

8. Equality Unmodified?

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This chapter examines a recent suggestion by the Senate Standing Committee on Legal and Constitutional Affairs in its Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality that it might be timely to consider redrafting Commonwealth discrimination laws so that—unlike the current situation, where there are separate acts for each of the various forms of discrimination (for example, sex, race, age, disability)—there is instead one piece of legislation: an Equality Act. Does this proposal have any potential to enhance women’s equality in Australia? Might it more readily address problems of intersectionality—the fact that women have a race, a sexuality—a multiplicity of identities that operates differently at different times and in different contexts? Would such an approach encourage a move beyond the complaints-based focus of traditional discrimination laws? We conclude by raising questions about the processes by, and the fora within, which these issues have been debated.

Introduction

When we were asked to speak at the conference out of which this collection arises, it was suggested we speak on the proposal that Australia should consider the enactment of an ‘Equality Act’.² In doing so, we reflect on a previous proposal to introduce an Equality Act, and the central importance of defining what we mean by equality. We then go on to consider the one aspect of Australia’s equal opportunity laws that is explicitly gendered: the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (previously the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth)). Towards the end of our chapter, we raise questions about the processes of law reform by asking who or which body might be the most appropriate to consider any proposal to introduce a broad-based ‘Equality Act’.

1 We are indebted to the Australian Research Council for supporting our research on law reform processes, ‘Changing Law/s, Changing Communities’. Thanks also to Laura Barnett who worked with us on this project, and also to Beth Goldblatt..

2 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Parliament of Australia, Canberra, 2008, Recommendation 43, <http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/report/report.pdf>

An Equality Act for the 1990s?

In the early 1990s, we were part-time commissioners of the Australian Law Reform Commission (ALRC) (with Hilary Charlesworth) on its reference on *Equality Before the Law*.³ While the term 'sex equality' was not used in the title, it was clear from the terms of reference and from the way the inquiry proceeded that the reference concerned equality before the law *for women*.⁴ As

3 Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report 69, Australian Law Reform Commission, Sydney, 1994, Part I, <<http://www.austlii.edu.au/au/other/alrc/publications/reports/69part1/ALRC69part1.pdf>>; Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report 69, Australian Law Reform Commission, Sydney, 1994, Part II, <<http://www.austlii.edu.au/au/other/alrc/publications/reports/69part2/ALRC69part2.pdf>> See also Australian Law Reform Commission, *Women's Access to the Legal System (Interim Report)*, Report No. 67, Australian Law Reform Commission, Sydney, 1994, <<http://www.austlii.edu.au/au/other/alrc/publications/reports/67/>>

4 The terms of reference were as follows: 'I, MICHAEL JOHN DUFFY, Attorney-General of Australia, HAVING REGARD TO:

(a) the principle of equality before the law;

(b) Australia's obligations under international law, including under articles 2 and 26 of the International Covenant on Civil and Political Rights to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in that Covenant and to the equal protection of the law; and the Convention on the Elimination of All Forms of Discrimination Against Women in pursuance of section 6 of the *Law Reform Commission Act 1973*, HEREBY REFER to the Law Reform Commission the following matters:

(a) whether any changes should be made to any laws made by, or by the authority of, the Parliament of the Commonwealth of Australia, including laws of the Territories so made, and any other laws, including laws of the Territories, that the Parliament has power to amend or repeal;

(b) whether any additional laws should be made within the legislative power of the Commonwealth to effect change to the unwritten laws of Australia;

(c) whether any changes should be made to the ways these laws are applied in courts and tribunals exercising Commonwealth jurisdiction;

(d) the appropriate legislative approach to reforming that law; and

(e) any non-legislative approach so as to remove any unjustifiable discriminatory effects of those laws on or of their application to women with a view to ensuring their full equality before the law.

IN PERFORMING its functions in relation to the Reference, the Commission shall:

(i) consult widely amongst the Australian community and with relevant bodies, and particularly with the Human Rights and Equal Opportunity Commission, the Affirmative Action Agency and the Sex Discrimination Commissioner;

(ii) consider & report on Australian community attitudes on difficulties associated with gender bias as it relates to women;

(iii) in recognition of work already undertaken, have regard to all relevant reports, including:

- the National Strategy on Violence Against Women prepared by the National Committee on Violence Against Women;
- the Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975*;
- the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on its Inquiry into Equal Opportunity and Equal Status for Women in Australia, particularly as it relates to the *Sex Discrimination Act 1984*;
- the Australian Law Reform Commission's Report No 57 on *Multiculturalism and the Law*;
- the Australian Law Reform Commission's Report No 39 on *Matrimonial Property*; and
- the Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* by the Affirmative Action Agency; and

(iv) consider and report on the relevant law of any other country.

one of its final recommendations in *Equality Before the Law: Women's Equality*, the majority of the commission recommended that an equality provision—either in the *Constitution* or (much more likely) a statutory provision in ordinary legislation—an Equality Act, should enshrine equality for women and men.⁵ We (that is, the two of us and Hilary Charlesworth) agreed generally with the idea that there should be an Equality Act that was independent of, and separate from, the *Sex Discrimination Act 1984* (Cth) (*SDA*), which is, in effect, a complaint-based Act. We dissented, however, and published a ‘minority view’ in which we argued that any new equality legislation should apply for the benefit of women only.⁶ We had a number of reasons for taking that position.

First, we argued that it was essential to identify clearly what was the problem or ‘mischief’ that such legislation was designed to respond to. Specifically, our concern was the needs of people who suffer inequality in the legal system because of their sex. While the term ‘gender’ is often used loosely, in fact, when we talk about a gender issue, we are almost invariably talking about women (just as when we talk about race we are referring to those who are racialised as other: non-Anglo). So ‘gender disadvantage’ is just a gender-neutral way of describing the concept of ‘women’s inequality’. It is women, rather than men, who experience gender disadvantage. This is not to suggest that men do not suffer discrimination or disadvantage in the legal system—far from it—but in most circumstances that is going to occur because of some factor such as their race, their class or their sexuality, not solely because they are men. We took the view that only if the problem of women’s lack of equality in law is recognised by name in the title and body of the legislation would we be able to label the problem accurately and only if we did that, would it be capable of being properly addressed.

Second, we argued that the central issue in gender equality is the power imbalance between women and men, rather than mere differences between them. For that reason, we saw an *Equality for Women Act*, rather than an *Equality for Gender-Neutral Persons Act*, as most consistent with a subordination or disadvantage approach to equality.⁷ That is, the issue is not whether men and women are different and should be treated differently, or the same and treated in the same way legally, but rather the focus should be on the relative distribution of power between women and men. An Act that on its face dealt with equality for women was more likely to recognise such power imbalances.

5 Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Recommendation 4.

6 Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Chapter 16.

7 This approach is most frequently attributed to Catharine MacKinnon (see her, *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, Cambridge, Mass., 1987, especially Chapter 3). For some discussion of different approaches to equality, see: Regina Graycar and Jenny Morgan, *The Hidden Gender of Law*, Second edition, Federation Press, Sydney, 2002, Chapter 3.

An approach that focused on women was also, we argued, consistent with our international obligations. Specifically, the *SDA* was enacted as Australia's implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a treaty concerned with discrimination against women (not with discrimination against men). This was spelled out clearly by Justice Spender in *Aldridge v Booth*, where His Honour rejected a challenge to the validity of the sexual harassment provisions of the *SDA*. It was argued that to the extent that the express statutory prohibition of sexual harassment addressed only sexual harassment of women, the legislation did not implement Article 15(1) of the Convention, which provides that 'States Parties shall accord to women equality with men before the law'. Spender J stated:

To give effect to the Convention, the legislation must be directed at the elimination of discrimination against women. Legislation which was directed at the elimination of discrimination generally could not fairly be characterised as legislation 'giving effect to the Convention'. The argument of the respondents assumes that one cannot promote the exercise and enjoyment of rights 'on the basis of equality with men' by prohibiting discrimination against women. There is implicit in this argument a necessity for a legislative prohibition of sexual harassment of men to be in existence.

I reject this argument. It would seriously restrict the operation of the Convention, and its implementation. It puts an unwarranted premium on the existence of legislation, which may or may not reflect the true position in fact.

If this argument of the respondent be right, legislation prohibiting the killing of young girls would be inconsistent and contrary to the terms of the Convention, unless there was in existence legislation prohibiting the killing of young boys, even though, in fact, the killing of young girls was widespread, and the killing of young boys non-existent or rare.

The fact that the legislation, as having effect by s 9(10), does not address sexual harassment of men in the workplace is irrelevant, in my view, to the question of whether the Act gives effect to the Convention.⁸

In any event, the current *SDA*, despite being passed in pursuance of Australia's ratification of CEDAW, does not preclude men from bringing general claims of sex discrimination—something they have tended to do with some frequency.⁹

⁸ *Aldridge v Booth* (1988) 80 ALR 1, 17–18.

⁹ See the discussion of cases such as the notorious challenge brought by Dr Proudfoot (*Proudfoot v ACT Board of Health* (1992) EOC 92-417) in Graycar and Morgan, *The Hidden Gender of Law*, Chapter 3.

Indeed, this led to our fourth argument. A further disadvantage we saw in a gender-neutral Act that applies equally to women and men was that it would perhaps encourage further legal challenges to women-only programs or services that were designed to address some of the well-documented legal disadvantages experienced by women.

An Equality Act in 2010?

We would have to concede that part of the reason we recommended a women-only equality guarantee in 1994 was that, like good academics, we wanted to provoke debate. A women-only Act, however, probably was not politically feasible then, and it probably is not now. There is nonetheless a live proposal on the table (from the Senate Standing Committee on Legal and Constitutional Affairs)¹⁰ suggesting that there be an inquiry into an Equality Act for Australia.

There seems little reason to think that if we did get such an Act—whether it was constitutional or statutory—it would recognise on its face only those who are disadvantaged on the grounds of race, sexual orientation, and so on. If there is to be equality legislation, it would almost certainly protect the interests of heterosexuals as much as gay men and lesbians, white Anglo-Celtic Australians as well as Asian Australians, men as well as women. In our view, such an approach fails to identify who it is that is suffering disadvantage.

It was for this reason that, when working on the ALRC inquiry, we considered it essential to provide a definition—or what might perhaps be better described as a methodology—for determining whether equality rights have been infringed, to enable us to move beyond mere formal equality. In a recommendation that was endorsed by the whole commission, we recommended (drawing on some of the early equality jurisprudence of the Supreme Court of Canada)¹¹ that:

In assessing whether a law, policy, program, practice or decision is inconsistent with equality in law regard must be had to

- the historical and current social, economic and legal inequalities experienced on the ground of gender [race, sexual orientation, and so on]

10 Senate Standing Committee on Legal and Constitutional Affairs, *Report of the Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Recommendation 43.

11 The commission referred in particular to *Law Society of British Columbia v Andrews* [1989] 1 SCR 143. In this case, the Supreme Court first set out its substantive view of ‘equality’—a view subsequently reaffirmed in a number of cases. See, for example: *Law v Canada (Minister for Employment and Immigration)* [1999] 1 SCR 497; *Symes v Canada* [1993] 4 SCR 695; *Egan v Canada* [1995] 2 SCR 513; *Miron v Trudel* [1995] 2 SCR 418; *Thibault v Canada* [1995] 2 SCR 627; *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624; and *Vriend v Alberta* [1998] 1 SCR 493.

- the historical and current practices of the body challenged and the extent to which those practices have contributed to or perpetuate the inequalities experienced
- the history of the rule or practice being challenged.¹²

The provision of a method by which to approach the issue of equality provides some chance of ensuring that the court dealing with a challenge to a particular program, including one enacted for the benefit of women, does not merely apply a formal equality approach but rather assesses whether there is ‘equality’ in context. So, for example, in order to decide whether there has been a violation of an equality guarantee in the context of women-only health services, it would not be possible to say merely that there are no men-only health services and therefore women-only services must go. Instead, there would need to be an examination of, say, women’s disadvantage in the health field, the aims and bona fides of the organisation providing the service, an analysis of why the service was introduced, and so on, before it could be decided whether equality had, in the particular context, been promoted or denied.¹³

Would Having a Single Equality Act Address any of these Concerns?

Would having a single Equality Act address any of these concerns? Once again, drawing on our academic backgrounds, the answer is—like the answer to almost every question in law school—‘it depends’. Before we could even attempt an answer, we would need to untangle what the proposal for a single Equality Act really involves. It could mean one of two things, or a combination thereof. At one end is the complaints-handling aspect: the equality law is there to enable an individual to complain about discrimination (the current main role of both federal and State anti-discrimination laws). A proposed single Equality Act could mean that we should simply follow the approach of Australia’s States and put all our discrimination law grounds into one omnibus Act.¹⁴ At the other end of the spectrum of possibilities is the introduction or promotion of a positive or proactive right to equality. This has been little explored in Australia, with the exception of the 1980s affirmative action legislation, now renamed the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWWA). As we were

12 Australian Law Reform Commission, *Equality Before the Law: Women’s Equality*, Recommendation 4.5.

13 Contrast with *Proudfoot v ACT Board of Health* (1992) EOC 92-417.

14 See *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas.); *Equal Opportunity Act 1995* (Vic.); *Equal Opportunity Act 1984* (WA).

reminded by Margaret Thornton and others at the conference, the language of affirmative action appears to have disappeared from public discourse. We will consider these different possibilities in turn.

One Act for Complaints

The first possibility would involve the creation of an omnibus complaint-handling Act—that is, merging the *SDA*, the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth), and perhaps adding new grounds not currently included such as religion or trade union activity. One possible advantage of such a move is arguably to ensure that the best aspect(s) of each piece of legislation is used (for example, it is sometimes suggested that there should be a general prohibition against sex discrimination, as there is in relation to race discrimination.¹⁵ Of course, any such attempt to enhance each of the Acts could be done by way of simple legislative amendment, without the need for an omnibus Act. Such an approach would be consistent with the Australian Human Rights Commission's submission to the senate committee inquiry in which it argued that there should be some immediate changes to the *SDA* and a more thoroughgoing review later.¹⁶

Intersectionality

Perhaps the strongest argument presented for combining the Acts is that, theoretically at least, it should make the issue of intersectionality easier to deal with.¹⁷ That is, if all the grounds are in the one Act, it might be argued that it is easier to recognise that a woman has both a gender and a race, and might well be discriminated against in particular ways, because she is, say, an Indigenous woman. This was certainly the view taken by a number of those who made submissions to the senate committee.¹⁸ Others, however, appeared more sceptical.¹⁹ After all, we do have the perfect experiment, with all State legislation currently including multiple grounds in the one piece of legislation. There are, however, few examples of litigation in fact raising multiple grounds. Moreover, surely a complaint that raised issues of intersectionality could be—

15 See *Racial Discrimination Act 1975* (Cth), s. 9.

16 Australian Human Rights and Equal Opportunity Commission, Submission 69 to the Senate Standing Committee on Legal and Constitutional Affairs, 1 September 2008, Chapter 6, <http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sub69.pdf> The AHRC's recommendations for immediate change to the *SDA* include reforming the definition of indirect discrimination, specifying breastfeeding as a separate protected ground and increasing protection on the grounds of family and carer responsibility, and strengthening sexual harassment laws.

17 For a discussion of intersectionality, see Graycar and Morgan, *The Hidden Gender of Law*, pp. 48–55.

18 See, for example: submissions by Women's Lawyers' Association of New South Wales and Australian Women Lawyers, National Association of Community Legal Centres, Women's Legal Services Australia, Australian Council of Trade Unions and the Human Rights Law Resource Centre.

19 See, for example: submissions by UNIFEM and Margaret Thornton.

and arguably already is—dealt with administratively by the Australian Human Rights Commission (AHRC), to try to ensure that all aspects of the complaint are addressed.

It could be instead that what is needed is a change in thinking rather than a change in legislation in order to deal effectively with intersectional discrimination. As such, it seems unlikely that a mere inclusion of all grounds in the one Act would contribute much, if anything, to that change of thinking.

As for possible downsides, it is also possible, as a number of submissions to the senate inquiry noted,²⁰ that the inclusion of all grounds in the one Act could lead to a reduced focus on any one—and here of course we are especially concerned about gender. Margaret Thornton, for example, referred to the fact that a single omnibus Act would be likely to mean treating ‘all forms of discrimination as the same’,²¹ which could lead to a ‘distorting effect’.²² So, beyond the administrative convenience of addressing a series of new grounds in one Act, we are at the least sceptical about whether a single complaints-handling Act will add much.

Separation of Complaints Handling and Broader Equality Mission

When the ALRC proposed an Equality Act, it was in the context of the continued existence of the *SDA*. That is, an Equality Act was not meant to replace the *SDA*, but rather was intended to operate separately and independently of that Act. This would have had the effect of having an agency such as in New South Wales, the Anti-Discrimination Board, or the Australian Human Rights Commission continue to deal with individual complaints, but other enforcement of equality rights would be done in a different way and/or by a different agency. There is some consideration of this sort of model in the most recent review of the Victorian *Equal Opportunity Act*: the *Gardner Report*.²³ In this report, Julian Gardner, former Victorian Public Advocate, suggested that a ‘proactive and strategic approach towards compliance’ might conflict with the need for the Equal Opportunity and Human Rights Commission (Vic.) to appear to be impartial, as is required for its dispute-resolution function.²⁴ Arguably, the

²⁰ Ibid.

²¹ Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, p. 44.

²² Margaret Thornton, Testimony before the Senate Standing Committee on Legal and Constitutional Affairs, 11 September 2008, *Hansard*, p. 44.

²³ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008, Department of Justice, Government of Victoria, Melbourne, [*Gardner Report*], <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/home/your+rights/equal+opportunity/>>

²⁴ ‘The Act does not clearly empower the Commission to take a more proactive and strategic approach towards compliance. Further, the exercise of proactive powers under the current Act could create potential conflicts of interest with the Commission’s complaint handling function. This may compromise the perception of impartiality’ (ibid., p. 43).

AHRC, with its capacity to, say, intervene in cases that raise human rights issues, has either breached its impartiality obligation or negotiated it successfully. In any event, it could be that to advocate (gender) equality effectively, regardless of any perception of ‘bias’, it would be useful to separate out complaints handling from other functions. Such a division might allow a greater focus on education, research, determining and advocating for ‘equality-achieving’ best practice, strategic pursuit of bad practice, review of legislation and other practices and policies, and the identification and remediation of systemic inequality. That is, an Equality Act could be a good move but in addition to, not in substitution for, the *SDA*, the *Racial Discrimination Act*, the *Disability Discrimination Act*, and so on. We return below to the concern about perceptions of bias that could arise if an equality body has more than one function.

Positive Duties

As has been noted, one of the central concerns when we proposed an Equality Act was the definition of equality. We have in the previous section considered that one possible way of moving towards ‘equality’ legislation is to place all the grounds of discrimination into one Act, as the States currently do. Such a proposal does not, however, necessarily touch on the basic understanding of equality. Another option is to propose a positive duty to ensure equality. Without clear attention to what is meant by equality, however, that proposal also raises questions about the extent to which, if at all, it takes us beyond a constrained equality of opportunity scenario.

As we mentioned above, however, Australia has—and has had for 23 years—legislation that might be seen as embodying a more proactive approach to equality: the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (*EOWWA*), or as it was formerly known, the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth). Currently, that Act covers some 20–25 per cent of employees, provides an obligation on private employers of more than 100 people to report progress on various employment matters and has as its sanction public reporting/reporting in Parliament of non-compliant organisations. Such organisations are also not eligible for government contracts for the supply of goods and services.

This legislation, too, is currently under review, by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), at the request of the minister.²⁵ As part of that review, KPMG was asked to conduct a consultation that included

25 KPMG, *Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs, Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation Report*, January 2010, KPMG, Melbourne [hereafter, *Review*]. The terms of reference of that review are to: ‘examine the contribution that the EOWW Act has made to increasing women’s employment opportunities and advancing women’s

- the release of an Issues Paper and a call for public submissions
- individual interviews with key stakeholders
- roundtables in capital cities across Australia with key stakeholders
- a survey of reporting organisations under the *EOWWA*
- a survey of employees.²⁶

This report became available in January 2010. Some of the limitations of the *EOWWA* are obvious, but the particular contribution of the report for our purposes is first of all the identification of more finely grained and up-to-date critiques, but perhaps even more importantly suggestions for change to the legislation. These two aspects are canvassed in some detail below.

Clearly there are limitations on the powers of the Equal Opportunity for Women in the Workplace Agency (EOWA). The Act excludes government agencies and ‘small’ employers from its purview.²⁷ What the KPMG report makes clear, however, is the large number of organisations that do not bother to report at all. The EOWA, in its submission to KPMG, estimates that there are some 13 000 organisations employing 100 or more people and only some 8500 have identified themselves to the EOWA.²⁸ That is, some 4500 eligible organisations have not submitted themselves to scrutiny and are thus not subject to even the very soft forms of enforcement contained in the legislation. In short, in addition to the specifically excluded government and ‘small’ employers, these 4500 organisations remain unidentified, are not on any list of non-compliant organisations and therefore remain eligible for government contracts.

In addition, the EOWA cannot, for example, begin an investigation of an organisation of its own motion.²⁹ It undertakes community education, awards ‘Employer of Choice’ designation to selected organisations (111 in 2009) and has

equality in the workplace; examine the role that the EOWW Act and the EOWA [the Equal Opportunity for Women in the Workplace Agency] have in gathering and reporting on workplace data; consider the effectiveness of the existing legislation and arrangements in delivering equal opportunity for women; provide advice on practical ways in which the equal opportunity for women framework could be improved to deliver better outcomes for Australian women; consider opportunities to reduce the cost of existing regulation and/or ways to ensure that any new legislation is cost-effective and well-targeted; consider the EOWW Act and EOWA within the framework of existing and proposed human rights and proposed human rights and workplace-related legislation, policy and administration, with a view to maximising complementarity and reducing overlap; and have regard to the effects of the EOWW Act, or any proposed recommendations resulting from this review, on social inclusion, the economy, the labour market, business competitiveness and the general wellbeing of the Australian community’ (p. 1).

26 Ibid., pp. 1–2. The key stakeholders were identified or at least approved by FaHCSIA (p. i).

27 Interestingly, 37 per cent of submissions to the KPMG consultation thought the coverage of the act was inadequate—usually proposing increasing the coverage to smaller and governmental organisations. Only one submission proposed reducing the coverage of the act (ibid., p. 47 [5.1.1]). It appears that there was less consensus in roundtable discussions (ibid., pp. 79–80 [7.1.4]).

28 Ibid., at 3.1.1.

29 Ibid., p. 13 [3.1.2].

as its ‘flagship event’ the annual Business Achievement Awards.³⁰ Interestingly, a number of those who made submissions to the KPMG consultation felt that these awards were on occasion given to organisations that in fact had serious problems in relation to the employment of women.³¹ More generally, it was suggested that data collection from those employers who do comply was inadequate—for example, there was a lack of data on the ‘industry pay differential between men and women’,³² the data on Indigenous women³³ and women with disabilities were also inadequate, as were the data on available child care in the area.³⁴ More broadly, a number of submissions to KPMG argued that the Act, and the agency, did not adequately focus on outcomes; the provision of data seemed to be enough.³⁵

‘A recurring theme arising from the consultations was that reporting [the reporting currently required under the Act] was process, rather than outcomes, driven and, overall, largely ineffective in improving employment outcomes for women.’³⁶

And, according to the EOWA, itself:

Flexibility that was built into the 1999 Act has created uncertainty among employers about the standards to be applied to both their equal opportunity programs (ie, their analysis, actions and evaluations) and to their reporting. This uncertainty has been reflected in employers’ reports and has often meant that the Agency may not have a clear basis for evaluating many programs.³⁷

Indeed, some 21 per cent of public submissions to KPMG argued for the inclusion of numerical targets in organisations’ plans—a view also strongly supported in roundtable discussions.³⁸ Government, expert individuals and community organisations were the strongest advocates for setting targets.³⁹ It is worth noting that while the Australian Chamber of Commerce and Industry opposed the introduction of targets—‘employers resist their workplaces being used to engineer social attitudes or to experiment with policy that is ahead

30 Ibid., p. 17 [3.1.4].

31 Ibid., p. 55 [5.1.5]. Anne Summers is quoted as saying that there was a need ‘to end the charade of government giving awards to companies that are barely compliant (and sometimes in breach) of even the watered-down legislation that currently exists’ (ibid., p. 114 [7.2.3]).

32 Ibid., p. 30 [4.1.2].

33 See also Aileen Moreton-Robinson, ‘Masking Gender and Exalting Race: Indigenous Women and Commonwealth Employment Policies’ (1992) 15 *Australian Feminist Studies* 5.

34 KPMG, *Review*, pp. 30, 31 [4.1.2]. This is further elucidated at pp. 48–9 [5.1.2].

35 See for example: ibid., p. 31 [4.1.2].

36 Ibid., p. 50 [5.1.3].

37 Ibid., p. 51 [5.1.3].

38 Ibid., p. 69 [6.2.5]. As KPMG notes, this proposition was also contested by some respondents—for example, the Australian Chamber of Commerce. (See also pp. 87–94 [7.1.6]).

39 Ibid., p. 88 [7.1.6].

of community attitudes'⁴⁰—other private employers were, like government and expert individuals, in favour, as 'focusing efforts'.⁴¹ So, one industry submission, quoted by KPMG, said:

The absence of adequate and appropriate targets and benchmarks linked to an enforcement regime allows organisations to be seen to make progress, when the reality is otherwise...our preferred model would be the establishment of voluntary targets for organisations (eg, specific year-on-year improvements in female representation at leadership and senior leadership levels).⁴²

There was less industry support for mandatory quotas set by government, though strong union and academic support for such initiatives.⁴³

Current sanctions available to the EOWA were, unsurprisingly, also viewed as inadequate, with 34 per cent of submissions indicating penalties were inadequate.⁴⁴ Others suggested that 'non-compliance' should cover those who had 'failed to make any improvements for women in their organisation',⁴⁵ and not just inadequate or no reporting.⁴⁶ Other proposals for improvement included strong support for compliance auditing, perhaps in conjunction with the Fair Work Ombudsman, and restricting access to government grants for non-compliant organisations;⁴⁷ additionally, a public league table of the top-200 and bottom-200 companies was proposed.⁴⁸

So, do proposals for the development of a proactive equality obligation indicate that we are simply arguing for a return to the 1980s (perhaps complete with shoulder pads)? We think it is clear that we are not just returning to the 1980s; while progress in achieving gender equality in the workplace has been frustratingly slow, we should be at least marginally heartened by some of the changes in attitude towards 'affirmative action'—for example, the very widespread support manifest in the KPMG report for what in the 1980s would have been seen as radical proposals.

40 Ibid., p. 91 [7.1.6].

41 Ibid.

42 Ibid.

43 Ibid., pp. 92–3 [7.1.6].

44 Ibid., p. 53 [5.1.4].

45 Ibid., p. 72 [6.3.3] and p. 97 [7.1.7].

46 See Part IV of the EOWWA. Further information about sanctions for non-compliance and current lists of non-compliant organisations are available on the Equal Opportunity for Women in the Workplace Agency's web site ('Sanctions for Not Complying': <http://www.eowa.gov.au/Reporting_And_Compliance/Complying_with_the_Act/Sanctions_for_not_Complying.asp>). See also Sara Charlesworth's chapter in this collection.

47 KPMG, *Review*, pp. 97 and 101 [7.1.7].

48 Ibid., p. 105 [7.2.1]. A continuing role for the EOWA in education and an increased role in leading relevant research were also discussed and supported (pp. 107–11), as well as the development of stronger links with industry (pp. 111–12 [7.2.2]). It was also suggested that financial incentives through the tax system should be pursued (pp. 119–20 [7.3.1]).

A Focus on ‘Out-Groups’?

Sandra Fredman has argued that a ‘more nuanced approach to the aims of a proactive model goes beyond the opportunity-results conceptual framework’. In her view:

[I]t should break the cycle of disadvantage associated with out-groups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail an accommodation and positive affirmation and celebration of identity within community, and finally, it should facilitate full participation in society.⁴⁹

Like Fredman, we see the need to focus on ‘out-groups’—that is, we see Fredman’s approach as appearing to want to recognise disadvantage. We do acknowledge, as Charlesworth points out elsewhere in this volume, that recognition has often occurred, especially since the 1999 amendments to the *EOWWA*, within the confines of a limited human resource management framework.⁵⁰ The explicit recognition of disadvantage even within the current legislation, is, however, the reason why we think that positive duties might have more in common with our affirmative action legislation than is apparent from our Act’s current limited scope. That is, the key aspect of affirmative action/equal employment opportunity legislation is that it does at least recognise who it is—between women and men—who is disadvantaged in the workplace. In the context of addressing continued gender inequality, we question whether there is a need for new ‘equality’ legislation focused on positive duties, rather than a need to vigorously pursue the renewal and revitalisation of the extant gendered legislation—the *EOWWA*—that we already have (and have had since the 1980s).

Some Reflections on Law Reform Process(es)

We want to conclude by looking at issues about the process of law reform in relation to achieving a more effective recognition of equality rights.

Just about every form of law reform body or process has been used in the drafting and review of discrimination and/or equality legislation. There have

49 Sandra Fredman, ‘Changing the Norm: Positive Duties in Equal Treatment’ (2005) 12(4) *Maastricht Journal of European and Comparative Law* 369, 377.

50 See also Carol Bacchi, ‘The Seesaw Effect: Down Goes Affirmative Action, Up Comes Workplace Diversity’ (2000) 5 *Journal of Interdisciplinary Gender Studies* 64.

been Private Members Bills,⁵¹ government bills,⁵² parliamentary inquiries,⁵³ ALRC inquiries,⁵⁴ inquiries under the auspices of the AHRC or equivalent⁵⁵ and review by a private consulting firm.⁵⁶ At the State level, we have had law reform commission inquiries,⁵⁷ stand-alone inquiries⁵⁸ and parliamentary inquiries,⁵⁹ among others. It is not possible, at least in this context, to make a comprehensive assessment of where, when and how each of these bodies might be best placed to consider and propose reforms.⁶⁰ We do, however, want to raise some specific questions about 'expertise'.

It should be recalled that while we were asked to comment on the proposed single 'Equality Act', the Senate is not in fact proposing that such legislation should be enacted. Rather, it is a proposal that an inquiry be undertaken by the AHRC into whether a single Equality Act is a good idea. In turn, the AHRC's submission to the National Human Rights Consultation suggests that it was not the appropriate body to undertake the task, arguing it had a 'vested interest' and that the ALRC was a more appropriate body (with perhaps the AHRC acting in an advisory capacity).⁶¹ Why the ALRC, we ask? Perhaps it seemed appropriate because of the work we have talked about earlier that the ALRC undertook on an Equality Act? As we are only too aware, however, that was a very long time ago. We are not so convinced that the ALRC—a generalist law reform body—is the appropriate body. Although the commission completed the Equality Before the Law Inquiry in record time, generally, the ALRC conducts very lengthy inquiries—in both time and page numbers.⁶² Additionally, can we

51 For example, Senator Susan Ryan introduced a Private Members Bill in 1981 aimed at implementing the provisions of CEDAW. Although the Bill was ultimately unsuccessful, it did go on to become the government-sponsored *SDA* and the *Affirmative Action (Equal Employment Opportunity for Women) Act*.

52 For example, the *SDA* and the *Affirmative Action (Equal Employment Opportunity for Women) Act*.

53 For example, the 1992 House of Representatives Standing Committee on Legal and Constitutional Affairs' inquiry, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*; and the 2008 Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality.

54 For example, the ALRC's 1994 inquiry, *Equality Before the Law*.

55 For example, the Human Rights and Equal Opportunity Commission's 1992 study, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, Human Rights and Equal Opportunity Commission, Sydney.

56 For example, the current review of the *EOWWA* being undertaken by KPMG under the auspices of the Australian Government Office for Women, discussed above.

57 For example, the NSW Law Reform Commission's 1999 Review of the *Anti-Discrimination Act 1977*.

58 For example, the 2008 Gardner Review in Victoria.

59 For example, the Victorian Parliament's Scrutiny of Acts and Regulations Committee's continuing inquiry into exceptions and exemptions in the *Equal Opportunity Act 1995*.

60 Laura Barnett, *The Process of Law Reform: In Search of Indicators for Success*, Paper prepared as part of ARC-funded project on law reform (forthcoming; on file with the authors).

61 Australian Human Rights Commission, Submission to the National Human Rights Consultation, June 2009, pp. 91–2, <http://www.hreoc.gov.au/legal/submissions/2009/200906_NHRC_complete.pdf>

62 In a speech given in October 2008, the Special Minister of State described the ALRC's privacy report as follows: 'There are 295 recommendations for reform in the ALRC's three volume, 74 Chapter, 4.8 kg report' (see <http://www.smos.gov.au/speeches/2008/sp_20081002.html>). He might have added that the report contained 2694 pages.

assume it would have the necessary expertise? Of course, this can be met by the appointment of commissioners and/or consultants with relevant expertise. As we know, however, the wheels of government can be slow and, notwithstanding a very short reporting deadline, it was not until at least halfway through the reference that a part-time commissioner was appointed to the ALRC's current inquiry into domestic violence laws.⁶³

Moreover, there seems to be a tendency to assume that expertise is inherently partial; certainly, in our experience, expertise in issues of gender equality is often associated with a lack of impartiality, as has been well documented by our colleague Hilary Astor.⁶⁴ In an article published in 1997, Astor reflected on an experience she had at an Australian law teachers' conference. She had given a paper, using a storytelling method, to raise the issue of violence in mediation. The paper was at a general plenary session (that is, not in a session on 'gender' or 'violence' or even an interest group on 'mediation'). She told the fictitious story of Elizabeth, a lawyer, who was severely beaten by her husband, whom she finally left after his violence had caused her to miscarry. Astor asked the audience to reflect on whether Elizabeth might end up in mediation in the resolution of her dispute with her husband about property and the children and how she might fare in a mediation process, given the history of the violence.

The second part of Astor's paper reflects on the audience's reaction to it. All through morning tea, which immediately followed the presentation, people were speculating on who 'Elizabeth' *really* was. One legal academic announced that he knew Elizabeth: he had taught her. Others simply assumed the story was autobiographical. Someone else claimed that the paper was unlike others at the conference: 'It was emotional! The author must have a barrow to push—perhaps she is talking about herself.'⁶⁵ Astor reflected on this experience as follows:

One does wonder whether, when an academic gives a paper on bankruptcy, there is speculation about whether that academic has personal experience of bankruptcy. Or whether, if one used a storytelling method to illustrate the dilemmas faced by a bankrupt in the legal system,

63 This study was referred to the ALRC in July 2009 and its final report and recommendations are expected by July 2010. The terms of reference require the commission to consider the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act* and relevant Commonwealth, State and Territory criminal laws; and the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence and to consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children.

64 Hilary Astor, 'Elizabeth's Story: Mediation Violence and the Legal Academy' (1997) 2 *Flinders Journal of Law Reform* 13, discussed in Regina Graycar, 'Claire L'Heureux-Dubé: Reflections from Down Under' in Elizabeth Sheehy (ed.), *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé*, Irwin Law, Toronto, 2004, pp. 96–7.

65 Astor, 'Elizabeth's Story' 27.

one would be seen as pushing a 'barrow'. Speculations that Elizabeth's story was polemic motivated by autobiography are disturbing in that they do not do justice to the issues raised.⁶⁶

This phenomenon, which seems to extend to all manner of issues relating to gender or equality, was also described by Canadian law professor Christine Boyle many years ago when she highlighted a description of herself (a feminist) in a program as having been placed 'under the heading of "Legal Scholarship for a Cause"', while a male tax lawyer spoke under the heading "Conventional Legal Research".⁶⁷ One of us was once part of a broad group of highly experienced researchers who applied for a government consultancy contract that involved violence against women. We were told that we had not been successful in our tender because our expertise in that field meant that we were 'too close to the issue'. This is why we believe it important to draw attention to this tendency to presume that knowledge of gender equality issues, rather than demonstrating expertise, in fact indicates some lack of partiality. We would do well to ask the same questions of bodies that specialise in tax or corporations: are they ever considered inappropriate as reviewers or researchers of those issues because they are 'too close to the issue'?

So, let us return to why the Australian Human Rights Commission said it was not the appropriate body. It commented that 'the inquiry would inevitably need to examine the powers, functions and institutional arrangements of the commission itself'⁶⁸ and that, 'as the federal body responsible for receiving, investigating and conciliating discrimination complaints, the Commission is an integral component of the anti-discrimination regulatory system'.⁶⁹

As if that was self-explanatory, it went on to say: 'An independent body such as the Australian Law Reform Commission (ALRC) would be a more appropriate choice as *it would not be as vulnerable to criticism of having a vested interest in the outcome of the inquiry*' (emphasis added).⁷⁰

Let us try to unpack this a little. It could be said that the AHRC does have a vested interest in, say, the continuing existence of specialist commissioners; people might lose their jobs if these were abolished and someone might suggest they would be reluctant to recommend that. Is that really enough of a reason for it to decline to undertake an inquiry in a field in which it is the agency with appropriate expertise?

66 Ibid., 29.

67 Christine Boyle, 'Sexual Assault and the Feminist Judge' (1986) 1 *Canadian Journal of Women and the Law* 93, 102, n. 39.

68 Australian Human Rights Commission, Submission to the National Human Rights Consultation, p. 92.

69 Ibid.

70 Ibid.

We surely want those who are expert in understanding and indeed promoting equality to undertake an inquiry rather than, without intending any offence to law reform bodies, a body whose expertise is as a generalist legal reform body. This area of equality is too important to be left to non-specialists and we need to address directly this tendency to associate independence with *not* having particular expertise.

There are other possibilities for undertaking such a review and there are many models that could be explored. One possibility would be a stand-alone ad-hoc body established for this purpose and advised by the AHRC. This is not a completely foreign or new idea to this area. In the early 1980s, the Working Party on Affirmative Action Legislation consisted of a mix of politicians, representatives of employers, trade unions and women's organisations. We realise we are in a different era, with different needs—there is not quite the premium on getting politicians to be able to move beyond the notion that the *SDA* and affirmative action meant the end of the family, the death of merit and the grossest interference with business prerogative that anyone had ever imagined (as anyone as old as us will remember).⁷¹ And the politicians this time around have had a substantial input already, via the senate inquiry itself. Another possible model is the recent National Council on Violence Against Women—comprising a range of representatives from around the country. Perhaps a group made up of some representatives from the AHRC and other stakeholders—for example, the Women's Electoral Lobby (WEL), union-based feminists, employers, and so on, but dominated by and chaired by non-AHRC people—would be a suitable group to work out fully the implications of an Equality Act.

Conclusion?

It is interesting to reflect on the difference in having this conference now, compared with a similar conference, say, three years ago. Then, we were at the height of neo-liberalism and neo-conservatism. Now there appears to have been a shift in thinking about what we can expect from governments with the advent of the Rudd Government. While we could hardly describe Kevin Rudd as a radical, the government has certainly been prodigious in setting up inquiries (though perhaps less so at delivering on their recommendations).

We need to keep on the agenda a focus on what we mean by equality and also to remember that while a lot has changed since the early days of the *SDA* and affirmative action legislation, much has stayed the same. We seem to be still having a debate that was fully discussed in the early 1990s and has not progressed much since then.

71 And as discussed by Chris Ronalds and Susan Ryan, in this volume.

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