

9. And Which ‘Equality Act’ Would that Be?

Simon Rice¹

In 2008, an Australian senate committee report recommended a public inquiry into the merits of a national Equality Act, to harmonise existing federal anti-discrimination acts and to legislate for a positive equality duty along the lines of such a duty in the United Kingdom. The Australian Government has since announced a ‘streamlining’ exercise for federal anti-discrimination law, but has made no mention of an equality duty. I review the history of calls for an Equality Act in Australia and the process by which the United Kingdom has arrived at its own Equality Act. I propose that any Australian Equality Act is an advance on established methods of pursuing equality only if it enacts a positive equality duty, and I identify lessons for Australia arising from the extensive UK process of reform.

Introduction

In 2008, a review of the *Sex Discrimination Act 1984* (Cth) (*SDA*) recommended an inquiry ‘to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act’.² Submissions to the Senate Standing Committee on Legal and Constitutional Affairs canvassed different ways one can think of an ‘Equality Act’, and it is unclear what particular idea of an Equality Act the committee had in mind in its recommendation.³

The idea of an Equality Act in Australia risks going the way of the idea of ‘access to justice’, where the term is a rallying cry and goal for many interests, from many perspectives, without clearly having one meaning that can survive a public policy debate intact. In this chapter, I survey different ‘Equality Acts’—real and proposed—and attempt to ‘untangle what the [the senate committee’s]

¹ I was ably assisted by research carried out by Tiffany Henderson.

² Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Parliament of Australia, Canberra, 2008.

³ The lack of clarity could be of little moment since the federal government, in its response to the Senate Standing Committee’s report in May 2010, ignored completely the ‘Equality Act’ recommendation: *Government Response to Senate Standing Committee on Legal and Constitutional Affairs Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, 6 May 2010, Commonwealth of Australia, Canberra.

proposal for a single Equality Act actually involves'.⁴ I suggest that to have real meaning, an Equality Act is more than just another complaints-based remedial statute, but that following the spirit, though not the letter, of the *Equality Act 2010* (UK), it legislates for a positive equality duty.

The first of the 'Equality Acts' I review is the one proposed by the Australian Law Reform Commission (ALRC) in 1994. I characterise it as, effectively, a 'third-generation' form of equality law, dependent on individuals challenging offending conduct in much the same way as in all Australia's current anti-discrimination laws. Drawing on our experience of those anti-discrimination laws to date, I note various reasons why this approach to redressing inequality is unlikely to succeed, concluding that what the ALRC had in mind is not what we now need in Australia, if ever it was a good idea.

Second, I review the 'Equality Act' proposed by the senate committee in 2008, in which I identify two distinct proposals. One is to 'harmonise' Australia's four federal anti-discrimination laws and one, less obviously stated, is to introduce a positive equality duty. The duty that is envisaged seems to be along the lines of a duty that has been in place in the United Kingdom under its anti-discrimination laws for some years, but which, at the time of the senate committee inquiry, was in the Equality Bill 2008 (UK); in April 2010, that Bill became the *Equality Act 2010* (UK). In the course of considering the senate committee's 'harmonising' proposal, I comment, without enthusiasm, on the more recently announced 'streamlining' of Australia's four federal anti-discrimination laws for 'deregulatory' reasons.

I then look at the lengthy and substantial process that led to the passage of the UK *Equality Act*, and at the terms and scope of its positive equality duty. There are lessons in this for Australia, principally in relation to the process for arriving at a well-considered, contemporary and widely accepted approach to pursuing equality through legislation, which I set out subsequently. At the same time, I consider what the content of a positive equality duty in Australia might be. I conclude by suggesting that if ever Australia is to have an Equality Act that delivers positive equality, it will require a strength and vision of political leadership that we currently lack.

The ALRC's 'Equality Act'

In 1993, in anticipation of the tenth anniversary of the passage of the *SDA*, the then Commonwealth Attorney-General, Michael Duffy, asked the ALRC to investigate what steps should be taken 'so as to remove any unjustifiable

4 Reg Graycar and Jenny Morgan, this volume.

discriminatory effects of [Commonwealth] laws on or of their application to women with a view to ensuring their full equality before the law'.⁵ At the outset, the reference was limited to equality 'before the law'; the ALRC, looking in particular at the *SDA*, recognised that it 'will be unable to address fully issues of women's inequality'.⁶

The ALRC assessed the adequacy of the *SDA* and found it wanting, saying that⁷

- the *SDA* addresses only individual acts of discrimination within specified fields of activity for which a person may make a complaint
- it has a limited understanding of equality; it does not take account of the historical and contextual framework of disadvantage
- it is unable to address the issue of violence against women as discrimination other than within the framework of sexual harassment
- it is unable to challenge directly gender bias or systemic discrimination in the content of the law
- it concentrates on the treatment of individuals rather than the effects of laws
- it cannot strike down rules or laws
- it exempts areas from its operation
- its protection is activated only by making a complaint.

Reflecting many of the submissions it received, the ALRC's response to the limitations of the *SDA* was to recommend—in terms drawn from the Canadian experience under its Charter of Rights and Freedoms⁸—a legislative guarantee of 'equality before the law, equality under the law, equal protection of the law, equal benefit of the law, and the full and equal enjoyment of human rights and fundamental freedoms'.⁹ This legislative guarantee was the ALRC's Equality Act.

Following the Canadian experience of a constitutional equality right operating alongside, and not instead of, existing sex discrimination legislation, the ALRC's proposed Equality Act was to be a national human rights standard, obliging government to ensure that its conduct resulted in equality to women, while anti-discrimination laws would continue to set local standards, obliging both public and private actors to treat women equally. Importantly, the ALRC's Equality Act was premised on an adversarial mechanism that would enable women (and men) to mount a legal challenge against law or conduct that operated with unequal effect; as the ALRC said: 'An Equality Act would ensure that women's rights

5 Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No. 69, Australian Law Reform Commission, Sydney, 1994, Part I, p. xv.

6 Ibid., Part II [4.5].

7 Ibid. (endnotes omitted).

8 Ibid., Part II [4.20].

9 Ibid., Part I, Rec. 4.3.

are fully acknowledged and protected in law. It would be *a means by which women could challenge laws, procedures and practices* that create or perpetuate inequality. It would affect the interpretation and development of the common law' (emphasis added).¹⁰

Although aspects of the ALRC's reports were implemented,¹¹ the proposed Equality Act did not eventuate. In hindsight, that might not have been a bad thing—not because nothing more needed to be done to address discrimination against women, but because the ALRC's Equality Act would have been only more of the same approach that had, and has, proved to be of limited effectiveness.

Negative Duties

I should explain what I mean by 'more of the same approach'. It is true that the ALRC's Equality Act would have been different from the *SDA* and, on the *SDA*'s twentieth anniversary, Gaze proposed, as an alternative to the *SDA*, legislation 'perhaps modelled on the Equality Act proposed by the Australian Law Reform Commission'.¹² The difference would have been in declaring equality before the law, rather than merely proscribing 'a narrow band of discrimination and promot[ing] a limited form of equality'.¹³ Women would have had access to a much wider range of claims—significantly, for example, in relation to discriminatory legislation¹⁴ and 'acts of government and the performance of public functions, powers and duties';¹⁵ it would not have been bound by the 'closed' categorisation of types of discrimination that characterises Australia's anti-discrimination legislation.¹⁶

What would have been the same was the legislative model, premised on individual complaint as the means of identifying and remedying offending conduct, whether that conduct offended a technical definition of discrimination or a broader concept of equality. The ALRC, for example, described the protection offered by its Equality Act as 'a declaration or an injunction from a court and...the ordinary range of administrative law remedies'.¹⁷ Even when the ALRC could see past the making of an order 'striking down laws or actions', it

10 Ibid., Part II [4.1].

11 Australian Law Reform Commission, *Summary: Equality Before the Law* (ALRC Reports 67 & 69), Australian Law Reform Commission, Sydney, <www.alrc.gov.au/inquiries/title/summary_alrc67&69.htm>

12 Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27(3) *University of New South Wales Law Journal* 914, 921.

13 Belinda Smith, 'Models of Anti-Discrimination Laws – Does Canada offer any Lessons for the Reform of Australia's Laws?' in Deirdre Howard-Wagner (ed.), *W(h)ither Human Rights? Proceedings of the 25th Annual Conference of the Law and Society Association of Australia and New Zealand*, 2008, p. 1.

14 Gaze, 'The Sex Discrimination Act After Twenty Years' 917.

15 Australian Law Reform Commission, *Equality Before the Law*, Part II [4.21].

16 Smith, 'Models of Anti-Discrimination Laws', p. 3.

17 Australian Law Reform Commission, *Equality Before the Law*, Part II [4.21]; [5.24]–[5.32].

remained within the adversarial sphere of making orders against a wrongdoer (granting 'appropriate relief' to parties)¹⁸ and anticipated only a broader form of injunctive order, which could require a party who has 'violated' the equality right to take some positive action.¹⁹

Put simply, the ALRC's Equality Act was, in its conception of the manner in which legislation operates to achieve social change, 'modelled on the negative duties and the individualistic, adversarial approach of [so-called] third-generation...legislation, rather than the fourth-generation positive duties and affirmative action legislation'.²⁰ Discussion of an Equality Act, in this chapter and in 2010 generally, is discussion of the merits of such 'fourth-generation' legislation, not of the 'old' approach of the ALRC's Equality Act.

In Australia,²¹ as in the United Kingdom, 'there can be no doubt that the third generation legislation [for example, the *SDA*]...has broken down many barriers for individuals in their search for jobs, housing and services, and...[has] driven underground those overt expressions of discrimination that were current 25 years ago'.²² It is also true to say, however—perhaps even more so in the federated jurisdiction that is Australia rather than is the case in the United Kingdom—that third-generation anti-discrimination legislation such as the *SDA* is unable to overcome structural barriers that entrench inequality, because 'it adopts a fragmented, inconsistent and incoherent approach to different manifestations of inequality of opportunity'.²³

Even as a means of awarding an individual remedy, let alone as legislation for social reform, the individual complaint model for addressing discrimination is excessively demanding of a litigant. Conceptually, a complainant must first fit themselves into a category that is defined precisely and exclusively according to a personal attribute (without accommodating intersectional or 'multiple grounds' claims),²⁴ and then must fit the circumstances they complain of into a 'rigid, complex and artificial'²⁵ statutory definition of discrimination. The latter requirement can be contrasted with the more accessible and accommodating approach in Canadian anti-discrimination law.²⁶

18 Ibid., Part II [5.33].

19 Ibid.

20 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality, A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart Publishing, Oxford, 2000, p. 7.

21 Gaze, 'The Sex Discrimination Act After Twenty years' 915.

22 Hepple et al., *Equality, A New Framework*, p. 14.

23 Ibid., p. 19.

24 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [4.50]–[4.56]; and see Thornton, and Graycar and Morgan, this volume.

25 *IW v City of Perth* (1997) 191 CLR 1, 12, per Brennan CJ and McHugh J.

26 Smith, 'Models of Anti-Discrimination Laws'. For a critique of 'categories' of discrimination under Canada's discrimination laws, see: Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993–94) 19 *Queen's Law Journal* 179.

If a complainant can fit within the definitional constraints, they must then pursue a remedy in an adversarial environment. They are complaining of discrimination precisely because they are the less powerful of two parties, yet they must gather and maintain the resources—money, time, expertise, resilience—to meet technical legal requirements to hold the more powerful party accountable. Resources aside, the technical aspects of proving discrimination are a significant obstacle, such as the burden of proof,²⁷ the standard of proof,²⁸ the comparator test for direct discrimination²⁹ and the requirements to prove indirect discrimination such as identifying a condition and addressing the reasonableness test.³⁰

Reliance on the Courts

At the time that the ALRC proposed its version of an Equality Act, there was reason enough to question whether faith should be placed in legislatures and courts to facilitate, let alone embrace, the aims of the Equality Act that was envisaged. In the years since, however, we have been given further reason to hesitate before relying on either institution to advance human rights guarantees.

Parliaments in Australia have shown little courage or leadership in enacting human rights legislation³¹ and have at times been quick to enact otherwise.³² The conduct of federal, State and Territory parliaments in relation to proposed human rights acts and charters has shown that on the rare occasions that they volunteer to have their conduct bound by human rights standards, those standards are expressed in terms that are both conditional and avoidable. In

27 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [6.46]–[6.51], Rec. 22. See Jonathon Hunyor, ‘Skin-Deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535.

28 See Loretta de Plevitz, ‘The Briginshaw “Standard of Proof” in Anti-Discrimination Law: “Pointing with a Wavering Finger”’ (2003) 27(2) *Melbourne University Law Review* 308.

29 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [3.15]–[3.22], Rec. 5.

30 *Ibid.*, [3.27]–[3.34], Rec. 6.

31 Examples include: the journey in South Australia from the Equal Opportunity (Miscellaneous) Amendment Bill 2006 to the *Equal Opportunity (Miscellaneous) Amendment Act 2009*; the *Government Response to the Productivity Commission’s Review of the Disability Discrimination Act 1992*, January 2005 (<www.ag.gov.au/PCDDA>); the failure of the Tasmanian Government to act on the recommendations in Tasmania Law Reform Institute (*A Charter of Rights for Tasmania*, Report No. 10, October 2007, Tasmania Law Reform Institute, Hobart) and the failure of the West Australian Government to act on the recommendations in *Report of the Consultation Committee for a Proposed WA Human Rights Act* (November 2007); and the explicit refusal of the federal government (Attorney-General Hon. Robert McClelland MP, Launch of Australia’s Human Rights Framework, Address to the National Press Club of Australia, Canberra, 21 April 2010) to act on Recommendations 17–31 of the Commonwealth of Australia (*National Human Rights Consultation Report*, Commonwealth of Australia, Canberra, 2009, [Brennan Report]).

32 For example, *Anti-Discrimination Amendment (Drug Addiction) Act 2002* removing discrimination protection for people whose disability is due to addiction to a prohibited drug and, to the same effect, the Disability Discrimination Amendment Bill 2003 (Cth); the Sex Discrimination Amendment (Teaching Profession) Bill 2004 (Cth) to allow sex discrimination ‘in order to redress a gender imbalance [in favour of women] in teaching’; the Human Rights Legislation Amendment Bill (No. 2) 1998 to allow the Attorney-General to veto court intervention by the Australian Human Rights Commission.

the Australian Capital Territory, for example, failure to table a compatibility statement for a bill or to report on a human rights issue raised by a bill does not invalidate a law³³—and similarly in Victoria for failure to table a compatibility statement.³⁴

A further reason to baulk at a complaint-based remedial model for addressing inequality is that it is dependent on courts and tribunals. Courts and tribunals of course have no institutional obligation to promote human rights, although they do have an obligation to prefer 'a construction that would promote the purpose or object underlying the Act...to a construction that would not promote that purpose or object'.³⁵ As Gaze has recounted in some detail, this obligation is too often overlooked:

Australian judges have generally approached interpretation of anti-discrimination statutes as being similar in kind to other statutes: a matter of giving effect to the words...[the] subject matter has not been seen as a basis for any different approach to interpretation...

In interpreting anti-discrimination legislation...it is rare for judges to consider the policy or concepts underlying these laws. On the occasions on which the High Court has discussed the purpose of anti-discrimination laws, it has unambiguously stated that they are remedial and should receive a beneficial construction...However, at the same time, the Court has found reasons for adopting a narrow approach to the interpretation of specific terms in the legislation...which has been followed with such wholeheartedness by some lower courts that one Federal Court judge has said:³⁶

It is not appropriate to consider the question of reasonableness [in indirect discrimination] by commencing first with a view that human rights and discrimination legislation should be liberally construed. Nor is it correct to approach the meaning of reasonableness informed by the objects and purposes of the Act.

As a result, Australian judges most often give a literal or a narrow reading of specific provisions or terms they are construing, using only textual methods to reach a decision. In this process, some very narrow and technical distinctions have been introduced, making success more difficult for complainants and discouraging the bringing of actions.³⁷

³³ *Human Rights Act 2004* (ACT), s. 38.

³⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic.), s. 28.

³⁵ For example, *Acts Interpretation Act 1901* (Cth), s. 15AA.

³⁶ *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 88 per Davies J, relying on Brennan CJ and McHugh J in *IW v City of Perth* (1997) 191 CLR 1, 15.

³⁷ Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 332–3 (some references omitted).

Australia has a long history of relying on adversarial litigation under anti-discrimination legislation to achieve the aim of equality, and the conduct of the courts in giving effect to this aim has been dispiriting. The High Court's anti-discrimination jurisprudence is a sad example of the failure to have regard to the aims of the legislation, and other superior courts have been little better. They have been highly technical and out of touch with the spirit of the legislation, overturning decisions of trial courts and tribunals because of disagreement over the meaning and the application of the statutory provisions without regard to aims and purpose.

Rees et al. point out that '[t]he sheer regularity with which appellate courts have overturned decisions in favour of complainants has generated a passionate response from Kirby J, on three separate occasions'.³⁸ In *IW v City of Perth*, in dissent, Kirby J said:

Courts grappling with the novel concepts and objectives of [anti-discrimination] legislation quite frequently complain about the difficulties which they are called upon to resolve. They warn against 'misdirected' litigation which seeks to impose upon such legislation 'a traffic it was not designed to bear' [citing *Waters v Public Transport Corporation*, (1991) HCA 49; (1991) 173 CLR 349 at 372].

...unless courts are willing to give such legislation the beneficial construction often talked about, it seems likely that the legislation will continue to misfire.³⁹

In *X v Commonwealth*, Kirby J began his dissent in resigned exasperation—'Once again, this Court has before it an appeal which concerns the operation of anti-discrimination legislation'—and went on to say with some drama:

[T]his [case] again demonstrates [that] the field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief originally granted to them.⁴⁰

In *NSW v Amery*, Kirby J—again in dissent—was palpably annoyed: 'This case joins a series, unbroken in the past decade, in which this Court has decided appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation.' After giving an account of earlier High Court cases

38 Neil Rees, Katherine Lindsay and Simon Rice, *Anti-Discrimination Law in Australia*, Federation Press, Sydney, 2008, p. 30.

39 [1997] HCA 30; 191 CLR 1, 52.

40 [1999] HCA 63; 200 CLR 177, 211.

that 'reflected the beneficial interpretation of the laws in question', citing, for example, *Mabo v Queensland (No. 2)*, Kirby J said resignedly: 'The wheel has turned.'⁴¹

Elsewhere in this volume, Belinda Smith has compared the approaches to anti-discrimination law taken by courts in Canada and Australia. She suggests that the 'narrow, technical approach' taken by the Australian High Court is referable to the prescriptive and equally narrow and technical approach in the drafting of Australia anti-discrimination statutes.⁴² It could be that if, as Smith proposes, the legislation is rewritten appropriately, the courts will feel they are more able to pursue and develop its beneficial aims, but for the moment they cannot be relied on to behave in that way.

Litigating for Equality

Graycar and Morgan observe that 'engagement in test case litigation...is not a major site of feminist engagement in Australia, unlike in Canada'.⁴³ Advocates for women's equality in Canada have, however, had more to work with than have advocates in Australia; the Canadian Charter of Rights and Freedoms offers a constitutional guarantee of equality, just as the ALRC proposed working towards with its legislative guarantee in an Equality Act. Graycar and Morgan's account of Canadian litigation refers principally to the renowned women's rights advocacy organisation Legal Education and Action Fund (LEAF), which began its existence on the same day that the delayed equality provisions of the Canadian Charter began operation.⁴⁴ While there are heroic tales of test case litigation in Canada and the United States under an equality right, there are many more unrecorded and familiar tales of litigants who have been defeated by cost and delay, of principles clouded and rulings reversed by the vagaries of judicial opinion and of repeat players not learning—or not caring about—the lessons that an adverse finding in litigation is supposed to teach them.

LEAF's commitment to litigation as a strategy for achieving social change has been assessed, and its effectiveness qualified, by LEAF itself⁴⁵ and by commentators.⁴⁶ To the extent that test case litigation is an attractive strategy, Graycar and Morgan have reservations about attempting to replicate LEAF's

41 *New South Wales v Amery* [2006] HCA 14; (2006) 230 CLR 174, 200.

42 Belinda Smith, this volume.

43 Regina Graycar and Jenny Morgan, 'Law Reform: What's In It For Women?' (2005) 23 *Windsor Yearbook on Access to Justice* 393, n. 2.

44 Lynn Smith, 'Equality' in Nasreen Rajab-Budlender and Steven Budlender (eds), *Judges in Conversation: Landmark Human Rights Cases of the Twentieth Century*, JUTA, Cape Town, 2009, p. 37.

45 Melina Buckley (ed.), *Transforming Women's Future: A Guide to Equality Rights Theory and Action*, West Coast Women's Legal Education and Action Fund, Vancouver, BC, 2001.

46 Sherene Razack, 'The Women's Legal Education and Action Fund' in Frederick Lee Morton (ed.), *Law, Politics, and the Judicial Process in Canada*, University of Calgary Press, Alberta, 2002, p. 316.

litigation campaigning in an Australian context.⁴⁷ Galligan and Morton have observed that in Australia, despite there being ‘a large number of rights-protection organizations in Australia...[m]ost do not use “test case” litigation as a strategy for advancing their rights goals’, and ‘[t]here has not been a court-based rights revolution’.⁴⁸ Consistently with LEAF’s reassessment of test case litigation as a strategy, Galligan and Morton report that the Public Interest Advocacy Centre, for example, ‘has shifted its...tactics away from straight litigation to an integrated approach to public interest advocacy that combines litigation, policy development and education and training’.

Galligan and Morton point out that in Australia ‘[t]here is no dedicated test-case funding program as in Canada’—presumably a reference to the Court Challenges Program of Canada, a national non-profit organisation, which, until it was closed in 2006, funded test cases that advanced language and equality rights in the Canadian Charter of Rights and Freedoms.⁴⁹ And although they are wrong to say that the Australian Human Rights Commission ‘is barred by statute from initiating test cases on its own’,⁵⁰ it is true to say that the commission is not empowered to initiate litigation⁵¹ and that is a significant limitation on what prospects there might be for the strategic use of anti-discrimination legislation in Australia.

The utility of test case litigation as a means of achieving social change is constantly under debate;⁵² a small sample of the literature runs from early reservations within the American Council for Civil Liberties⁵³ and a review of the use of the strategy in the US ‘war on poverty’⁵⁴ to an analysis of test cases for

47 Regina Graycar and Jenny Morgan, ‘A Quarter Century of Feminism in Law: Back to the Future?’ (1999) 24 *Alternative Law Journal* 117, 119.

48 Brian Galligan and Fred Morton, Australian Rights Protection, Paper presented to the Australasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004, p. 9. Cf., for example, the ‘Test case litigation program’ administered by the Australian Taxation Office, which funds litigation ‘to develop legal precedent [to] provide guiding principles’ on the operation of tax provisions (<<http://www.ato.gov.au>>).

49 Court Challenges Program of Canada (<<http://www.ccpcj.ca/e/ccp.shtml>>).

50 Galligan and Morton, Australian Rights Protection, p. 12.

51 See *Australian Human Rights Commission Act 1986* (Cth), ss 10A, 11 and 13.

52 Referring to ‘a lively debate about the role and efficacy of...“test case litigation”’, Dianne Martin (*A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth?*, Department of Justice Canada, Ottawa, 2002,) refers at note 95 to: Amy Bartholomew and Alan Hunt, ‘What’s wrong with Rights?’ (1991) 9 *University of Minnesota Law School Journal* 1; Stephen Brickey and Elizabeth Comack, ‘The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?’ (1987) 2 *Canadian Journal of Law and Society* 97; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?*, Canadian Advisory Council on the Status of Women, Ottawa 1989; Board of Directors, Parkdale Community Legal Services, ‘Poverty Law and Community Legal Clinics: A View From Parkdale Community Legal Services’ (1997) 35 *Osgoode Hall Law Journal* 595.

53 Stephen Halpern, ‘Assessing the Litigative Role of ACLU Chapters’ (1972) 4(2) *Policy Studies Journal* 157.

54 Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973*, Yale University Press, New Haven, Conn, 1993.

child protection⁵⁵ and a reflection in light of an unsuccessful Canadian Charter case in relation to same-sex relationships.⁵⁶ There is widespread sympathy for Rhode's claim that 'test case litigation [is not an] effective means of addressing the structural sources of poverty. Routine cases deal with symptoms not causes... and courtroom victories are seldom significant or enduring without a political base to support them.'⁵⁷

Effectiveness

Differently from assessing whether anti-discrimination laws 'work' in a procedural sense,⁵⁸ we have little understanding of whether and how anti-discrimination laws, through the consistent and accumulating decisions of liability in individual discrimination cases, result in broader understanding of the aims of the legislation, and in consequent changes in behaviour.⁵⁹

An interesting empirical study was conducted in Australia to determine whether and how conventional 'third-generation' or 'negative' anti-discrimination legislation affected employer behaviour in the recruitment process.⁶⁰ The short answer to the question was that 'the anti-discrimination legislation does not appear to be particularly significant or relevant for employers...[that] discrimination at the recruitment and selection stages is still very common, and that anti-discrimination legislation has only had a limited effect'.⁶¹ Employers in the sample 'indicated that they are able to "find a way around" the legislation'.⁶² These research results contrast starkly with, for example, the 'significant impact' of fourth-generation positive equality measures in Northern Ireland.⁶³

55 Bruce Hafen, 'Exploring Test Cases in Child Advocacy: Review of Robert H. Mnookin *In the Interest of Children, Advocacy Law Reform and Public Policy*' (1986–87) 100 *Harvard Law Review* 435.

56 Jody Freeman, 'Defining Family in *Mossop v DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation' (1994) 44 *University of Toronto Law Journal* 41.

57 Deborah L. Rhode, *Access to Justice*, Oxford University Press, UK, 2004, p. 110.

58 For example, technical issues such as burden and standard of proof, and so on. See: Dominique Allen, *Reforming Australia's Anti-Discrimination Legislation: Individual Complaints, The Equality Commission and Tackling Discrimination*, Doctoral thesis, University of Melbourne, Vic., 2009.

59 For an overview of theories of legislative failure, see: Edward Rubin, 'The Conceptual Explanation for Legislative Failure; review of Noga Morag Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State*' (2005) 30 *Law and Social Inquiry* 583.

60 Lynne Bennington and Ruth Wein, 'Anti-Discrimination Legislation in Australia: Fair, Effective, Efficient or Irrelevant?' (2000) 21 *International Journal of Manpower* 21. For an economic analysis of employers' evasion of discrimination obligations, see: Shelly Lundberg, 'The Enforcement of Equal Opportunity Laws Under Imperfect Information: Affirmative Action and Alternatives' (1991) 106 *Quarterly Journal of Business and Economics* 309. For a study of enforcement of discrimination law by the US Equal Employment Opportunity Commission, see: Lenahan O'Connell, 'Investigators at Work: How Bureaucratic and Legal Constraints Influence the Enforcement of Discrimination Law' (1991) 51 *Public Administration Review* 123.

61 Bennington and Wein, 'Anti-Discrimination Legislation in Australia'.

62 Ibid.

63 Hepple et al., *Equality, A New Framework*, pp. 67–9.

So, the general challenges of litigating, the poor record of Australian courts in developing anti-discrimination legislation consistently with its beneficial aims, the mixed success of litigating equality guarantees in countries such as Canada and the uncertain effectiveness of ‘negative’ legislation together augur badly for a plan to achieve social change that is premised, as the ALRC’s Equality Act was, on the success and influence of adversarial litigation.

The Senate Committee’s Equality Act

In Chapter 4 of its 2008 report on the *SDA*, the senate committee asked the question, ‘An Equality Act?’ Its deliberations in answering that question make it clear that its conception of an Equality Act is one that consolidates the four existing and concurrent anti-discrimination acts—an exercise commonly referred to as ‘harmonisation’.

Harmonisation

The senate committee canvassed a number of submissions, which proposed consolidating the four existing federal anti-discrimination laws into one. Australian Women Lawyers, for example, ‘submitted that replacing the existing separate pieces of federal anti-discrimination legislation with a single Equality Act would be a more effective mechanism for dealing with intersecting forms of discrimination’;⁶⁴ the National Association of Community Legal Centres proposed that ‘a single Act would provide a means of harmonising the processes for promoting equality, addressing systemic discrimination and inequality, and dealing with individual complaints’;⁶⁵ and the Law Council said that ‘to have all of the relevant anti-discrimination provisions in one Act at a federal level would certainly make the process much easier for applicants, respondents and practitioners because there is not a consistency in the terms of all of the federal acts’.⁶⁶

Towards achieving this harmonisation, the Australian Human Rights Commission⁶⁷ (AHRC) suggested an inquiry to examine ‘incorporating the Sex Discrimination Act with other federal discrimination laws, such as the

64 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [4.57].

65 Ibid. [4.58].

66 Ibid. [4.59].

67 The Human Rights and Equal Opportunity Commission (HREOC) as it then was.

Disability Discrimination Act, into one piece of legislation'. This would lead to 'a considered view on whether having a single federal equality act is indeed preferable to the current situation of separate federal acts'.⁶⁸

Against submissions such as these, Margaret Thornton cautioned against 'a so-called omnibus act':

One of the problems with a so-called omnibus act having a whole range of grounds within the legislation—sex, race, sexuality, age, disability and so on—is that they end up being treated as mirror images of the other. That, I think, can have a distorting effect. We see this happen with State acts, which do follow the omnibus model. I suppose it is both a strength and a weakness of the federal legislation that it has adopted a different model of having the discrete pieces of legislation so that one is not necessarily seen as a mirror image of the other.⁶⁹

Nevertheless, it is clear that in Chapter 4 of its report the senate committee had in mind an 'omnibus' Equality Act that would be a considered consolidation of the existing four federal anti-discrimination laws, and it recommended that the Australian Human Rights Commission 'conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act'.⁷⁰ In making this recommendation:

The committee accepts the evidence it received that a clear deficiency of the existing Act and other federal anti-discrimination legislation is its inability to deal with claims of discrimination on intersecting grounds. The committee believes there is some merit in the proposal to address this difficulty by replacing the existing anti-discrimination acts with a single Equality Act.⁷¹

'Streamlining' the Federal Laws

In April 2010, the federal government announced the 'streamlining' of the four federal anti-discrimination statutes into 'one single comprehensive law'.⁷² It seems that the senate committee's harmonisation recommendation will be acted on, although the announcement did not refer to the senate committee and

68 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [4.62].

69 Ibid. [4.60].

70 Ibid., Rec. 43.

71 Ibid. [11.48].

72 Attorney-General Hon. Robert McClelland MP and Minister for Finance and Deregulation Hon. Lindsay Tanner MP, Reform of Anti-discrimination Legislation, Media release, 21 April 2010, Parliament House, Canberra; Commonwealth of Australia, *Australia's Human Rights Framework*, Commonwealth of Australia, Canberra, 2010, p. 9.

the process does not obviously intend enhancing coverage and protection of anti-discrimination laws, which was the reason behind the senate committee's recommendation. From the little that has been announced, the exercise will produce an omnibus statute, not to enhance protection against discrimination, but to 'reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individual and business particularly small business'.⁷³

It seems that consolidation of the current four federal anti-discrimination laws into a single 'omnibus' law will be an exercise in technical legal reform, amending problematic provisions and harmonising inconsistent provisions of the four federal anti-discrimination acts. The 'deregulatory' terms of the intended process suggest it is unlikely that there will be any new prescribed personal attributes as grounds for unlawful conduct,⁷⁴ although the federal government's subsequent response to the senate committee's report did say that '[f]urther consultation on additional grounds of discrimination will be undertaken as part of the consolidation project'.⁷⁵

Such an omnibus act (and it would not appear to warrant the name 'Equality Act') would reform practice and procedure and, for as long as Australia relies on the complaints-based approach of its current federal anti-discrimination laws, the need for such technical reform is becoming vital. Current anti-discrimination laws—federal, State and Territory—risk losing integrity and respect as their unprincipled diversity increasingly creates confusion, and imposes costs on the private, public and business communities. The laws are poorly worded or dysfunctional and differences among the various statutes are confusing and unprincipled.⁷⁶ Some of the differences are historical, some are policy based and some are simply inexplicable. The situation certainly invites an attempt at streamlining, if not 'harmony', although to harmonise anti-discrimination laws nationally would be a herculean task.

Elsewhere in this volume, Graycar and Morgan have set out a number of reasons for being wary of attempting an 'omnibus' solution to these inconsistencies, and I noted above Thornton's warning to the senate committee. Harmonisation of anti-discrimination statutes was, however, a principal reason for the UK *Equality Act 2010*, which I discuss in more detail below, and there were

73 McClelland and Tanner, Reform of Anti-Discrimination Legislation.

74 See Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Rec. 43—referring to the possibility of sexual orientation and gender identity as additional grounds.

75 Commonwealth of Australia, *Government Response to Senate Standing Committee on Legal and Constitutional Affairs Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*.

76 See Rees et al., *Anti-Discrimination Law in Australia* [5.1.5.4]–[5.1.5.11].

concerns there too about the difficulty of the task.⁷⁷ Certainly, the process of consolidation will be difficult, because it will force provisions for the protection of four very different personal attributes into one legislative regime when there are reasons to maintain some of those differences. The risk that consolidation will result in different provisions being resolved at the level of the lowest common denominator is heightened by the ominous 'deregulatory' rationale for the exercise.

I describe below the extensive process of consultation and expert advice that resulted in the United Kingdom's *Equality Act* and, most relevantly for the technical process of consolidating legislation, the Discrimination Law Review, *A Framework for Fairness*.⁷⁸ The McClelland/Tanner media release does not promise such a process. Instead, the government will go straight to developing 'exposure draft legislation as the basis for consultation',⁷⁹ obviating the opportunity for any public deliberation about theory, philosophy or principle that might be resolved before words are put on paper. The dominant principle seems to have been decided: deregulate and reduce the burden of compliance. If a reduced compliance burden is the goal, there is no need to consult; the best way to achieve this would be to repeal anti-discrimination laws. That is a fanciful prospect, one would hope, but it is consistent with the fact that the streamlining exercise seems not to be motivated by reasons such as the pursuit of equality, recognition of the right to non-discrimination, respect for human rights or protection of marginalised groups.

The government appears unconcerned to inquire into, for example, how to reduce the burden of proof or, more substantially, to inquire into the fundamental conceptual issues that were the subject of deep and extensive deliberation in the United Kingdom, such as the meaning and type of equality goal, the extent and nature of the harm that is being addressed and the continuing usefulness of reactive, negative, third-generation anti-discrimination laws.

A Positive Equality Duty?

Separately from its discussion of an Equality Act in Chapter 4, the senate committee considered in Chapter 9 proposals for legislating a 'positive duty to promote equality'. The senate committee canvassed submissions from the Equal

77 See Robin Allen, *A Single Equality Act: Patchwork of Promise*, Paper presented at Equal Protection, Working for a Single Equality Act Conference convened by Justice, National Aids Trust and the Trades Union Congress, 12 May 2003.

78 *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (<<http://www.equalities.gov.uk/PDF/DLRConsultation.pdf>>). For a critique of the consultation paper's 'radical shift of regulatory philosophy in equality legislation', see Christopher McCrudden, 'Equality and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper (2007)' 36 *Industrial Law Journal* 25.

79 McClelland and Tanner, *Reform of Anti-Discrimination Legislation*.

Opportunity Commission of Western Australia,⁸⁰ Women's Health Victoria⁸¹ and the WA Equal Opportunity Commission,⁸² which recommended amending the *SDA* to impose a positive duty on public organisations to eliminate discrimination and harassment and to promote equality—similar to the approach taken in the United Kingdom under what is now the *Equality Act 2010* (UK).

The idea of a positive duty characterises the fourth generation of equality legislation. The attraction of a positive duty is that it gets in first; it is preventive rather than remedial. While anti-discrimination laws allow inequality to continue—including in the conduct of the state—until it is challenged, a positive duty attempts to achieve equality by requiring conduct, not by punishing misconduct.⁸³

Under a positive duty, a person's right to equality is championed by the state, which sets out what is required to be done to realise the right. This is in clear contrast with the current remedial approach, where the state merely enables a person to claim a right to equality by calling someone to account for their conduct. The fourth-generation equality laws are 'based on a positive duty to promote equality rather than simply to refrain from discriminating'.⁸⁴

Fredman identifies this shift in emphasis—from restraining conduct to requiring conduct—as following from the growing awareness that duties of restraint are ineffective in addressing discrimination and inequality.⁸⁵ The foreword to the *Discrimination Law Review Consultation Paper* in the United Kingdom spells out transition from third to fourth generation:

We have reached a situation where we want our institutions to work in a way which prevents unfairness happening in the first place, rather than addressing it after the event through litigation by individuals—though without removing any rights to seek redress where any discrimination has occurred. Getting it right in the first place is better for individuals, for business and for public administration.⁸⁶

80 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [9.2].

81 Ibid. [9.4–9.6].

82 Ibid., Submission 57.

83 See Hepple et al., *Equality, A New Framework*, pp. 59–65; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, UK, 2008. For a useful overview of legislation with positive equality duties and references, see: Gabrielle Szabo, *Mainstreaming Equality in the ACT: An Equality Duty for the ACT Discrimination Act*, ACT Human Rights Commission, Canberra, 2008.

84 Sandra Fredman, 'Combating Racism with Human Rights' in Sandra Fredman (ed.), *Discrimination and Human Rights: The Case of Racism*, Oxford University Press, UK, 2001, p. 27; and see Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14 *Deakin Law Review* 189, 204–5.

85 Fredman, *Human Rights Transformed*, p. 175. Fredman is a champion of the idea of positive equality duties and has written about them extensively, in detail and with enthusiasm: see bibliography.

86 Ruth Kelly, 'Foreword', in *A Framework for Fairness*, p. 7.

From an international human rights perspective, Article 3 of the International Covenant on Civil and Political Rights obliges states to 'ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant'. In its General Comment 28, the UN Human Rights Committee considers that the meaning of Article 3 focuses on 'the important impact of this article on the enjoyment by women of the human rights protected under the Covenant',⁸⁷ and says that '[t]he State party must not only adopt measures of protection, *but also positive measures* in all areas so as to achieve the effective and equal empowerment of women' (emphasis added).⁸⁸

In her submission, Belinda Smith pointed out to the senate committee that Canada and the United Kingdom, with anti-discrimination regimes analogous to Australia's, had supplemented their 'negative anti-discrimination law system—an individual, complaint based, human rights based mechanism—[with] a positive duty that supplements [that mechanism]'.⁸⁹ She noted the positive duties imposed by the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (*EOWWA*), but described them as 'a very mild, soft process' in contrast with stronger obligations under the *Equality Act 2006* (UK).⁹⁰ In her submission to the senate committee, Sara Charlesworth agreed with Smith that the existing duties of private sector employers under the *EOWWA* are inadequate,⁹¹ and suggested that the mooted positive duty to promote equality be imposed on private as well as public sector employers.⁹² She invoked the oft-cited example of 'a statutory requirement on private sector employers in Northern Ireland to monitor and report on their equality practices in relation to the employment of Catholics',⁹³ saying that 'these duties have been effective in improving the employment profile of Catholics'.⁹⁴

The senate committee received a collaborative submission from leading women's organisations and women's equity specialists,⁹⁵ which provided an extensive explanation of the equality duty in the United Kingdom and argued strongly for such a duty. The Australian Council of Trade Unions (ACTU) supported a positive duty to eliminate discrimination applicable to the public and private

87 United Nations Human Rights Committee, *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, 29 March 2000, CCPR/C/21/Rev 1/Add 10 [1], United Nations, New York.

88 Ibid. [3].

89 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [9.3].

90 Ibid. [9.7].

91 Ibid. [9.9].

92 Ibid. [9.8].

93 See Hepple et al., *Equality, A New Framework*, pp. 67–9.

94 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [9.10].

95 Ibid., Submission 60.

sectors,⁹⁶ and the Australian Human Rights Commission supported amending the *SDA* to impose a positive duty to eliminate sex discrimination similar to the approach taken in relation to standards for disability discrimination under the *Disability Discrimination Act 1992* (Cth).⁹⁷

Opposition came from the Australian Chamber of Commerce and Industry, which protested that '[t]he difficulty for employers is knowing exactly what their legal obligation is and how to comply with it. If there is a general amorphous obligation on employers, particularly vicarious liability, it would be very difficult for the employer to ensure that they comply with it',⁹⁸ and that

compulsory plans and the like are simply additional costs to small businesses, additional regulatory burdens...They will simply become an exercise in compliance and will not contribute to further cultural change and awareness and diversity and the like, but will also be potentially resented because they cost money or will be quite narrowly complied with and put away...it is a far more powerful notion to see a more diverse workplace, to see a more diverse [range] of people in work and the benefits they provide in your company and in your peer companies and to hear personal stories of successes.⁹⁹

The extent to which the senate committee was looking ahead to a positive equality duty is unclear. The possibility that such a duty was in their contemplation can only be inferred from its having canvassed the issue of positive duties in Chapter 9, where it said, for example, 'it would be worthwhile considering the creation of broad positive duties: to promote equality and remove discrimination [and] to take reasonable steps to avoid sexual harassment'.¹⁰⁰ The senate committee referred specifically to the UK *Equality Act* as 'a useful model which could be adopted and applied either to public sector organisations or to both the public and private sector',¹⁰¹ and as an add-on to Recommendation 43, said: 'The inquiry...should also consider...what additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.'¹⁰²

In considering 'additional mechanisms', the senate committee had in mind what it called the 'more innovative approaches to addressing discrimination both overseas and in our own states and territories'.¹⁰³ This was being generous to the States and Territories. There is little that is innovative in their approach to

96 Ibid. [9.11].

97 Ibid. [9.12].

98 Ibid. [9.16].

99 Ibid. [9.17].

100 Ibid. [11.9].

101 Ibid. [11.94].

102 Ibid., Rec. 43.

103 Ibid. [11.110].

addressing discrimination; the legislation is invariably of the 'third-generation' approach to addressing inequality. What differences exist between the anti-discrimination legislation of the States and Territories on the one hand, and the federal anti-discrimination statutes on the other, are variations on a persistent theme of individual remedial measures for unlawful conduct. Some of those variations are of interest—such as a different test for discrimination in the Australian Capital Territory and Victoria,¹⁰⁴ a prohibition against vilifying women in Tasmania,¹⁰⁵ absolute proscription in Queensland of sexual harassment without limit to an area of activity¹⁰⁶ and protection against 'ethno-religious' discrimination in New South Wales¹⁰⁷—but they are not the 'innovative approaches to addressing discrimination' that the senate committee was looking for. Only the standards under the *Disability Discrimination Act (DDA)*¹⁰⁸ are a real step away from the 'if you keep scolding them they'll eventually learn' approach to eliminating discriminatory behaviour, which characterises Australian anti-discrimination law.¹⁰⁹ The standards have not, however, been replicated in other legislation—not even the subsequent federal anti-discrimination statute: the *Age Discrimination Act 2004*.

It would seem, therefore, that as well as the technical reforms that go towards 'harmonisation' and an omnibus anti-discrimination statute, the senate committee's report does anticipate positive duties as 'additional mechanisms Commonwealth law should adopt in order to most effectively promote equality' along the lines of positive duties legislation in the United Kingdom to which the senate committee was referred by many of the submissions.

The federal government's response to the senate committee's recommendation pointedly makes no comment on 'additional mechanisms', saying only that the recommendation has been 'noted'.¹¹⁰ As the government's earlier 'streamlining' announcement does not refer to the possibility of a positive equality duty, it seems the government has no interest in considering new ways of achieving equality through legislative measures—welcome news no doubt to the Australian Chamber of Commerce and Industry in light of its submissions to the senate committee.

104 *Discrimination Act 1991* (ACT), s 8(1)(a) and *Equal Opportunity Act 2010* (Vic.), s 8(1), where mere unfavourable treatment is sufficient and there is no need for 'less' favourable treatment.

105 *Anti-Discrimination Act 1998* (Tas.), s. 17(1).

106 *Anti-Discrimination Act 1991* (Qld), s. 118.

107 Definition of 'race', *Anti-Discrimination Act 1977* (NSW), s. 4.

108 *Disability Discrimination Act 1992* (Cth), Part 2, Division 2A.

109 For an overview of Australia's anti-discrimination regime, see Belinda Smith, 'Australian Anti-Discrimination Laws—Framework, Developments and Issues' in Hiroya Nakakubo and Takashi Araki (eds), *New Developments in Employment Discrimination Law*, Kluwer Law International, London, 2008, pp. 115–46.

110 Commonwealth of Australia, *Government Response to Senate Standing Committee on Legal and Constitutional Affairs Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*.

Enacting an Equality Act in the United Kingdom

The British Labour Government went to the 2005 election with a policy to enact an Equality Bill. The Equality Bill was to

simplify the law which, over the last four decades, has become complex and difficult to navigate. Nine major pieces of legislation and around 100 statutory instruments will be replaced by a single Act written in plain English to make it easier for individuals and employers to understand their legal rights and obligations.¹¹¹

As well, the Bill would ‘put a new duty on public bodies, government and local councils to consider how to reduce socio-economic inequalities’.¹¹² These became the ‘two main purposes’ of the government’s 2009 Equality Bill: ‘to harmonise discrimination law, and to strengthen the law to support progress on equality.’¹¹³

Background Inquiries

The UK Government’s reform process can be traced to the independent report in 2000, *Equality: A New Framework*,¹¹⁴ conducted by the University of Cambridge Centre for Public Law and the Judge Institute of Management Studies, and funded by the Joseph Rowntree Charitable Trust, the Nuffield Foundation and Organizational Resources Counselors Incorporated. It was described as the ‘brainchild of Anthony (Lord) Lester, whose enthusiasm, guidance and unfailing support’ is credited with making the review happen at all.¹¹⁵ The report was ‘supported by a series of papers written by commentators of the first rank’¹¹⁶ and by an advisory panel and a panel of experts. It made 53 recommendations—the first of which was that ‘[t]here should be a single Equality Act in Britain’. Anticipating the *Equality Act* that eventuated, Recommendation 7 was that ‘[a]nti-discrimination measures should be augmented by positive duties to promote equality which do not depend upon proof by individuals’.

In 2000, at the beginning of the United Kingdom’s journey to an Equality Act, Lester describes a situation in the United Kingdom that is very like that in Australia in 2010:

111 UK Labour Party, *Labour Policies: Equality*, Labour Party, London, <<http://www.labour.org.uk/Equalities>>

112 Ibid.

113 UK Parliament, *Explanatory Notes: Equality Bill 2009 (UK)*, Bill as introduced (incorporating side-by-side Explanatory Notes). Volume I, Bill 85 08-09, (27 April 2009), Parliament of the United Kingdom, London, [10], <<http://www.publications.parliament.uk/pa/cm200809/cmbills/085/voli/09085i.i-ii.html>>

114 Hepple et al., *Equality, A New Framework*.

115 Ibid., ‘Acknowledgements’.

116 Allen, *Reforming Australia’s Anti-Discrimination Legislation*, p. 5.

[The anti-discrimination] legislation is now outdated, and there is a really pressing need for reform to make the law comprehensive, consistent, effective, and user-friendly. During the quarter century since its enactment, the limits and defects of the legislation have become more and more apparent, and the passing of each new measure has added to the incoherence and opaqueness...[Equality] Commissions and other[s] have repeatedly called for the reform of this tangled web of legislation...[b]ut successive Governments have failed to heed their recommendations, preferring instead to make limited and piecemeal changes. The defective state of the law helps no-one except lawyers.¹¹⁷

The momentum created by the independent review led to reports from two concurrent public inquiries. One was The Equalities Review—a 'root and branch review to investigate the causes of persistent discrimination and inequality in British society'¹¹⁸—which produced the report *Fairness and Freedom*.¹¹⁹ The other was the Discrimination Law Review, which produced a consultation paper, *A Framework for Fairness*.¹²⁰

The Equalities Review tackled the conceptual and practical issue of 'equality' and, based on data, expert evidence, commissioned empirical research, consultations, stakeholder discussions and personal narratives,¹²¹ it set out 10 steps to greater equality,¹²² and criteria against which progress should be measured.¹²³

The Discrimination Law Review consulted on 'proposals for a Single Equality Bill for Great Britain',¹²⁴ meeting with general audiences in regional public events, with specialist audiences on age discrimination and public sector duties, and with stakeholders and interest groups.¹²⁵ The scope of the Discrimination Law Review anticipated the three principal parts of what became the *Equality Act 2010* (UK): first, 'harmonising and simplifying the law',¹²⁶ which included

117 Hepple et al., *Equality, A New Framework*, 'Preface'.

118 UK Cabinet Office, Background information on the Equalities Review, <<http://archive.cabinetoffice.gov.uk/equalitiesreview/background.html>>

119 UK Government, *Fairness and Freedom: The Final Report of the Equalities Review*, Government of the United Kingdom, London, 2007, <http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf>

120 UK Government Discrimination Law Review, *A Framework for Fairness—The Equality Bill*, June 2008, Consultation Paper, Government of the United Kingdom, London. For a critique of the consultation paper's 'radical shift of regulatory philosophy in equality legislation', see McCrudden, 'Equality and Reflexive Regulation'.

121 UK Government, *Fairness and Freedom*, Annexure D.

122 *Ibid.*, pp. 10–11, Ch. 5.

123 *Ibid.*, p. 11, Ch. 5.

124 *Ibid.*, p. 3.

125 UK Government, *The Equality Bill—Government Response to the Consultation*, June 2008, Government of the United Kingdom, London, p. 14 [1.6]–[1.7], <<http://www.equalities.gov.uk/pdf/EqBillGovResponse.pdf>>

126 UK Government, *Fairness and Freedom*, p. 16.

simplifying and standardising definitions and tests in discrimination law, and simplifying and harmonising exceptions; second, ‘making the law more effective’,¹²⁷ which included simplifying the existing public sector equality duties in a single duty; and third, ‘modernising the law’,¹²⁸ which included adding and extending protected grounds such as age, gender reassignment and maternity, extending protection to new areas such as private clubs and expanding the grounds for protection from harassment.

In its response to the Discrimination Law Review,¹²⁹ the government announced its intention to introduce an Equality Bill, informed by the Discrimination Law Review and the Equalities Review, and by an analysis of disadvantage set out by the Government Equalities Office, *A Fairer Future—The Equality Bill and other Action to make Equality a Reality*.¹³⁰ Among the many stark conclusions the data in *A Fairer Future* pointed to were that without the restructuring of discrimination law as proposed in the Equality Bill, ‘the pay gap between men and women in the UK will not close until 2085; and it will take almost 100 years for people from ethnic minorities to get the same job prospects as white people’.¹³¹

Complementing its response, the government published its proposal for an Equality Bill, *Framework for a Fairer Future—The Equality Bill*,¹³² to ‘strengthen protection, advance equality and declutter the law’.¹³³

The *Equality Act 2010* (UK)

The Equality Bill was in the British Parliament for a few days short of a year. It was introduced in the House of Commons on 24 April 2009 and was debated and refined in 20 sittings of the Public Bill Committee. On 2 December, the Bill was reported to the House and the motion that it be read a third time was passed 338 votes to eight. This degree of support is significant in light of concerns that a change in government in the United Kingdom in the 2010 elections could lead to repeal, or at least to obstruction, of the *Equality Act*. In the House of Lords, the Bill was scrutinised at six committee sittings and was returned to the House of Commons on 23 March 2010 with proposed amendments. The House of Commons accepted the amendments and passed the Bill on 6 April;

127 Ibid.

128 Ibid.

129 UK Government, *The Equality Bill—Government Response to the Consultation*.

130 UK Government Equalities Office, *A Fairer Future—The Equality Bill and other Action to make Equality a Reality*, June 2008, Government of the United Kingdom, London, <http://www.equalities.gov.uk/pdf/NEWGEO_FairerFuture_may09_acc.pdf>

131 Ibid., p. 6.

132 UK Government, *Framework for a Fairer Future—The Equality Bill*, June 2008, Government of the United Kingdom, London, <<http://www.equalities.gov.uk/PDF/FrameworkforaFairerFuture.pdf>>

133 Ibid., p. 8.

the *Equality Act 2010* (UK) received the Royal Assent on 8 April 2010.¹³⁴ While some provisions began on assent, most of the Act will begin at the discretion of the government.¹³⁵ This too is significant, as the government elected in the 2010 elections is under no obligation to put the UK *Equality Act* into operation.

The UK *Equality Act* is an omnibus act of the sort anticipated by the Australian senate committee in its review of the *SDA* and now the subject of the federal government's streamlining process. It repeals and replaces the whole of the *Equal Pay Act 1970*, the *Sex Discrimination Acts 1975 and 1986*, the *Race Relations Act 1976* and the *Disability Discrimination Act 1995*, and various Employment Equality Regulations relating to, for example, religion and belief, sexual orientation and age,¹³⁶ and leaves intact so much of the *Equality Act 2006* as relates to the *Constitution* and the operation of the Equality and Human Rights Commission.

As an illustration of its 'omnibus' nature, the UK *Equality Act* makes common provision for what it calls 'particular strands of discrimination',¹³⁷ which are discrimination 'because of' age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. As well, the Act deals with harassing conduct 'related to' age, disability, gender reassignment, race, religion or belief, sex and sexual orientation¹³⁸ and victimisation.¹³⁹

More than merely consolidating different anti-discrimination statutes into one, however, the UK *Equality Act 2010* legislates to impose a positive equality duty.

The Equality Duty in the UK *Equality Act*

The statement of a positive duty in the UK *Equality Act* is a very tentative one. It is not a guarantee of equality. In parliamentary debates on the UK Equality Bill 2009, Lynne Featherstone, a Liberal Democrat, thought that 'the Government could have taken a more radical perspective and extended the commitment to equality beyond the Bill, with an overarching equality guarantee'.¹⁴⁰

The duty in Section 149 of the *Equality Act* is called a 'Public sector equality duty' and is limited in its operation to public sector actors. A public authority must, in the exercise of its functions, have due regard to the need to

134 *Equality Act 2010* (UK).

135 *Ibid.*, s. 216(3).

136 *Ibid.*, Schedule 27.

137 *Ibid.*, s. 25.

138 *Ibid.*, s. 26.

139 *Ibid.*, s. 27.

140 *Hansard*, House of Commons, 11 May 2009, Column 577.

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
- advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it
- foster good relations between people who share a relevant protected characteristic and people who do not share it.

A duty to 'have due regard' is weak. As early as 2001, Fredman described as 'disturbingly vague' the then new duty in the *Race Relations Act 1976* (UK) to 'have regard to the need...to promote equality of opportunity'.¹⁴¹ Fredman repeated the concern in 2008, when commenting on a similar duty ('have due regard') introduced to the *Sex Discrimination Act 1975* (UK).¹⁴² In their submission to both the Equality Review and the Discrimination Law Review, Fredman and Spencer made the point again and—after describing the limitations of a duty to 'have due regard'—they proposed instead a duty to 'take such steps as are necessary and proportionate to eliminate discrimination and to achieve the progressive realisation of equality (as defined)'.¹⁴³

The extent of the duty 'to have regard' (whether 'due' or not) has been left in the hands of the courts—a legislative drafting decision by which the Parliament has effectively opted to entrust the courts with the full development of its reforms. Commenting on the duty in the *Race Relations Act*, Fredman said:¹⁴⁴

[I]t only requires the authority to 'pay due regard'...This means that the duty is only breached by a failure to 'properly consider whether there was any potential discrimination' [citing *R (Elias) v. Secretary of State for Defence, Commission for Racial Equality* [2005] EWHC 1435]. If, after considering these matters, the authority adopts precisely the same scheme, it would have done so after having due regard to the obligations under the statute and therefore discharged its duty. Nor is the duty breached if an authority forms the view on proper grounds that there is no issue of unlawful discrimination which could sensibly be said to arise.

The nature of the duty was explained more recently, in 2009, by the UK Court of Appeal in *Domb v The London Borough of Hammersmith and Fulham*.¹⁴⁵ The

141 Sandra Fredman, 'Equality: A New Generation' (2001) 30 *Industrial Law Journal* 145, 146, 168.

142 Sandra Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193, 214. A duty in the same terms was introduced by the *Disability Discrimination Act 1992* (Cth), s. 49A.

143 Sandra Fredman and Sarah Spencer, *Delivering Equality: Towards an Outcome-Focused Positive Duty*, Submission to the Cabinet Office Equality Review and to the Discrimination Law Review, June 2006.

144 Fredman, 'Reforming Equal Pay Laws', p. 214.

145 *Domb, Sobral and Bushiwa v The London Borough of Hammersmith and Fulham, and The Equality and Human Rights Commission* [2009] EWCA Civ 941.

burden of the duty is not onerous: 'there is no statutory duty to carry out a formal impact assessment...the duty is to have due regard, not to achieve results or to refer in terms to the duty...due regard does not exclude paying regard to countervailing factors, but is "the regard that is appropriate in all the circumstances"'.¹⁴⁶ More positively, however, 'the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking...the duty must be performed with vigour and with an open mind'.¹⁴⁷

The Meaning of 'Equality' in the UK *Equality Act*

The object of the duty is 'equality' and there are many ways in which equality can be characterised. Fredman suggests a range of equality principles that might drive the imposition of a duty, such as formal equality, equality of outcomes and equality of opportunity, and three equality aims that a duty might be directed towards: 'removal of stigma, redistribution [and] accommodation'.¹⁴⁸ She would agree with Graycar and Morgan's observation in this volume that to propose a duty 'does not necessarily touch upon the basic understanding of equality' and that 'without clear attention to what is meant by equality', the new provisions could be limited only to equality of opportunity.

The UK Equalities Review canvassed some ways of seeing equality: equality of process, which it described as ensuring that people are treated in the same manner in any given situation; equality of worth (according each individual equal respect); equality of outcome (aiming for equal wealth or the same educational attainment); and equality of opportunity (ensuring that circumstances beyond an individual's control should not undermine the opportunity an individual has to thrive).¹⁴⁹ The review observed that

in the real world, outcomes are dependent on opportunities and opportunities on outcomes. If your family is poor, your educational potential is less likely to be realised; and if your educational achievement is lower, you are likely to earn less. But it is central to our terms of reference to focus on outcomes and, in particular, what will reduce the gap between those who enjoy the best life chances and those who suffer the worst.¹⁵⁰

146 *Domb, Sobral and Bushiwa* [52], per Lord Justice Rix.

147 *Ibid.*

148 Fredman, 'Combating Racism with Human Rights', p. 29.

149 UK Government, *Fairness and Freedom*, pp. 14–15.

150 *Ibid.*, p. 15.

This led the review to a definition that ‘attempts to accommodate the rigorous testing of the intellectual, but also strives to be meaningful and practical to everyone’:

An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish. An equal society recognises people’s different needs, situations and goals and removes the barriers that limit what people can do and can be.¹⁵¹

The long title of the *Equality Act* describes the Act as one concerned with ‘reducing socio-economic inequalities’ and ‘increas[ing] equality of opportunity’. It does not define equality or socioeconomic inequality and relies on two strategies: the longstanding ‘negative’ approach of prohibiting conduct on prescribed characteristics in prescribed areas of activity¹⁵² and the more recent ‘positive’ approach of imposing a duty to act to eliminate, or at least reduce, inequality.¹⁵³

Lessons for Australia from the United Kingdom

Without gainsaying the issues for creating omnibus legislation that Thornton¹⁵⁴ and Graycar and Morgan¹⁵⁵ have warned of, the UK *Equality Act* shows that it is possible to roll into one statute separate concurrent statutes that prohibit characteristic-based discrimination. The federal government’s proposed streamlining exercise will be the test of that—although the UK reform exercise was driven by a commitment to enhancing protection, not to reducing the compliance burden.

The UK *Equality Act* shows as well that it can make sense to complement the negative prohibitions on conduct that offend equality by imposing a positive duty that promotes equality—although the federal government’s response to the senate committee inquiry makes clear that a positive equality duty is not within its contemplation.

Process

The obvious lessons for Australia from the recent UK experience are of process. As the extensive collaborative submission to the senate committee said of the reform exercise in the United Kingdom: ‘By embracing a three-year process the

151 Ibid., pp. 6, 16.

152 *Equality Act 2010* (UK), Parts 2–10, 14, 15.

153 Ibid., Parts 1, 11, 12, 13.

154 Thornton, Testimony before the Senate Standing Committee on Legal and Constitutional Affairs, [4–60].

155 Graycar and Morgan, this volume.

Government has been able to bring people along.'¹⁵⁶ Even this simple lesson of 'bringing people along' seems lost on the federal government, which has announced only that it 'intends to develop exposure draft legislation as the basis for consultation with stakeholders and the public'.¹⁵⁷

Of the many important lessons in process from the UK experience, one is that if a government shows no interest in improving protection against discriminatory conduct then non-government actors, perhaps led by committed (and well-connected) champions, need to make the issue one of public importance, as Lord Lester's independent review in the United Kingdom did.

Another lesson—harder to emulate but vital to achieving measures that will work—is that the analysis of current inadequacy and the proposals for reform need to be informed by extensive research such as statistical and survey data, expert advice and extensive consultation. The UK *Equality Act* is the culmination of a reform process that was based on sophisticated research and widespread consultation. The Equalities Review, for example, commissioned surveys, studies and advice from various expert academics, research centres and consultancies on issues such as the history of equality for different groups in the past 60 years, personal testimonies and case studies on people's lived experiences of inequality, prejudice and discrimination, equality issues for children and families, gay, lesbian, transgender and transsexual people's experiences of inequality, employment disadvantages of different social groups, prejudice in Britain and public attitudes to equality, tools with which to tackle prejudice and a framework for measuring inequality.¹⁵⁸

A refinement to this emphasis on research is that it needs to be undertaken with an explicit desire to pursue the same social policy goal of equality as was the subject of the inadequate regime, but to find better means of doing so. Lester's independent review, for example, engaged in a 'profound study of what is wrong with existing laws', with the aim of establishing 'what could be done to develop an accessible legislative framework...to promote equal opportunities'.¹⁵⁹ When the UK Government began responding to the momentum established by the independent report, it established the Discrimination Law Review in a similar spirit—'to consider the opportunities for creating a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage'.¹⁶⁰

156 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Submission 60, p. 37.

157 McClelland and Tanner, Reform of Anti-Discrimination Legislation.

158 UK Government, *Fairness and Freedom*, pp. 148–50.

159 Hepple et al., *Equality, A New Framework*, 'Preface'.

160 UK Government, *A Framework for Fairness*, p. 3.

The tone of the reform process in the United Kingdom was established from the outset. It was not motivated principally by a desire to reduce the burden of compliance. More fundamentally, it did not revisit a commitment to eliminating inequality. I contrast this with an approach that would treat the reform process as one that, even only impliedly, reopens for discussion the merits of a discrimination legislative framework at all—and of state intervention designed to achieve equality. Such an invitation does seem implicit in the proposed federal streamlining process, which invites those who need to comply with anti-discrimination laws to say how the burden of doing so could be reduced; as I suggested above, the best way to achieve this would be, if not wholly to repeal anti-discrimination laws, then to significantly reduce their strength and scope.

A further lesson is that the discussion of reform needs to be informed by a theoretical conception of the equality aims that are being perused. From the independent review¹⁶¹ and the Equalities Review¹⁶² through to the government's proposal for an Equality Bill,¹⁶³ discussion in the United Kingdom centred consistently on two conceptions of equality—equality of recognition and equality of opportunity—which manifested in the *Equality Act* as, respectively, the continuing prohibitions against discriminatory conduct and the imposition of positive duties. This exercise of clearly conceptualising the equality goals again seems outside the contemplation of the proposed Australian federal streamlining process.

An important issue of process is who will conduct the necessary review, and how. Elsewhere in this volume, Graycar and Morgan make a strong case for the work to be done by experts such as are to be found at the Australian Human Rights Commission. Certainly, the UK process shows the benefit of extensive contribution by a wide range of experts in discrimination theory, philosophy, law, practice, comparative studies, research and lived experience, who participated in processes that were run within departments and by independent bodies. There is no sign of this extensive, deep and thoughtful approach in the 'streamlining' exercise announced by the federal government in April 2010, in which a 'Better Regulation Ministerial Partnership' will consult on already-drafted legislation with a predetermined deregulatory goal.

The Content of a Positive Equality Duty in Australia

The UK process for achieving an *Equality Act* that both harmonises negative provisions and establishes positive duties is attractive. The result of the process

161 Hepple et al., *Equality, A New Framework*.

162 UK Government, *Fairness and Freedom*.

163 UK Government, *Framework for a Fairer Future*.

is less appealing—at least in the formulation of the positive duty: the UK *Equality Act* requires only the vague standard of 'having due regard' to certain matters, and requires it only of public authorities.

Neither the senate committee nor the submissions to it turned their mind to how such a duty ought to be framed. If we are to admire the UK process that achieved an *Equality Act*—and I think we ought—then we must be careful at the same time not to unthinkingly accept the result of that process. The point that the UK *Equality Act* arrived at after its political gestation ought not be the point at which Australia begins its own deliberations.

Smith cautioned that Australia needs to take account of local considerations in working out how best to implement positive duties, but did not spell out those considerations.¹⁶⁴ I suggest some considerations here.

One that comes to mind is the Australian judiciary's persistently technical and curmudgeonly approach to the beneficial aims of discrimination legislation, which I noted above. This suggests to me that a detailed prescriptive statutory duty is desirable, leaving the courts with a limited interpretative role. While Smith suggests that with less prescriptive legislation the courts could be less technical and more inclined to give effect to the beneficial aims of anti-discrimination legislation,¹⁶⁵ I am not as confident. Indeed, I am inclined to think that the legislative terms of the duty ought to be quite prescriptive—effectively codified—if it is to withstand the unsympathetic approach the Australian courts have been inclined to take to anti-discrimination legislation.

A local consideration is the constitutional limitation on the effective scope of a positive duty imposed by federal legislation on public actors, given the extent of services provided by the States. The Commonwealth is likely to have power to require government actors, whether Commonwealth or State, to give effect to an equality right, although there would be some limitations on the extent of that power.¹⁶⁶

Another consideration—a favourable one—is the well-entrenched acceptance in the Australian public sector of merits review and judicial review of decisions, a process that lies at the heart of the justiciability of a positive equality duty.

There was little discussion in the United Kingdom about whether the equality duty under the UK *Equality Act* would operate in the private sphere. As Smith

164 Belinda Smith, 'It's about Time—For a New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 117, 138.

165 Smith, 'Models of Anti-Discrimination Laws'.

166 I am grateful to my colleague James Stellios for advice on this point.

points out,¹⁶⁷ the independent report in the United Kingdom did not limit the proposed positive duty to public authorities,¹⁶⁸ and Fredman has criticised the fact that the duty in the United Kingdom is limited in that way.¹⁶⁹ There could and should be, however, a good discussion of that possibility in Australia, where the established history of anti-discrimination laws operating in both public and private spheres suggests that we need not be coy about expecting private actors to comply with an equality duty.¹⁷⁰

The concurrent operation in the Australian Capital Territory and in Victoria of human rights legislation is not a relevant consideration—at least not one that militates against an Equality Act. As the UK experience shows, an Equality Act that imposes positive duties is conceptually separate from a human rights act or charter. Whatever right to equality is provided for in a human rights law, the active and prescriptive imposition of an equality duty is a related but separate exercise. The *Victorian Equal Opportunity Review Report*, for example, explains the concurrent operation of the proposed positive duty with the duty under Section 38 of the Charter on a public authority to give effect to human rights.¹⁷¹

Existing Positive Duties in Australia

Before the passage in Victoria of a new *Equal Opportunity Act* in 2010, the few existing positive equality duties in Australia were limited to employment—and largely to public sector employment—although Mackay makes the point that complying with a positive equality duty in Australia would ‘not involve a radical departure from what many employers are already doing to avoid vicarious liability’ (for negligence).¹⁷²

The best-known explicit positive equality duty in Australia is in the *EOWWA*, which was the subject of submissions to and discussion by the senate committee, noted above.¹⁷³ There is consensus that the *EOWWA* needs considerable strengthening, but its scope would never be so wide as to obviate the desirability of a general equality duty, as Graycar and Morgan suggest elsewhere in this volume.

167 Belinda Smith, Positive Equality Duties (UK), Paper presented at The Future of Australian Anti-Discrimination Law Workshop, University of Melbourne Law School, Melbourne, 15 November 2007.

168 Hepple et al., *Equality, A New Framework*, Rec. 7.

169 Fredman, ‘Reforming Equal Pay Laws’ 214.

170 See Szabo, *Mainstreaming Equality in the ACT*, pp. 37–8.

171 Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, Department of Justice, Government of Victoria, Melbourne, June 2008, p. 80.

172 Mackay, ‘Recent Developments in Sexual Harassment Law’ 206.

173 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, [9.7]–[9.9].

Similar positive duties exist under legislation covering Australian government employees, under legislation in New South Wales and Queensland, and under policy in Western Australia.¹⁷⁴ A type of positive duty exists under the disability standards in the *Disability Discrimination Act 1992* (Cth), also noted above. By way of international example, there are legislated positive duties in like jurisdictions such as Northern Ireland,¹⁷⁵ South Africa,¹⁷⁶ Canada¹⁷⁷ and the United States.¹⁷⁸

The Victorian *Equal Opportunity Act 2010* was passed by the Victorian Parliament on 15 April 2010 and most of its provisions will begin on 1 August 2011 if they are not proclaimed to start before then.¹⁷⁹ It implements many of the two inquiries that preceded it,¹⁸⁰ including that '[t]he Act should contain a duty to eliminate discrimination as far as possible'.¹⁸¹ Section 14 of the Act very closely follows the recommendation: 'A person must take reasonable and proportionate measures to eliminate...discrimination, sexual harassment and victimisation as far as possible.' The review report recommended that the duty apply in both public and private spheres¹⁸²—and that, too, is just what the new Victorian *Equal Opportunity Act* does. An alleged breach of the duty can be the subject of investigation, inquiry and report by the Victorian Equal Opportunity and Human Rights Commission.¹⁸³

Conclusion: The Best Next Step

Positive duties are an innovative and necessary conception of an Equality Act, to move beyond the 'third-generation' reactive and negative legislative response to discrimination and towards an active approach to achieving equality. There is, however, a real question of whether there will ever be such an Equality Act in Australia.

174 See Szabo (*Mainstreaming Equality in the ACT*, Part 2 and Appendix A), citing: *Pubic Service Act 1999* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth); *Anti-Discrimination Act 1977* (NSW), Part 9A; *Equal Opportunity in Employment Act 1992* (Qld); WA Equal Opportunity Commission, *Policy Framework for Substantive Equality*, 2004.

175 *Northern Ireland Act 1998* (UK) (s. 75 and Schedule 9), relating to public authorities, and the *Fair Employment and Treatment (NI) Order 1998* ('FETO'; previously the *Fair Employment Act 1976*).

176 *Employment Equity Act 1998* (South Africa); *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa), s. 5.

177 *Employment Equity Act 1995* (Can.).

178 *Executive Order 11246* of Sept. 24, 1965—*Equal employment opportunity* (US).

179 *Equal Opportunity Act 2010* (Vic.), s. 2(5).

180 Scrutiny of Acts and Regulations Committee (SARC), *Exceptions and Exemptions to the Equal Opportunity Act 1995—Final Report*, Government of Victoria, Melbourne, 2009; *An Equality Act for a Fairer Victoria*.

181 *An Equality Act for a Fairer Victoria*, Rec. 9, p. 41.

182 *Ibid.*

183 *Equal Opportunity Act 2010* (Vic.), s. 15(4), Part 9.

I would like to be hopeful that the *Equal Opportunity Act 2010* (Vic.) will pave the way for a national equality duty, but it is hard to see this happening. First, there is the dispiriting failure of successive federal governments to follow the examples of the Australian Capital Territory and Victoria of legislating to establish human rights standards for public conduct. The current federal Labor Government continues to avoid committing itself to passing legislation that would commit its own legislation and conduct to human rights compliance.¹⁸⁴ And there is the very limited, perhaps even diminishing, vision of anti-discrimination protection in either the federal government's announcement of a deregulatory streamlining process or its very limited response to the senate committee's report.

The travesty is that when dealing with anti-discrimination legislation, federal governments choose to respond to the demands of those who do not need protection, rather than taking the initiative to help those who do. With exceptions from time to time and place to place, our governments' policies for the past 15 years or so have tended both to support under-regulated free-market activity and to pander to the shrill and shifting demands of media news and opinion. There will be no equality law at all without public leadership—and that is what we face in Australia.

Strategic activists will perhaps be able to make out a low-compliance, regulation-lite 'business case' for a positive equality duty. Even then, however, they face a battle to overcome government vulnerability to lobbies that are as intent now as they were when opposing the *Sex Discrimination Act* 25 years ago¹⁸⁵ on preserving the power and privilege they have accrued from social inequality.

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¹⁸⁴ McClelland (Launch of Australia's Human Rights Framework) declining to act on Recommendations 17–31 of the National Human Rights Consultation Committee (*National Human Rights Consultation Report*, Commonwealth of Australia, Canberra, 2009).

¹⁸⁵ Marian Sawer, this volume.

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