

Ontario's Employment Equity Legislation: An Act Not to Follow

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IN recent decades much attention has been paid to social inequality in Australia, and in particular to the position of women. The Australian Law Reform Commission's recent report *Equality Before the Law: Women's Equality*, which includes comparisons with the Canadian experience, recommends the adoption of a legislative guarantee of equality, in which the meaning of equality would be determined in a contextual fashion, thereby promoting 'a more substantive understanding of equality as a response to economic, social and political disadvantage of women' (ALRC, 1994:53).

Australia has so far not adopted any requirement of discrimination in favour of 'disadvantaged groups'.¹ But positive measures to redress apparent inequalities are becoming fashionable. For example, the Australian Labor Party in September 1994 decided to set a quota of 35 per cent of female candidates in 'winnable seats'. Dr Clare Burton, a former Equal Opportunity Commissioner, has called for quotas to be introduced to the private sector by 2000. In her view, industry should set targets immediately 'which are realistic, given the presence of women as employees, small-business owner/managers and consumers in each industry sector. . . We should set targets [for boards] now, like the ALP if you like' (*The Australian Financial Review*, 28 September 1994, p.19).

The mechanics of affirmative action, however, have attracted little attention. But we can observe schemes that have been employed elsewhere in the world. Perhaps the most radical scheme of affirmative action currently in operation is that adopted by the Canadian Province of Ontario. In January 1994, the government of Ontario secured the passage of the Employment Equity Act, which requires employers in the Province to comply with state-imposed quotas in employment. On-

¹ The Sex Discrimination Act 1984 (Cth) prohibits discrimination on the basis of sex. An example of the current legislative treatment of positive discrimination can be found in the recent decision of *Proudfoot and Ors v ACT Board of Health and Ors* (1992) EOC para 92-417, where three men challenged the ACT government's women's health program on the ground that it discriminated against men. Although the program survived this challenge, it was held that it did involve discrimination on the basis of gender. The Human Rights and Equal Opportunity Commission ultimately applied exemptions contained in the Sexual Discrimination Act 1984 in order to conclude that the services were not unlawful. *Equality Before the Law* recommends that such programs ought not be considered discriminatory at all (ALRC, 1994:51).

tario firms are now in the process of ordering their affairs so as to comply with its terms.

Ontario's Employment Equity Act 1994

The preamble to the Act states:

The people of Ontario recognise that Aboriginal people, people with disabilities, members of racial minorities and women experience higher rates of unemployment than other people in Ontario . . . The people of Ontario recognise that this lack of employment equity . . . is caused in part by systemic and intentional discrimination in employment. People of merit are too often overlooked or denied opportunities because of this discrimination. The people of Ontario recognise that when objective standards govern employment opportunities, Ontario will have a workforce that is truly representative of its society.

This passage contains an obvious inconsistency. It is said that when 'objective standards' prevail in Ontario, the workforce of the province will be 'truly representative of its society'. But how can mandating employers to make employment decisions *on the basis of race, disability or gender* promote the application of 'objective standards'? This has always been an underlying difficulty of programs, such as this one, that seek to combat the effects of past oppression and discrimination by effectively reversing the process.

All employers to whom the Act applies must comply with five broad principles of employment equity. These principles are set out in Section 2 of the Act:

1. Every person who is a member of a designated group is entitled to be considered for employment, hired, retained, treated and promoted free of barriers that discriminate against them;
2. Every employer's workforce, in all occupational categories, and at all levels of employment, shall reflect the representation of the designated groups in the community;
3. Every employer shall ensure that its recruitment, hiring, retention, treatment and promotion practices and policies are free of barriers that discriminate against the designated groups;
4. Every employer shall implement positive measures for recruiting, hiring, retaining, treating and promoting members of the designated groups; and
5. Every employer shall implement supportive measures for recruiting, hiring, retaining, treating and promoting members of the designated groups, which will also benefit the workforce as a whole.

During the debate preceding passage of the Act, the Opposition proposed an amendment that provided that nothing in the Act removed or diminished an employer's right to hire or promote the most qualified person for a position. This proposal was defeated in committee. It is clear that the Act is remedial in nature and could be classified as 'affirmative action' legislation. It is equally clear that the legislation will impose what it describes as 'equity' with little regard to merit and that employers will henceforth be obliged to document very carefully their hiring and promotion decisions, and be prepared to respond to complaints where the burden will be on them to justify their actions.

How the Act Works

Generally speaking, employers are obliged to conduct a Workforce Survey to obtain a 'snapshot' of their current employees. They must also conduct an 'Employment Systems Review' in order to remove barriers to employment and promotion. The information thus obtained is used to develop and implement an 'Employment Equity Plan', which will remain in effect for three years, and will set out the barriers to be eliminated, the qualitative and supportive measures to be implemented, numerical goals and timetables for the hiring and promotion of members of the designated groups, and the process to be followed in monitoring progress towards the goals.

Relevant employers must survey their workforce to determine the extent to which they employ members of the designated groups. Every nine years, a questionnaire must be distributed to all employees, stating that each employee has the right to decide whether to answer the questions and may nominate himself or herself as a member of one or more designated groups.

The definitions of some of the designated groups are vague. Consider two of the definitions: 'racial minority' and 'person with a disability'. The relevant questions on the questionnaire are as follows:

2. For the purposes of employment equity, a person is a member of a racial minority if, because of his or her race or colour, the person is in a visible minority in Ontario. . . Based on this description, do you consider yourself to be a member of a racial minority?
3. For the purposes of employment equity, a person is a person with a disability if the person has a persistent physical, mental, psychiatric, sensory or learning impairment and,
 - (i) the person considers himself or herself to be disadvantaged in employment by reason of that impairment, or
 - (ii) the person believes that an employer or potential employer is likely to consider him or her to be disadvantaged in employment by reason of that impairment.

Based on this description, do you consider yourself to be a person with a disability?

What exactly does the term 'visible minority' mean? Some minority groups who have persistently been the targets of the most pernicious discrimination are not distinguished by physical characteristics. Are these groups somehow excluded from the definition? As for the disabled, which disabilities count? It has been held in Canada that alcoholism is a disability under the Canadian Human Rights Code.² Does this mean that alcoholics may consider themselves to be persons with a disability under the Act? Remember that the definition that must be applied turns on a determination of disability by the employee.

The Regulation to the Act, Section 15(2), provides that a policy or practice is a barrier to the hiring, retention or promotion of members of a designated group 'if it has a direct or indirect adverse impact on members of the designated group'. This means that, in view of the goal of a workforce that reflects the demographic make-up of the community, any deviation from this pattern will constitute *prima facie* evidence of barriers in a place of employment. One important qualification to this, however, is effected by the Ontario *Human Rights Code*, which provides that employers may apply a requirement, qualification or factor that has the effect of excluding or preferring members of a particular group so long as that requirement, qualification or factor is 'bona fide in the circumstances'.³

Numerous decisions have been made on what is meant by the concept of 'bona fide occupational qualification'.⁴ It is likely that 'barrier' will include any job requirement or job practice that is not job-related, not a business necessity and not consistently applied. Any practice causing an adverse impact or undue hardship on members of a designated group will probably be held to be a barrier. But the clear message conveyed by the Act is that it is the *effect* of a given practice rather than the *intention* of the employer that determines whether discrimination exists.

Perhaps the most controversial aspect of the Act is the requirement that Employment Equity Plans set out specific goals and timetables with respect to the composition of the employer's workforce. The Regulation defines a numerical goal as the proportion of opportunities for entry into the occupational group during the term of the Plan that will be filled by designated employees. The Ontario government has insisted that the Act does not mandate quotas, since the statutory body set up to enforce the Act, the Employment Equity Commission, will not impose any specific percentage on an employer. Nonetheless, while employers are given the task of setting numerical goals, they will have to do so on the basis of guidelines es-

² See *Niles v Canadian National Railway*, [1991] CHRD. No 6.

³ *Human Rights Code of Ontario*, RSO 1990, Chapter H 19, s.11(1).

⁴ See *Ontario Human Rights Commission v Etobicoke*, [1982] 1 S.C.R. 202, *Alberta Human Rights Commission v Central Alberta Dairy Pool*, [1990] 2 SCR 489 and *Large v Stratford Police Department*, (1992) 9 OR (3d) 104 (Div. Ct.) confirmed by the Ontario Court of Appeal, unreported, 22 December, 1993.

tablished under the Act. The goals set must be reasonably achievable with good faith effort by the employer and they must constitute reasonable progress toward achieving the ideal goal of parallel representation. In practice, this second principle means that employers will aim for the same representation in each job as exists in the community in which the workforce is located. Employers must therefore estimate the number of openings they will have in each job in the next three years and must calculate how many of any new openings must be filled by members of the designated groups in order to achieve parallel representation. If there is significant under-representation, or the number of new openings is small, employers could be required to fill all openings by members of the designated groups. (This approach is not without some precedent in Ontario. In 1985, the Ontario College of Art announced that, on account of the low number of female instructors on its staff, it would not hire any male candidate at entry level for the next 10 years.)

The History of Ontario's Employment Equity Legislation

In a review of the legislative history of the Act, Professor Robert Martin (1994:409) has recounted the history of the concept of 'affirmative action', tracing the genesis of the modern use of the term to a policy implemented by the United States government in the late 1960s to require companies that entered into contracts with the US government to take 'affirmative action' to hire certain numbers of employees who were members of minorities. The 1977 Ontario Human Rights Commission report, titled *Life Together: A Report on Human Rights in Ontario*, considered the imposition of certain forms of affirmative action to remedy what was termed as 'a climate of hostility and indifference' and a 'proliferation of racial slurs and hate propaganda' (p.57). It recommended affirmative action falling short of the imposition of quotas:

Some jurisdictions, particularly in the U.S., have attempted to remedy long-established patterns of discrimination against various groups by requiring employers to hire quotas of people belonging to the groups. The Commission believes that this is a crude and simplistic approach to a complex problem. Such an approach casts doubt on the legitimacy of minority group achievements. Moreover, it betrays the basic principle of equality of opportunity if people are given jobs or promoted not because they are competent, but because they belong to a minority group. Such reverse discrimination, though well-intentioned, is discrimination none the less. It still spells condescension and, in the long run, it may do far more harm than good. At the bottom it is the antithesis of human rights legislation. (p.35)

Nevertheless, the slide towards quotas had begun. In 1983, the Canadian federal public service formally adopted principles of affirmative action. The program then introduced was mandatory, but the Minister responsible stated: 'The numerical goals which we will be introducing as part of affirmative action are not quotas' (Knopff, 1985:97).

The federal legislation followed the publication of a 1984 report, titled *Equality in Employment*, of an influential Royal Commission chaired by Judge Rosalie Abella. Mindful of the difficulties of employing the term 'affirmative action', Abella preferred to refer to the measures she suggested as 'employment equity'. The Report said, 'No great principle is sacrificed in exchanging phrases of disputed definition for newer ones that may be more accurate and less destructive of reasoned debate' (p.7). The report contained no reference to quotas. It was instrumental in persuading Canada's federal government to adopt its own employment equity legislation in 1986.

However, the problem with the Abella Commission was that it was convinced of the existence of an epidemic of racism and racial discrimination on the basis of scant evidence. The Report asserted, 'Non-whites all across Canada complained of racism. They undeniably face discrimination, both overt and indirect' (p.47). But according to Martin (1994:416),

Abella held a series of public meetings across Canada. The people who attended these meetings were self-selected and, given the purpose of the Commission's enterprise, it is understandable that they complained about racism.

In addition to this pattern of asserting the evidence needed to justify the legislation, claims of discrimination have repeatedly been based on misuse of statistical evidence. The Canadian Bar Association's Task Force on Gender Equity (1993:157) concluded that women were seriously underrepresented in both legal practice and the teaching arm of the profession. Their conclusions were based on scant empirical evidence. For example, the Report merely states the percentage of staff constituted by women law professors and, after observing that 28 per cent of full time teachers in Canadian faculties of law are women, concludes, with no further analysis, that 'the representation of women in Canadian law teaching remains tentative and circumscribed'. As for minority-group representation, the Report states: 'There were so few minority law teachers in these faculties that it made little sense to construct population estimates or inquire further about minority teaching experiences in the general faculty survey.' This did not prevent the Task Force from recommending that 'law schools should give priority to the recruitment of members of minority groups into faculty positions' (1993:159). The 'evidence' on which this and other recommendations having to do with instituting and supporting programs of affirmative action are made consists of impressionistic statements made by respondents to the Task Force's survey. In the Task Force's own words: 'The survey of faculty included open-ended questions' (1993:161). Thus, the 'evidence' upon which most of the recommendations are made consists of impressions, feelings and statements of experience. The Report is riddled with testimonial statements which are then used as proof of the assertions contained therein. In the context of the law schools, this 'evidence' is then used to justify programs of affirmative action to make the faculties more 'representative'.

Professor Constance Backhouse's case for employment equity is likewise based on the misuse of statistics. In a paper dealing with the question of female teaching staff at the University of Western Ontario, Backhouse (1990) presents an array of statistical data which, in her opinion, proves that that university continues to discriminate against women. The statistics are convincing enough: there is a low number of women in full-time academic positions, women's earnings are on average less than those of men, and women predominate in the lower rungs of the professoriate. Yet nowhere does Backhouse ask whether women are underrepresented by reference to the numbers of women available or qualified for employment in full-time academic positions. The closest she comes is to compare the percentage of staff who are women with the percentage of students who are women.

By contrast, in an analysis of hiring trends in Canadian universities over the past 40 years, Grant Brown (1994:99) concludes:

We are repeatedly told that women do not get a fair shake, either in hiring or in promotion, at Canadian universities. What are regarded as 'moderate' commentators admit that things have begun to change in the wake of the Federal Employment Equity Act and the Federal Contractors program, which were put into law in 1986. According to this 'moderate' view, 1986 or 87 was the cross-over point, when women ceased being discriminated against on a widespread scale and began receiving a fair shake, or possibly even a small break in university hiring.

In fact, the data indicates that the actual cross-over point took place somewhere around 1970; since then, Canadian universities have increasingly favoured women in hiring. Although the recent data that is available to me is not complete, it suggests that qualified women are typically twice as likely as qualified men to be hired for university positions.

At no point does Backhouse present any evidence of the number of women graduating with relevant qualifications at the relevant times. She assumes that the number of women on the teaching staff should reflect something other than the percentage of qualified women or women available for employment.⁵ But Brown calculated the proportion of women in the qualified applicant pool at the relevant time (that pool being comprised of women with either masters or doctoral level post-graduate degrees) and compared it with the proportion of women hired in the relevant period to faculty positions. His research reveals that the percentage of women holding relevant qualifications was greater than the percentage of women holding appointments as full professors for the period up to about 1970. However, he is careful to indicate that there may well be explanations other than discrimina-

⁵ 'I firmly believe that men and women have an equal capacity to contribute as faculty in Canadian universities. I wait to be convinced otherwise, but so far have been provided neither with data nor arguments which refute this belief. I therefore assume that since the ratio of men and women is not roughly 50:50, that something must be seriously amiss' (Backhouse, 1990:55).

tion that account for the difference, such as the interruption of career for child-rearing or geographical move (1994:102).

Australian Debate about Affirmative Action

The afore-mentioned Australian Law Reform Commission's Report *Equality Before the Law: Women's Equality* recommends that Australia adopt an Equality Act that would contain a 'guarantee that everyone is entitled to equality in law' (ALRC, 1994:58). The Report contains much criticism of the approach labelled as 'formal equality', which is meant to refer to the approach of treating men and women the same (p.45). The Commission's preferred approach to the meaning of equality is clearly designed to secure favourable outcomes for the 'disadvantaged' group:

Equality needs to be defined in terms of outcomes, that is, there needs to be a broad definition of equality which overcomes the limitation of formal equality before the law and its lack of recognition of historical and cultural factors which produce unequal results. (p.48)

The Report assumes that women have been and continue to be the subject of virulent discrimination. But like the Abella Report in Canada, the Report contains little or no statistical evidence to support this assumption.

One of the few references to statistical evidence appears in the Report's chapter on 'Women in the legal profession':

Women make up 50 per cent of law school graduates, and 25 per cent of the legal profession as a whole. However, women leave the profession at a much higher rate than men, and they are clustered in the lower ranks of the profession. This chapter will . . . recommend that lawyers' professional associations take a more active role in changing the work practices and culture of the profession. (p.176)

Here the Report repeats the same error made by Backhouse in the Canadian context: the comparison of statistics taken out of the correct time frame. It is on the basis of this sort of scant statistical analysis and the 'stories' of self-selecting witnesses that the Report reached its conclusions. Those conclusions apparently also flow from the assumption that the profession and the judiciary ought to be more 'representative'. By contrast, the more orthodox view is that appointment to judicial office ought to be on merit rather than on some vague notion of achieving a 'representative' bench. In the words of Sir Harry Gibbs, former Chief Justice of Australia: ' . . . the policy which is sometimes propounded by politicians that more women and members of ethnic groups should be appointed to the Bench, without regard to whether they are the persons best qualified for appointment, must surely be misconceived' (*The Australian*, 27 September 1993).

Conclusions

The Ontario Employment Equity Act presents a model of what measures designed to achieve 'proportional representation' in the workplace might look like. What emerges is a policy founded on generalised assumptions, either unsupported by evidence or supported by statistical evidence that has been incorrectly interpreted. Where no evidence is available, anecdotes or stories appear to suffice.

There is more to be said about the cost that such legislation or any close approximation would impose. Speaking solely of legislation designed to eradicate sex discrimination, Posner (1993:1334) writes:

... it is possible that women as a whole have not benefited and have in fact suffered. Because of the heterogeneity of women as an economic class and their interdependence with men, laws aimed at combating sex discrimination are more likely to benefit particular groups of women at the expense of other groups rather than women as a whole. And to the extent that the overall effect of the law is to reduce aggregate social welfare because of the allocative and administrative costs of the law, women as a group are hurt along with men. Sex discrimination has long been on the decline, for reasons unrelated to law, and this makes it all the more likely that the principal effect of public intervention may have been to make women as a group worse off by reducing the efficiency of the economy. . . if by reducing the wages of men sex discrimination law propels more wives into the job market, with the result that (since they still bear the principal burden of household production) they work harder, have fewer children, and have less stable marriages, it is not clear that they are better off on balance than they were when their husbands had higher wages and they stayed home.

And what of the fairness of discriminating in favour of one group at the expense of another? The essential problem is equating past disadvantage of one group with present advantage of that group. It has often been observed that the problem this presents is that those who benefit have not necessarily suffered, while those who suffer have not necessarily benefited. Aside from this is the moral question of whether the discrimination *against* those who are not members of the favoured group can be justified by the need to remedy past injustices. Writing in support of the adoption of legislation prohibiting discrimination against women only, Nicola Lacey (1987:419) referred to the problem of discrimination against men:

This [an equality guarantee aimed at women only] would be aimed at attaining equality in terms of some more substantive measure, such as resources, in the longer term. This would not, of course, be to imply that discrimination against men on grounds of sex is morally unproblematic, although it certainly does imply that non-discrimination on grounds of sex conceived in formal equality terms is not a moral absolute. But the main thrust of such a strategy would be to acknowledge that sex discrimination against men is not

a social phenomenon of the same order, does not involve comparably damaging and oppressive effects as does sex discrimination against women, and that this clear social difference justifies and, indeed, calls for a totally different legal response.

Few adherents of positive discrimination even admit to this difficulty. In this sense, legislation like the Ontario Employment Equity Act strikes at the concept of individualism: the world thus created rewards not individual achievement so much as membership of the right group.

This is likely to create further difficulties, such as animosity towards members of the advantaged group. Hunter (1991:202) has observed,

Affirmative action does not ameliorate racial animosities: it exacerbates them because one minority individual or group benefits from the programme while another individual or group does not. . . individual applicants must identify themselves in terms of racial or sexual characteristics in order to gain employment or promotion. Such programmes retard rather than advance genuine progress toward equality.

The very factors we hope to eradicate become institutionalised, maintaining the relevance of gender or ethnicity, just as society is moving in the opposite direction.

Furthermore, the adoption of affirmative action risks marginalising the achievements of members of the disadvantaged groups. For example, a US Navy pilot recently crashed her F-14A Tomcat on approach to an aircraft carrier. In the aftermath, suggestions were made that the crash, which was found to have been caused by engine failure rather than pilot error, was the result of placing an unqualified female pilot in a demanding position: a decision made on grounds of affirmative action (*The Age*, 15 March 1995).

Inevitably, the adoption of legislation creating a present advantage for members of groups that can lay claim to victim status will generate an incentive to portray one's own group as victim. The ultimate result of such a trend will inevitably be the division of society along lines of race or gender, with each group claiming to have been victimised to a greater extent than the others, especially in times of economic decline.

It is not difficult to imagine the resentment soon felt by individuals in the amorphous majority who are turned upon in this way. This resentment may be expressed in an emotional 'backlash' directed against all members of the victim group. In other words, the victim group and the amorphous majority soon become polarised into opposing camps. (Roberts, 1994:408)

It seems odd that, at a time when many Americans question the continuation of affirmative action programs in their country after 30 years of experience, Australia should be considering taking the same path. Voters in California have succeeded in

placing a proposition on the ballot in next year's election which, if successful, would eradicate all affirmative action programs in that state (*The Canberra Times*, 19 February 1995). Even President Clinton, an ardent supporter of affirmative action in the past, has initiated a review of federal affirmative action programs with a view to eliminating unjustifiable ones. He may have been preempted by the US Supreme Court, which recently upheld a challenge against the federal government's 'minority contracting' program — a program that has parallels in Australia (*The Australian*, 14 June 1995).

It is hardly surprising that many of those arguing for the adoption of affirmative action programs are either members of groups who would benefit directly or else white males at the top of the career ladder who would not be burdened by the institutionalisation of discrimination against their group. Given the severe moral hazard that their arguments present, any choice to follow them would appear to be unjustified, on both moral and practical grounds.

Postscript

On 8 June 1995, Ontario elected a new Progressive Conservative government with a solid majority in the provincial legislature. On 20 July the Ontario Premier, Mike Harris, announced that the Employment Equity Act would be repealed. 'My government is opposed to any form of discrimination', he said. 'But the Employment Equity Act is not the vehicle to fight discrimination in the workplace. It is a quota-driven system.' He foreshadowed an 'equal opportunity' plan that would combat discrimination and allow employers to choose the best person for the job (*The Australian*, 21 July 1995, p.8).

References

- Australian Law Reform Commission (ALRC) (1994), *Equality Before the Law: Women's Equality*, Sydney (Discussion Paper No. 54).
- Backhouse, C. (1990), 'Women Faculty at the University of Western Ontario: Reflections on the Employment Equity Award', *Canadian Journal of Women and the Law* 4: 36-58.
- Brown, G. (1994), 'Discrimination in University Hiring: Against Women or Men?', *Inroads* 3: 98-104.
- Hunter, I. (1991), 'When Human Rights Become Wrongs', *Gazette* 25: 197-203.
- Knopff, R. (1985), 'The Statistical Protection of Minorities: Affirmative Action Policy in Canada', in N. Nevitte & A. Kornberg (eds), *Minorities and the Canadian State*, Mosaic Press, Oakville.
- Lacey, N. (1987), 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective', *Journal of Law and Society* 14: 413-27.
- Martin, R. (1994), 'Challenging Orthodoxy: A Critical Analysis of Racially-Based Job Quotas', *Canadian Labour Law Journal* 1: 409-23.

- Posner, R. (1989), 'An Economic Analysis of Sex Discrimination Laws', *University of Chicago Law Review* 56: 1311-37.
- Roberts, R. (1994), 'Employment Equity – Unfair', in M. Charlton & P. Barker (eds), *Contemporary Political Issues* (2c), Nelson Canada, Scarborough.
- Task Force on Gender Equity (1993), *Touchstones for Change: Equality, Diversity and Accountability*, The Canadian Bar Association, Ottawa.