169 (Kesser Torah); *Y v Human Rights & Equal Opportunity Commission* (2004) EOC 93-325; [2004] FCA 184; BC200400708; *Ware v Oamps Insurance Brokers Ltd* (2005) EOC 93-402.

¹⁰⁹ *Coleman v Bobby Dodd Institute Inc* (D Ga, Civ No 17-029, 8 June 2017) (‘*Coleman*’).

¹¹⁰ Ibid [2].

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ *Purvis* (n 61) 97 [2].

revulsion, such as faecal incontinence.¹¹⁴ This fundamentally misunderstands what menstruation is, reducing a natural but variable biological process that is used to create life to nothing but its fluid excreta components and reinforcing the stigmatised view of menstruation as ‘gross, disgusting, or shameful’.¹¹⁵ A continuation of the *Purvis* approach in relation to menstrual discrimination would allow for further strawman comparisons to be made regarding menstruation, perpetuating the systematic denial of the lived experience of menstruation and the ways it impacts the day-to-day living of people who menstruate.

Having highlighted the deficiencies of the Australian approach to menstruation discrimination, this article offers models of statutory reform that attempt to address the shortcomings present in both statute and case law on this issue.

III Practical Solutions: Models for Reforming the Sex Discrimination Act

Menstruation discrimination is likely to become a grave issue for Australian legislators and jurists to address in the coming years. However, the appropriate reforms needed to achieve substantive change remain unclear. Potential models of reform include: a common law approach in allowing decided cases to shape the issue of menstruation discrimination,¹¹⁶ amending auxiliary legislation such as the *Fair Work Act* to account for menstruation discrimination to strengthen workplace discrimination claims,¹¹⁷ creating a new section of the *SDA* which specifically attributes protections to menstruation, and amending the *SDA* to allow and promote the implementation of ‘special measures’ to support people who menstruate. After weighing the benefits and detriments of these approaches, this article contends that creating both an entirely new menstruation discrimination provision, as well as adopting various special measures such as guaranteed access to period products and ensuring the provision of menstrual friendly bathrooms, provides the best and most comprehensive approach to protect people who menstruate.

A *Common Law Approach: The Power of One is Not Enough*

As explained in Section II, there are numerous challenges to resolving the shortcomings of anti-discrimination legislation through the courts.

¹¹⁴ *Coleman* (n 108) [2].

¹¹⁵ Przybylo and Fahs (n 34).

¹¹⁶ See generally Allen, ‘Rethinking the Australian Model of Promoting Gender Equality’ (n 57).

¹¹⁷ *Fair Work Act 2009* (Cth) (‘FWA’); See generally Allen, ‘Rethinking the Australian Model of Promoting Gender Equality’ (n 56) 403–4.

Having previously identified the numerous structural barriers people who menstruate face in accessing justice through the courts, there are strong reasons to believe that clearly enshrining menstruation discrimination as a valid and recognised category of discrimination at law would be comparatively more effective at protecting their interests. In allowing judges the opportunity to interpret the terms of an Act of Parliament that has the clear intent of protecting people who menstruate from both direct and indirect forms of discrimination,¹¹⁸ the likelihood of succeeding on these claims becomes much more significant than in the counterfactual and ensures more certainty in the law.¹¹⁹ Additionally, having precise gender-neutral terminology reduces the risk of judges interpreting menstruation in a way that excludes trans, intersex, and gender-nonconforming people who menstruate.¹²⁰

This approach, admittedly, is still subject to the structural challenges that disincentivise victims of discrimination from pursuing actions through the courts but makes some efforts to ameliorate them. There will still be power and resource asymmetries between parties in these matters, but this reform will open up remedies that were previously unavailable at law for people who menstruate generally. This will likely encourage greater participation in the system and potentially more individual justice for victims through the complaints model, even if this does not amount to widescale group-oriented reform for people who menstruate.¹²¹ Additionally, the reform widens the scope of direct discrimination to include a wide variety of menstrual experiences, making it easier for those experiencing menstruation discrimination to establish a claim.

The interpretation of this Act is indeed constrained by the interpretation of direct discrimination provisions provided in *Purvis*. However, adding in menstruation as a unique characteristic gives the courts opportunity to reflect on issues arising from the formulation of the comparator for experiences that are unique to particular classes of people.¹²² This, in turn, may give rise to more significant reforms in the area of discrimination law more broadly, particularly with regard to the formulation of the ‘comparator’ for experiences that do not have a true analogue.¹²³

B *Auxiliary Legislation: Fair Work, but Not Much Else*

Another proposed area of reform comes from strengthening the recognition of menstruation discrimination through industrial relations

¹¹⁸ *Purvis* (n 61) 103 [19] per McHugh and Kirby JJ.

¹¹⁹ Allen (n 57) 401–2.

¹²⁰ Johnson (n 64).

¹²¹ Allen, ‘Against Settlement? Owen Fiss, ADR, and Australian Discrimination Law’ (n 99) 195.

¹²² Allen, ‘Behind the Conciliation Doors’ (n 89) 789. See also Goldblatt and Steele (n 15) 307.

¹²³ Smith (n 51) 25.

legislation such as the *FWA*.¹²⁴ There are numerous distinct benefits to this approach. Firstly, there is a reduced burden of proof for complainants to establish a claim, needing only to prove the existence of adverse action and a protected characteristic,¹²⁵ as opposed to being treated less favourably than the comparator on the basis of that characteristic.¹²⁶ Secondly, once a complaint has been established, the burden of proof then reverses so that the discriminator must prove that they did not discriminate against the aggrieved party,¹²⁷ rather than leaving the discriminated party to try and establish the subjective intent of the discriminator, as is the case under the *SDA*.¹²⁸ Finally, in the context of sex discrimination, the majority of claims brought to the Human Rights Commission are those occurring within the workplace or professional environments.¹²⁹ Therefore, it would seem logical to expand protections for people who menstruate in the workplace through legislation that explicitly deals with this purpose. Whilst this is a logical approach, this subsection will outline why this is insufficient to deal with the broad scope of direct and indirect discrimination experienced by people who menstruate and by particularly vulnerable subgroups of people who menstruate and why this specific change is realised more clearly under a broader legislative change to the *SDA*.

Firstly, and most importantly, the *FWA*'s discrimination provisions are only enlivened if the adverse action is unlawful under the Australian anti-discrimination framework, including the *SDA*.¹³⁰ As menstruation discrimination is not explicitly unlawful under the *SDA*, as it is not dealt with substantively, the *FWA* would be unable to apply to menstruation discrimination until necessary changes to the *SDA* were made. Consequently, implementing the amendments proposed in this Section would subsequently enliven this particular provision of the *FWA*, strengthening the remedies available for people who menstruate experiencing discrimination in the workplace.

Even if we could assume that the above was not at issue, in a hypothetical where the *FWA* could independently enliven workplace protections for menstruation discrimination, it is still insufficient to rely solely on changes to industrial relations legislation to cover an issue that impacts people who menstruate in all spheres of life.¹³¹ While most claims for menstruation discrimination would benefit from having additional protections in the workplace to prevent adverse action, all

¹²⁴ Allen, 'Rethinking the Australian Model of Promoting Gender' (n 57) 391, 403. See also Goldblatt and Steele (n 15) 308–9.

¹²⁵ *FWA* (n 117) s 351(1).

¹²⁶ *SDA* (n 11) s 5.

¹²⁷ *FWA* (n 117) s 360.

¹²⁸ *SDA* (n 11) s 5(1).

¹²⁹ See, eg, Australian Human Rights Commission, *Annual Report 2004–2005* (n 92) 51.

¹³⁰ *FWA* (n 117) s 351(2)(a).

¹³¹ McCarthy and Lahiri-Dutt (n 7).

people who menstruate would be comparatively better off in having recognition of menstruation as a generally protected characteristic in all settings.¹³² The *SDA* would extend not only to workplace matters but also to discrimination issues in terms of provision of public infrastructure such as gender-neutral and menstrual-friendly toilets,¹³³ delivery and management of WASH infrastructure in remote Indigenous communities,¹³⁴ and accessibility and affordability of period products.¹³⁵ This change would also assist in strengthening discourse and political capital around providing free period products to people who menstruate, in line with the Scottish model,¹³⁶ or in increasing the state's role in the production and provision of period products as a public good.

As the *FWA* only complements the enactment and enforcement of changes that otherwise can be made to the *SDA*, the amendments proposed in the following sections represent a better option overall. Expressly, they represent the causative factor that allows the *FWA* to become a useful legislative tool for people who menstruate experiencing discrimination in the workplace.

C *SDA, All the Way: The Proposed Amendments*

The *SDA* is the only appropriate legislative vehicle to situate menstruation and menopause discrimination protections, as it intersects with, and gives protections to, the myriad identities of people who menstruate; cis-women, intersex, and trans and gender-nonconforming peoples.¹³⁷ Moreover, as established in Section I, the *SDA* affords protections to traits that are only made possible through menstruation: breastfeeding, pregnancy, and family responsibilities.¹³⁸ It is absurd that the main piece of sex discrimination legislation in Australia is willing to protect many potentialities of reproductive systems, but not the predictable continuity of menstruation as a biological process for almost half of the population. Therefore, it is logical to base the proposed amendments on protections for similar reproductive functions under the *SDA*. Accordingly, the proposed amendments take the form of a new s 7AB and s 7AC of the *SDA* and amendments to s 7D of the *SDA*, which I provide in Appendix I.

The proposed reform ascribes a series of negative rights to people who menstruate and those who experience menopause to be free from both direct and indirect discrimination on the basis of those experiences.

¹³² See generally Goldblatt and Steele (n 15) 308–9.

¹³³ Schmitt et al (n 36); Rydström (n 37).

¹³⁴ Hall (n 39); Browett, Pearce and Willis (n 39); Bailie, Carson and McDonald (n 39).

¹³⁵ Thornton (n 18).

¹³⁶ Ibid.

¹³⁷ *SDA* (n 11) ss 5, 5B, 5C.

¹³⁸ Ibid ss 7, 7AA, 7A.

This is consistent with the Australian model of rights protections enshrined within Acts like the *SDA*. The language of the proposed sections is adapted from the protections ascribed to pregnancy and breastfeeding, but I suggest some deviations. The bulk of the following analysis will focus on the benefits of the menstruation provisions but many of the same arguments can be prosecuted in favour of the menopause provisions. These may be expounded upon in future articles.

Firstly, the provisions are written in gender-neutral language to avoid alienating trans, gender-nonconforming, and intersex people who menstruate.¹³⁹ This allows for the recognition of the fact, at law, that not all those who menstruate are women.¹⁴⁰ Secondly, because menstruation is heavily stigmatised, it is necessary to add clauses that extend protections to the multivariate presentations of menstruation, choices regarding menstrual management,¹⁴¹ and experiences that may be peripheral to presentation, such as hormonal and mood changes.¹⁴² This allows for people who menstruate to feel confident that regardless of the particular form their menstruation takes, or the ways in which they choose to manage their presentation of menstruation, they will have protection from both direct and indirect discrimination at law.

Finally, extending protections to ‘associated bodily phenomena’ helps to provide a practical bridging point between the various presentations of menstruation considered within the norm and menstrual presentations considered to be disordered or abnormal.¹⁴³ To the extent that a person who menstruates’ experiences encompass menstrual disorders such as abnormal uterine bleeding, dysmenorrhea, and premenstrual dysphoric disorder, all of these phenomena are abnormal presentations of associated bodily phenomena of menstruation generally; pain, discharge of blood, and mood changes.¹⁴⁴ Prima facie, this would mean that these experiences would likely attract some protection under this proposed change. Even if it could be argued that these presentations of menstruation should be classified as disabilities or chronic medical conditions, it seems likely that they would find additional protection under the *Disability Discrimination Act*.¹⁴⁵ This means that these particularly vulnerable subsets of people

¹³⁹ Goldblatt and Steele (n 15) 320. See also Johnson (n 64) 2, 7; Rydström (n 37) 950–1.

¹⁴⁰ Chloe Sargeant, ‘Transgender Activist Tackles the Issue of Menstruation with Powerful Viral Photo’, *SBS News* (online, 24 July 2017) <<https://www.sbs.com.au/topics/sexuality/agenda/article/2017/07/24/transgender-activist-tackles-issue-menstruation-powerful-viral-photo>>.

¹⁴¹ Carla Pascoe, ‘A “Discreet Dance”: Technologies of Menstrual Management in Australian Public Toilets During the Twentieth Century’ (2015) 24(2) *Women’s History Review* 234, 247.

¹⁴² Shoep et al (n 4).

¹⁴³ Sally King, ‘Premenstrual Syndrome (PMS) and the Myth of the Irrational Female’ in Chris Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 287, 293–4.

¹⁴⁴ Shoep et al (n 4); Chrisler, Ussher and Perz (n 5).

¹⁴⁵ *DDA* (n 106) s 4 (definition of disability).

who menstruate would be given multiple layers of protection from discrimination, particularly for those who experience chronic conditions that impact their menstruation such as PCOS and endometriosis as discussed earlier in this article.

These reforms recognise menstruation as a biological process worthy of protection at law, clearly and concretely define the rights of people who menstruate, and enliven specific causes of action for menstruation discrimination that do not exist in the status quo. Further, it provides a legislative foundation for policymakers to build upon, allowing for the strengthening the rights of people who menstruate over time. The practical benefits of these reforms make them inherently more desirable than the other potential avenues of reform discussed thus far but do require further legislative and political support.

D *Special Measures: Fit for Purpose*

Whilst the proposed amendments to the *SDA* create greater avenues to address direct discrimination faced by people who menstruate reactively, it is not proactive; it is unable to solve the inequities experienced by intersections of people who menstruate on its own. People who menstruate are likely to continue to suffer from disparate outcomes if there remains no acknowledgement of how menstruation impacts the lives of people who menstruate generally and how these challenges are compounded intersectionally.¹⁴⁶ The impacts of menstruation discrimination cannot be solved by simply extending negative rights to people who menstruate as a whole; they require conscious political will, manifested through sustained political action and reform. As such, it is necessary to add menstruation as a characteristic for which ‘special measures’ can be made within s 7D of the *SDA*,¹⁴⁷ allowing (and hopefully encouraging) both public and private actors to introduce policies or practices that address these inequalities at their root.¹⁴⁸

‘Special measures’ refer to particular actions that actors are permitted to undertake to promote equality for disadvantaged groups in society.¹⁴⁹ These actions typically take the form of ‘positive discrimination’, or preferential treatment for members of disadvantaged groups, in order to account for inherent inequalities or barriers that that group may have to navigate.¹⁵⁰ Section 7D of the *SDA* operates as an exception to the direct and indirect discrimination clauses present

¹⁴⁶ Goldblatt and Steele (n 15) 301–2.

¹⁴⁷ *SDA* (n 11) s 7D.

¹⁴⁸ Australian Human Rights Commission, *Guidelines: Special Measures under the Sex Discrimination Act 1984 (Cth)* (November 2018) 8.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* 10.

within the Act.¹⁵¹ This provides the necessary legal protection for public institutions, businesses, or other services, to provide measures that prioritise disadvantaged groups over other parties.¹⁵² Notably, the purpose of ‘special measures’ is not constrained by the *Purvis* approach, as this section is designed to account for substantive equality rather than formal equality.¹⁵³

By adding menstruation and menopause as characteristics for which special measures can be made under the *SDA*, opportunities to specifically address the disadvantages faced by intersections of people who menstruate can be met. For instance, the Department of Education could prioritise funding programs for the provision of period products and the maintenance and upgrades of female and gender-neutral bathrooms, in remote Indigenous communities, without fear of legal challenge.¹⁵⁴ Similarly, employers could have confidence that introducing menstrual leave or modified work arrangement policies for people who menstruate would not expose them to a discrimination complaint.¹⁵⁵ Both of these examples reflect the dual benefit of this reform. Firstly, this represents the correction of ‘recognition wrongs’ that have come from pretending that menstruation and menopause do not exist as an issue or are unimportant.¹⁵⁶ Even as a symbolic action, it is meaningful and validating for people who menstruate to have their struggles acknowledged. More importantly, these measures aim to resolve or ameliorate ‘distributive wrongs’, the material and social disadvantage that comes from inadequate provision of resources.¹⁵⁷ For people who menstruate, correcting ‘distributive wrongs’ looks like the improvement of WASH infrastructure or better provision of period products.¹⁵⁸ This provides people who menstruate with the opportunity to meaningfully enjoy the right to be free from menstruation discrimination, being afforded the necessary tools or conditions to overcome the axes of disadvantage unique to their circumstances.¹⁵⁹

It is these actions undertaken by both government and non-government actors that are likely to contribute to meaningful structural reform on menstruation discrimination. Legislating this change

¹⁵¹ *SDA* (n 11) s 7D(2).

¹⁵² Julie O’Brien, ‘Affirmative Action, Special Measures and the *Sex Discrimination Act*’ (2004) 27(3) *UNSW Law Journal* 840, 841–2.

¹⁵³ Australian Human Rights Commission (n 129) 10.

¹⁵⁴ Nina Hall et al, ‘Water, Sanitation and Hygiene in Remote Indigenous Australia: A Scan of Priorities’ (Discussion Paper, Global Change Institute, University of Queensland, July 2017)) 38–9.

¹⁵⁵ Levitt and Barnack-Tavlaris (n 20) 562–3.

¹⁵⁶ Goldblatt and Steele (n 15) 300, citing Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 25–33.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* See also Emily Krusz et al, ‘Menstrual Health and Hygiene among Indigenous Australian Girls and Women: Barriers and Opportunities’ (2019) 19(146) *BMC Women’s Health* 1, 3; Thornton (n 18); NSW Government (n 19).

¹⁵⁹ Australian Human Rights Commission (n 129) 8.

provides the necessary confidence for these actors to implement 'special measures' to address inequities arising from menstruation. From this, the normalisation of public and private entities implementing measures that address these issues increases the likelihood of public consciousness developing around menstruation discrimination. This awareness can then be translated into political capital to leverage further legislative outcomes such as making period products free and easily accessible to all people who menstruate.¹⁶⁰ These proposed changes to the *SDA* are the first step towards achieving menstrual justice for all.¹⁶¹

IV Conclusion

Menstruation discrimination has always been a feature of living under a patriarchal society but is finally now garnering the recognition it deserves as an issue of undeniable relevance and gravity.¹⁶² It is clear that the current Australian anti-discrimination framework does not adequately contemplate, let alone provide protections against, menstruation discrimination. As long as menstruation remains absent as its own distinct protected characteristic under the *SDA*, people who menstruate must continue to suffer under the shame and silence that is expected of them in the management of their menses.¹⁶³ However, this does not have to be the case. By amending the *SDA* to include menstruation as a protected characteristic and framing it in terms that are inclusive of the vast array of people who menstruate, people who menstruate will have far greater ability to take action against policies and decisions that directly and indirectly discriminate against them on the basis of their biological reality.

It is an unfortunate truth that the ability to achieve justice through the courts for those suffering menstruation discrimination will still be significantly hampered by the structural forces that lead complainants to settle litigation and the difficulties people who menstruate face when attempting to overcome the formulation of the comparator.¹⁶⁴ However, these legislative changes give people who menstruate the opportunity to pursue specific claims for menstruation discrimination that have been unavailable to them previously. This likely increases the volume of claims made and promotes their progression through the courts.¹⁶⁵ Further, providing new provisions for the courts to interpret on the issue of menstruation discrimination creates an opportunity for the courts to grapple with antiquated elements of discrimination law that involve

¹⁶⁰ Thornton (n 18); NSW Government (n 19).

¹⁶¹ Johnson (n 64) 3.

¹⁶² Ibid 79; Goldblatt and Steele (n 15) 323.

¹⁶³ Przybylo and Fahs (n 34) 211.

¹⁶⁴ See *Purvis* (n 61); *Coleman* (n 109).

¹⁶⁵ Allen, 'Against Settlement? Owen Fiss, ADR, and Australian Discrimination Law' (n 99) 195, 198.

asking ‘who is like whom’¹⁶⁶, particularly where protected characteristics often do not have a perfect analogue.¹⁶⁷

The creation of ‘special measures’ helps to proactively address the unique structural barriers faced by people who menstruate, supporting the positive right to menstruate in concert with the negative right to be free from discrimination on these grounds. Furthermore, these options open exciting new avenues to achieve menstrual justice and remedy historical wrongs suffered by people who menstruate.

Whilst this article covers some new ground on the issue of menstrual discrimination, further academic discussion is needed on practical policy and legal solutions to menstrual discrimination and menopause discrimination. In particular, discussion on the unique legal challenges disadvantaged subsets of people who menstruate experience in relation to proceeding with a menstrual or menopausal discrimination claim should be explored.

Further areas of research on this issue should include ensuring inclusive protections for trans and gender non-conforming people who menstruate and avoiding restrictive legislative definitions of who protections can extend to. There are additional opportunities to examine the intersection between inadequate provision of Water, Sanitation, and Hygiene (WASH) infrastructure and menstrual discrimination, as well as approaches to aligning menstruation discrimination reforms with the obligations of signatory states under the *Convention for the Elimination of All Forms of Discrimination Against Women* (‘CEDAW’).¹⁶⁸

¹⁶⁶ Smith (n 51) 6.

¹⁶⁷ Ibid 25.

¹⁶⁸ *Convention for the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981).

Appendix Proposed Amendments

A SDA Menstruation Discrimination Provision

7AB Discrimination on the ground of menstruation

- (1) For the purposes of this Act, a person (the *discriminator*) discriminates against a person who menstruates (the *aggrieved person*) on the ground of the aggrieved person's menstruation if, because of:
 - (a) the aggrieved person's menstruation; or
 - (b) a characteristic that appertains generally to people who menstruate, or who are menstruating; or
 - (c) a characteristic that is generally imputed to people who menstruate, or who are menstruating;the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who does not menstruate or is not menstruating.
- (2) For the purposes of this Act, a person (the discriminator) discriminates against a person who menstruates (the aggrieved person) on the ground of the aggrieved person's menstruation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging people who menstruate, or are menstruating.
- (3) To avoid doubt, a reference in this Act to menstruation includes the presentation of menstrual blood or associated bodily phenomena consistent with menstruation.
- (4) To avoid doubt, a reference in this Act to menstruation extends to presentations of menstruation or acts directly connected to the management of menstruation.
- (5) This section has effect subject to sections 7B and 7D.

B *SDA Menopause Discrimination Provision*

7AC Discrimination on the ground of menopause

- (1) For the purposes of this Act, a person (the discriminator) discriminates against a person who experiences menopause (the aggrieved person) on the ground of the aggrieved person's menopause if, because of:
 - (a) the aggrieved person's menopause; or
 - (b) a characteristic that appertains generally to people who experience menopause, or who are experiencing menopause; or
 - (c) a characteristic that is generally imputed to people who experience menopause, or who are experiencing menopause;the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who does not experience menopause or is not experiencing menopause.
- (2) For the purposes of this Act, a person (the discriminator) discriminates against a person who experiences menopause (the aggrieved person) on the ground of the aggrieved person's menopause if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging people who experience menopause, or are experiencing menopause.
- (3) To avoid doubt, a reference in this Act to menopause includes the presentation of menstrual blood or associated bodily phenomena consistent with menopause.
- (3) To avoid doubt, a reference in this Act to menopause includes the endocrine, biological and clinical features and other associated bodily phenomena consistent with perimenopause and post-menopause.
- (5) To avoid doubt, a reference in this Act to menopause extends to:
 - (a) presentations of menopause or acts directly connected to the management of menopause.
- (6) This section has effect subject to sections 7B and 7D.

C *Special Measures Amendment*

7D Special measures intended to achieve equality

- (1) A person may take special measures for the purpose of achieving substantive equality between:
- (a) men and women; or
 - (aa) people who have different sexual orientations; or
 - (ab) people who have different gender identities; or
 - (ac) people who are of intersex status and people who are not; or
 - (b) people who have different marital or relationship statuses; or
 - (c) women who are pregnant and people who are not pregnant; or
 - (d) women who are potentially pregnant and people who are not potentially pregnant; or
 - (e) women who are breastfeeding and people who are not breastfeeding; or
 - (f) people who menstruate (or are menstruating) and people who do not menstruate (or are not menstruating); or
 - (g) people who are experiencing menopause and people who are not experiencing menopause; or
 - (h) people with family responsibilities and people without family responsibilities.