

Cambridge University Press  
978-1-107-43225-3 — Equality and Discrimination Law in Australia: An Introduction  
Beth Gaze , Belinda Smith  
Excerpt  
[More Information](#)

The background of the page is a grayscale topographic map. It features intricate contour lines that create a sense of depth and texture, resembling a landscape with hills and valleys. The lines are more densely packed in some areas, indicating steeper slopes, and more spread out in others, indicating flatter terrain. The overall effect is a complex, organic pattern that covers the entire page.

# INTRODUCTION

## 2 INTRODUCTION

- [1] This book provides an introduction to Australian anti-discrimination law in its *conceptual and social context*. Our aim is to give a clear and accessible introduction to the law's important features, contradictions and challenges based on the ideas underlying and implicit in it, to provide a foundation for critical assessment of the law's strengths and limitations. While anti-discrimination laws are the core of the book, our concern is broader than just laws that prohibit and remedy discrimination. We refer to the field as 'equality and discrimination law' because it now includes laws and practices that seek to prevent discrimination occurring, and that challenge discrimination at a structural or systemic level as well as at an individual level, seeking to change norms and practices to be more inclusive of people who have faced barriers to participation because of their attributes.
- [2] Anti-discrimination law is not the only area of law which seeks to reduce disadvantage and inequality. Labour law, social welfare law and taxation law, for example, play important roles in reducing inequality. Anti-discrimination law, however, is the main legal avenue for individuals to challenge inequalities based on protected attributes such as race, sex, sexuality, disability, age, religion and political belief.
- [3] There is wide agreement that equality of some kind is a centrally important value and goal in a democratic society. But to prohibit discrimination by law requires very specific definition of exactly what is not permitted, and this is where disagreements frequently arise. People might have very different opinions about what equality is in any particular situation and what it requires in terms of changing social practices. People whose actions are likely to be restricted by anti-discrimination law can find it burdensome, and may object to the way it can limit freedom they previously had.
- [4] Australia has had anti-discrimination laws for over four decades. They apply to a very wide range of activities, including employment, education, service provision, sport, the supply of goods and accommodation, as well as many government activities and the activities of some clubs and voluntary associations. It is prohibited to discriminate based on or because of a wide range of attributes including sex, race, disability, age, sexuality, gender identity, parental and carer responsibilities, and political or religious beliefs. This wide scope, and the fact that there are laws in every state and territory and four laws at the Commonwealth level, as well as the *Fair Work Act 2009* (Cth) (FWA) in the field of employment, make this a very complex area of law.
- [5] Australia's federal system has the merit of allowing innovations to be developed in single jurisdictions, and if successful, to be adopted more broadly. However, it makes compliance challenging for companies or organisations, especially those that operate across the country, dealing with legal differences in many jurisdictions. Because of the number of laws, there are many variations of detail which cannot be considered in this book. They are discussed in the text where important, and summarised in the tables in the Appendices.
- [6] Our anti-discrimination laws are based substantially on ideas developed in international human rights law and in the domestic legal systems of the USA and the UK, as outlined in Chapter 2. We refer where relevant to comparisons with international and comparative laws, but our focus is on providing an accessible path to understanding the Australian law.
- [7] The book is structured in three main parts that focus respectively on: (1) the social and conceptual context, history and framework of anti-discrimination laws; (2) the main elements of the law and process of enforcement that are needed to bring a discrimination

claim; and (3) broader avenues for pursuing equality beyond simply prohibiting discrimination, including consideration of possible future directions for the law.

Part 1 provides the *context* for the law through chapters examining concepts of equality and discrimination and the role of law in giving effect to them (Chapter 1), the historical and legal context for the laws and their development (Chapter 2), and an outline of the framework of laws designed to promote equality and non-discrimination (Chapter 3). Chapter 1 introduces *several ideas of equality*, including formal and substantive equality, equality of opportunity and equality of outcome, and introduces Fredman’s very useful multidimensional idea of equality. It then turns to *concepts of discrimination*, which include actions that treat people differently because of their protected attributes as well as actions that, although they appear to treat everyone the same, actually have an effect of disadvantaging people who have a protected attribute because they fail to take account of that relevant difference. These ideas correspond roughly to the prohibited forms of direct and indirect discrimination. Systemic or structural discrimination refers to broader and more persistent forms of discrimination. It recognises that practices that disadvantage some groups and privilege others are embedded in social arrangements, for example that people with disadvantaged attributes tend to be in lower socio-economic groups and more exposed to educational disadvantage that affects lifelong opportunities. Systemic discrimination can also include many small practices of disadvantage that add together to amount to a substantial limit on people’s opportunities.

Chapter 2 provides a *historical and legal context* for the law from its origins in international efforts to prevent oppression of minority groups after the two World Wars that led to the development of the international human rights law system, and in the American civil rights movement. The initial development of Australian laws began in South Australia, and the first federal law, the *Racial Discrimination Act* (RDA), was adopted in 1975, followed by federal laws on sex, disability and age discrimination, and omnibus laws covering a wide range of attributes in every state and territory. We outline the constitutional context and then review the development of the law over time through successful and failed reform efforts. In Chapter 3 we introduce the remainder of the book, explaining the *common framework used in the Australian anti-discrimination laws*, which is then discussed in some detail in Part 2, and the additional avenues for promoting equality that are considered in Part 3. These include rights under workplace law (the FWA), the requirement for data reporting in the *Workplace Gender Equality Act 2012* (Cth) (WGE Act), and the requirements of the human rights laws that exist in the Australian Capital Territory (ACT) and Victoria.

Part 2 contains the core of the book’s *analysis of anti-discrimination legislation*. It examines the major frameworks of the law in some detail: which personal attributes attract legal protection (Ch 4), what conduct the law prohibits and who owes duties not to breach the law (Ch 5), the areas of activity in which those protections apply (Ch 6), and the legal procedures and remedies available to provide redress for breaches of the law (Ch 7). All four aspects need to be considered to understand the nature and scope of the obligations and protections of any anti-discrimination law.

Anti-discrimination laws are essentially designed to promote equality and reduce discrimination in respect of protected attributes. Australian laws cover a very wide range of attributes, most of which are also broadly defined. Chapter 4 deals with these *attributes*.

#### 4 INTRODUCTION

It considers what criteria are available to identify attributes that should be protected, and then looks at the major attributes protected by the laws and how they are defined. This is central to determining the scope and nature of the prohibition of discrimination. Where the law prohibits discrimination ‘based on’ or ‘because of’ sex, for example, does that include discrimination based on pregnancy (a biological feature of female sex), or on having taken parental leave (a social arrangement to accommodate women’s reproductive role) or even a decision based on either actual or assumed inability to work unscheduled overtime? This depends on both how broadly ‘sex’ is interpreted and how broadly the prohibition on sex discrimination is to be interpreted: should it cover only actions in which the immediate motivation is sex, or should it extend to situations where the immediate reason is a manifestation or factor that is determined by sex? Answering these questions requires great care to ensure that the beneficial scope of the law is not narrowed by interpretation.

[12] Chapter 5 turns to the heart of anti-discrimination legislation – *how the prohibited conduct is defined*. We focus on discrimination, examining how it is defined, generally as direct and indirect forms, and consider some of the complexity and inconsistency on this definitional question in Australian law. Making sense of how discrimination is defined arguably poses the greatest challenge in this book. Unlike its unreflective usage in everyday language where it often refers to general unfairness or to the idea of acting on the basis of prejudice, legally ‘discrimination’ is used to cover inequality arising from treating people differently and treating them the same. Direct discrimination (sometimes called ‘disparate treatment’) prohibits treating people differently and requires same treatment, corresponding to formal equality. Indirect discrimination (also called ‘disparate impact’) recognises that inequality can also arise from treating people the same despite them being differently situated. Because it looks to effects, or outcomes, indirect discrimination better reflects the idea of substantive equality, which is only partly and incompletely present in Australian laws. The ideas of direct and indirect discrimination can overlap, but although Australian legislation does not define them as mutually exclusive, the courts have explicitly held that they are.

[13] In addition to examining the nature of prohibited discrimination, Chapter 5 also summarises *other related conduct that the legislation prohibits*, including harassment and vilification. To improve the effectiveness of the legislation, other ancillary prohibitions include anti-victimisation provisions, prohibition of aiding, instructing or otherwise encouraging someone to commit unlawful discrimination or harassment, and duties not to advertise in a discriminatory way or seek information in order to discriminate.

[14] Chapter 6 considers the *scope of the law* – the particular fields or areas in which conduct is prohibited. These vary, but generally cover the fields of work, education, and the provision of goods, services, accommodation and facilities. We describe the *key areas of coverage of the legislation* and explain how discrimination typically manifests in each of these fields. Given that work is such a central part of the lives of many people and is key to economic security, it is not surprising that most claims of discrimination concern work, so we devote considerable attention to this particular field. Notably, in contrast to the general focus of the FWA on the employment relationship, anti-discrimination laws also cover other forms of work, including independent contractors, contract workers and commission agents, partnerships, and the related fields of qualifying bodies, employment agencies, and registered organisations (such as unions); and in relation to some prohibitions such

as sexual harassment, the laws extend to unpaid workers or volunteers.<sup>1</sup> The laws contain exceptions that moderate and fine-tune their operation by permitting specific conduct. Because they operate to allow otherwise unlawful conduct, the rationale for each exception should be identified clearly, but this is not always the case. Exceptions that relate to the scope of operation in particular fields are discussed in this chapter.

To complete our survey of the operation of the law, Chapter 7 discusses the *enforcement processes* in anti-discrimination laws. This includes who is given rights and can take action to enforce those rights, who is subject to obligations under the laws, and against whom the laws can be enforced. It includes what processes exist for enforcing the laws, and the legal actions and institutions involved in enforcing them. Further, it looks to fundamental motivating aspects such as the remedies available and the impact of rules regarding litigation costs that affect the capacity of individuals to enforce their rights. Enforcement is a very important element of the law – there is little point in having the best substantive laws if there is no realistic possibility of them being enforced. [15]

In Part 3 we widen the focus to examine legal avenues for pursuing equality and non-discrimination that *operate alongside the prohibitions in anti-discrimination laws*. These include positive action to prevent discrimination occurring, both voluntary (through the exception for special measures) and as required by legislation such as the WGE Act (covered in Chapter 8), and protection in workplace law through the adverse action provisions of the FWA (covered in Chapter 9). Current anti-discrimination laws have a largely backwards-looking focus, providing remedies in respect of conduct that has already occurred. This may not be the most effective way to deter discrimination, especially as litigation to enforce the law is difficult and compensation awarded has tended to be relatively low. A potentially more effective approach to systemic change is to adopt positive measures that aim to prevent discrimination from arising in the first place. Positive action avoids the unfairness of discrimination and the consequent burden of enforcement on people affected, who are often the least privileged in society, and helps to encourage institutions and organisations to create and use fairer and more open structures and processes. Positive actions range from the ‘reasonable adjustments’ model of discrimination, through permitting and encouraging special measures by providing incentives or rewards for organisations to undertake such changes voluntarily, to requiring organisations to take various kinds of measures. Required actions can range from weak steps (such as greater transparency through producing information) to stronger requirements, such as employing a certain proportion of minority staff. Beyond these forms, positive duties on public or private organisations can require them to consider equality issues in their own activities and to develop and implement equality assessments and plans,<sup>2</sup> although monitoring and enforcing such duties can be challenging. [16]

In Chapters 10 and 11 we look at *ideas that have promise for the future of equality rights*. In Chapter 10 we consider the role of human rights protection as it operates in the ACT and Victoria in contributing to protection for equality and non-discrimination. We also examine some possible *initiatives used overseas*, such as the imposition of equality duties on public [17]

1 *Equal Opportunity Act 2010* (Vic) (EOAV) s 4(1), definitions of ‘employee’ and ‘employer’.  
2 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

## 6 INTRODUCTION

authorities, and how government uses its power as a major purchaser of goods and services to require change from its suppliers – an avenue that has been under-used in Australia so far. Finally, in Chapter 11, we examine the future for anti-discrimination and equality laws, including possible future legal developments, regulatory approaches that could improve their effectiveness in achieving their goals, and the track record of attempts at law reform in the Commonwealth, states and territories.

- [18] Ultimately we argue that having an effective suite of laws that protect against and deter discrimination is vital to a fair future for Australia, though not necessarily sufficient. As they stand, Australia's current laws fall well short of laws in comparable jurisdictions, and reforms are needed to ensure that they are much more effective at achieving their stated goals. While anti-discrimination laws are not a complete answer to social inequality and deprivation, effective laws are nevertheless essential for individuals or groups who suffer discrimination to seek redress. Australia needs reform of the existing law as well as progress towards adopting laws that prevent and redress discrimination at a systemic level, minimising the need for individuals who have suffered discrimination to seek a remedy through litigation.

### A note on the *Discrimination Amendment Act 2016* (ACT)

- [19] Some very important innovations to Australian anti-discrimination law were introduced by the *Discrimination Amendment Act 2016* (ACT) to the DAACT, which was passed too late to include in the text of this book. The changes commence in two stages, on notification, or 3 April 2017. New objects have been included in s 4 of the DAACT referring to promoting and protecting the right to equality in the *Human Rights Act 2004* (ACT), and the progressive realisation of equality, with recognition of substantive equality and the need for positive action to achieve it. New s 4AA of the DAACT requires courts to use a beneficial approach to interpretation. The definition of discrimination is moved to s 8 and amended to allow for intersectional discrimination on one or more attributes (an approach facilitated by the fact that the Act does not require a comparator). Section 53CA creates a rebuttable presumption of discrimination where a prima facie case is established, which requires the respondent to prove the action was not connected with the protected attribute.
- [20] In relation to protected attributes, the Act widens the definition of disability and provisions relating to assistance animals and disability aids. New protected attributes (defined in the Act's Dictionary) include accommodation status (including being homeless), employment status, genetic information, immigration status, intersex status, irrelevant criminal record (compared with the previous 'spent conviction'), family or kinship responsibilities (added to parent or carer responsibilities), physical features, political conviction, record of a person's sex having been altered under birth registration laws, religious conviction, and subjection to domestic or family violence. Some specific exceptions relating to some of these attributes have been added at ss 33A and 57O-57R.

A new vilification provision at s 67A covers disability, gender identity, HIV/AIDS status, race and sexuality; and an offence of serious vilification on the same attributes is inserted into the ACT Criminal Code. Finally, the victimisation provision s 68 has been revised to cover penalising someone because the person acting believes they have taken or proposed to take actions under the DA ACT, even if they have not actually done so.



PART

INTRODUCTION

Cambridge University Press  
978-1-107-43225-3 — Equality and Discrimination Law in Australia: An Introduction  
Beth Gaze , Belinda Smith  
Excerpt  
[More Information](#)

---



Cambridge University Press  
978-1-107-43225-3 — Equality and Discrimination Law in Australia: An Introduction  
Beth Gaze , Belinda Smith  
Excerpt  
[More Information](#)

# 1

## EQUALITY, DISCRIMINATION AND LAW

# 1.1 Introduction: Equality as a fundamental value

- [1] This chapter introduces the foundational concepts of ‘equality’ and ‘discrimination’ that underpin anti-discrimination laws. Neither concept has a clear, uncontested meaning, and both cover a range of ideas. Equality is generally regarded as a fundamental social value, but this apparent consensus may conceal disagreement about the specific idea of equality involved. Equality is a fundamental value in liberal political theory, and in democracy. An assumption that every individual should have equal liberties, including equal influence in government through ‘one person one vote’<sup>1</sup>, is one of the foundations of modern Western societies including Australia. The development of anti-discrimination law was based on extending the liberal idea of equality beyond the political sphere to assert that every person was entitled to be treated fairly and have equal chances in life, without disadvantages arising from attributes such as race or ethnicity, sex, or disability.<sup>2</sup> Anti-discrimination law is at present a relatively blunt weapon with which to challenge discrimination, and there is uncertainty and disagreement over the scope of activities that it does or should cover. In this chapter, we introduce some ideas about equality and discrimination as a starting point for understanding the basis of the law’s approach.
- [2] Equality is a primary value in modern Australian society. Australians think of themselves as egalitarian – a view formed perhaps by the attitudes of the early settlers, both convicts and free settlers, who came to Australia either by force or by choice seeking greater opportunities, which they found in rejecting the social hierarchies of their countries of origin.<sup>3</sup> Modern Australia is largely a society of immigrants (except for the Indigenous peoples) who have come in different waves over the past two centuries in search of a better life.<sup>4</sup> For most Australians, egalitarianism remains an important value and an essential part of the all-important ‘fair go’.
- [3] Australian egalitarianism falls short for many people in disadvantaged groups, including, in particular, Indigenous people, as well as people with disability, women, and racial or ethnic and sexual minorities. Over time many inequalities have been eliminated because they came to be perceived as unjust, as a result of the efforts of campaigners. For example, early court decisions that women were not ‘persons’ who could vote, or enter universities or the professions, were eventually changed by Parliaments,<sup>5</sup> as were laws limiting women’s rights in family, property and criminal law. The 1967 constitutional amendment that ended the

1 John Keane, ‘Why Read Tocqueville’s Democracy in America?’, 8 May 2015 <<http://www.johnkeane.net/why-read-tocquevilles-democracy-in-america/>>.

2 This is the foundational principle of liberalism and underpins the individualism that is such a strong feature of Western societies. J S Mill, *On Liberty*, (1859); Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

3 Elaine Thompson, *Fair enough: Egalitarianism in Australia* (UNSW Press, 1994).

4 Australian Human Rights Commission (AHRC), *Face the Facts* (AHRC, 2012), at 2.14 notes that 22 per cent of Australia’s 22 million people were born overseas; 44 per cent were born, or have a parent who was born, overseas.

5 Jocelynn A Scutt, *Women and the law: Commentary and materials* (Law Book Co, 1990) reviews the ‘persons cases’.