

Conference  
Sex Discrimination Act Silver Anniversary  
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Is an Equality Act the Next Best Step?

Simon Rice OAM

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## Is an Equality Act the Best Next Step?

**Associate Professor Simon Rice OAM**

**ANU College of Law  
The Australian National University**

**Paper to the Sex Discrimination Act Silver Anniversary  
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The idea of an Equality Act 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 which can sustain a public policy debate.

When the recent Senate Committee review of the SDA recommended that there be an inquiry into an Equality Act for Australia, what did it have in mind?

What did it think an Equality Act could be?

To understand what the Senate might have set in motion, I will look at different Equality Acts, actual or proposed.

### **The ALRC's Equality Act**

On the SDA's 10<sup>th</sup> anniversary, the ALRC recognised that the Act was 'only a partial response to women's legal inequality' (Rpt 69/2 [4.5] 55). It is important to note the reference not to 'women's inequality' but to 'women's legal inequality'. The ALRC accepted that the SDA, even with amendments to improve its effectiveness 'will be unable to address fully issues of women's inequality' (Rpt 69/2 [4.5] 56; x-ref to Rpt 69/1).

Noting that ‘existing statutes ... have failed to redress basic causes of women’s inequality’ the ALRC recommended that ‘the law should guarantee that everyone is entitled to equality in law’ (Rec 4.1).

The ALRC proposed following the Canadian approach of guaranteeing ‘equality before the law, equality under the law, equal protection of the law, equal benefit of the law, and equal enjoyment of human rights and freedoms.

As the ALRC noted, the focus of its Equality Act was ‘on the results or effects of a law or [public] action, rather than on how women are treated’. The proposed Equality Act was premised on an adversarial mechanism that would enable women, and men, to mount a legal challenge to public action, complaining that it operated with unequal effect.

On the SDA’s 20<sup>th</sup> anniversary, Beth Gaze repeated the ALRC’s reservations about the adequacy of the SDA as a means of redressing women’s legal inequality, and recalled the ALRC’s proposed Equality Act as a possible solution.

The ALRC’s idea of an Equality Act was one that had the equality guarantee of the Canadian Charter in mind, with its echoes of both international human rights and the American equal protection clause.

Following the Canadian experience of a constitutional equality right complemented by provincial anti-discrimination legislation, the ALRC’s proposed Equality Act was to operate alongside, and not instead of, existing sex discrimination legislation. It 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.

### **Reliance on parliaments and the courts**

There may have been reason enough at the time of the ALRC report to question whether legislatures and courts would operate in a way that would facilitate, let alone embrace, the aims of the Equality Act that was envisaged. But in the 15 years since we have been left in little doubt that neither institution can be relied on to advance human rights guarantees.

Parliaments in Australia have shown little courage or leadership in enacting human rights legislation, and have at times been quick to enact otherwise. 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 will volunteer to have their conduct bound by human rights standards, those standards are expressed in terms that are both conditional and avoidable.

And the courts. The inspirational women's right advocacy organisation LEAF began its existence on the same day that the delayed equality provisions of the Canadian Charter commenced operation (Lynn Smith, 35 at 37). While there are heroic tales of test case litigation in Canada and the US under an equality right, there are as well many more of the usual tales of litigants 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.

Once rights under an Act – any Act – are taken to court, the ordinary machinations of the adversarial system set to work. Whether it is under an Equality Act or, say, the Customs Act, litigation is a brutal and unpredictable way to go resolve an issue even between two parties, let alone to achieve hoped-for social policy or behavioural effects.

The approach that the courts in Australia have taken to anti-discrimination legislation is worse than uninspiring, it is positively 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.

So, quite apart from the mixed success of litigating equality guarantees in countries such as Canada, the failure of Australian parliaments and courts to work together to develop a coherent body of anti-discrimination law augurs badly for an Equality Act that is premised on adversarial litigation to achieve its ends.

### **The Senate Committee's Equality Act**

While the ALRC had in mind a clear – but, I now think, because of its reliance on litigation, flawed – idea of an Equality Act, the Senate Committee is less clear.

### **Technical reforms and harmonisation**

To be fair, the Committee recommended only an inquiry, not an Equality Act itself. But the precise terms of the recommendation are telling: an inquiry would not be into the merits of an Equality Act, but rather, into the merits of 'replacing the existing federal anti-discrimination acts with a single Equality Act' (Rec 44, at [11.111], 165).

This is different territory. In short, it is an exercise in technical legal reform, amending problematic provisions, and harmonising inconsistent provisions of the four federal anti-discrimination Acts.

As an exercise in refining and rationalising four federal laws, and perhaps in adding a few more prescribed personal attributes as grounds for unlawful conduct, a federal Equality Act would be all of desirable, difficult, dangerous and insufficient.

Desirable because there are provisions that are poorly worded or dysfunctional, and differences among the Acts that are confusing and unprincipled. Difficult because there are reasons to maintain some of those differences according to different attributes. Dangerous because of the risk it will move to the lowest common denominator of the variations among the four federal laws. And insufficient because the concurrent and overlapping state and territory laws would remain out of synch, with federal laws and each other.

Harmonisation of Australia's 13 concurrent discrimination and vilification laws is truly an enormous prospect, made just that little more complex by what we must now count as the 14<sup>th</sup> such law, in Part 3.1 of the *Fair Work Act*.

As an aside, refinement and harmonisation are necessary. For as long as we rely on complaint-based remedial mechanisms – and that will be for a long time to come – the need for coherence, if not harmony, 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.

That is an aside. The relevant point for today's purposes is that the Senate Committee's main focus seems to remain on conventional legislation to achieve equality.

### **UK Equality Act/Bill**

More than technical reforms, the Senate Committee's Equality Act recommendation does anticipate 'additional mechanisms Commonwealth law

should adopt in order to most effectively promote equality'. The Committee had in mind what it called the 'more innovative approaches to addressing discrimination both overseas and in our own states and territories'.

Quite frankly, the Senate Committee was being generous: there is little that is innovative in the states and territories' approach to addressing discrimination – the innovations are variations on a persistent theme of individual remedial measures for unlawful conduct. Only the standards under the DDA are a real step away from the 'if you keep scolding them they'll eventually learn' approach to eliminating discriminatory behaviour.

Looking overseas however, many submissions referred the Senate Committee to the UK Equality Act 2006 and Bill 2009 as a model to consider, not only because it, too, harmonises separate anti-discrimination laws and makes technical amendments, but also because it tries something different, if it becomes law before an election in the UK.

What excites attention – though the actual provision is somewhat anti-climactic – is the idea of imposing a positive duty of equality. The 2009 Bill contains a broader duty than now exists for each of gender, race and disability, and those existing duties will continue if the 2009 Bill does not become law.

I don't think anyone has written more or better on the idea of positive equality duties as an alternative legislative strategy than Sandra Fredman (Sandra Fredman *Human Rights Transformed*, Oxford 2008), and few in Australia have understood and promoted such a duty as well as Belinda Smith ('It's About Time – For a New Regulatory Approach to Equality', (2008 36 *FLR* 117), who is currently on leave in British Columbia.

### **A positive equality duty**

The theory 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 conduct of the state – until it is called into question, a positive duty legislates for equality policy by requiring conduct, not by punishing misconduct.

Under a positive duty a person's right to equality is championed by the state, which sets out what is required to be done, rather than the person's having to fight for their right by calling someone to account for what they didn't do. The foreword to the UK's 2007 Equality Act Consultation Paper spells it out:

*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.*

In its General Comment 28 the UN HRC set out its understanding of the meaning of the right to equality in Art 3 ICCPR. The whole tenor of its explanation is of a positive obligation on the state to ensure that conduct leads to equality, and does not perpetuate or compound inequality. While prohibiting discrimination is something States are mandated to do, the HRC makes clear that it expects States to report much more widely on what they have actually done to achieve equality.

Fredman identifies this shift in emphasis – from restraint of conduct to requiring conduct – as following from the growing awareness that duties of

restraint are ineffective in addressing discrimination and inequality (Fredman 2008, 175); it is a shift from the idea of restraining state misconduct which underpins civil and political rights, to the idea of requiring state conduct which underpins economic and social rights.

### **The equality duty in the UK Bill**

The UK Equality Bill's statement of a positive duty is, however, a very tentative one. It is not a guarantee of equality. In parliamentary debates earlier this year, 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 ...*' (House of Commons, Column 578, 11 May 2009).

The duty in the Bill is called a 'Public sector equality duty', and immediately you can see it is limited in its operation to public sector actors. The duty is to 'have due regard' to the need to eliminate prohibited conduct such as discrimination (145(1)(a)) and to 'advance equality of opportunity' (145(1)(b)).

Equality is the object of the duty. There are many ways in which equality can be characterised, including equality of recognition, equality of opportunity, equality of outcome, equality of participation and equality of access. Of these, the UK has chosen two: the need to eliminate discrimination is effectively equality of recognition, and there is explicit reference to equality of opportunity.

The nature of the duty itself is weak. The duty is only to 'have due regard', and the extent of that duty is in the hands of the courts. The burden of the duty could be set high or low, depending on how a court sees it. The highest it has been put in the UK was explained only last month (8 Sept 2009) in the UK Court of Appeal (Lord Justice Rix in *Domb, Sobral and Bushiwa v The London*

*Borough of Hammersmith and Fulham, and The Equality and Human Rights Commission* [2009] EWCA Civ 941) in terms reminiscent of a *Teoh* duty

‘... 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"; ... [but more positively] 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 ...’.

### **Considerations for positive equality duty in Australia**

When the Senate Committee was attracted to the innovative approach taken by the UK Equality Bill 2009, I trust that it was attracted to the idea of a positive duty in principle, and not merely to its manifestation in the UK Bill.

That is not to ignore the educative and strategic value of setting out in legislation a duty even as qualified as that in the UK Bill. But it is scarcely an appropriate place for Australia to start its own consideration of whether and how to legislate for a positive equality duty.

Belinda Smith, who advocates for a positive equality duty as the best next step to achieving substantive equality, has said that Australia needs to take account of local considerations in working out how best to implement positive duties, but she has not yet spelled out those considerations (Smith 2008, 138).

One that comes to mind is the Australian judiciary’s persistently technical and curmudgeonly approach to the beneficial aims of human rights legislation, which suggests to me a detailed prescriptive statutory duty, and a limited interpretive role for courts.

A more obvious local consideration is the constitutional question of the effective scope of a positive duty on public actors in federal law, given the extent of services provided by the states.

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 which lies at the heart of the justiciability of a positive equality duty.

A further favourable local consideration is the established history in Australia of anti-discrimination laws operating in both public and private spheres. This suggests that we need not be coy about expecting private actors to comply with an equality duty.

The concurrent operation in the ACT and Victoria of human rights legislation is not a relevant consideration – at least not in a negative sense – because, as the UK experience shows, an Equality Act that imposes positive duties is also 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 separate exercise. I note however that the implementation of the Victorian Charter is an admirable example of how a human rights equality guarantee can be used as tool to change culture, using the prohibition provision (s38) as a reason for adopting a preventive approach.

The proposed renaming of the Victorian Equal Opportunity Act is a relevant consideration only because the proposal would create unwarranted confusion. It would create an Equality Act that would not be the type of Equality Act that the UK has or the Senate Committee was attracted to. The proposed Victorian Equality Act would not contain a positive duty provision. It would be an anti-discrimination Act, albeit a refined and improved one, by another name.

But I have a concern that bears not on what the terms of an Equality Act be might be, but on whether there will ever be an Equality Act.

Fredman makes the unremarkable but not-to-be-forgotten point that lasting social change is dependent in large part on political will. There will be no equality law at all without public leadership, and that is the risk we face in Australia.

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.

Strategic activists will, I hope, be able make out the necessary 'business case' for a positive equality duty, but even then they face a battle to overcome government reluctance to resist lobbies that are as intent now as they were in opposing the Sex Discrimination Act 25 years ago, on preserving the power and privilege they have accrued from social inequality.

### **The best next step**

The best next step is to impose positive duties. Of course there will be a process to determine how best to do that, but the goal is not the process – which is how the Senate Committee recommendation reads – but creating the duty itself.

Positive duties is an innovative and necessary conception of an Equality Act. It is conceptually separate from the challenging but necessary exercise of harmonisation and technical reform of anti-discrimination laws, and the two should not be linked as the latter will only hold back the former.

Achieving positive duties is an innovative and necessary goal for a new Equality Act. It is conceptually separate from the challenging but necessary exercise of harmonisation and technical reform, and the two should not be linked, as the latter will only hold back the former.

There is no practical reason to wait. The merits of or need for an Equality Act is not dependent on what, if anything, the government does in response to the recommendations of the National Human Rights Consultation. Bring on an inquiry. Better still, bring on draft legislation. Parliament will debate it and inquire into it and debate it again. Parliament satisfies itself of the merits of a Sex Discrimination Act 25 years ago; it can now take the next step.