

Issues paper – Creation of a duty to eliminate discrimination

The Act does not impose a duty not to discriminate against another on any person or body. Victoria is the only Australian jurisdiction which imposes a positive duty on certain people and entities to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation, as far as possible. The issue arises as to whether the Act should include a positive duty.

There are possible benefits to the introduction of positive duty to eliminate discrimination:

1. It may encourage compliance with the law because the focus would be on the creation of institutional mechanisms for eliminating discrimination and less need to prove a breach of the law.
2. It may allow the EOC to address systemic discrimination more actively and effectively.
3. Systemic change due to institutional and structural causes of inequality may be diagnosed and addressed collectively, instead of on an ad hoc basis in response to individual complaints.
4. It may relieve the difficulty for complainants in proving a discrimination claim. Evidence shows that the difficulty in making out a claim may deter people from making complaints.
5. Reparation to resolve a complaint may be seen by a respondent as a cost of doing business and not encourage changes the discriminatory business practices. Change may be affected by a regulator supervising compliance with a positive duty.
6. It may work to distribute the responsibility for compliance more evenly. Currently the responsibility lies with complainants to report discrimination. By introducing a positive duty, the responsibility would lie with policy makers, service providers, employers and others, thereby relieving individual victims of the burden and expense of litigation.

There may be practical difficulties in requiring transnational entities to comply with differently expressed positive duties in different States. The imposition of such a duty would require a substantial overhaul of the Equal Opportunity Commission which is not established or funded as a regulator. The imposition of a positive duty would require a complete rethinking of the way that anti-discrimination laws operate in Western Australia. There is an issue as to whether the existing system is so deficient as to require such a significant change in approach.

The Commission invites submissions on whether a positive duty should be incorporated into the Act.

A full discussion of these issues is in the Discussion Paper at pages 26 [3.6], 59 [4.7], 154 [6.6].