Australian Anti-Discrimination Laws – Framework, Developments and Issues

Belinda Smith
University of Sydney

Abstract

Australian anti-discrimination laws reflect an individual complaints-based model of anti-discrimination laws, seeking to address discrimination and inequality by providing individual victims with the right to take legal action against the individual discriminator for compensation. Under this fault-based system, employers are prohibited from discriminating and, in the event of transgression, liable to the victim but otherwise not specifically required to be proactive in eliminating discrimination or promoting equality.

While they were radical at the time of their introduction, over thirty years ago, the significant limitations of Australian anti-discrimination laws in addressing the many different forms of discrimination have since surfaced, signalling the need for development. While the objective of these laws is 'to eliminate discrimination,' the regulatory mechanisms in the legislation are largely ineffective at achieving this goal.

In this paper, I provide an outline of the current anti-discrimination laws in Australia (II), an analysis of the regulatory framework established by this legislation (III), and a closer look at the elements and difficulties relating to proof of direct and indirect discrimination within this framework (IV). Following a brief outline of affirmative action legislation (V), I note three recent developments in the final part: the introduction in 2004 of a federal *Age Discrimination Act*; the introduction of 'Disability Standards'; and the push to establish wider anti-discrimination law protection for workers with family responsibilities. The disability standards are innovative, introducing an obligation to provide reasonable adjustments, but they are only applicable in respect of education, not employment. The new developments in respect of age and family responsibilities discrimination do little more than extend the old framework to cover new grounds, providing a limited right of redress and a symbolic statement, but failing to acknowledge and address the regulatory limitations of the system at large.

I. Introduction

When introduced in Australia in the 1970s, anti-discrimination laws were radical. Now, more than 30 years later, they have changed little and their progressive potential has largely been exhausted. They have played a significant role in raising awareness of discrimination and harassment and reducing the more blatant manifestations of these. However, they have not evolved to reflect new ideas about how to regulate effectively and to address the forms of discrimination that the original regulatory model fails to reach.

Anti-discrimination laws have been introduced in Australia at both the Federal and State/Territory levels, covering a wide range of grounds, generally prohibiting both direct and indirect discrimination across a variety of public fields, including work. For a variety of reasons, these laws were established separately to the primary employment relations laws and institutions. They were designed as general equality rights to apply not only to work but also to other public spheres such as education and the provision of goods and services.

In 2006, Sandra Fredman asserted that '[t]wo different models are emerging for the achievement of gender equality: an individual complaints led model based on a traditional view of human rights; and a proactive model, aiming at institutional change.'[1] Australian anti-discrimination laws certainly constitute the former model, seeking to address discrimination and inequality by providing individual victims with the right to take legal action against the individual discriminator for compensation. Under this fault-based system, employers are prohibited from discriminating and, in the event of transgression, liable to the victim but otherwise not specifically required to be proactive in eliminating discrimination or promoting equality.

In my research, I have been exploring how these anti-discrimination laws operate[2] and how they might be reformed[3] to address inequality at work more effectively. My primary conclusion in respect of the Australian laws is that whilst the objective of these laws is 'to eliminate discrimination,' the regulatory mechanisms in the legislation are largely ineffective at achieving this goal. The regulatory framework characterises discrimination predominantly as a private dispute between individuals, providing mechanisms only for resolving these disputes privately and redressing the individual victim's harm. Other than an impact on the most blatant kinds of discrimination,[4] the laws do little to enable redress for systemic or structural discrimination, and little to *prevent* discrimination or promote equality more generally. The most recent developments or proposals in Australia – namely, in respect of age and family responsibilities discrimination – do little more than extend the existing framework to new grounds, providing a limited right of redress and a symbolic statement, but failing to acknowledge and address the regulatory limitations of system at large.

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[1] Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 369.

[2] Belinda Smith (2006), 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in C Arup *et al.* (eds), *Labour Law and Labour Market Regulation*, Federation Press; Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* (forthcoming).

[3] Belinda Smith (2006), 'Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict'. *Sydney Law Review*, 28(4): 689-732; Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) (Working Paper, Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101187).

[4] See comments on the effectiveness of the *Sex Discrimination Act 1984* (Cth) in 'Forum: Sex Discrimination Act: A Twenty Year Review' (2004) 27 *University of New South Wales Law Journal*.

In this paper, I provide an outline of the current anti-discrimination laws in Australia (II), an analysis of the regulatory framework established by this legislation (III), and a closer look at the elements and difficulties relating to proof of direct and indirect discrimination within this framework (IV). Following a brief outline of affirmative action legislation (V), I note three recent developments in the final part that illustrate both innovation and limitation: the introduction in 2004 of a federal *Age Discrimination Act*; the introduction of 'Disability Standards' in respect of public transport and education; and the push to establish wider anti-discrimination law protection for workers with family responsibilities.

II. Australian Anti-Discrimination Laws – An Outline

Anti-discrimination laws across Australia reflect a relatively uniform regulatory model; federal and state laws vary mostly in respect of which grounds or traits are covered. In outlining this model, I will focus on the Federal laws which apply throughout Australia to both the public and private sectors and which operate in addition to the State and Territory laws.[5]

Without a charter or bill of rights, Australian equality laws have no constitutional force (and few constitutional limitations). The Federal Parliament's competence to enact anti-discrimination laws arises from its power to enact laws with respect to 'external affairs'[6] which includes the content of international treaties and conventions entered into by the Federal Government. For example, the ratification of the *International Convention on the Elimination of all Forms of Racial Discrimination* enabled the federal parliament to enact the *Racial Discrimination Act* in 1975. These laws have no special status and are interpreted and applied by the federal courts as ordinary legislation.

The federal anti-discrimination laws are found in five separate but connected statutes. There are four substantive Acts –

- *Racial Discrimination Act* 1975 (Cth);
- *Sex Discrimination Act* 1984 (Cth);
- *Disability Discrimination Act* 1992 (Cth); and
- *Age Discrimination Act* 2004 (Cth).

These are supplemented by the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (*HREOC Act*) which establishes the Human Rights and Equal Opportunity Commission (HREOC) as an independent statutory agency charged with the powers and functions to administer the substantive Acts. The *HREOC Act* also sets out the processes for resolving claims made under those Acts.

The coverage of these Acts is summarised below (and more fully in Appendix A):[7]

Act	**Ground**	**Comment on definition of ground**
Racial Discrimination Act 1975	'race, colour, descent or national or ethnic	Not defined; adopts words of the convention.

[5] The State and territories laws are: *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1984* (SA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

[6] *Commonwealth of Australia Constitution Act* (Cth), s 51(xxix).

[7] See Chris Ronalds & Rachel Pepper, *Discrimination: Law and Practice* (2nd ed, 2004) for a useful summary of all grounds, areas, and exceptions in Australian anti-discrimination laws.

	origin'	
Sex Discrimination Act 1984	Sex	Men and women.
	Marital Status	Symmetrical; covers all heterosexual statuses.
	Pregnancy	Includes potential pregnancy.
	Family Responsibilities	Broad definition of 'family', but does not extend to non-familial caring responsibilities and does not appear to cover same-sex couples and their families. Note: Prohibition limited.
	Sexual harassment	A separate right of action
Disability Discrimination Act 1992	Disability	Very wide definition, covering sensory, physical, and intellectual disabilities as well as mental illness; actual and imputed, temporary and permanent, past, present and future. Also covers associates of those with a disability.
	Disability harassment	A separate right of action
Age Discrimination Act 2004	Age	Applies to all ages and age groups.

There are some notable omissions from this list, such as religious belief and sexuality. These two grounds only have some very limited federal protection against termination of employment in the *Workplace Relations Act*,[8] and protection under state legislation[9] which varies across the country.

All federal Acts prohibit discrimination in employment[10] and generally also apply to other work related fields, such as membership of trade unions, partnerships, and independent contractors. In respect of each field, the prohibition applies to every stage including hiring, terms, conditions and benefits, and termination, and also covers retaliation or victimisation for exercising rights under the legislation.

As noted above, a relatively uniform regulatory model has been adopted across all anti-discrimination legislation in Australia. Under this model:

- Discrimination on particular grounds, such as sex or race, is prohibited in particular fields, such as work, at particular stages, such as hiring or firing, subject to specific exceptions. Discrimination is categorised as either direct or indirect, and there is no positive duty to accommodate.
- *Only victims* of prohibited discrimination are given the right to take action against perpetrators to seek remedies for the harm caused. This contrasts with models in other jurisdictions in which the agency has some powers to undertake investigations on behalf of claimants in order to enforce compliance. Federal claims cannot proceed directly to court but must first be lodged with HREOC.
- HREOC, the state agency charged with administering the federal legislation, upon

[8] 'Sexual preference' and religion are prohibited grounds for termination under section 659(2)(f) *Workplace Relations Act* 1996.

[9] See ss 6(j) and 6(l) of the Victorian *Equal Opportunity Act 1995* for discrimination prohibitions on the grounds of 'religious belief or activity' and 'sexual orientation' respectively. See also s 49ZG of the New South Wales *Anti-Discrimination Act 1977* for the protection against discrimination 'on the ground of homosexuality'.

[10] *Racial Discrimination Act 1975* (Cth) s 15; *Sex Discrimination Act 1984 (Cth)* s 14; *Disability Discrimination Act 1992* (Cth) s 15; *Age Discrimination Act 2004* (Cth) s 18.

lodgement of a complaint, has the power to undertake a very limited investigation to ascertain whether the claim is covered by the federal legislation, and is then empowered to confidentially conciliate complaints. HREOC also has powers to undertake general inquiries into human rights issues in Australia and generally promote the goals of the legislation through education and guidelines.

- Complaints that are not resolved through conciliation by the agency may then proceed to be determined by a court or, at state level, an administrative tribunal. The court or tribunal can generally only make orders that are compensatory, requiring the perpetrator to redress the victim for the harm caused. Generally, no sanctions of punitive damages or penalties can be ordered, nor corrective or preventative remedies.

It is worth noting that in addition to the anti-discrimination Acts, there is federal legislation – the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) – which imposes a very limited affirmative action obligation on large employers in respect of women, discussed further in part V below. There is no formal link between this Act and the *Sex Discrimination Act* or their respective agencies.

Commencing with the *Racial Discrimination Act* in 1975, federal anti-discrimination laws in Australia were established separately to industrial or labour laws.[11] This historical separation might have undermined the utilisation of equality rights in the workplace (especially by unions who traditionally have used the industrial arena to resolve workplace disputes and bargain for improvements in worker conditions[12]). However, this separation may also be the key reason why the laws fell outside the substantial reduction in worker rights (Work Choices) introduced by the Howard Government.[13] The Work Choices amendments, which came into effect in March 2006, constituted a very substantial overhaul of Australian industrial relations and constituted a decisive issue in the recent Federal election with the new Australian Labor Party government promising to eliminate many of the more drastic changes.[14] Equality laws were not on the election agenda and the new Federal government has not proposed to make any significant changes (apart from a particular initiative in respect of workers with family responsibilities, discussed in part VI, below).

III. Regulatory Framework – Discrimination Law Rights and Their Limits

Australian anti-discrimination laws are loosely modelled on those adopted in the United States and, at least originally, in the United Kingdom. They could clearly be characterised, using Fredman's expression, as an 'individual complaints led model based on a traditional view of human rights'[15] and as such, the limitations identified in this model apply to

[11] One more recent overlap is the prohibition in the *Workplace Relations Act* 1996 on discriminatory (unlawful) termination of employment. Section 659 prohibits termination of employment on the ground of 'race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin' and other grounds, subject to some exceptions.

[12] Sara Charlesworth, 'The Overlap of the Federal Sex Discrimination and Industrial Relations Jurisdictions: Intersections and Demarcations in Conciliation' (2003) 6(4) *Australian Journal of Labour Economics* 559-577.

[13] The *Workplace Relations (Work Choices) Act* 2005 (Cth) amended the *Workplace Relations Act* 1996 (Cth) (WRA).

[14] Australian Labor Party, *Forward with Fairness – Labor's Plan for Fairer and More Productive Australian Workplaces* (2007) <http://www.alp.org.au/download/now/forwardwithfairness.pdf> (accessed 7 March 2008).

[15] Fredman, above n 1.

Australian laws. In some ways, the Australian model is even more individualised than its international counterparts, causing the identified limitations to be magnified.

Being a rights-based model, the Australian laws are designed to eliminate discrimination by placing a prohibition on certain conduct and then, in the event of transgression, giving the victim a right to take legal action against the perpetrator. The limitations of this model can be identified by considering each element: how the standard of behaviour is set, who gets to enforce compliance with the standard, what process is used for enforcement and what consequences flow from transgression. In brief, the key limitations of the model are:

- **The standard is limited to a general and negative or *pro*scriptive duty**. The generality provides flexibility but creates compliance uncertainty, and the proscriptive nature of the duty means the system is fault-based, requiring employer action *only* in the event of transgression having been proven and thus only after the occurrence of wrongdoing.
- **There is no enforcement agency.** The enforcement of compliance is limited to victims as no power is given to the administering agency or other public prosecutor to investigate possible breaches, take action against apparent perpetrators, or even support individual claimants in their actions.
- **The sanctions are limited to individual compensation.** The orders that can be made against perpetrators are limited to orders for compensation or redress, not punishment or, more importantly, preventative or corrective orders.
- **The enforcement process is largely private**. Commencing with compulsory, confidential conciliation, beyond which few claims proceed, the process mostly keeps breaches out of public view which limits both the educative and deterrent effect of claims.

The stated objectives of each federal anti-discrimination statute include the normative, public goal of eliminating discrimination.[16] The *Sex Discrimination Act*, for example, states it is designed 'to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work' (s 3(b)). However, the formal regulatory mechanisms – providing only an individual right to litigate for individual redress – clearly prioritise an implicit remedial objective of resolving discrimination claims as individual, interpersonal disputes. Victims may get redress in individual cases, but this is often limited to the more blatant, sensational ('news-worthy') cases, leaving systemic or structural discrimination largely untouched.

Standard

The central regulatory mechanism of Australian anti-discrimination laws is a general statutory standard that prohibits discrimination.[17] Being a negative or proscriptive duty, employers are simply put on notice that if they do, or continue to, behave in a particular (discriminatory) way, they bear the risk of having to pay for the harm done to victims who can prove discrimination and that the perpetrator caused the harm. This fault-based system means that an employer is not required to do anything unless fault can be identified and attributed to

[16] See the *Disability Discrimination Act 1992* (Cth) s 3, *Sex Discrimination Act 1984* (Cth) s 3, and *Age Discrimination Act 2004* (Cth) s 3. See also the preamble to the *Racial Discrimination Act 1975* (Cth), which states that the Act makes provision for giving effect to the *International Convention on the Elimination of all Forms of Racial Discrimination*.

[17] In a comparative study, Jean Sternlight notes that the US, UK and Australian anti-discrimination laws are very similar in their prohibitions, but they differ significantly in their enforcement procedures. Sternlight J, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401 at 1404.

the employer. If there are other causes of inequality and it cannot be proven that an employer contributes to the inequality in the specifically prohibited way, then it will bear no responsibility for addressing the inequality.

Moreover, there is no positive substantive or process duty to identify and eliminate discrimination or promote equality. More specifically, there is no legal duty to identify potential or actual discrimination in the workplace, no duty to educate workplace participants about the prohibition, no duty to establish a policy against discrimination in order to translate the legislation into workplace regulation, and no duty to establish internal grievance procedures to assist anyone who feels they have experienced a breach of the legislation.[18]

Of course, many employers have developed workplace discrimination policies and it is arguable that even though the legal rule is a negative one, it has played a role in prompting such action. However, because the legislation does not mandate such behaviour it has no mechanism for monitoring or evaluating it, so employer initiatives are patchy and their effectiveness untested. Whilst corporate policies might be triggered by the legislation, it is not clear the extent to which they reflect business needs at the cost of human rights, fairness and the wider needs of society.

General duties provide for flexible and innovative responses, but pose compliance difficulties – without elaboration through regulations or evidentiary standards, compliance is only certain when adjudicated after the fact. The Australian legislation enables the administering agencies to create guidelines, but these are not statutory and are not recognised as evidentiary standards. Thus the formal mechanism for elaborating on the general duty is through litigation. In this way, the courts are left to provide guidance on the content of the general duty, but can only do so in the context of resolving a particular dispute, leaving other employees and organisations to ponder the applicability of the precedent to their circumstances.

For a number of reasons only a very small proportion of claims made to HREOC proceed beyond confidential conciliation to a public hearing. This means that judges decide few matters - approximately 100 federal matters in 2006-07[19] - with a number of implications. Firstly, court judgments can have an educative or normative effect, informing employers and employees of what is acceptable and what is not, and changing the cultural norms in respect of such behaviour. However, if the courts get to decide only a small number of cases, only a proportion of these get public attention, this educative and normative effect is undermined. This is particularly problematic in a system that provides for no other formal mechanisms for elaborating upon the general rule.

The second concern is that with limited guidance and limited experience in resolving questions of discrimination, judges have often struggled to understand the legislation and articulate clear principles about its scope and operation that accord with the normative objective of the legislation. Many provisions have been interpreted in very limited and technical ways, making the burden of proving a claim even more onerous for applicants, as

[18] Cf part V Affirmative Action, below, for limited positive duties in respect of women.

[19] In 2006-07 only 98 unlawful discrimination claims were filed in the Federal Magistrates Court (which hears nearly all federal claims). Federal Magistrates Court, *Annual Report 2006-2007* (2007). At state level, in the most populous state of New South Wales in 2006-07 the relevant tribunal finalised 140 matters (123 discrimination complaints and 17 applications for leave to proceed) NSW Administrative Decisions Tribunal, *Annual Report 2006-2007* (2007) <http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/vwFiles/ADT_AnnualReport_2007_FINAL.pdf/$file/ADT_AnnualReport_2007_FINAL.pdf> [27] (accessed 6 March 2008).

explored in detail by many commentators already.[20]

The normative effect is also undermined by the limited scope of the federal Acts and a lack of commitment to equality shown by the Howard Coalition government. Being only statutory and not entrenched in any way, the federal government is free to legislatively discriminate, ignore and even override anti-discrimination legislation. So, for example, in order to avoid a judicial finding of breach of the *Racial Discrimination Act* 1975 (Cth) in respect of a 2007 federal intervention into Aboriginal communities, the federal government overrode the *Racial Discrimination Act* by expressly legislating that it did not apply to the intervention.[21] Further, a recent HREOC inquiry and report,[22] listing 58 federal statutes that were found to discriminate against same-sex couples and their families, failed to be acted upon by the Coalition government.[23]

Enforcement rights and dispute resolution processes

The power to enforce compliance with the federal prohibition on discrimination is limited to victims, who are granted a right to sue for redress. HREOC has no power to initiate investigations of non-compliance, no explicit power to support claimants in breach proceedings, and no power to enforce judgements or settlement agreements that have been made. The absence of an agency with such enforcement powers distinguishes the anti-discrimination regulatory scheme from both other Australian workplace regulatory frameworks – eg, award compliance and occupational health and safety – and from US and UK anti-discrimination schemes.[24]

In respect of compliance, HREOC's powers are limited to responding to each claim of breach with a preliminary investigation and attempting to resolve each complaint, using confidential conciliation. The conciliation is confidential, with a strict non-disclosure duty on HREOC which means the agency cannot use publicity of specific claims to raise awareness of the Act or to apply public pressure to corporations to prevent or settle disputes. In conducting conciliation, HREOC has taken a neutral or impartial position in helping to resolve claims.[25] Ultimately, if conciliation fails, the claimant can then pursue the claim through a federal court with all the formality and legal trappings this entails.

There are a number of problems associated with victim-only prosecution. Firstly, those

[20] See, e.g., Thornton M, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (Oxford University Press, Melbourne, 1990); Hunter R, *Indirect Discrimination in the Workplace*, (Federation Press, Annandale, 1992); Gaze B, 'Context and Interpretation in Anti-Discrimination Law' [2002] *MelLRev* 18; Hunyor J, "Skin-deep: Proof and Inferences of Racial Discrimination in Employment" [2003] *SydLRev* 24. See also Justice Kirby's comments at n 64 below.

[21] Section 132(1) of the *Northern Territory National Emergency Response Act 2007* (Cth) provides that any acts done pursuant to its provisions are, for the purposes of the *Racial Discrimination Act 1975* (Cth), 'special measures', whilst s 132(2) of the Act deems such acts to be excluded from the operation of Part II of the *RDA*.

[22] Human Rights and Equal Opportunity Commission, *Same-Sex Same Entitlements* (2007) <http://www.hreoc.gov.au/human_rights/samesex/index.html> (accessed 7 March 2008).

[23] Further, it is yet to be seen whether the new ALP government will act upon its previous support for equal treatment of same-sex couples in work-related and financial areas. See The Canberra Times, *Rudd's Same-Sex Stand a Positive* (2007) <http://canberra.yourguide.com.au/news/opinion/opinion/rudds-samesex-stand-a-positive/1101133.html> at (accessed 7 March 2008).

[24] Sternlight, above n 17 at 1413; Baker A, 'Access vs Process in Employment Discrimination: Why ADR suits the US but not the UK' (2002) 31 *Industrial Law Journal* 113 at 118.

[25] Raymond T and Ball J, *Alternative Dispute Resolution in the Context of Anti-Discrimination and Human Rights Law: Some Comparisons and Considerations*, HREOC, < http://www.hreoc.gov.au/complaints_information/publications/alternative.html > (accessed 6 March 2008).

who experience discrimination do not necessarily identify it as discrimination. In appointing victims as prosecutors, the system relies upon the victim to 'name,' 'blame' and 'claim,' that is, identify that behaviour is wrong and unlawful, identify a perpetrator who should be held responsible, and articulate and pursue a legal claim for a remedy.[26] Sara Charlesworth's research demonstrates that prevailing norms have a strong impact on the capacity of victims to identify discrimination and to recognise the conduct as wrong.[27]

Claimants under anti-discrimination legislation are, by the very nature of the legislation, members of traditionally disempowered groups. Expecting members of such groups to have the time, security and resources to alone identify breaches, press claims, and enforce outcomes without any public assistance represents a fundamental regulatory weakness even when the initial dispute resolution system is relatively informal and accessible. Further, by limiting enforcement to the victim, HREOC is limited in doing what it might be in the best position to do – identifying systemic discrimination and, through the strategic use of investigation and regulatory sanctions, compelling the worst offenders to change and helping to ratchet up the standards of the mild offenders or reluctant compliers.

Ultimately, HREOC's regulatory power is largely limited to the soft tools of education and raising public awareness. It carries out these functions in a plethora of ways, including inquiry reports, court interventions, media releases, national consultations and forums, classroom education resources, and human rights awards.[28] HREOC has worked hard, on a very limited budget, to prompt corporate responsibility by using these educative tools to bolster, translate and leverage the otherwise weak formal mechanisms under equality laws. It has utilised a combination of arguments about the business case, moral case and litigation risk of inequality to prompt or reinforce commitment to a non-discrimination norm. However, to be effective, human rights information and arguments must compete with wider business imperatives and other competing discourses, such as freedom of contract, labour market flexibility, and the separation of work and family.

Sanction

The sanctions available for breach of the Australian anti-discrimination laws are generally limited to compensatory remedies.[29] Publicity cannot be used by HREOC because of its confidentiality obligations, and the reputational risk of litigation is minimised by private conciliation being the primary dispute resolution process. If a matter does make it to court, the remedy ordered is usually damages – primarily for economic and non-economic loss, with aggravated damages available but rarely awarded. Importantly, penalties and punitive damages are not available.[30] Again, the regulatory scheme can be contrasted with both other

[26] Sara Charlesworth, 'Managing Work and Family in the 'Shadow' of Anti-Discrimination Law' in Jill Murray (ed), *Work, Family and the Law* (2005) 88, 93, drawing on the work of William L F Festiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980-81) 15 *Law and Society Review* 631.

[27] Ibid.

[28] Human Rights and Equal Opportunity Commission, *About the Commission* (2008) <http://www.humanrights.gov.au/about/index.html> (accessed 6 March 2008).

[29] Section 46PO(4)(d) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) permits 'an order [for unlawful discrimination] requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered.' There are a few penalty provisions, but these generally relate to dispute resolution powers of HREOC or victimisation.

[30] *Hughes (formerly De Jager) v Car Buyers Pty Ltd and Ors* [2004] FMCA 526 at [69] to [71]; Cf the decision of Raphael FM in *Font v Paspaley Pearls* (2002) FMCA 142 at [158] to [167]. See also Jonathon Hunyor, 'Human Rights Remedies for Unlawful Discrimination' (2005) 43(7) *Law Society Journal* 40.

Australian workplace regulation and US anti-discrimination laws.[31]

Limiting remedies to compensation has a number of implications. Firstly, the focus of the remedy is the individual claimant, restricting remedial orders to the harm that the victim has suffered and, importantly, not extending them to require systemic changes to prevent harm to others. This limits the capacity for change to be ordered and reinforces the notion of discrimination being merely an interpersonal dispute rather than a public wrong.

Further, compensatory remedies focus attention on the impact of the wrongful act on the applicant, while punitive damages or corrective orders focus on the wrongdoer and what needs to be done to improve behaviour. Without a range of sanctions the court has no capacity to tailor the remedy according to the level of wrong-doing or efforts of the respondent. Once liability is found, the flagrant, egregious or repeated wrongdoer is not distinguished from the respondent who instituted compliance programs and training that simply failed to prevent the discrimination. In a compensatory scheme a reduction in damages could only be a deduction from the victim's compensation.

Finally, being only compensatory, the damages are generally very low, and thus have minimal deterrent effect. Pain and suffering are often under-estimated by judges[32] (who likely have not experienced discrimination in their lives[33]) and awards for economic loss are generally low often because claimants are from low paying jobs and also struggle to show the economic impact of the particular discriminatory action. The Australian legislative scheme certainly does not have a "big stick" that, according to Ayres and Braithwaite, is needed to regulate responsively and most effectively use the more persuasive or lower level enforcement mechanisms.[34]

IV. Conceptions of Equality, Definitions of Discrimination

While anti-discrimination laws are directed at promoting equality, the particular notion or notions of equality they are designed to promote is often not clear or questioned. The notion of equality that has popular appeal and appears conceptually straightforward is that of 'formal equality'. This Aristotlean notion of equality (merely) requires likes to be treated alike and says that justice inheres in consistency.[35] It means ignoring differences, judging 'blindly' and focussing instead on the relevant criteria for the job, position, etc.[36] Such a notion of equality is powerful for opening doors that have been closed to whole groups, such as women, and compelling individuals to be treated according to their merits rather than their group status or stereotyping. However, it suffers many limitations.[37] The mandate to treat likes alike immediately prompts the difficult question of 'who is like whom?' (and the related question of who gets to decide this). Then there is the problem of the relative nature of this notion, entitling likes to be treated alike, whether that treatment is good or bad. Finally, while it requires that individuals be treated according to their 'merits,' it does not enable any challenge

[31] Baker, above n.24, at 115.

[32] Awards for non-economic loss may be nominal and generally fail to exceed $10,000: Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005: Supplement 1 March 2005 – 1 July 2007 (2007)* <http://www.hreoc.gov.au/word/legal/fdl/fdl_supplement07.doc> [59-66] (accessed 7 March 2008).

[33] Gaze, above n 20.

[34] Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, New York, 1992).

[35] Sandra Fredman, *Discrimination Law* (2002) 2.

[36] Regina Graycar and Jenny Morgan, *Hidden Gender of Law*, (2nd Ed.) 2002, 28-29.

[37] Fredman, above n 35 at 7-11.

to the criteria that are used, only the consistency of their application. This means that the notion and bias of 'merit' or the criteria used may go unquestioned.

Substantive equality alternatively requires differences to be acknowledged and accommodated rather than ignored.[38] Substantive equality is about equality of *outcome* or equality of *opportunity*, not merely same treatment. When there are relevant differences, simply ignoring them will not promote equality of opportunity or outcome and can, in fact, exacerbate inequality.[39] In practice, substantive equality means doing more than merely allowing all to apply; it requires a review of the criteria to see if their effect is exclusionary and an assessment as to whether different treatment, facilitation or services are required to *enable* equal participation.

It is clear from court judgments, media reports and other public debates that the notion of substantive equality is not well understood or accepted in Australia. Formal equality or same treatment is well entrenched as the ultimate goal. Often any special measures or different treatment proposed to achieve substantive equality are depicted as a breach of (formal) equality principles. The slipperiness of determining formal equality – especially the question of who is like whom and who gets to decide this – also feeds into this confusion. For example, HREOC's proposal for paid maternity leave to be provided to enable female workers to participate equally with male workers in the workforce[40] was immediately challenged as discriminatory against mothers who were not in the paid workforce and against fathers in the paid workforce, both of whom were characterised as being 'like' new mothers in the workforce.

It is the formal notion of equality that features most strongly in Australian anti-discrimination laws, although there are elements which are clearly designed to achieve more than this.

Under Australian legislation direct discrimination prohibits different treatment of persons who are in like circumstances based on a protected trait (such as sex or race). The focus is on treatment and, more importantly, the reason for that treatment. At its most simple, direct discrimination is about rejecting someone for a job or promotion *because of* their race, sex, religion etc. Indirect discrimination prohibits the requirements or conditions that disparately impact on protected groups, unless the requirement or condition is 'reasonable' in all the circumstances.

It is generally understood that both direct and indirect discrimination are proscribed by our legislation in order to promote both formal and susbtantive equality. The direct discrimination prohibition reflects a same treatment notion of equality and has been interpreted as being confined to the promotion of formal equality, leaving only indirect discrimination to promote susbtantive equality. To date, most claims have been framed as direct discrimination, with indirect discrimination often being characterised as conceptually difficult to understand and extremely difficult to prove.[41]

The exceptions available under the legislation play an important role in demarcating what is 'unacceptable' discrimination and what is permissible. It is important to note that in

[38] Ibid 11-14.
[39] Reg Graycar & Jenny Morgan 'Thinking About Equality' (2004) 27 *UNSW Law Journa*l 833, 834.
[40] Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002) <http://www.humanrights.gov.au/sex_discrimination/paid_maternity/pml2/index.html> (accessed 7 March 2008).
[41] E Hastings, "FounDDAtions: Reflections on the First Five Years of the Disability Discrimination Act in Australia", (1997) <http://www.hreoc.gov.au/disability_rights/hr_disab/found.html> at 28 January 2008. Cf Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992).

the definition of *direct* discrimination in Australian legislation there is no justification or reasonableness element. For the most part, the legislation simply says that the particular grounds or traits must not be used to distinguish between candidates in the provision of jobs, services, etc. In order to prevent absurdities arising from this general prohibition, exceptions have been set out rather than a general 'justification' defence.

There are various kinds of exceptions in the legislation. Firstly, there are those that allow employers to choose by trait for particular positions. For example, sex discrimination legislation enables theatre groups to choose women for female roles and lingerie sellers to employ women to fit bras using a 'genuine occupational qualification' exception.[42]

A second kind is called a 'special measures' or positive discrimination exception. Most grounds of discrimination protection are framed in a way that is symmetrical (eg, sex) rather than assymetrical (eg, women). However, in respect of these grounds, each of the federal Acts provide an exception that allows for positive discrimination whereby the trait can be used to identify disadvantaged groups and offer 'special measures'[43] in order to promote substantive equality.[44] For example, the *Sex Discrimination Act* provides that special measures taken 'for the purpose of achieving substantive equality between … men and women' do not constitute unlawful discrimination, 'whether or not that purpose is the dominant or substantial' purpose.[45]

Conversely, another exception permits employers to exclude protected groups if their traits prevent them from performing the job. So, for example, disability discrimination legislation allows bus companies to exclude blind people from bus-driving jobs by identifying sight as an 'inherent requirement' of the job.[46] However, the scope of this statutory exception is quite narrow. Under federal law, it is limited to the *Disability Discrimination Act* and the *Age Discrimination Act*. Further, in the *Disability Discrimination Act* it is limited to hiring and dismissal from employment, not applying to all employer requirements but only 'inherent' requirements or essential aspects of the job.

Australian anti-discrimination laws have a patchwork of such exceptions designed to make the general prohibition on direct discrimination workable and to enable substantive equality or affirmative action measures to be taken. If different treatment (direct discrimination) is found, each exception, in effect, allows for a consideration of whether the use of the ground or trait is 'justified' or permitted for some policy reason. In this way, the legislation and specifically the exceptions provide some concession to a strict formal equality approach which says that such grounds or traits may *never* be used as a basis for decision making. There are a number of other exceptions – some practical, some political – that apply to both direct and indirect discrimination under the federal Acts.[47]

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[42] *Sex Discrimination Ac*t 1984 (Cth), s 30.

[43] For example, s 7D *Sex Discrimination Act* 1984 (Cth).

[44] Other exceptions suggest political compromises, such as exempting small businesses and private educational authorities from such discrimination prohibitions in New South Wales. See, eg, *Anti-discrimination Act* 1977 (NSW) s 49D(3).

[45] *Sex Discrimination Act 1984* (Cth) ss 7D.

[46] See, eg, *Disability Discrimination Act* 1992 (Cth), s 15(4); *Anti-Discrimination Act* 1977 (NSW) s 49D(4).

[47] For example, the *Sex Discrimination Act 1984* (Cth) contains exceptions to liability for unlawful discrimination for charities (s 36) and voluntary bodies (s 39), religious bodies (s 37) and educational institutions established for religious purposes (s 38). The *Racial Discrimination Act 1975* (Cth) contains an exception to liability for unlawful discrimination for instruments conferring charitable benefits (s 8(2)).

Direct Discrimination

To prove direct discrimination, a claimant needs to establish three related elements:

- That the claimant has suffered some detriment, such as not getting hired or promoted, receiving poorer terms and conditions of employment, being harassed at work, or having their employment terminated (the **detriment** or prohibition element);
- that the detriment was the result of being treated less favourably in comparison to someone who is not of the same class (sex, race, disability, etc) but is otherwise in the same material circumstances (the '**comparator**' element); and
- that the different treatment was because of the trait of gender, race, disability, etc. (the '**causation**' element).[48]

The respondent may then try to prove that the case falls into one of the exceptions and thus is 'justified.'

Generally, the first element is not the issue in any claim, as it is usually obvious. The issue is whether the detriment was caused by discriminator treatment, which relates to the last two elements, both of which pose challenges for claimants to prove.

The comparator element is difficult to prove when there is no actual person without the trait who is in like circumstances. In respect of sex this is particularly acute because of Australia's highly gender-segregated workforce. For instance, child care work is overwhelmingly a female occupation, which would make it difficult for a female child care worker to find a male child care worker to show that she had been treated less favourably than someone not of her sex in like circumstances. Despite courts being permitted to consider a hypothetical rather than actual comparator, the highly gendered nature of the work makes the imagination of such a figure difficult.

There is also significant controversy over what constitutes 'like circumstances.'[49] This issue arose in the first sex discrimination case decided in Australia, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-002. Mrs Wardley had applied to Ansett Airlines to become a commercial pilot. She scored better than or as well as all the other applicants, all of whom were male, but was ultimately refused a job. Mrs Wardley was young and recently married and, in response to an interview question, said that she did intend to have children at some stage (although would not let this interrupt her career). Ansett had a policy of not employing women as pilots and the admission of this policy was enough to find that it had directly discriminated against her. However, in any event, it also tried to argue that it had not rejected Wardley because she was a woman but because she was likely to take (maternity) leave. In this way, it argued, it had not treated her any differently than any other (male) applicant in similar circumstances of intending to take a substantial period of leave in the early stages of their career. The tribunal rejected the inclusion of potential pregnancy or potential taking of maternity leave as merely a circumstance that could be attributed to the comparator, concluding that the taking of (maternity) leave was integrally connected with being female and thus a decision based on sex.

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[48] See, eg, s 5(1) *Disability Discrimination Act* 1992 (Cth) 'For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.'

[49] Smith, 'From *Wardley* to *Purvis*', above n 2.

The appropriate comparators were all the male applicants and similar circumstances were qualifications, flying hours, test results and interview scores.

However, the High Court of Australia in a recent and leading judgement on this point has decided otherwise.[50] In the case of *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92, a student with multiple disabilities was admitted into school but, upon exhibiting various disruptive behaviours as a result of his disabilities, was expelled. The student claimed that he was directly discriminated against on the basis of his disability because he was treated less favourably than a student without a disability. However, while the Court accepted that the student's behaviour was a manifestation of his disability, it ultimately held that the behaviour was to be attributed to the comparator. So, the question for the Court was whether the school had treated the student less favourably than it would have treated a non-disabled student *who behaved that way.* On this test, the Court found there had been no less favourable treatment and thus no direct discrimination.

This demonstrates key limitations of using an anti-discrimination approach to the promotion of equality and the progressive improvement in benefits. There is great uncertainty or flexibility in the characterisation of who is like whom, and a struggle over who gets to decide this. Further, the formal equality model underpinning the direct discrimination prohibition only requires the disabled student to be treated the same as the non-disabled student. Without a 'reasonable accommodation' duty on the school (employer, etc) to enable or facilitate the disadvantaged student's participation, the same treatment will continue to exclude and marginalise, and entrench the disadvantage.

The role and purpose of the comparator element has been criticised at the highest level. In their *Purvis* minority judgment, Justices McHugh and Kirby noted with approval scholarly attempts to 'reformulate the notion of direct discrimination so as to free it of the shackles of the comparator.'[51] Until issues of equality get onto the political agenda, such technical reform suggestions will not be given much attention or support.

To prove the third element, causation, the claimant must provide evidence of the reasons for the decision or conduct, and prove that the ground was a reason for the conduct. Evidence can include statements disclosing the reason for conduct or statements disclosing a prejudice or animus from which it can be inferred that the trait was at least one of the reasons for the decision or conduct. For all federal Acts, except the *Age Discrimination Act* (discussed below), the reason need not be the sole or even dominant reason, merely a reason.[52] It is often said that intention or motive need not be proven, although the courts often still seek to establish that the ground was the 'true basis' for the decision.[53]

It appears that prohibitions on direct discrimination have had an effect on reducing blatant and intentional discrimination; there are fewer smoking guns. This may be attributable to the normative effect of legislation, acting to educate and deter people and changing the norm of what is acceptable criteria and language in the workplace. The blatant and intentional conduct would be most susceptible to such effects because it is the easiest to prove. However, the legislation is not well designed to address the less intentional or less conscious, subtle and

[50] For further analysis of this case, see Smith, 'From *Wardley* to *Purvis*', above n 2.

[51] *Purvis* (2003) 217 CLR 92, [114] per McHugh and Kirby JJ, citing to Fredman above n 35, 96 and to *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26.

[52] For the *Age Discrimination Act 2004* (Cth), the claimant has to prove that age was 'dominant' reason. See Part VI below.

[53] *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176-177 per Deane and Gaudron JJ, 184 per Dawson J, 208 per McHugh J; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J, 400 per McHugh J.

structural forms of discrimination.[54] It is significantly more difficult, even impossible, to prove these kinds of discrimination and thus they remain poorly addressed by rights based anti-discrimination legislation.

Indirect Discrimination

Indirect discrimination is prohibited in respect of all grounds under Federal legislation, except family responsibilities[55] (as discussed in part VI, below). The definition, however, differs between the Acts. In essence, the claimant must show that a requirement or condition imposed by an employer disparately impacts upon their class and the requirement or condition is not reasonable in all the circumstances. There are essentially two formulations of this definition, differing in respect of how disparate impact is to be shown and which party has to show that the requirement is (not) reasonable.

The elements that a claimant must prove under the *Disability Discrimination Act* (with a similar test in the *Racial Discrimination Act*) are:

- a **requirement** or condition has been imposed by an employer (contractor, partner, education provider, etc);
- with which the claimant cannot or **does not comply** (a practical, not theoretical test);
- with which a substantially higher proportion of the those without the claimant's disability (or race) can comply (**disparate impact**); and
- the requirement or condition is **not reasonable** in all the circumstances.

This was originally also the test in the *Sex Discrimination Act* and, from the beginning it proved to be complex, technical and interpreted in a legalistic way. Claimants, respondents and courts grappled with understanding and articulating how disparate impact was to be proven,[56] struggling to fill the gap Parliament had left in using such an open-textured term as 'reasonable' and not providing any definition or guidance on this.[57] Few indirect discrimination cases were brought and even fewer were won, although notably two were won in the High Court.[58]

After a federal inquiry into gender equality[59] and much lobbying, the federal Government amended the *Sex Discrimination Act* in 1995, inserting a simpler definition of indirect discrimination. The *Racial Discrimination Act* and *Disability Discrimination Act* remain unchanged, although the recent *Age Discrimination Act* 2004 uses this revised definition.[60] Under the *Sex Discrimination Act* a claimant only needs to prove that an employer 'imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, *the effect of disadvantaging persons of the same sex*' as the claimant.[61] The

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[54] Susan Sturm analyses these limitations of anti-discrimination legislation at length in Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia Law Review* 458.
[55] Note that state legislation does prohibit indirect discrimination in respect of carer's responsibilities. See, eg, *Anti-Discrimination Act* 1977 (NSW).
[56] *Australian Iron & Steel v Banovic* (1989) 168 CLR 165.
[57] *Waters v Public Transport Corporation* (1991) 173 CLR 349.
[58] *Australian Iron & Steel v Banovic* (1989) 168 CLR 165; *Waters v Public Transport Corporation* (1991) 173 CLR 349.
[59] *Halfway to Equal* (1992), House of Representatives, Standing committee on Legal and Constitutional Affairs.
[60] *Age Discrimination Act 2004* (Cth) s 15. Subsection 15(2) places the burden of proving that the condition, requirement or practice is reasonable in the circumstances on the respondent.
[61] *Sex Discrimination Act 1984* (Cth) s 5(2).

respondent now bears the onus of proving as a defence that the condition or requirement was reasonable in all the circumstances,[62] with some guidance provided about such circumstances.[63] The impact of this revision has not been substantial. While potentially easier to prove, indirect discrimination is still difficult to understand, identify and articulate.

While designed as the key mechanism in the legislation for enabling substantive equality, the progressive capacity of the indirect discrimination prohibition is weakened by the open-texture of its elements, such as 'reasonableness.' Such terms are vulnerable to highly conservative interpretations that are made to appear objective. Importantly, many observers of the High Court have noted an increasingly conservative trend in its jurisprudence. It was demonstrated in the most recent direct discrimination case before the Court, *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92, noted above, in which the majority of the Court took a very technical, legal rather than purposive approach to interpreting the definition of direct discrimination.

The Court's conservative approach was further demonstrated in its most recent indirect discrimination case, *State of New South Wales v Amery* [2006] HCA 14 which concerned two separate pay scales. In that case, female teachers claimed indirect sex discrimination arguing that they were paid less than equivalently qualified and experienced teachers because a higher pay scale was afforded to those teachers employed on a 'permanent' or on-going basis than those who were employed as 'casuals.' The permanency requirement disparately impacted upon women because in order to gain permanency teachers had to agree to be transferable to any school in the State and women, who disproportionately bear family caring responsibilities, were not able to accept this condition and hence remained casual. The women ultimately lost the claim in the High Court. In the hearing and two appeals leading up to the High Court the issue was over whether there was a disparate impact and, ultimately, whether the permanency requirement was reasonable in all the circumstances. What is particularly significant though is that the majority of the High Court essentially chose to avoid the difficult, value-laden industrial question of whether it was reasonable to have two different pay scales and instead focused on whether the permanency condition was imposed on the casual teachers. The majority took a new and an extraordinarily technical and conservative approach to this question and found against the teachers. In dissent again, Justice Kirby was led to make the following comments:[64]

> 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. It was not always so. In the early days of State and federal anti-discrimination legislation, this Court, by its approach to questions of validity and application, upheld those laws and gave them a meaning that rendered them effective. … The Court's successive conclusions in these cases reflected the beneficial interpretation of the laws in question, ensuring they would achieve their large social objectives. In *Mabo v Queensland [No 2]*, the general approach which the Court took to discrimination (in that case on the ground of race) was stated clearly. The Court there acknowledged the need to ensure that the law "in today's world" should "neither be nor be seen to be frozen in an age of ... discrimination". The wheel has turned.

V. Affirmative Action

Unfortunately, one attempt at an alternative approach to the rights-based anti-discrimination laws outlined above has a similar array of weaknesses and possibly even

[62] *Sex Discrimination Act 1984* (Cth), s 7C.
[63] *Sex Discrimination Act 1984* (Cth) s 7B.
[64] *New South Wales v Amery* [2006] HCA 14 at [86]-[88] per Kirby J (footnotes omitted).

less support. The *Affirmative Action Act* 1986 (Cth) was enacted soon after the *Sex Discrimination Act* 1984 was introduced. In contrast to the complaints-based model of the anti-discrimination law, the *Affirmative Action Act* was designed to promote equality for women by embedding gender equality into management processes. It required employers[65] to audit their organizations, identify barriers to women's equal participation and reward, and develop a plan for addressing the inequality. These requirements were not onerous, nor were breaches the subject of any significant legal sanction, being limited to naming in Parliament.

However, the notion of affirmative action was highly controversial, with the Act characterized as a threat to management prerogative, merit, the family and society![66] There was some initial success in establishing compliance with affirmative action laws as a mark of good management, but this soon abated.[67] While the Act never imposed hard or even soft quotas, it was often misrepresented as requiring this and depicted as a threat to quality and the use of merit in selection processes. Gradually responsibility for compliance was relegated further down the management line, or over to the human resource managers, and with the growth of neo-liberalism the *Affirmative Action Act* slowly lost what little support it had. In a review of the legislation held less than 15 years after its introduction, the 'de-regulation' supporters won ground. With the repeal of the Act and enactment of the *Equal Opportunity for Women in the Workplace Act* 1999 (*EOWW Act*), the legislative requirements were significantly watered down and, importantly, the language of 'affirmative action' was removed.[68]

The *EOWW Act* imposes a very limited process duty on employers to analyse their workplaces and workforces and develop plans for the elimination of barriers to equality for women. It only applies to large employers, only in respect of women, and essentially only requires the organisation to provide a report to the administering agency for a stamp of compliance. The agency has virtually no enforcement powers, and the sanction is very limited: a corporation that fails to report may be named in parliament as non-compliant[69] and, although this has never been used, may be excluded from federal government contracting.[70]

Drawing on Christopher McCrudden's summary of essential elements of reflexive regulation,[71] a number of key regulatory limitations are evident in respect of the *EOWW Act*. Firstly, there is no obligation on the employer to produce comparable data or to publicly disclose findings of its audit and analysis, nor even the plan and report it provides to the agency. This absence of any disclosure obligation significantly limits the capacity of the law to effect change as it denies stakeholders access to the information necessary to evaluate and compare organisations. Secondly, there is no requirement to ensure that any consultation with stakeholders is meaningful and capable of challenging existing assumptions and practices.

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[65] Limited to employers of 100 or more employees, and tertiary education institutions.

[66] Braithwaite, V. & Bush, J. 'Affirmative action in Australia: A consensus-based dialogic approach' (1998) 10 *National Women's Studies Association Journal* 115-134.; Margaret Thornton, "EEO in a Neo-Liberal Climate' (2001) 6(1) *Journal of Interdisciplinary Gender Studies* 77.

[67] Braithwaite and Bush, above n 66.

[68] Thornton, above n 66.

[69] *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 19.

[70] See EOWA website – sanctions for not complying – Equal Opportunity for Women in the Workplace Agency (EOWA) website, *Contract Compliance Policy* <http://www.eowa.gov.au/Reporting_And_Compliance/Complying_with_the_Act/Sanctions_for_not_Complying/Contract_Compliance_Policy.asp> at 28 January 2008.

[71] Christopher McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36(3) *Industrial Law Journal* 255.

Finally, while the Act requires an organisation to take a look at itself and design a plan for promoting equality, it does not require the organisation to act upon and implement the plan. In this way, there is no effective requirement to change existing practices. Two particular changes to the regulatory framework under the new Act significantly undermine its effectiveness: organisations no longer need to report using a standard form, thus diminishing the capacity for even the agency to compare performance between organisations and across time; and the agency no longer has power to evaluate and grade the equality plans and publicly disclose these results. Today, the EOWW Agency, lacking in any significant regulatory powers, focuses on building the business case for diversity and marketing it to employers.

VI. Recent Developments - Innovations and Limitations

It is worth noting a few recent developments in Australian anti-discrimination laws in order to illustrate innovations, limitations and current issues. The first, the introduction of a federal *Age Discrimination Act*, is notable as an apparently significant legislative step that is likely to have little substantial impact. The second, the introduction of Disability Standards, may have gone largely unnoticed in Australia but represents regulatory innovation that has the potential to bring about real change. Finally, the recent report of HREOC into work and family balance and its recommendation of expanding federal protection against family responsibilities discrimination reflect the growing debate about work-family balance but also a lack of support for significant regulatory reform.

Age Discrimination

Australia, like many other countries around the world, is experiencing an aging of the population and expects a consequential pressure on government revenue. The enactment of age discrimination legislation is consistent with government policy, including social security and superannuation changes, designed to encourage higher workforce participation of older workers to help address this problem. However, when the *Age Discrimination Act* 2004 (Cth) came into effect, in June 2004, there was little fanfare, no surprises, and some disappointment.[72]

The Act prohibits both direct and indirect discrimination on the ground of age,[73] across work and other areas, with work defined broadly to include employment (s.18), contract workers (s.20), commission agents (s.19), partnerships (of 6 or more) (s.21), qualifying bodies (s.22), registered organisations under the *Workplace Relations Act* (s.23), and employment agencies (s.24). It covers all ages and permits positive discrimination (s.33) to enable special measures to be taken to promote age equality.

The Act had been a long time coming, emerging after almost a decade of political party promises, human rights commission inquiries, numerous government consultations, a Senate Committee inquiry, and much public debate. While almost universally welcomed, it was a disappointment to some for a number of reasons. Firstly, while the Act largely replicates the model of the *Sex Discrimination Act*, it has a unique and particularly onerous proof requirement for direct discrimination. In respect of direct discrimination the Act departs from all other Australian anti-discrimination statutes by requiring the claimant to prove that age is

[72] This summary draws upon Smith, B, Riley, J & Sarina, T, 'Industrial Legislation in 2004' (2005) 47(2) *Journal of Industrial Relations* 171-185.
[73] *Age Discrimination Act 2004* (Cth) ss 14 and 15, respectively.

not merely one of any number of reasons for their less favourable treatment but the '*dominant* reason' (s.16). The other federal Acts all provide that if an act is done for two or more reasons and a discriminatory ground is one of those reasons, the act is taken to be done for the discriminatory reason whether or not it is the dominant or substantial reason. This proof requirement of the *Age Discrimination Act* is thus inconsistent with the other Acts, extremely onerous for claimants, and was criticised strongly by many commentators. Its inclusion represents a significant barrier to all but the most blatant and intentional cases of age discrimination.[74]

Secondly, the Act has been criticised for both the number and breadth of its exceptions.[75] The Act contains the 'inherent requirements' exception which is found in the *Disability Discrimination Act* and the unlawful termination provisions of the *Workplace Relations Act*. This exception has been interpreted widely,[76] allowing organisations great freedom to establish and define positions to meet their organisation's needs. While not yet tested, it is relatively clear, however, that neither this exception or other exceptions under the legislation would permit compulsory age retirement.

Two other notable exceptions are youth wages and compliance with legislation and industrial instruments. Section 25 specifically exempts youth wages, thereby permitting employers to provide lower rates of pay for those under 21 and to choose to employ someone under 21 in order to pay youth wages. This specific exception is in addition to section 39 which provides that the Act does not make unlawful anything that is done in direct compliance with specified Acts, an agreement made under the *Workplace Relations Act* or an industrial award. The stated rationale for the youth wages exception is the protection of youth employment, but HREOC has argued that the evidence that their retention is justified is equivocal and should be reviewed further.

Finally, by the time the Act came into effect, age was already a prohibited ground of discrimination in all states and territories. It was also a ground of complaint under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (which provides for investigation but no enforceable rights), and a proscribed reason for termination of employment under the *Workplace Relations Act*.[77] Compulsory age retirement, for instance, has been unlawful under this state legislation for many years. The new legislation does fill some gaps – federal public servants, for instance – and provides a national dimension.

In addition to handling complaints in respect of the prohibition, the *Age Discrimination Act* gives HREOC the usual raft of powers to 'promote an understanding and acceptance of the Act,' 'undertake research and educational programs' and prepare and publish guidelines for avoiding age discrimination (s.53). As for the other federally protected grounds, this legislation might be most successful in changing attitudes and bringing about change through these roles of HREOC, leveraging off the limited prohibition.

Disability Standards & Action Plans

In many ways the *Disability Discrimination Act* does not differ from the model of

[74] The 98 discrimination law decisions made by the Federal Magistrates Court during 2006-07 involved cases of sex, race and disability discrimination, with very few applications alleging age discrimination filed. FMC annual report, above n 19 at 32.

[75] For a more extensive outline of the Act, including its extensive exceptions, see Joanna Hemingway, Roadmap to ADA: The *Age Discrimination Act 2004* (2007) <http://www.hreoc.gov.au/age/roadmap_ADA.html> at 28 January 2008.

[76] *Qantas Airways v Christie* (1998) 152 ALR 365.

[77] Now section 659(2)(f) *Workplace Relations Act* 1996.

anti-discrimination regulation used for the other federal Acts. The Act proscribes direct and indirect discrimination in work, education, and other fields and, like the other federal Acts, contains no general obligation on duty holders to provide reasonable accommodation or adjustments. So, for the most part, victims of disability discrimination are required, without public assistance, to recognise discrimination, identify an individual perpetrator, and pursue relief through conciliation or ultimately court litigation. It is probably unsurprising then that the impact of the Act has been very mixed, being least helpful for those who have intellectual impairment and mental illness, and those who have multiple disabilities or intersecting disadvantages.[78]

However, the Act does contain two regulatory mechanisms that are different and worth highlighting: disability standards;[79] and action plans.[80] The Act provides for the development by the government of disability standards in respect of employment, education, accommodation and transport services. It took a decade of consultation and negotiation before the first standards were introduced (public transport),[81] another few years to see Disability Education Standards, and there is general acknowledgment that employment standards will never be finalised. To the extent that they apply to a situation, the Transport and Education standards operate to override the general direct and indirect discrimination provisions.

The two standards are significant in different ways. The Public Transport standards essentially represent an industry wide agreement of a timetable for the introduction of services, equipment and facilities that will gradually make public transport accessible for users with disability. For instance, the Standards mandate that by 2012, bus providers must ensure that at least 55% of buses are wheelchair accessible.[82] The standards still reflect a rights-based framework but operate to ease the burden on claimants by specifying precisely what each operator needs to do and by when. Instead of a claimant having to prove that a practice or requirement that disparately impacts upon those with their disability is 'not reasonable,' they merely need to show breach of the specific standard. In this way it is an industry-wide agreement of what is reasonable.

The Education Standards are not prescription standards, but are significant because they have introduced an obligation on education providers to undertake consultation with students (and applicants) and provide 'reasonable adjustments' to enable the student's equal participation. In this way, the Education Standards provide a unique and limited accommodation duty and thereby shift some of the burden for promoting equality off the victims and onto providers of education.

The second mechanism, action plans, is even more modest. The Act provides simply that '[a] service provider may prepare and implement an action plan.' (s.60) 'Service providers' are government departments and instrumentalities and persons who provide goods or services. There is no obligation on service providers to develop or provide an action plan to HREOC, but if they choose to do so, the plan must conform to specific requirements. It must include provisions relating to: the development of policies and programs to achieve the Act's objectives; communication of these; review of its practices to identify discriminatory practices; setting of goals and targets (where reasonable) against which the success of the plan may be assessed; means of evaluating the policies and programs; and the appointment of

[78] Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No. 30, 30 April 2004.
[79] *Disability Discrimination Act 1992* (Cth) ss 31-34.
[80] *Disability Discrimination Act 1992* (Cth) ss 59-65.
[81] *Disability Standards for Accessible Public Transport 2002* (Cth).
[82] *Disability Standards for Accessible Public Transport 2002* (Cth) s 3.2; Schedule 1, s 2.3.

persons responsible for implementation (s.61).

What is interesting is that these action plans are entirely voluntary, have no express link to any of the prohibitions in the rest of the Act, and yet have been provided by a growing number of companies across Australia, across a range of industries. HREOC provides a register of providers on its website, with a link to each action plan.[83] The site expressly asserts that '[r]egistration of an action plan does not imply that it is endorsed by the Commission.' However, it appears by the provision and increasing number of these plans that organisations are seeking to gain some sort of public recognition or acknowledgement of their diversity efforts through this mechanism. The Act imposes no obligation in respect of action plans, but might be indirectly prompting their development by creating a public expectation that companies take action (or at least must be seen to be taking action) to promote participation and equality for workers with disability.

Family Responsibilities

Given the limitations of the regulatory framework of Australian anti-discrimination laws, it is probably unsurprising that gender inequality is still very prevalent. I would argue that one very clear indication that there is insufficient support for women as citizens entitled to participate equally in public life, such as employment, is the lack of paid maternity leave.[84] The absence of paid maternity leave significantly undermines women's capacity to participate in paid employment and also enjoy the freedom to bear and care for children.

After Australia ratified *ILO Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* in 1990, it introduced into the *Sex Discrimination Act* an amendment designed to give effect to the obligations of the convention. The Act was amended to make discrimination on the basis of 'family responsibilities' unlawful, but it was limited to direct discrimination (s.7A) and employment termination (s.14(3A)). (Given these limits, claimants generally frame their claims alternatively as direct or indirect sex discrimination,[85] or, in some cases, pregnancy discrimination.[86] However, each of these actions is limited, as I have explored elsewhere.[87]) While there was some suggestion that the limited federal protection was to be expanded in the future, no further provisions were introduced. (In the meantime, States have progressively introduced an equivalent ground, such as 'parental status or status as a carer'[88] or

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[83] See Human Rights and Equal Opportunity Commission, *Register of Disability Discrimination Act Action Plans* (2008) <http://www.hreoc.gov.au/disability_rights/action_plans/Register/register.html> at 28 January 2008. At 2 January 2008, the site notes that over 400 plans have been provided.

[84] Australia is noted as one of two OECD countries (the other being the US) which does not have any national paid maternity leave scheme: Human Rights and Equal Opportunity Commission, *Valuing Parenthood – Options for Paid Maternity Leave: Interim Paper* (2002) [4.1] <http://www.humanrights.gov.au/sex_discrimination/paid_maternity/pml/valuing_parenthood.pdf> at 28 January 2007.

[85] See, eg, *Escobar v Rainbow Printing Pty Ltd* (No.2) [2002] FMCA 122; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584.

[86] See, eg, *Thomson v Orica Australia Pty Ltd* [2002] FCA 939; *Rispoli v Merck Sharpe and Dohme and Ors* [2003] FMCA 160.

[87] Smith B and Riley J, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395 for an analysis of recent cases that have used anti-discrimination laws and contract law to seek redress for family-unfriendly practices; Smith B, 'Maternity Leave: Still Unpaid and Still Uncertain' (2002) 15 *Australian Journal of Labour Law* 291.

[88] *Equal Opportunity Act 1995* (Vic) s 6(ea).

'responsibilities as a carer'.[89])

The lack of response to an inquiry into paid maternity leave[90] and the ongoing prevalence of disadvantages experienced by workers with family responsibilities (predominantly women) trying to participate in the workforce prompted HREOC to undertake a wide-ranging inquiry into work and family. The aim of the inquiry was to 'broaden the work and family debate to better include men's role in family life, include forms of care other than child care (such as elder care and care for people with disability) and to highlight the relationship between paid work and unpaid work.'[91]

In March 2007, HREOC reported on the inquiry issuing a final paper – *It's About Time: Women, Men, Work and Family.*[92] In concluding that the federal government could do more to address the difficulties faced by workers trying to satisfy both their work and family responsibilities, it recommended a wide array of new initiatives. The central recommendation was the enactment of a new federal anti-discrimination Act to promote cultural change through greater protection and support for workers with family responsibilities.[93] The *Family Responsibilities and Carers' Rights Act*[94] would (a) expand the prohibition of discrimination on the basis of family responsibilities and (b) provide employees with a right to request flexible working arrangments.

The introduction of such an Act would be supported by advocates of gender equality because it could help to further enable the participation of carers in paid work and workers in family care-giving. The introduction of an express right for carers to request flexible working arrangements would be of particular significance, representing a shift toward a presumption of flexibility rather than such requests being characterised as pleading for special treatment. While the new Labor government has not committed to new discrimination protections, its industrial relations election policy included a promise to introduce a right to request flexible work arrangements at least for new parents.[95]

While acknowledging its merits, I would suggest that the proposal reflects the limited support in Australia for creative and robust regulatory thinking in respect of equality. The recommendation is merely for an expansion of the existing regulatory framework, which means relying upon victim enforcement of remedial rights to achieve cultural change. As outlined above, Australia's rights-based regulatory system assumes that victims have the capacity to identify discrimination, that an adequate norm will exist for the conduct to be understood as a legal wrong, and that the victims have the time, security and resources to pursue litigation in the event of breach. Yet the report emphatically identified a deeply entrenched dichotomisation of work and family, supporting an idealisation of the worker who is unencumbered by family responsibilities. Further, a central finding of the inquiry is that workers with family responsibilities are extremely time poor and thus not ideally placed to undertake the additional job of reforming workplaces through litigation.

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[89] *Anti-Discrimination Act 1977* (NSW) Part 4B.
[90] HREOC, 'Valuing Parenthood', above n 84.
[91] Human Rights and Equal Opportunity Commission, *It's About Time: Women, Men, Work and Family – Final Paper* (2007) <http://www.hreoc.gov.au/sex_discrimination/its_about_time/docs/its_about_time_2007.pdf> [xi] at 28 January 2008.
[92] Ibid.
[93] For a critique of this proposal see Smith, 'It's About Time' above n 3.
[94] Ibid xvii.
[95] Australian Labor Party, *Forward with Fairness – Labor's Plan for Fairer and More Productive Australian Workplaces* (2007) [8] <http://www.alp.org.au/download/now/forwardwithfairness.pdf> at 14 December 2007.

VII. Conclusion

The progressive introduction of anti-discrimination laws over the past thirty years has arguably had an effect on reducing at least some of the more blatant and intentional discrimination in Australia. The prohibition on discrimination has had a normative effect of raising awareness of and support for equality. However, since the introduction of these laws the regulatory framework has changed little, leaving victims of discrimination and equality advocates to rely upon an individualised, victim driven approach to promote equality.

Australian anti-discrimination legislation is limited by the proscriptive and general nature of the prohibition, the individual and civil nature of enforcement, the narrow range of sanctions and the limited role the State has played in building incentives and capacity for employers to address inequality.[96] There is little in the existing regulatory model to ensure that equality even makes it onto the employer agenda, that responses are genuine and effective, that information about employer initiatives is developed and shared to create a standard or norm of better practice or that such information can be used to pressure laggards and encourage leaders. A conservative trend observable in the highest courts further limits the progressive potential of Australian equality laws which are almost entirely dependent upon judicial interpretation for elaboration of the general legislative rules.

The enactment of anti-discrimination laws gave to the Human Rights and Equal Opportunity Commission and equality advocates the language of human rights and a public policy of equality, which they have used to leverage the limited legal rights provided by these laws. I suggest, however, that that the absence of a national bill of rights or constitutional equality laws, and the dearth of discrimination cases before the courts has severely limited the development of a sophisticated public understanding and debate about the meaning of equality in Australia.

[96] Smith, 'Baby and Bathwater' above n 3.

Appendix A – Protected grounds under Australian Federal Anti-discrimination Laws

Act	Ground	Section	Comment
Racial Discrimination Act 1975 (Cth)	**Race, colour, descent or national or ethnic origin**.	9, 12, 13, 14, 15	Uses words of the convention.
Sex Discrimination Act 1984 (Cth)	**Sex**	5	Women and men, girls and boys.
	Marital status means the status or condition of being: (a) single; (b) married; (c) married but living separately and apart from one's spouse; (d) divorced; (e) widowed; or (f) the de facto spouse of another person. ***De facto spouse***, in relation to a person, means a person of the *opposite sex* to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person.	4, 6	Restricted to heterosexual relationships.
	Pregnancy or potential pregnancy ***Potential pregnancy*** of a woman includes a reference to: (a) the fact that the women is or may be capable of bearing children; *or* (b) the fact that the woman has expressed a desire to become pregnant; *or* (c) the fact that the woman is likely, or is perceived as being likely, to become pregnant. ***Woman*** means a member of the female sex irrespective of age.	4, 4B, 7	
	Family responsibilities, in relation to an employee, means responsibilities of the employee to care for or support: (a) a dependent child of the employee; *or* (b) any other immediate family member who is in need of care and support. ***Child*** includes an adopted child, a step child or an ex nuptial child. ***Dependent child*** means a child who is wholly or substantially dependent on the employee. ***Immediate family member*** includes:	4, 4A, 7A	Prohibition limited to direct discrimination in termination of employment.

Act	Ground	Section	Comment
	(a) a spouse of the employee; *and* (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee. ***Spouse*** includes a former spouse, a de facto spouse and a former de facto spouse. ***De facto spouse***, in relation to a person, means a person of the *opposite sex* to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person.		
Disability Discrimination Act 1992 (Cth)	***Disability***, in relation to a person, means: (a) total or partial loss of the person's bodily or mental functions; *or* (b) total or partial loss of a part of the body; *or* (c) the presence in the body of organisms causing disease or illness; *or* (d) the presence in the body of organisms capable of causing disease or illness; *or* (e) the malfunction, malformation or disfigurement of a part of the person's body; *or* (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; *or* (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that: (h) presently exists; *or* (i) previously existed but no longer exists; *or* (j) may exist in the future; *or* (k) is imputed to a person. The ground extends to persons accompanied by, or possessing: (a) a palliative or therapeutic device; *or* (b) an auxiliary aid; *or* (c) an interpreter; *or* (d) a reader; *or* (e) an assistant; *or* (f) a carer; *or* The ground also extends to those persons with a visual,	4, 7, 8, 9	Very wide definition, covering sensory, physical, and intellectual disabilities as well as mental illness; actual and imputed; temporary and permanent; past, present and future.

Act	Ground	Section	Comment
	hearing or other disability who possess or are accompanied by: (a) a guide dog; *or* (b) a dog trained to assist the aggrieved person in activities where hearing is required, or because of any matter related to that fact; *or* (c) any other animal trained to assist the aggrieved person to alleviate the effect of the disability, or because of any matter related to that fact.		
Age Discrimination Act 2004 (Cth)	***Age*** includes age group.	5, 14	Applies to all ages and age groups.