Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia's laws?

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Abstract

Looking around the world, there are various models that have been used in the design of anti-discrimination laws. In this paper I compare the model used by Canada, which has a reputation for being a leader in addressing inequality, and the model used in Australia which has come to be seen as an international laggard. Canada's open model provides much discretion to the courts to identify what constitutes discrimination and legitimate justifications. With this scope for interpretation the courts are free to establish principles and, importantly, also to revise them over time as society changes. Australia, on the other hand, chose a more closed model, precisely defining a formula for direct discrimination and indirect discrimination, on specific grounds in specific areas, and with specific exceptions.

In Australia there is growing evidence of our laws' limitations and growing interest in legislative reform. In exploring legal reforms, I suggest that we need to consider changing not merely the legislative prescription but also the prescriptiveness of our model. Rewriting the definitions without taking a look at the bigger picture of what role our judges could and should play might help to solve a particular problem but leave us with a regulatory framework that is still ill-equipped to evolve over time. We need to re-examine both the legitimacy and capacity of our courts to take on a greater role in the protection of human rights, and specifically the promotion of substantive equality, in Australia.

Key words

discrimination, law, Australia, Canada, substantive equality

Introduction

In drafting Australian anti-discrimination laws choices were made about the scope and model of legal regulation. After more than 30 years of these laws it is timely to ask: are they well equipped to promote equality? They appear to have played a role in reducing both blatant forms of discrimination that reflected and reinforced prejudice toward marginalised groups such as racial minorities, and blanket kinds of exclusion such as company policies against hiring women as pilots, mechanics or miners. The significance of these achievements should not be underestimated, but opening doors and permitting entry does not necessarily challenge the pre-existing criteria, rules and power structures. Now everyone may be *allowed* to play the game, but their success will still largely depend upon their likeness to the entrenched norm of 'benchmark man'.[1] Substantive equality means *enabling* not merely allowing full and equal participation, dignity and respect. The more specific question then is whether our laws are well equipped to promote substantive rather than merely formal equality.

In this paper I compare the model of anti-discrimination laws used by Canada, a leader in addressing inequality, and the model used in Australia, which has come to be seen as an international laggard (Chaney and Rees 2004: 9). In Australia there is growing evidence of our laws' limitations (e.g., Smith 2008; Roberts 2005; Rattigan 2004; Campbell 2007) and growing interest in legislative reform.[2] Are there lessons we might learn from the Canadians?

Open and closed models of anti-discrimination laws

When using law in seeking to regulate behaviour, one issue of design is how to set the standard of desired behaviour. In proscribing discrimination, models around the world range in different ways. One categorisation is on a sliding scale from 'open' to 'closed' in respect of the definition of the discrimination that is prohibited (Heringa 1999: 25-37). In an open model discrimination is very generally defined leaving it largely up to the courts to determine what constitutes discrimination and when, if ever, discrimination is justified or permissible. This description matches the Canadian model. The alternative model, used in Australia, is a closed one in which prohibited discrimination is carefully and precisely defined, leaving less discretion to the courts.

To see the operation of these different models we can look at the different ways in which discrimination is defined under each. The definition of discrimination is central to the operation and effect of anti-discrimination laws in a number of ways. The definition is the legislative characterisation of the problem and determines the nature of the right to be free of discrimination. If discrimination is defined too narrowly, it will only operate to address a narrow band of discrimination and promote a limited form of equality. If the definition is too complex or difficult to prove, the law will be less enforceable and thus less effective at changing behaviour. If the law is very general or wide, there may be uncertainty about its meaning and reliance upon the courts to develop clear and workable principles. There appears to be a trade-off between certainty and flexibility.

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[1] This term was coined by Margaret Thornton: Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, 1990.

[2] See, for example, the report of the Senate Standing Committee on Legal and Constitutional Affairs 'Effectiveness of the *Sex Discrimination Act 1984* (Cth) In Eliminating Discrimination and Promoting Gender Equality' December 2008.

Canadian open model

A typical Canadian equality law prohibits discrimination in employment in the following way:

> **Discrimination in employment**
> **13** (1) A person must not
> (a) refuse to employ or refuse to continue to employ a person, or
> (b) discriminate against a person regarding employment or any term or condition of employment
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
> . . .
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.[3]

Under this formulation, a person applying for a job or who is already employed must not be excluded or treated less favourably 'because of' one of the listed characteristics, if the characteristic is unrelated to the employment, unless *the employer* can prove that the discrimination was justified because of a 'bona fide occupational requirement'. Notably there is no precise definition of discrimination; it was left to the courts to determine the nature of discrimination, the meaning of 'bona fide requirement' and the onus in respect of this element.

In seeking to understand the nature of discrimination, the starting point usually is the notion of direct discrimination, or different treatment. This is premised on a notion of formal equality or 'treating likes alike' and covers blanket and blatant kinds of discrimination, such as 'women need not apply'. However, the challenge for courts faced with open or general prohibitions like the Canadian one has been to decide whether and how other forms of discrimination are to be prohibited. An alternative form of discrimination is one that results not from such category-based distinctions, but from the unfair disproportionate *impact* of apparently neutral rules. A minimum height requirement for a job, for example, does not single out women for different treatment but would disproportionately exclude them. This 'indirect' form of discrimination would not be covered by a narrow definition or interpretation that merely required the same treatment of similarly situated individuals.

The Canadian courts, following on from the American judgement of *Griggs v Duke Power* in 1971, extended their initial interpretation of discrimination to include this adverse impact or indirect form of discrimination (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*). The question of whether the discrimination was justifiable because it was a bona fide occupational requirement – and thus not unlawful – was to be a matter for the employer or respondent to prove. The courts thus established this bifurcated definition of discrimination as the conventional approach under Canadian human rights law, as summarised in *Meiorin* (at 19):

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[3] *Human Rights Code*, R.S.B.C. 1996, c. 210

> The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) "direct discrimination", where the standard is discriminatory on its face, or (2) "adverse effect discrimination", where the facially neutral standard discriminates in effect.

Another question faced by the courts was to decide on the significance given to the distinction between direct and indirect discrimination. Importantly, in Canada, whether a matter was characterised by the court as being direct or indirect discrimination came to be of great significance as it determined both the defences available to the respondent and the nature of the remedy the court could order.

However, in the 1999 case of *Meiorin* the Supreme Court of Canada concluded that the distinction between direct and indirect discrimination was too malleable to allow so much to turn on it, and the bifurcated approach could 'compromise both the broad purposes and the specific terms' of human rights legislation.[4] Importantly, since the bifurcated definition had been developed by the courts to give effect to the general wording of the statute, it was open to the Supreme Court to reconsider that approach. And it did: The Court abandoned the bifurcated approach and adopted instead a unified approach that allows the court to focus on whether an employer's exclusionary standard is imposed for a purpose rationally connected with the job, that it is applied in good faith for that purpose, and that the standard is reasonably necessary for achievement of that purpose. Importantly, the test requires the job criteria or standard to be justified, alternatives to be assessed, and special needs of targeted employees to be accommodated up to unjustifiable hardship. This revised test: removed the legal distinction between direct and indirect discrimination; and enabled the court to examine the *legitimacy of the employer's goal* in imposing the standard or criteria, and the *appropriateness of the means* by which the goal was to be achieved.

It is important at this stage to note a distinction between what a court is permitted to do and what it is prepared to do. While it was the open model, which allowed the Supreme Court to develop and revise the interpretation of discrimination under these statutes, this does not necessarily explain its willingness to do so in this progressive way. In its interpretation of the constitutional equality provisions in the Charter, the Supreme Court of Canada has demonstrated a sophisticated appreciation of the distinction between formal and substantive equality and, notably, has explicitly adopted a substantive equality approach (*Eldridge v British Columbia (Attorney General)*; *Vriend v Alberta*). This approach to constitutional interpretation clearly influenced the Court in developing the principles for interpreting statutory anti-discrimination laws.

Australia's closed model

The current state of anti-discrimination laws and equality jurisprudence in Australia reflects a very different picture. There is no constitutional equality guarantee, only a patchwork of overlapping and intersecting federal and state Acts that have been interpreted in an increasingly narrow and formalistic way.

By the time Australia enacted its first anti-discrimination laws, in the 1970s, the United States' courts had already developed the distinction between direct and indirect discrimination (*Griggs v Duke Power*). The United Kingdom government had picked up

[4] The Court gave seven reasons for adopting the new approach: *Meiorin* [1999] 3 SCR 3, [25]-[49].

this distinction and enacted prescriptive or closed legislation that specifically defined discrimination as direct and indirect, limited grounds upon which discrimination was prohibited and a limited range of exceptions. The Australian governments were thus faced with a choice about whether to enact an open model like the US or a closed model like the UK.

The model that has become the standard in Australia reflects the UK drafting[5] by specifically defining discrimination to have two forms – direct and indirect. As in the UK, Australian drafters appear to have simply tried to codify the judicial principles that had already emerged in the US. In this way, although late in being enacted the Australian legislation may have made up some time by starting with these judicial principles rather than having to wait for cases to be brought to the courts so that the courts could develop these principles.

However, setting such detail into legislation had the effect of establishing a model in Australia of parliamentary prescription over judicial discretion. Giving the courts so little discretion may have been smart and progressive at the time, but it also reflects a narrow view about the role of judges in a democratic society and certainly places a significant burden on legislatures to ensure the law evolves over time as society changes.

Looking at the Australian model, the *Disability Discrimination Act 1992 (*Cth*)* (DDA) for instance, defines discrimination on the ground of disability in the following way:

> **5 Disability discrimination**
>
> (1) 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.
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> (2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.
>
> **6 Indirect disability discrimination**
>
> 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 the discriminator requires the aggrieved person to comply with a requirement or condition:
>
> (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

The first thing to note is how complicated this definition is, relative to the Canadian one set out above. In seeking to codify direct and indirect discrimination, the meaning of the statute has been obscured substantially. And, this is only the definition of disability

[5] While the *Racial Discrimination Act* 1975 (Cth) (RDA) adopted the open words of the international convention underpinning it, that Act remains peculiar among Australian anti-discrimination laws.

discrimination, set out separately are the prohibitions. Three other federal Acts provide three other definitions. Notably, under this model there is no general justification type of exception, but a range of specific and limited exceptions listed for each particular ground, many plainly reflecting nothing more than political compromise.

A number of consequences flow from this level of prescription. Firstly, arguably the statutes' complexity has undermined the development of a deep and sophisticated public understanding of the notions of discrimination and commitment to equality. Compliance and norm development depend at least in part on parties understanding their obligations and rights. Even the High Court has struggled to understand them, asserting that in defining 'discrimination in this manner language has been employed which is both complex and obscure and productive of further disputation.' (*IW v Perth* at 137 per Gummow J). Secondly, the detailed prescription prompts actors, accused of discrimination, to look for loopholes to evade liability. Finally, the task faced by the courts becomes one that is focussed on statutory interpretation, seeking to make sense of wordy and convoluted sections, with limited scope for developing general principles.

These points are demonstrated in the recent High Court case of *Purvis v New South Wales (Dept of Education and Training)*. A student with multiple disabilities was expelled from a school because of behaviour, which was a manifestation of his disability. The student brought a claim of direct discrimination, arguing that in being expelled because of his behaviour he had been treated differently to non-disabled students. Instead of the focus being on what it would take to give effect to substantive equality for this student in his education, the question for the Court became a highly technical and artificial one: with whom should the student be compared - a non-disabled student who was well behaved or one who shared the same behavioural problems? The Court chose the former and found that the school had not discriminated because it treated this disabled student the same as it would treat all students *who behaved that way*.

In making this decision, the Court clarified and reinforced a stark distinction between direct and indirect discrimination, in contrast to the direction of Canadian jurisprudence.

The new approach means that the prohibition on direct discrimination merely requires employers and education providers to 'treat likes alike' and, importantly, lets the employer or school decide who is like whom (Smith 2008). Direct discrimination provisions do not prevent employers (education providers, etc) from using criteria that very closely connect or overlap with traits that are supposedly protected by the anti-discrimination laws. For example, while an employer may be prohibited from applying a blanket exclusion of women, direct discrimination provisions allow the employer to choose the candidate who can work 24/7, can do overtime on short notice, will not take extended leave, will not take their entitlement to carer's leave or any other criteria that may have a gendered element but is not expressly 'sex'. Further, under direct discrimination actions, such criteria are not subjected to any evaluation of legitimacy or connectedness to the job and there is no obligation to provide reasonable accommodation. The *Purvis* decision removes the criteria from judicial scrutiny and makes clear that reasonable adjustments are not required.

The indirect discrimination provisions are still available to challenge such criteria, but with all the uncertainty and litigation difficulties that indirect discrimination provisions entail. The *Purvis* precedent makes discrimination litigation even more complex and significantly limits the progressive potential of Australian anti-discrimination laws. The

artificiality and complexity of the distinction between direct and indirect discrimination is particularly problematic given that in Australia it is victims alone who must prove breaches of our anti-discrimination laws.

Conclusion - Lessons for Australia?

Implications of the *Purvis* precedent have been noted by a number of commentators, and legislative reform has been recommended. In reforming our definition of discrimination, the unified approach adopted by Canada has much to offer. Firstly, it ensures that victims of discrimination are not unduly burdened by the challenge of trying to figure out whether their experience fits into the artificially distinct categories of direct or indirect discrimination. This is a difficult task and one that currently matters a lot as the choice of action determines what needs to be proven and, as *Purvis* showed, whether the respondent's criteria or practice can be scrutinised for anything other than its consistent application and whether any accommodation is required of the respondent. Secondly, the test ensures that the criteria used to select (and exclude) employees or applicants is subjected to some assessment of legitimacy in light of the goals of our equality laws. Importantly, the Canadian test also allows for an assessment of the reasonableness of the means by which an employer seeks to achieve its goals and, into this is built a limited obligation on employers to accommodate difference or make reasonable adjustments to the extent of undue hardship.

However, in exploring legal reforms, we should at least consider changing not merely the legislative prescription but also the prescriptiveness of our model. Rewriting the definitions without taking a look at the bigger picture of what role our judges could and should play might help to solve a particular problem but leave us with a regulatory framework that is still ill-equipped to evolve over time. Some would argue that courts lack democratic legitimacy in determining the meaning of substantive equality, but is this taking a narrowly majoritarian view of democracy? Others argue that courts are not sufficiently representative of our diverse citizenship to be able to appreciate fully the experience of discrimination and I accept that this argument has significant strength. The limited effectiveness of our anti-discrimination laws and the absence of a deep and sophisticated understanding and commitment to equality in Australia simply leads me to suggest that we need to question not merely the specific legal rules but also the wider framework. We need to re-examine both the legitimacy and capacity of our courts to take on a greater role in the protection of human rights, and specifically the promotion of substantive equality, in Australia.

List of Cases

British Columbia (Public Service Employee Relations Commission) v BCGSEU [1999] 3 SCR 3 (*Meiorin*)

Eldridge v British Columbia (Attorney General) [1997] 3 SCR 624

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IW v City of Perth (1997) 191 CLR 1

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536

Purvis v New South Wales (Dept of Education and Training) (2003) 217 CLR 92

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