ANALYSIS OF THE AUSTRALIAN FEDERAL AND VICTORIAN ANTI-DISCRIMINATION LEGISLATION IN ACHIEVING THE PUBLIC POLICY GOAL OF SUBSTANTIVE EQUALITY

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Abstract

Anti-discrimination laws in Australia have mostly remained consistent beyond the state of Victoria since the time they were legislated. The article seeks to decompose the evolution of Federal and Victorian Anti-Discrimination legislation and tries to reflect on the public policy goals of substantive equality through the lens of the Anti-Discrimination legislation. Subsequently, I attempt to examine the effect of the machinery in the Equal Opportunity Act 2010 (Vic) ('EOA') on advancing substantive equality and confronting systematic discrimination especially with respect to the state of Victoria although, the effect of other facets of this legislation have not been examined. Further, this article sheds light into the various problems associated with the enforceability of the anti-discrimination laws. Finally, an analysis on the current proposition of law with respect to the Federal government's proposal in 2010 to review and consolidate the five federal Acts into a Statute through the Human Rights and Anti-Discrimination Bill 2012 has been undertaken.

Keywords: Anti-Discrimination law, Human rights, Substantive equality, Public policy.

Introduction

Anti-discrimination legislations have had a significant impact on our behaviour in schools, workplaces and on how the delivery of goods and services takes place. There are, however, far fewer methods incorporated within anti-discrimination laws to particularly address inequality, which is one of the reasons why they have not been able to address systematic and on-going discrimination. Victoria is the only state to have its anti-discrimination laws revamped in the last couple of decades. There are numerous provisions in the *Equal Opportunity Act 2010* (Vic) ('EOA') which were incorporated to advance substantive equality and address the issue of systemic discrimination.[1]

[1] Explanatory Memorandum, Equal Opportunity Bill, 2010, (Vic).

One of the primary objectives of this essay is to analyse the Federal and Victorian Anti-Discrimination legislation and introspect on whether the Anti-Discrimination legislation currently assist in achieving the public policy goal of substantive equality? In doing so, the essay will reflect on: firstly, federal anti-discrimination legislation and issues like substantive equality; what does direct and indirect discrimination mean; what kinds of reasonable adjustments should be made; what are special measures; is there an obligation to eliminate victimisation, sexual harassment, and discrimination etc.? Secondly, Victoria's anti-discrimination law and its evolution. Thirdly, whether the existing definitions of discrimination have been used by the Courts to interpret the Statutes in a manner which makes it easier to ascertain direct and indirect discrimination. Lastly, what potential changes might be made to bring Anti-Discrimination law closer to achieving the public policy goal of substantive equality.

Federal Anti-Discrimination Laws [2]

The five federal Acts, namely the *Racial Discrimination Act 1975* (Cth) ("*RDA*"), the *Sex Discrimination Act 1984* (Cth) ("*SDA*"), the *Disability Discrimination Act 1992* (Cth) ("DDA"), the *Age Discrimination Act 2004* (Cth) ("*ADA*"), and the procedural *Australian Human Rights Commission Act 1986* (Cth) ("*AHRC Act*") are largely similar to the state legislation's like the complaint resolution model despite some variations in coverage and definitions. Part A of this section presents an overview of the substantive law, including definitions of substantive & formal equality, discrimination and what are special measures and reasonable adjustments. Part B focuses on the procedural law- particularly the individual enforcement model, and recognizes issues with this model.

A. Substantive law:

(i) Formal Equality

Simply put, equality is the belief that likes must be treated equally and that all individuals are equal in the eyes of the law regardless of their place of birth, gender, religion, caste, creed, and so on. The requirement of stability and uniformity, and the presumption of differences as not being relevant most of the time, make such an approach a restricted one. For example, the same or similar treatment in the case of a differently abled person might not automatically enable

[2] Berkeley Comparative Anti-Discrimination Law Conference, April 2013, *Reconsidering Australia's anti-discrimination laws,* (2013).

 ISSN: 2456-4605(O)

him or her to be a full and equal participant in society.[3] However, once it is recognised that strict adherence to formal equality is not always necessary, such a limitation can be overcome. For instance, there are three circumstances in which deviation from equal treatment is permitted. The first is in the case of affirmative action. Secondly, in situations when the ones compared are not alike, as in the case of a differently abled person. Thirdly, in instances where equal treatment disproportionately disadvantages one group when compared to another. Such situations occur when a policy or action, although on the face of it appears neutral, it does not have the same effect on members of a disadvantaged group and is therefore unreasonable. Indirect discrimination goes beyond equality of opportunity by examining the outcome or consequences of a so-called "neutral policy" or act on members of a group. In the given scenario, reasonableness would imply that the disadvantaged group's requirements should be taken into account by the respondent but only to a level which would not have him or her harmed, such as in the case of recruiting a not-so-highly-qualified staff.[4] Thus, by not having the requirement to adjust differences, indirect discrimination is restricted in solving inequality.

(ii). Substantive Equality

Given the limitation of formal equality, it implies that we must come up with a more productive idea of equality that addresses formal barriers and one that guarantees uniformity. To make room for differences, it should be flexible enough to the extent that deviation from equal treatment should be permitted when necessary. Thus, equalising of the starting point or the end result is a pre-requisite for substantive equality that is distinct from equality of opportunity, which is a requirement of procedural nature. Given the excessive state control the government may have to exercise to achieve the desired end result, substantive equality as an idea appears to be antithetical to liberalism. An appropriate example would be requiring workplaces to be representative of the current demographics of the community or equitably distributing resources. This suggests that substantive equality as a concept is more in consonance with the aim of socialism, thus contradicting it with the ideals of democracy and liberalism.[5] If formal equality implies that all rules apply equally to everyone, substantive equality ascertains the entry rules and analyses the end result of the contest.

[3] Modern Law Review 16, 16–17, *Discrimination, Equality and Social Inclusion,* (2003) 66(1).
[4] Oxford Journal of Legal Studies*,* 408, 413, *Discrimination and Equality of Opportunity: Northern Irish Lessons*, (1990) 10(3).
[5] Sandra Fredman, *Discrimination And Human Rights: The Case Of Racism,* Oxford University Press (2001) 19.

Equality of outcome considers adjustments of differences like race and sex as necessary to achieve equality, whereas equality of opportunity does not see them as relevant things that are needed to be considered when making decisions. For example, a substantive approach acknowledges that a differently abled person begins from a distinct position and recognises that it is essential to adjust to the differences in education, recruitment, or the delivery of goods and services. However, what exactly an equal society ought to be like or what parameters are to be used to ascertain equality remains unclear, as does the exact definition of equality.[6]

(iii)Special Measures and Reasonable adjustments

In cases involving systemic discrimination, it might be essential to take proactive steps to ensure that the starting points remain the same for both the majority and disadvantaged groups. A few examples of such measures are positive discrimination, reservations, affirmative actions and special measures. Favourable treatment to balance the representation of disadvantaged group in allocation of appointments or nominations and quotas are some examples to name a few.[7] Although this may appear as 'reverse discrimination' since individuals are treated differently based on their attributes and hence antithetical to formal equality, substantive equality acknowledges that such an approach is necessary to achieving equality, and thus is not an anomaly.

Within the context of differently abled individuals, reasonable adjustment is a proactive measure with deference towards "expectations, societal customs and practices that disadvantage the differently abled individuals'.[8] For example, instead of insisting on strict equality, an employer might be required to make reasonable accommodations for a differently abled individual. In Australia, the idea of reasonable adjustments has found limited usage and can only be located in the *Disability Discrimination Act 1992* (Cth) ('*DDA*') at the federal level, although the Northern Territory and South Australian Acts mention that if not reasonable, a failure to adjust disability would amount to discrimination.[9]

There are various exceptions contained in the *SDA, DDA* and *ADA* that allow Organisations to seek an exception for an action which would be ideally be considered discriminatory to allow

[6] Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide* (2005) 21(2) South African Journal on Human Rights 163, 167.
[7] Jacomb v Australian Municipal Administrative Clerical and Services Union , 2004 140 FCR 149, 168 [60]–[62] (Crennan J).
[8] Colm O'Cinneide, A New Generation of Equality Legislation? Positive Duties and Disability Rights' in Anna Lawson and Caroline Gooding (eds), Disability Rights in Europe: From Teory to Practice (Hart Publishing, 2005) 219, 220.
[9] Equal Opportunity Act, 1984 (SA) 66(d); Anti-Discrimination Act, 1992 (NT) 24.

 ISSN: 2456-4605(O)

for example -'female only hours' at swimming pools.[10] However, the most controversial exemptions are contained in the *SDA* and *ADA* that allow discrimination by religious organisations in delivery of goods and services, education and employment. For example, one of the exemptions to Section 38(1) of the *SDA* has been misused to further discrimination against homosexual couples in aged care and women in employment. Only in context of discrimination of the differently abled do reasonable adjustments apply thus not imposing a positive duty.[11] As stated by the *DDA*, failure to make reasonable accommodations for a differently abled individual would amount to discrimination unless the said accommodation imposes an unreasonable hardship.[12]

Thus, both the ideas of substantive and formal equality can be incorporated into policy making and law. In ensuring that victims of unjust treatment are provided with an adequate remedy, it is pertinent to prevent making decisions on the basis of characteristics which are not relevant, like sex or race. It might also be vital to adjust differences like disability or a person's religious views to undo the historical wrongs meted out to them in certain instances, like that of Australia's Indigenous peoples. As will be discussed further in this essay, these two concepts are not antithetical to one another but can be adjusted to complement one another.

B. Resolution of a discrimination complaint (Procedural law):

The mechanism of discrimination complaint resolution is similar like in the states and territories. An individual can file a complaint with the Australian Human Rights Commission (AHRC) if she or he has suffered discrimination in delivery of goods & services, education or employment and the AHRC would try to address the issue through Alternative Dispute Resolution in case the complaint has merit and falls within its jurisdiction.[13] Most of the discrimination complaints are either withdrawn or settled and since they are confidential, no information about them are published by the AHRC. The Federal Court can hear the complaint in case it does not get settled.[14] The difficulty in proving discrimination, litigation costs, tensions associated with a trial and the possibility of the compensation award being less are various reasons as to why only a fraction of cases reach the hearing stage. Although a wide range or remedies including systematic remedies are allowed by some legislations,

[10] Sex Discrimination Act, 1984, 44.
[11] Dominique Allen, *Removing Barriers to Substantive Equality: A Case Study of Remedying Disability Discrimination Complaints* (2011) 17(2), Australian Journal of Human Rights 159, 163-164.
[12] Disability Discrimination Act, 1992, 4(1).
[13] Australian Human Rights Commission, *Annual Report* 2011-2012, Appendix 3.
[14] Australian Human Rights Commission Act, 1986, Part IIB. A general civil tribunal hears complaints in the states and territories.

compensation of relatively lower amounts are ordered by courts in case of a claim being successful.[15] In the process of resolution of a complaint, the role of AHRC is limited. As a neutral facilitator, it is required to conciliate complaints pursuant to receiving and investigation. Thus, intervening in litigation and acting as an amicus curie are the most constructive roles the AHRC can take.

Victoria's Anti-Discrimination Laws

A. The Problems with Anti-Discrimination Laws:

Corresponding to the Commonwealth legislation, all Australian territories and states have enacted anti-discrimination legislations. Discrimination on the basis of various attributes- both direct and indirect are prohibited and the laws are largely similar throughout. However, they are not always uniform and often have differences in what is the definition of discrimination and what attributes are to be considered for the purposes of discrimination. Although procedurally similar, these State and Territory Acts are not always in consonance with the Commonwealth Acts.[16] The responsibility to receive complaints and provide services like Alternative Dispute Resolution, are vested with an equality agency which have been statutorily established by each and every state. Federal Courts or Civil Tribunals hear matters which are not or cannot be resolved by equality agencies, none of which are empowered to enforce the law.

As has been recognised by experts, anti-discrimination laws have various problems associated with their enforceability. Firstly, discrimination i.e., both direct and indirect have been narrowly interpreted.[17] Secondly, more often than not, the burden of proof lies with the one making the complaint and often, it can be hard to secure evidence to meet the burden.[18] Thirdly, there is limited jurisprudence on such matters because an overwhelming number of discrimination cases are withdrawn or get settled even before they reach Court hearing.[19] In fact amendments to EOA were made to solve some of these issues. In addition to litigation costs, the impediments to proving a discrimination claim is another consideration when making

[15] Australian Human Rights Commission Act, 1986, 46PO(4).
[16] Viskauskas v. Niland, (1983) 153 CLR 280; University of Wollongong v. Metwally, (1984) 158 CLR 447.
[17] Beth Gaze, *Context and Interpretation in Anti-Discrimination Law* (2002) 26(2), Melbourne University Law Review 325, 340–353.
[18] Dominique Allen, *Reducing the Burden of Proving Discrimination in Australia* (2009) 31(4), Sydney Law Review 579, 582–583.
[19] Dominique Allen, *Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria* (2009) 18(3), Griffith Law Review 778, 778.

 ISSN: 2456-4605(O)

a decision to settle a case. Even for discrimination claims which are successful, the damages awarded in compensation may not be sufficient enough to cover the legal fees.

Moreover, the complainant-centric resolving procedure begins with the victim filing a claim at a statutorily established equality agency that seeks to address the matter via conciliation. The complainant can bring a suit in case the conciliation is not successful. Less information about the settlement of a dispute or its nature is revealed given the privatised nature of dispute resolution processes and that such agreements often have confidentiality clauses thus making it tough to ascertain if the entire procedure operated productively.[20]

Rarely are employers obligated to adhere to anti-discrimination laws to foresee the effects of their discriminatory actions until a strong claim is brought against them. Even in such scenarios, instead of being required to ensure and implement fundamental changes, it is more likely that the employers would be directed to compensate the claimant.[21]

B. Victoria's Anti-Discrimination Laws

Direct discrimination based on marital status and sex in the fields of education, recruitment, accommodation and delivery of goods and services was prohibited by the *Equal Opportunity Act 1977* (Vic) which is the first anti-discrimination law in Victoria. The number of attributes which are protected have expanded over the last 30 years, but the goal and enforcement mechanisms envisaged by it have remained the same. A review of the *Equal Opportunity Act 1995* (Vic) *('EOA 1995')* in August 2007 required considering if the improvement of technical facets of the law, reduction of red tape while initiating a claim, resolving institutional discrimination and giving extra powers to VEOHRC would help address discrimination more effectively.[22] The objective of strengthening the anti-discrimination laws of the state by introducing *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') provided the momentum for reviewing its anti-discrimination laws.

The recommendations of the review suggested that in addition to clearly articulating the aim of getting rid of discrimination, more proactive steps ought to be taken to address and tackle systematic discrimination. As defined by the report, systematic discrimination involved *"patterns or practices of discrimination that are the result of interrelated policies, practices*

[20] Margaret Tornton, *Revisiting Race in Zita Antonios (ed), The Racial Discrimination Act 1975: A Review (Australian Government Publishing Service, (1995)* 81, 84.
[21] Dominique Allen, *Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach* (2010) 29(2), University of Tasmania Law Review 83, 99–104.
[22] Department of Justice (Vic), *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) 11 ('*Gardner Report*').

and attitudes that are entrenched in organisations or in broader society [which] create or perpetuate disadvantage for certain groups".[23]

Going beyond formal equality, the Gardner Report made 93 suggestions on how the statute could be improvised. It involved altering the aim of the Act and the definition of discrimination as well as re-visiting the role of VEOHRC from a institution which dispenses services like dispute resolution into one which takes a proactive stance towards furthering the objectives of the Act.[24]

To advance substantive equality, the *EOA* has 5 established procedures: the meaning of direct and indirect discrimination; the duty to ensure reasonable accommodations for the differently abled; the meaning and what constitutes special measures; and the obligation to abstain from victimisation, sexual harassment, and discrimination. In addition to the introduction of direct access to VCAT for complainants, the model of implementation was not altered by the government, and neither were all of Gardner's suggestions.

Comparative analysis and potential changes

The federal government in 2010 had proposed to review and consolidate the five federal Acts into one Statute through the Human Rights and Anti-Discrimination Bill 2012 (Cth) ("HRADB") which was released in November 2012.[25] However, significant changes to the enforcement model was not proposed and thus it failed to resolves Australia's anti-discrimination law's two fundamental problems.

Firstly, the HRADB would not be able resolve the fact that law is grounded in formal equality. The introduction of a right to equality before the law was rejected by the government as was the introduction of a positive duty to promote equality and eliminate discrimination, thus restricting it to racial equality. The recognition of the principal of equality in objects clause was the only change the proposed. Secondly, the prevalent individualised and fault based approach to resolving discrimination is unlikely to be steered away by the proposed recommendations of the HRADB. The AHRC is unlikely to play a role in enforcement of law whether by proactively taking steps in its own name or assisting complaints-thereby having no impact in altering the individual complaints based approach, because of the government's aim to streamline the laws and ease regulatory burden on business.

[23] *Gardner Report* (n 25) 11.
[24] Ibid 16.
[25] Attorney General, Robert McClelland, and Minister for Finance and Deregulation, Lindsay Tanner, *Reform of Anti- discrimination Legislation*, (Media Release, 21 April 2010).

 ISSN: 2456-4605(O)

Three significant issues exists with the enforcement model. First, the society is not aware of the kind of discrimination's that exist or how to tackle it because majority of the complaints are settled confidentially. Second, whether settled or established in court, the outcome of a complaint is a remedy that may tackle the suffering experienced on case to case basis. It does not do anything to resolve the circumstances of similarly situated people or inequality in the society at a broader level. Third, instead of proactively advancing equality, the system is designed to be reactive and neither does it give the institutions any incentive to change their practices thus compounding to the existing problems impacted by the restricted role of the AHRC. Additionally, the AHRC can appear as an amicus curiae in the court, conduct enquiries related to important human rights issues and has been entrusted with the responsibility to create awareness regarding anti-discrimination law, thus, allowing it to act subjectively. In case the AHRC is able to both litigate and conciliate complaints, conflict of interest arises -which is the rationale behind the government not bestowing upon it the duty to enforce the law. Therefore, the reliance by the system is upon the person to 'name, blame and claim' in order for anything to be done.[26]

Specifically focussing on Victoria, now that it is clear that the government of Victoria enacted the *EOA* to advance substantive equality and address systematic discrimination, an obvious question worth reflecting on is the extent to which the law has come to achieve its goal? It cannot be denied that the objective of the Act has had an effect with regards to the interpretation of discrimination and that some of the Acts provisions have been more effective than others. For example, it is easier for those making the complaint to initiate their claim with the latest definition of direct discrimination. A strong point of *EOA* is that the identification of the comparator as not being a pre-requisite alters the situation as to who bears the burden of proving reasonableness. Mandatorily requiring employers to make reasonable accommodations for the differently abled has also had a positive effect. Another strength of the *EOA* is that the duty to address inequality has been imposed on organisations since they are most ideally suited to predict the effect of their actions on their employees or customers.

Creating awareness about the EOA (which is also one of VEOHRC's functions) will be needed if the entire machinery of the VEOHRC is to be as impactful as envisaged. VCAT has provided clear rules to let service providers and employers ascertain beforehand if a suggested measure constitutes special measures and thus proceed further. But this has not stopped them from

[26] William LF Felstiner, Richard L Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* (1980-1981) 15 Law & Society Review 631.

seeking an exception. The exact effect of Section 12 cannot be ascertained till a measure is challenged and the defence of special measures is taken.

Lastly, Section 15 has had very little effect, and given its symbolic nature, its impact is buttressed on how effectively the VEOHRC utilises its machinery. Until it is drafted as an enforceable obligation, Section 15 is not likely to have any impact given that it imposes a duty to take reasonable steps to eliminate sexual harassment, victimisation, and discrimination.

Conclusion

Since the time anti-discrimination laws were legislated, they have largely remained the same outside of Victoria. Specifically with regards to Victoria, this essay has attempted to analyse the impact of the machinery in *EOA* on advancing substantive equality and tackling systematic discrimination. However, in doing so, it has not analysed the impact of the other aspects of the statute, and the purview of Victoria's anti-discrimination law has been largely restricted to the changes brought by the *EOA* .Though anti-discrimination laws aim to make sure that people can bring a complaint and get the appropriate remedy, one also needs to reflect on ways to constructively address discrimination if the community at large seeks to realise substantive equality. Thus, in the future iterations of Federal and Victoria's anti-discrimination legislations, a more bold and enforceable obligation to address systematic discrimination ought to be considered.

 ISSN: 2456-4605(O)