QUT Law Review ISSN: Online–2201-7275
Volume 18, Book Review Issue 2 pp. 318–321 DOI: 10.5204/qutlr.v18i2.762

BOOK REVIEW - EQUALITY AND DISCRIMINATION LAW IN AUSTRALIA

Beth Gaze and Belinda Smith; Cambridge, 2017; pages 1 - 328;

ISBN: 9781107432253

JODHI RUTHERFORD*

Anti-discrimination laws aim to protect people from harm to which they may be subject on the basis of personal attributes such as gender, race, age or disability. With human rights principles as their source, anti-discrimination laws can be seen to have equality as their goal however contested notions of equality make it difficult to determine whether the laws are reaching this objective. Anti-discrimination law occupies a peculiar position at the nexus of public and private law; it encompasses both civil and political rights *and* obligations between individuals.

Beth Gaze and Belinda Smith's new book, which acknowledges the public-private dichotomy at the heart of anti-discrimination laws, situates the law in its conceptual and social framework. Gaze and Smith are longstanding and well-known contributors to the field of Australian equality and discrimination law. Gaze is Professor of Law at the University of Melbourne and Smith is an Associate Professor at the University of Sydney Law School. Their extensive experience of teaching and researching in this field has produced a text which will interest students seeking an introduction to the area, and practitioners looking for a contextual and normative inquiry into the state of play of anti-discrimination law in Australia.

With eight different anti-discrimination statutes in State and Territory jurisdictions and four separate laws at Commonwealth level, the authors have produced a comprehensive account of the statutory framework up to early 2017. In terms of the text's scope, laws that have received judicial consideration are the main focus. In terms of the authors' approach, Gaze and Smith advocate explicit conceptual and empirical links between notions of equality and discrimination.

Anti-discrimination law translates the liberal principle of equality into legal rights, and the authors' central argument is that Australian laws are not a comprehensive response to the complexities of inequality. Discrimination resulting from socio-economic status or the experience of multiple protected attributes is not adequately redressed by laws that maintain a singular focus on protecting specific attributes from discrimination, rather than a wider agenda of reducing social inequality. The authors identify substantive equality as the appropriate goal of the law, requiring law reform to enable the prevention of systemic discrimination.

The book is structured in three parts, corresponding to the conceptual structure, the legal framework and suggestions for reform. The first part examines equality and discrimination and how the law accommodates each concept. It surveys the historical context of the Australian legal framework, as well as identifying some legal mechanisms for redressing inequality which sit outside the existing suite of laws. Part Two provides doctrinal analysis of the personal attributes that are protected under Australian law, the areas and types of wrongdoing regulated by law and relevant enforcement and remedy processes. Part Three of the book examines ways to promote equality other than anti-discrimination statutes, by looking to equality initiatives in comparative overseas jurisdictions and finding solid evidence of equality measures already existing in the broader Australian framework.

Gaze and Smith open their discussion in Chapter One with a critical distinction between direct discrimination, whereby a person acts unlawfully on the basis of another person's protected attributes, and indirect discrimination, in which a *prima facie* neutral act done by a person may be highly unequal in its application. These concepts of discrimination are inadequate to regulate social practices which cause or result in inequality, but which, in the authors' argument, should be within the remit of anti-discrimination laws. The definitional complexity of equality is also examined, with formal equality and its focus on fair process and treatment, sitting uneasily alongside notions of substantive equality, which themselves are unclear in terms of content. The authors rely on Fredman's theory of substantive equality which places significant positive obligations on government to facilitate redistributive, cognitive, participative and transformative dimensions of substantive equality.[1] "Tackling systemic practices, for example through positive action or positive duties to avoid them, is, however an essential part of moving towards transformative equality, which would involve creating social systems that do not allocate disproportionate disadvantages to groups of people with an attribute of disadvantage."[2]

The examination of the historical context of Australian anti-discrimination law which is provided in Chapter Two, is necessary to unpack the basic framework of the legislation in Chapter Three. The authors evaluate how existing laws relate to, or incorporate other known legal mechanisms for reducing inequality. These mechanisms include human rights statutes such as the *Human Rights Act 2004* (ACT) and Victoria's *Charter of Human Rights and Responsibilities Act 2006*. Chapter Three observes current criticism of anti-discrimination law including how the laws have failed to evolve as inequality manifests over time. The authors also note that the regulatory designation of discrimination as a civil wrong that requires the harmed individual to seek redress, highlights the public-private tension inherent in an area of law which seems unable to acknowledge the social dimensions of discriminatory acts.

Part Two of the book is of significant value to beginning students with its thorough doctrinal analysis of the body of Australian anti-discrimination laws. Chapter Four attempts to tackle the complexity of how protected attributes are formulated and conceptualised by exploring issues such the degree of symmetry in definitions, the intended breadth of the protected attribute and how the law's focus on single attributes constrains its ability to manage cases where the harmed individual embodies multiple attributes. The authors argue that substantive equality requires not just accommodation, but normalisation, of protected attributes by the legal system. Gaze and Smith also observe that the law's focus on symmetrical definitions of attributes belies the reality exposed by the legal requirement to implement special measures to achieve equality, namely that the experience of discrimination is asymmetrical.

Chapter Five explores types of conduct prohibited by Australian anti-discrimination laws, which alongside discrimination also includes harassment and vilification. It outlines the way such conduct has been defined in Australian laws, as either direct or indirect discrimination, and queries why Australian courts maintain a bright line characterising conduct as either direct or indirect discrimination, when in many circumstances wrongdoing can be construed as either, with differing outcomes for the person who has been discriminated against. For example, a pregnant woman disciplined by her employer for being late to work due to morning sickness could be understood as experiencing direct discrimination on the basis of a characteristic relating to pregnancy, or as experiencing indirect discrimination by the imposition of a

* BA (UQ), LLB (Hons) (QUT), GradDipLP (QUT), LLM (QUT). Sessional Academic and PhD Candidate, Centre for Research Excellence in End of Life Care and Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology (QUT).

[1] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011).

[2] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia* (Cambridge, 2017) 24.

punctuality rule which is *prima facie* neutral but would disproportionally impact those who are pregnant. The focus on fitting discriminatory conduct into one of two categories also inhibits the legal system's ability to respond to circumstances of systemic discrimination.

Chapter Six imports a discussion of when discriminatory conduct is prohibited and the scope of the prohibition, which includes but is not limited to work, education, sport and the provision of good and services and accommodation. In examining the obligations of the State, it is observed that duties exist only in its role as provider of employment or goods and services, but not when it is exercising executive, legislative or judicial power. This in turn significantly weakens the protections contained in anti-discrimination laws because government can transact out of its legal duties in certain cases. Exceptions and defences to unlawful conduct are also examined in this chapter.

Part Two of the book ends with several normative claims made in Chapter Seven regarding how to make rights more effective via institutions, procedures and remedies. The current system is deficient in many respects: the mandatory requirement for conciliation which keeps the dispute private and unassisted by judicial guidance, strict time limits, confusing choices of law and jurisdiction, the requirement for legal advice and costs rules that discourage litigation. "The focus on settling individual cases through conciliation and the absence of public resources for enforcement gives little weight to the public interest in developing the law through judicial decisions that elaborate anti-discrimination norms and principles. It also denies the broader motives of complainants, who are often reported as saying that they wanted to ensure no-one else in their situation can be treated as they were."[3] One mitigation offered by the authors is to empower anti-discrimination agencies to enforce the law, which allows for strategic development of the law, similar to existing Australian mechanisms in consumer protection and employment law. The authors also suggest that potential reform to the onus of proof, which is always on the claimant under Australian anti-discrimination laws, would be useful; precedent exists in the *Fair Work Act 2009* (Cth) ('*FW Act*') where the shifting onus of proof is a major attraction for bringing work discrimination actions under that statute. Gaze and Smith also identify the mechanism of protective costs orders as a way to support more people to enforce their anti-discrimination rights.

Part Three overviews some potential devices for enhancing Australia's legal capacity to deal with discrimination at a more systemic level. The thrust of the argument here is that retrospective laws that focus on past wrongdoing are not effective at deterring discrimination because of the imposts created on the individual by litigation, hence measures aimed at preventing discrimination from arising in the first place may prove more effective. Chapter Eight focusses on positive actions that duty holders can be required to take, such as affirmative action. However the authors are careful to note that their recommendation does not equate to quotas, which is how affirmative action is commonly understood by employers, but is wider to include special adjustments and data reporting. For example the *Workplace Gender Equality Act 2012* (Cth) requires specific positive action by private sector employers to audit workplaces and develop programs or data about gender in the workplace.

Chapter Nine case studies the non-discrimination measures under the *FW Act*, specifically section 351 which prohibits adverse action by an employer on the basis of various protected attributes, the classes of which are wider than under anti-discrimination laws. The *FW Act* is found to be more effective at tackling workplace discrimination because of a shifting onus of proof, a faster resolution process in which each party bears their own costs, and a regulatory body which can enforce claims. It also provides general protections in addition to section 351

[3] Ibid 174.

which prohibit adverse action against employees on the basis of non-protected attributes such as union membership.

Chapter Ten explores ways in which governments can advance equality, such as committing to non-discrimination in the exercise of State power and requiring public and private organisations to promote equality in their policies, service delivery and procurement activities. This chapter also reviews the two human rights charters in the Australia Capital Territory and Victoria and notes the human rights filter which each apply to government action, necessitating training of public sector employees to ensure public administration respects the rights of individuals. Some overseas examples of governments assuming positive duties to non-discrimination are also explored, such as the 2012 adoption of a general public sector equality duty in the United Kingdom.

The book concludes with Chapter Eleven's focus on equality rights into the future. The authors have adduced good evidence of substantive equality as a policy goal of anti-discrimination law. Gaze and Smith supply an analytical model to evaluate both existing regulation and new initiatives to determine duty bearers' capacity and commitment to non-discrimination. Regulatory theory is relied on here to explain how duty bearers can be moved towards a goal of non-discrimination. The authors conclude by summarising the various proposals for reform they have canvassed, from positive duties, to a shifting onus of proof and protective costs orders, through to laws which focus on future compliance rather than retrospective breaches, such as the *FW Act*.

Of particular benefit to readers is the appendix which includes summary tables of all Australian anti-discrimination laws in terms of key provisions and differences between jurisdictions. The tables reference legislation up to 1 July 2016 and are very useful, though they remain somewhat underutilised by the authors in their commentary proper. This Australian text is unique because of its deft combination of normative and doctrinal analysis. Instead of the usual casebook format of student texts, Gaze and Smith have deployed a conceptual and contextual analysis of the legal framework to ground their argument of the requirement for systemic change to counter systemic discrimination. Their case is tightly argued, empirically based and adds significant weight to claims for substantive notions of equality to underpin discrimination law in Australia.