

‘Advance Australia Fair’: An Agenda to Promote Equality and Address Discrimination in Australia



Issue

Equality is a pre-eminent Australian value and the bedrock of a fair, cohesive and productive society. Some of the most pressing social issues of our time – including Indigenous disadvantage, violence against women and poverty – are both causes and consequences of inequality. In economic terms, Prime Minister Rudd has recognised that inequality contributes to ‘poorer educational results, lower productivity, worse health outcomes, shorter working lives and lower workforce participation.’¹

The law can and should play a central normative and educational role in advancing meaningful equality for all Australians. This requires a shift away from an outdated and ineffective complaints-based, remedial model of anti-discrimination laws.² Australian law should promote a rights-based model of substantive equality which emphasises equal outcomes and addresses structural causes of inequality.

Opportunity and Imperative for Action

While our current anti-discrimination laws have made an important contribution to addressing discrimination in Australian society, they have significant shortcomings in that they:

- are reactive and complaints-based;
- fail to actively promote equality or address systemic discrimination;³
- do not address all grounds of discrimination or multiple discrimination;⁴ and
- are ineffective in areas that have been granted permanent exemptions.⁵

For over 20 years detailed, high-level reports have recognised the shortcomings of our anti-discrimination laws and called for greater legal protection of equality.⁶ The 2009 National Human Rights Consultation Report noted that that ‘[a] large number of submissions focused on the inadequacies of anti-discrimination legislation’ and recommended that the Federal Government audit and amend anti-discrimination legislation to ensure that it complies with Australia’s human rights obligations.⁷

The Government’s recently announced commitment to ‘harmonise and consolidate Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly’ (the ‘Consolidation Project’) is an opportunity to adopt a robust and comprehensive legal framework which promotes real equality and addresses all grounds of discrimination.⁸

The Consolidation Project is a key component of *Australia’s Human Rights Framework*. However, for the Consolidation Project to be a legitimate human rights initiative, it must address issues beyond regulatory overlap and inconsistencies. The Federal Government should use this opportunity to ensure that our equality laws meet the standards articulated in the international human rights treaties to which Australia is a party, and proactively and progressively contribute to a fairer Australia.

Recommendations for Action

Legislative Reform

The Consolidation Project provides a unique opportunity to modernise and strengthen our anti-discrimination regime by adopting a legal framework that not only prohibits individual instances of discrimination, but also provides for a positive duty to prevent discrimination.⁹

1. The Government should release an exposure draft for a single, comprehensive Equality Act, the features of which include:
 - a. a legal right to substantive equality;
 - b. comprehensive coverage through a non-exhaustive list of protected attributes;¹⁰
 - c. the recognition of compounded or intersectional discrimination;
 - d. replacement of the 'comparator' test with the 'detriment' test;¹¹
 - e. reversing the onus of proof in discrimination cases;¹²
 - f. mechanisms to identify, target and address systemic discrimination;¹³
 - g. provision for representative and individual complaints;
 - h. provision for temporary special measures to promote equal opportunity; and
 - i. the removal of permanent exceptions that do not meet human rights standards of reasonableness and proportionality.¹⁴

Constitutional Amendment

The strongest legal mechanism available to promote the right to equality in Australia is a Constitutional guarantee of equality. Constitutional entrenchment would have significant symbolic power and ensure that the Government cannot easily amend or overturn the right to equality simply by passing legislation.

2. The federal Equality Act should include a provision mandating that, after four years of operation, an inquiry be held into a constitutional amendment aimed at enshrining the right to equality.

Government Commitment

The Federal Government should take the lead on supporting and promoting equality by ensuring that equality is linked to governmental and administrative decision-making, performance management and accountability frameworks.

3. The Federal Government should require public bodies to consider equality in policy development, spending and service delivery.
4. The Federal Government, its agencies and public authorities should use public procurement to promote equality and assess suppliers on the progress that they are making in reducing inequality.
5. The Federal Government should show political leadership and support for the equality agenda by appointing a Minister for Human Rights and Equality who should hold a seat in cabinet.¹⁵

Institutional and Reporting Frameworks

Poor data makes it extremely difficult to effectively identify and address inequality. The Government should create the machinery for the measurement and transparency necessary to recognise and address inequality and provide an evidence base for further action.

6. All public bodies should produce and publish annual equality reports.
7. The *Australian Human Rights Commission Act* should be amended to provide that all Commissioners are to submit a report, to be tabled in Parliament, regarding the status of human rights in Australia within their areas of responsibility and containing concrete recommendations to enhance human rights in these areas.¹⁶ Further, the Commission should be adequately resourced to discharge this function.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a leading national community legal centre. The Centre promotes and protects human rights and contributes to the alleviation of poverty and disadvantage in Australia.

¹ Prime Minister Rudd, 'One year on from the crisis: economic and social policy challenges for Australia', Sambell Oration address to the Brotherhood of St Laurence, Melbourne, 15 October 2009. See also United Nations 2000, *Human Development Report*. The ABS has reported that '[a] more cohesive society is one in which communities are strong and inclusive, in which inequalities are reduced and people have a sense of belonging': see www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1383.0.55.001Main+Features252009. For a detailed discussion of the case for equality see *Fairness and Freedom: The Final Report of the Equalities Review* (2007) available at http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf. See also Goldman Sachs JB Were, 'Australia's Hidden Resource: The Economic Case For Increasing Female Participation', 26 November 2009.

² *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

³ See, for example, Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008).

⁴ Under domestic law, sex, race, age and disability are all protected attribute. This is a narrower set of grounds that under international human rights treaties, which prohibit discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Multiple (or compounded) discrimination occurs when a person or group is discriminated against on more than one grounds; for example, where an Indigenous woman is discriminated against on the basis of her sex and her race, her experience of discrimination is different than if she had been discriminated against on one of those grounds alone.

⁵ For example, under the *Sex Discrimination Act 1984* (Cth), sporting clubs, religious bodies and charities are permanently exempt from the operation of the Act.

⁶ See, for example, Constitutional Commission, *Final Report of the Constitutional Commission* (1988); Australian Law Reform Commission, *Equality before the Law*, ALRC 69 (1994), [4.17]; Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008).

⁷ National Human Rights Consultation Committee Report (September 2009), Recommendation 4, xxx.

⁸ *Australia's Human Rights Framework* (April 2010), available at www.ag.gov.au/humanrightsframework

⁹ International Labour Office, *Time for Equality at Work*, Geneva, 2003, p.xii

¹⁰ Modelled on the equality and non-discrimination provisions of the core treaties to which Australia is a party, including: International Covenant on Civil and Political Rights, arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, art 2; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of Persons with Disabilities, art. 5; and Convention on the Rights of the Child.

¹¹ For further information see NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1997* (NSW) (1999, paras 3.51-3.53); this recommendation has been implemented in s 8(1)(a) of the *Discrimination Act 1991* (ACT).

¹² Under this approach the complainant must make out a prima facie case that discrimination has occurred and the onus then shifts to the respondent to show that the conduct complained of was justified: see, for example s 809 of the *Workplace Relations Act* (Cth).

¹³ See, for example, the newly enacted *Equal Opportunity Act 2010* (Vic). Of particular significance are the positive duty to eliminate discrimination (s 15), the strengthening of the Victorian Equal Opportunity and Human Rights Commission's role in issuing guidelines, action plans, education and research (Parts 10 and 11), and the new powers of VEOHRC to conduct investigations and public inquiries into serious instances of systemic discrimination (Part 9).

¹⁴ Many exceptions in Federal anti-discrimination legislation protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups. Rather than allowing a nuanced balancing of rights in cases where particular rights conflict, many permanent exceptions appear to be arbitrary, inflexible, broad, and unreasonable. For a detailed discussion of the human rights compatibility of permanent exemptions and exceptions, see PILCH and HRLRC, *Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995* (Vic) (July 2009) available at www.hrlrc.org.au/files/eo-review-pilch-hrlrc-submission-to-sarc.pdf

¹⁵ The new UK Government includes a Minister for Women and Equalities (The Rt Hon Theresa May MP) and a Minister for Equalities (Lynne Featherstone MP). The Minister for Women and Equalities has a seat in Cabinet.

¹⁶ Section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner is to submit a report, which is tabled in Parliament, regarding the human rights of Aboriginal persons and Torres Strait Islanders, and recommendations as to the action that should be taken to ensure the exercise and enjoyment of human rights by those persons. This function is not currently conferred on any of the other Commissioners.