

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

SUBMISSION TO THE FEDERAL ATTORNEY-GENERAL

1. The federal Attorney-General and the federal Minister for Finance and Deregulation should be commended for launching the public discussion paper to facilitate community consultation on the Consolidation of Anti-Discrimination Laws project.
2. My submission seeks to address Question 5 of the discussion paper: *Should public sector organisations have a positive duty to eliminate discrimination and harassment?*
3. The proposed recommendations in this submission are guided by the main principles of the consolidation project, including ‘a reduction in complexity and inconsistency in regulation’, ‘ensuring simple, cost-effective mechanisms for resolving complaints of discrimination’, and ‘clarifying and enhancing protections where appropriate’.

Executive summary

4. Current anti-discrimination legislation is based on an individual complaints-driven model that is inefficient, costly, time-consuming and ineffective in eliminating and preventing unlawful discriminatory conduct.
5. This fault-based system should be complemented with a positive duty where duty holders are obliged to actively take steps in eliminating discrimination and harassment, which go beyond merely punishing misconduct that has taken place.
6. A positive duty in the context of anti-discrimination laws is not new in Australia. The *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (*EOWWA*) reflects a form of positive duty to achieve equality for women in employment. It requires employers with 100 or more employees to identify, develop and report on equal employment opportunity (EEO) issues facing women in their workplaces.
7. The *EOWWA* framework shows that there is a strong ‘business case’ for a positive duty on organisations to eliminate discrimination and harassment. The benefits include: attraction and retention of talent, increased productivity, and the reduction in the risk of discrimination and harassment litigation.
8. Victoria’s *Equal Opportunity Act 2010* contains a positive duty on public and private organisations to take ‘reasonable and proportionate measures to eliminate discrimination, sexual harassment and discrimination as far as possible’.
9. EEO schemes in the public sector exist in some States and at the federal level, generally requiring public bodies to prepare, implement and report on EEO plans in their employment and service delivery functions. However these schemes have varying legal and policy bases.¹ A public sector equality duty would go some way to harmonise these parallel but separate schemes.
10. There are lessons to be gleaned from the UK’s public sector equality duty which places a positive duty on public authorities, when exercising their functions, to have ‘due regard’ to

¹ Some are specified in legislation (e.g. *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth); *Anti-Discrimination Act 1977* (NSW), Part 9A); while others rest entirely on government policy (e.g. Western Australia Equal Opportunity Commission, Policy Framework for Substantive Equality 2010).

the need to eliminate discrimination and harassment, advance equality of opportunity, and foster good relations between persons. However there is a risk that the duty has become a bureaucratic, box-ticking exercise without obligations on public bodies to take action towards outcome-oriented goals.

Key recommendations

11. A positive duty on all Commonwealth, States and Territories public sector bodies to eliminate discrimination and harassment should be introduced. The duty should also extend to private bodies carrying out public functions with respect to those functions.
12. The positive duty should be seen as complementing and enhancing the effectiveness of the individual complaints-based model underlying existing anti-discrimination laws.
13. The positive duty should apply across various functions of a public body — from employment to policy-making and service delivery.
14. The positive duty should clearly set out obligations on organisations to develop an action plan to take reasonable and proportionate measures to eliminate discrimination and harassment across its various functions.
15. Specific goals and progress indicators should be developed from careful consultation with all stakeholders with sufficient interest, such as employees, service-users and civil society.
16. Organisations should be required to monitor and evaluate actions taken, and to report against specified targets on a regular basis. Collection and publication of relevant information on organisations' anti-discrimination plans by the Australian Human Rights Commission (AHRC) should be made publicly accessible and available on the AHRC's website.
17. The AHRC should be granted a range of 'soft' and 'hard' enforcement mechanisms, including broad investigatory powers to audit anti-discrimination plans, and issue compliance notices which could be enforced by court orders.
18. A statutory code of practice could be developed and administered by the AHRC to provide further guidance on the details of the duty.

Why do we need a positive duty?

19. The shortcomings of current laws in addressing more covert, structural forms of discrimination have been widely attributed to the individual complaints-driven model which places the burden on individual victims to bring claims against their discriminator. Not only is litigation a lengthy and expensive process, resulting remedies are retrospective, usually in the form of compensation to individual victims. Employers are not required to take active steps to eliminate discrimination and harassment.
20. While providing a normative baseline in eliminating overt forms of discrimination, current anti-discrimination laws have had minimal impact on addressing structural discrimination against certain groups of persons, such as eliminating discrimination against women that arises from gendered assumptions around work, care and family.²

² Margaret Thornton (ed.) *Sex Discrimination in Uncertain Times* (ANU Press, 2009)

21. A positive duty is arguably a simpler, more cost-effective mechanism for public and private organisations to not only resolve but also *prevent* complaints of discrimination arising in the first place. A positive duty is proactive instead of reactive. Beyond the legal costs involved in litigation, a discrimination court case could unleash significant damage to the reputation of an organisation, the morale of existing staff, and the perceptions of shareholders and clients.
22. Many public and private sector organisations are already engaged in diversity management in their workplaces. Existing anti-discrimination laws provide some ‘special measures’ exemptions for organisations wishing to be more proactive in eliminating discrimination. However, what they can/not do is often unclear. A positive duty provides these organisations with a stronger mandate to take active steps to eliminate discrimination and harassment, and also compels laggards to ‘lift their game’.
23. A positive duty on large private sector organisations to eliminate discrimination against women in the workplace already exists in the *EOWWA*. While a weakness of the *EOWWA* framework has been its focus on procedural compliance (i.e. report submission) rather than substantive compliance (taking action to achieve specific EEO goals), its underlying model of a positive duty means that organisations need to be proactive in at least examining causes of discrimination and developing EEO plans. The potential of a positive duty goes much further than an individual complaints-driven, fault-based model in addressing discrimination against a group of persons.
24. In the recent Victorian *Equal Opportunity Act 2010* (Vic), there is a positive duty in section 15 on public and private organisations to take ‘reasonable and proportionate measures to eliminate discrimination, sexual harassment and discrimination as far as possible’. In determining whether a measure is reasonable and proportionate, the Act provides that various factors must be taken into account, including the size, nature and circumstances of the business and the cost and practicability of the measures.
25. A positive duty ‘aiming at institutional change’³ can address the significant limitations of the individual-rights model to eliminate discrimination and harassment. As detailed in a submission to this review by Oxford Pro Bono Publico, the benefits of a positive duty have been recognised in jurisdictions such as the UK, Canada, and Ireland.

What would this positive duty look like?

Underlying principles

26. Fredman usefully identifies four key ingredients of an effective proactive approach to eliminating discrimination: responsibility, participation, monitoring, and enforcement.⁴
27. First, a positive duty involves a shift in the primary responsibility away from the individual claimant to a body that is in a position to take action to eliminate discrimination and harassment.

³ Sandra Fredman, ‘Changing the Norm: Positive Duties in Equal Treatment Legislation’ (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 369.

⁴ Sandra Fredman, ‘Making Equality Effective: The role of proactive measures’ (European Network of Legal Experts in the Field of Gender Equality, June 2010) <ec.europa.eu/social/BlobServlet?docId=4551&langId=en> accessed 20 January 2012.

28. Second, a positive duty entail deliberative mechanisms which engage various participants throughout the process — from identifying causes of discrimination to developing, monitoring, reviewing, and enforcing the proactive measures.
29. Third, since proactive measures are programmatic and ongoing, a regular process of monitoring is essential to assess, review, and adjust them if necessary.
30. Finally, responsive means of enforcement need to be in place, in the absence of which proactive measures may simply become box-ticking gestures.

UK's public sector equality duty

31. Under the UK's public sector equality duty, a general duty requires all public bodies and any organisations exercising public functions to have 'due regard' to the need to eliminate unlawful discrimination, promote equality of opportunity, and foster good relations between specified groups.⁵
32. It applies in respect of all functions of public authorities, including employment, policy-making, and service provision. However for private organisations, the general duty only applies to the public functions they carry out, not their private functions.
33. The equality duty in 2010 brings together previous separate duties of race, disability and gender, and extends it to other protected characteristics including age, pregnancy and maternity, religion or belief, gender reassignment, and sexual orientation.
34. The general duty is enforceable only through judicial review brought by any person with sufficient interest. The general duty is supported by specific duties set out in regulations and a code of practice for listed authorities which are administered and enforced by the Equality and Human Rights Commission (EHRC).
35. The specific duties require a listed authority to annually publish relevant, proportionate information showing its compliance with the general duty, and to set and publish specific, measurable equality objectives.
36. The EHRC also issues a Code of Practice that provides guidance to the detail of the law. The draft Code for the new public sector equality duty is currently being prepared.
37. The EHRC may enforce the specific duties through various compliance mechanisms. It has broad investigative powers to conduct an assessment of compliance. It may issue compliance notices which can be enforced by a court order.⁶ The EHRC can also enter into binding agreements under which the public authority agrees to take 'necessary and proportionate steps' and forestall further enforcement action.⁷
38. While the equality duty has been a major landmark in UK anti-discrimination law, its vague standard of 'having due regard' is enough to ensure that action is taken. The most recent specific duties leave out requirements for organisations to actually develop measures to eliminate discrimination and harassment, to have well-informed consultation with relevant stakeholders, or to assess the impact of any measures taken. A compliance focus on publishing information and objectives is not sufficient on its own to ensure public bodies take substantive action.

⁵ *Equality Act 2010* (UK), s 149.

⁶ *Equality Act 2006* (UK), ss 31, 32.

⁷ *Ibid*, s 23.

The scope of a positive duty to eliminate discrimination & harassment in Australia

39. The positive duty should cover all grounds currently in Australian anti-discrimination laws. An integrated duty could address problems of intersectional discrimination.
40. A positive duty should apply across various functions of a public body. Australian anti-discrimination laws already apply to public and private sectors in the fields of employment, provision of goods and services, education, and administration of laws and government programs. This helps to build and strengthen anti-discrimination/ anti- harassment considerations into the public bodies' core activities.
41. The duty should apply to all Commonwealth, States and Territories government bodies. If it is decided that some bodies should be excluded, a statutory list should be drawn up to specify the excluded organisations. Taking into account the increasing outsourcing and privatisation of public services, a positive duty should also apply to private bodies exercising public functions in relation to the public functions they carry out.

Responsibility to take outcome-oriented measures

42. A positive duty should ensure that an organisation actually undertakes appropriate planning, resource allocation, and ongoing responsibilities to undertake proactive measures to achieve specified anti-discrimination and equality goals and targets.
43. The positive duty could require organisations to develop, implement and review an anti-discrimination and anti-harassment plan, setting specific goals to be achieved and 'reasonable and proportionate' measures to be taken, taking into account the nature, size and circumstances of the organisation.
44. These anti-discrimination/anti-harassment plans serve as a reference point for assessing whether or not actions have been taken, enhancing transparency and accountability.
45. A report on the implementation and evaluation of the plan should be submitted to the AHRC on a bi-annual basis.

Deliberative participation among stakeholders

46. A positive duty should harness the synergy of stakeholders in developing the objectives and actions to be taken in the anti-discrimination/anti-harassment plan. Stakeholders should be involved in the implementation, monitoring, and enforcement of the plan.
47. Requirement for consultation with all employees at all levels (particularly groups which are most likely to benefit from positive duty) and their representatives in planning, implementing, reviewing, and reporting on workplace programs.
48. Stakeholders beyond the workplace, such as civil society groups and industry associations could also play a consultative role as educators, watchdogs, and advocates across organisations and industries.
49. A statutory code of practice could provide details on who, what, and how to consult, with ways to build stakeholders' participatory capacity.

50. Consideration should be given to developing and supporting the role of anti-discrimination/anti-harassment and EEO representatives in the organisation.

Effective monitoring and assessment

51. Duty-holders, the EHRC and other stakeholders should be able to conduct regular monitoring, assessment, and review of measures taken to eliminate discrimination and harassment based on objective indicators and benchmarks. This requires comparable, and usable data collection and publication for monitoring progress over time against targets set out in action plans, within and between organisations.
52. A statutory code of practice could list various means for organisations to evaluate the measures taken, ranging from conducting pay audits to reviewing existing anti-discrimination plans at least once every two to three years, thereby providing flexibility in the process but not rendering self-evaluation an entirely voluntary exercise.
53. Information on organisations' anti-discrimination/anti-harassment plans, including objectives and evaluation of actions taken should be made publicly available and accessible on the AHRC's website. To overcome privacy issues, some information such as disaggregated workplace data do not need to be made public. Pay data could also be publicly reported as ratios, and other details kept confidential by the AHRC. Enhancing public disclosure would facilitate more effective monitoring by other stakeholders, ensuring accountability and transparency in the operation of the positive duty.

Responsive enforcement and compliance

54. Effective compliance requires a responsive regulatory agency with broad monitoring powers and a range of 'soft' and 'hard' sanctions as well as incentives at its disposal. The AHRC should have the powers to investigate, on its own motion, any organisations suspected of not fulfilling their substantive and/or procedural obligations under the positive duty, such as making misrepresentations in reports or a continual failure to take any action based on their anti-discrimination / anti-harassment plans.
55. More broadly, the AHRC should have powers to investigate and act on possible serious breaches of anti-discrimination laws which are likely to affect a class or group of people. It should be able to undertake compliance audits, and issue notices with the possibility of financial penalties. Heavier sanctions could include the potential loss of government contracting for private organisations exercising public functions.
56. Incentives such as awards and positive mentions in Parliament could prompt some organisations to go above and beyond their peers in developing innovative measures.
57. Individual discrimination claims could trigger dialogue between the AHRC and the organisation in question about taking positive steps to address the potential causes of complaints and to report on the remedial steps in its anti-discrimination plan. The AHRC should also be given greater scope to intervene in discrimination proceedings to promote the objects of anti-discrimination laws.
58. Granting the AHRC with the responsibility to administer and enforce the positive duty will increase its workload, and additional resources should be allocated to the AHRC to support its new role.