FROM NEUTRAL TO DRIVE

Australian anti-discrimination law and identity

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This article critically examines the way in which Australian anti-discrimination law understands individual and collective identities, arguing that in a number of key ways anti-discrimination law fails to reflect the complexity of identity formation and the reality of how discrimination is experienced. Firstly, Australian anti-discrimination law largely ignores the intersectionality of discrimination — the reality that some individuals are discriminated against on a number of overlapping grounds. Secondly, current anti-discrimination laws demonstrate a tendency to essentialise collective identity attributes or fall back upon undesirable stereotypes. Lastly, the neutral way in which such laws are framed has the potential to overshadow the notion that they were created for beneficial purposes. It is suggested that these failings create very real practical problems for those who claim that they have been discriminated against. Broadly, public policy-makers remain at a loss as to how to legislate to prevent discrimination, while still recognising the diversity within groups that share collective attributes.

A number of specific changes can be made to existing anti-discrimination laws so that they better reflect the processes by which identity is formed and the way in which discrimination is experienced. It is suggested that proposals to develop a wider ranging body of legislation which aims to achieve specific outcomes (such as social inclusion), without defining specific protected grounds, have the advantage of avoiding the practical and political difficulties involved in dealing with collective attributes.

The current system

The common law does not provide a detailed protection against discrimination.[1] The High Court of Australia recognises that no implication can be found in the *Constitution* that 'Commonwealth laws must not be discriminatory or must operate uniformly throughout the Commonwealth'.[2] Anti-discrimination law in Australia is primarily a product of statutory instruments.

The current body of anti-discrimination law has four key general attributes. Firstly, discrimination is deemed unlawful only on specified grounds and in limited circumstances — experiences of discrimination are positioned on a single axis of legal significance. There is no general prohibition against discrimination. At the Commonwealth level separate statutes protect against discrimination on the basis of race, sex, disability and age in limited situations.[3] At the state level, discrimination is generally protected against on certain select grounds set out within one statute.[4] These grounds are broader than those found within Commonwealth statutes.[5]

Secondly, anti-discrimination law is neutral in its application to different collective groups. The legislative framework does not have the stated aim of protecting any particular sub-group. For example, both sexes are protected under section 5(1) of the *Sex Discrimination Act 1984* (Cth) and all 'races' benefit from the provisions of the *Racial Discrimination Act 1975* (Cth). Only those who are disabled are singled out for particular protection.[6] As Victorian legal scholar Beth Gaze suggests, it is an 'intrinsic' feature of Australian anti-discrimination legislation that 'it is drafted neutrally to avoid acknowledging the asymmetrical reality of social disadvantage'.[7]

A third general feature of Australian anti-discrimination law is that it largely focuses upon preventing discrimination rather than achieving substantive equality of outcomes.[8] While anti-discrimination law permits positive measures (such as affirmative action programs) to remedy the disadvantage experienced by a particular group,[9] such measures are the exception to the 'liberal individual' norm. Positive measures must be adapted to achieve the outcome of equality envisaged by the act in question and may be struck down as unlawful if they are not carefully framed.[10] Australian Indigenous communities seeking to impose restrictions on the sale of alcohol in their communities, for example, have at times relied on certificates of validity issued by the Human Rights and Equal Opportunities Commission ('HREOC') to ensure that these restrictions do not breach racial discrimination laws.[11] Such restrictions have been the subject of legal challenge.[12]

Lastly, while Australian anti-discrimination law may be 'neutral' in operation, issues of how to define collective identity do become relevant when courts or tribunals are required to make determinations as to causation or conduct comparisons. Judicial officers have thus had to question what individual attributes can be related to a person's disability[13] and what general characteristics can be attributed to individuals of a particular national or racial background or gender.[14]

Diagnosing the problem(s)

Despite apparent surface 'neutrality' in their application, current anti-discrimination laws raise issues of how to define and understand collective and individual identities. Given the personal stake individuals

REFERENCES

1. See Nick O'Neill, Simon Rice and Roger Douglas (eds), *Retreat from Injustice: Human Rights Law in Australia* (2004) 476.

2. *Leeth v Commonwealth* (1992) 174 CLR 455, Mason CJ, Dawson & McHugh JJ, 468, quoted in O'Neill, above n 1, 476.

3. See *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1982* (Cth) & *Age Discrimination Act 2004* (Cth).

4. See *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1995* (Vic).

5. *Equal Opportunity Act 1984* (WA), for example, protects against discrimination on the basis of marital status (s 9) and discrimination in sporting (s 35) and club contexts (s 35ZB).

6. See, generally, the *Disability Discrimination Act 1982* (Cth).

7. Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 329.

8. See ibid, 326–327.

9. See s 8 of the *Racial Discrimination Act 1975* (Cth) and s 7D of the *Sex Discrimination Act 1984* (Cth).

10. In the context of special measures to overcome racial discrimination see *Gerhardy v Brown* (1985) 159 CLR 70, and in the context of special measures to overcome sex discrimination see the decision by then Justice Crennan of the Federal Court in *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250.

11. See Commissioner Zita Antonios, Commonwealth Racial Discrimination Commissioner, *Alcohol Report: Racial Discrimination Act 1975, Human Rights and the Distribution of Alcohol*, 1995 http://www.humanrights.gov.au/racial_discrimination/report/alcohol.html at 29 February 2008.

12. See, for example, *Tennant Creek Trading Pty Ltd, Whyteross Pty Ltd, Charles Keith Hallett and Tennant Creek Hotel Pty Ltd v The Liquor Commission of the Northern Territory of Australia and Julalikari Counil Aboriginal Corporation* No SC 179 of 1994, [1995] NTSC 50 (7 April 1995).

have in the outcome of complaint procedures, it is important to question the extent to which Australian anti-discrimination laws reflect the complexity of individual and collective identities and the reality of how discrimination is experienced.

Significantly, the way in which Australian anti-discrimination laws are structured (with separate provisions for distinct protected grounds such as race and sex) contradicts the reality that individuals will offer suffer a single act of discrimination which covers multiple protected grounds. Consultations conducted by the Commonwealth Human Rights and Equal Opportunities Commission in 2001 revealed that

> There [is] general agreement... that discrimination is rarely based on one ground. For individuals who are subjected to discrimination the experience is compounded by other characteristics such as gender, disability, age, religious beliefs and sexuality.[15]

The consultations noted that a number of young men of particular 'ethnic' backgrounds had reported experiencing the 'intersectionality' of age and race discrimination as they were 'labelled with the negative term "members of a gang".'[16] The HREOC summary of the consultations succinctly noted the importance of recognising the phenomena of intersectionality, arguing that 'aspects of identity are indivisible and that speaking about race and gender in isolation from each other results in concrete disadvantage'.[17] HREOC noted a number of cases where, because individuals had experienced discrete acts of discrimination that saw a number of prohibited grounds 'intersect', they were required to bring separate complaints under different pieces of legislation.[18]

While it is possible for complaints under different anti-discrimination statutes to be heard before a single court or tribunal in one sitting, the problems raised by the failure of anti-discrimination law to acknowledge the reality of intersectionality are far from theoretical. American Professor of Law Kimberlé Crenshaw has suggested that legal systems which take the approach of making discrimination unlawful on particular individual grounds have the effect of privileging the claims of some while sidelining those who have experienced intersectional discrimination.[19]

Importantly, Crenshaw explains the evidentiary difficulties 'single axis' (or discrete ground) anti-discrimination systems can create for complainants. She notes, for example, the 9th circuit case of *Moore v Hughes Helicopter Inc*[20] involving a claim for indirect racial discrimination. The plaintiffs, by specifying that black women had been especially disadvantaged by a requirement imposed by their employer, were prevented from bringing evidence of discrimination against black men. The pool of those who had allegedly been discriminated against was narrowed so significantly by the court that it was inevitable that the plaintiffs' claim would fail.[21]

The failure of anti-discrimination law to acknowledge intersectionality means that a plaintiff may have to make a socially divisive choice, for evidentiary purposes, to emphasise the experiences of one collective group which may have been prejudicially affected by a particular condition or requirement, over the experiences of another group that has also been negatively impacted by the same circumstances. In the context of black America, Crenshaw has noted that 'when one considers the political consequences of this dilemma, there is little wonder that many people within the Black community view the specific articulation of Black women's interests as dangerously divisive'.[22]

In Australia it is foreseeable that a complainant may have to choose to pursue a claim based on discrimination on one protected ground, despite the reality that the alleged discriminatory conduct intersected with an alternative ground. It is also foreseeable that plaintiffs who bring multiple claims under different acts when they are clearly alleging that they have suffered 'intersectional' discrimination (such as the plaintiff in *Djokic v Sinclair*[23]) may face social or political difficulties if their claim succeeds on one ground but fails on another. Such considerations have led one legal academic to suggest that the current 'single axis' system of anti-discrimination law in Australia is psychologically damaging because it 'unduly misrepresent[s] ... the complexity and richness of social life'.[24]

Closely related to the phenomena of intersectionality is the potential of current anti-discrimination laws to essentialise collective identity attributes. English academic Christopher McCrudden has noted that:

> the distinctions [between grounds of discrimination] may be problematic because, by distinguishing between them, we increase the likelihood that each ground is thought to capture a distinct truth about individuals, whereas, in reality, individuals are made up of a combination of identities.[25]

Where anti-discrimination laws select certain attributes for protection, there is the potential to view narrowly the complex and diverse social reality of what it means to be female or a member of a particular 'race'. Further, the limiting of protection to select grounds only, and the effort to bring other attributes within the ambit of these grounds, can inadequately represent the meaning of those attributes to an individual's sense of identity. Andrew Sharpe of Macquarie University notes, for example, that efforts to extend the protection of anti-discrimination laws to trans-gendered individuals have often inappropriately expanded existing provisions relating to the conceptually different categories of sexuality or sex.[26]

The difficulties of legislating to protect those who share collective identity attributes are highlighted by a number of cases. In the English case of *London Underground Ltd v Edwards (No. 2)*[27] a claimant who was arguing that the imposition upon tube workers of a particular shift roster amounted to indirect sex discrimination had to suggest that the need to fulfill childcare responsibilities was a characteristic that could generally be attributed to women. In Australia in the case of *Metwally v University of Wollongong*[28] the New South Wales Equal Opportunity Tribunal, when considering a claim of racial discrimination, relied upon 'unchallenged evidence ... that the whole legal and political structure

13. *IW v City of Perth* (1997) 191 CLR 1; *Purvis v New South Wales Department of Education and Training* (2003) 202 ALR 133.

14. In the context of race and nationality see *Metwally v University of Wollongong* (1984) EOC 92-030. In the context of gender characteristics see the English case of *London Underground Ltd v Edwards* (No. 2) [1997] IRLR 157 EAT.

15. Human Rights and Equal Opportunities Commission, *'I want respect and equality': A Summary of Consultations with Civil Society on Racism in Australia*, (2001) http://www.humanrights.gov.au/racial_discrimination/consultations/consultations.html at 29 February 2008.

16. Ibid.

17. Quoted in O'Neill, above n 1, 483.

18. See *Djokic v Sinclair* (1994) EIC 92-643 relating to complaints heard before the HREOC under the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth). See also *Fares v Box Hill College of TAFE* (1992) EOC 92-391.

19. See Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* extracted in Christopher McCrudden *Anti-Discrimination Law* (2004).

20. 708 F2d 475.

21. Crenshaw, above n 19, 480. See also *DeGraffenreid v General Motors* 413 F Supp 142 (E D Mo 1976) where the United States District Court rejected an attempt by five black women to consolidate into a single claim alleged instances of sex and racial discrimination.

22. Crenshaw, above n 19, 480. See also Elisabeth Holzleithner, 'Mainstreaming Equality: Dis/Entangling Grounds of Discrimination' (2004–2005) 14 *Transnational Law and Contemporary Social Problems* 928, 946.

23. Above n 18.

24. Mark Nolan, 'Some legal and psychological benefits of a nationally uniform and general anti-discrimination law in Australia' (2000) 6 *Australian Journal of Human Rights* 79, 103.

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of Egypt ... is based on Islam'.[29] This extraordinarily broad finding was not challenged on appeal. As Hugh Collins of the London School of Economics has noted, 'those who want to benefit from discrimination laws have to rely upon stereotypes or social norms that they may wish to escape or reject'.[30]

Ironically, while single axis anti-discrimination laws demonstrate in practice a tendency to essentialise collective identity attributes or full back upon undesirable stereotypes, the neutral way in which such laws are framed has the potential to hide the reality that they were created for beneficial purposes. In England, for example, sex discrimination legislation has been used by a male to strike down as discriminatory a local council scheme allowing his wife discount entry to a pool.[31] In Australia, it was noted by the Commonwealth Racial Discrimination Commissioner in 1995 that the restricted ability of Indigenous communities to adopt 'special measures' (specifically alcohol restrictions in communities) to protect cultures, highlights the reality that 'self-determination is poorly accommodated by the *Racial Discrimination Act 1975* (Cth) ...'[32]

When the courts have considered the meaning of a particular identity attribute in the context of determining causation and conducting comparisons in anti-discrimination cases, the 'protected' attribute of an individual has, at times, been artificially separated from the remainder of their personality. Thus in the leading High Court case of *Purvis*[33] the suggestion that a disabled child (whose disability caused him to behave aggressively and inappropriately) had been discriminated against by his school was rejected on the grounds that a non-disabled but also poorly behaved child would not have been treated differently. The rejection by the majority of the principle that 'the circumstances of the aggrieved person which are related to the proscribed ground are excluded from the circumstances of the comparator'[34] has the potential to influence the interpretation of other anti-discrimination statutes and, by limiting the causative significance of protected identity attributes could 'seriously undermine the purposes of anti-discrimination law ...'[35]

The practical limitations of 'single-axis' anti-discrimination laws have spawned criticisms of the liberal equality-focused political philosophy upon which such laws rest. Legal academics Reg Graycar and Jenny Morgan noted on the 20th anniversary of the passing of the *Sex Discrimination Act 1984* (Cth) (SDA) that the Act had not succeeding in moving beyond the paradigm of neutrality and formal equality.[36] More broadly, anthropologists Gillian Cowlishaw and Barry Morris have suggested that, by emphasising procedural equality, Australian governments have failed to recognise the extent to which social and economic problems have become racialised as a result of entrenched institutional practices.[37] Such critiques bring to the forefront the question of how anti-discrimination law can be improved so that it understands (without essentialising) identity and better recognises the reality of how discrimination is experienced.

Searching for solutions

There are a number of practical solutions to the problems arising from the manner in which anti-discrimination law deals with issues of identity. One step which could help shift the emphasis of anti-discrimination laws towards substantive rather than merely formal equality is the amendment of relevant pieces of legislation in order to mandate that they be interpreted in the context of their beneficial purposes. The current approach of the High Court is to interpret Commonwealth anti-discrimination statutes as they would any other piece of legislation. The majority judgment in *Purvis*, for example, warned against constructing the meaning of anti-discrimination legislation in the light of the aspirations of international legal documents.[38]

A 1999 review by the NSW Law Reform Commission of the *Anti-Discrimination Act 1977 (NSW)* suggested that the Act should be amended to include a statement of objects.[39] It was argued that such objects should include the implementation of strategies (including 'special measures').[40] These recommendations have yet to be implemented. Such interpretation or objects provisions could be introduced into anti-discrimination statutes in order to draw to the attention of tribunals and courts the beneficial nature of the legislation and the need to judge the legality of special measures in light of relevant international instruments and the desire to achieve substantive equality outcomes.[41] This reform could be supported by changes placing the onus of disproving discrimination upon the defendant after a preliminary evidentiary hurdle has been passed by the complainant[42], although the 'hurdle' would have to be substantial enough to ensure fairness for the defendant.

Further, anti-discrimination laws could be amended to clarify the uncertainty that exists, post-*Purvis*, as to the extent that the attributes related to a legislatively protected ground (such as a child's poor behaviour partly caused by their disability) should be attributed to

25. See McCrudden, above n 19, xxv.

26. Andrew Sharpe, 'Transgender Performance and the Discriminating Gaze: A Critique of Anti-Discrimination Regulatory Regimes' (1999) 8 *Social & Legal Studies* 5.

27. [1997] IRLR 157 EAT.

28. (1984) EOC 92–030.

29. See O'Neill, Rice and Douglas, above n 1, 486–487.

30. Hugh Collins 'Discrimination, Equality and Social Inclusion' (2003) 66 *The Modern Law Review* 16, 30.

31. *James v Eastleigh Borough Council* [1990] 3 WLR 55. See also Lizzie Barmes & Sue Ashtiany 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 *Industrial Law Journal* 274.

32. Commissioner Antonios, above n 11, 28.

33. *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133.

34. Samantha Edwards, 'Notes and Comments: *Purvis* in the High Court: Behaviour, Disability and the Meaning of Direct Discrimination' (2004) 26 *Sydney Law Review* 639, 646.

35. Ibid, 649.

36. Reg Greycar & Jenny Morgan, 'Thinking about Equality' (2004) 27 *University of New South Wales Law Journal* 833, 839.

37. Gillian Cowlishaw and Barry Morris (eds), *Race Matters: Indigenous Australians and 'Our' Society* (1997), 3. In the English context see Evelyn Ellis, *EU Anti-Discrimination Law* (2005) 3ff.

38. See the comments of Edwards, above n 34, 644. See also Gaze, above n 7.

39. New South Wales Law Reform Commission *Report 92 (1999) – Review of the Anti- Discrimination Act 1977 (NSW)* (NSW Law Reform Commission: Sydney, 1999) ch 3, recommendation 8 <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r92chp3> at 29 February 2008.

40. Ibid.

a 'comparator person' for the purpose of determining whether discrimination has occurred.[43] The issue of identity definition raised by *Purvis* could be clarified, and the beneficial nature of this body of legislation reaffirmed, if relevant anti-discrimination statutes were amended to specify that personal attributes or characteristics generally related to a protected ground should not be attributed to a comparator when determining whether that comparator would have been treated differently than the claimant(s). The 'unexpressed declaration that certain attributes are irrelevant within the areas in which discrimination is proscribed'[44] must be made express.

One of the key problems with the way in which Australian anti-discrimination law currently classifies individual and collective identities — namely, its indifference to the reality of intersectionality — must be addressed if the law is to more accurately reflect the way in which discrimination is experienced. Anti–discrimination statutes could easily be amended to allow a single claim to be brought on multiple grounds of discrimination. This suggestion was unfortunately not adopted by the Commonwealth government when it introduced the *Age Discrimination Act 2004 (Cth)*. Section 6 of this Act explicitly prevents a person bringing a claim suggesting that disability is an attribute of their age.

Issues of identity definition and intersectionality are, however, unlikely to be fully resolved if anti-discrimination statutes continue to adopt the method of making discrimination unlawful on the grounds of protected collective attributes. While the NSW Law Reform Commission suggested in 1999 that issues of identity have posed few practical problems for courts and tribunals[45], this article suggests that real practical problems have the potential to arise for claimants. However, to focus anti-discrimination statutes more clearly on what attributes fall within a protected category, or to single out particular collective groups for protection would not necessarily solve the dilemma of how to bring about substantive equality. As the NSW Law Reform Commission noted, 'the closer a society comes to an ideal of equality of opportunity, the less appropriate such classifications [of collective disadvantage] become'.[46] In the USA and Australia, one of the principal criticisms of affirmative action measures which seek to benefit certain collective groups is that they have largely only succeeded in benefiting wealthy members of comparatively disadvantaged social sub-groups.[47]

The inherent difficulties involved with legislating in relation to collective or individual identity attributes may be avoided if one seeks to legislate to achieve particular outcomes that are conceptually clearer than the attainment of 'equality'. English academic Hugh Collins, for example, has argued that notions of 'equality' upon which anti-discrimination laws have historically been based are vague and confuse how these laws should operate in practice.[48] Collins suggests that anti-discrimination laws should be based on notions of 'social inclusion' whereby the guiding public policy aim would be 'ensur[ing] the removal of barriers to participation in the benefits of citizenship, so that all groups actually achieve those benefits'.[49] Collins also notes the necessity for a wider acceptance of the need for positive measures to include disadvantaged groups[50] and particularly focuses on the benefits of 'a fulfilling level of education, participation in politics, cultural activities, and work'.[51]

Collins' approach has been fairly criticised as replacing one set of contested concepts (those related to 'equality') with another (those associated with 'social inclusion').[52] However, by focusing on targeting social inclusion, rather than attempting to achieve equality by protecting against discrimination on the grounds of certain protected attributes, his proposal would provide a clearer way to determine when a group should benefit from special measures. Collins' notes that:

> One effect of the indeterminacy of protected groups ... is that the province of anti-discrimination laws always remains contested. In contrast, social inclusion provides a more determinate criterion for the composition of protected groups. The question is whether the group is one that in practice has been disproportionately socially excluded compared to the population as a whole.[53]

It is politically impractical as well as patently undesirable to amend statutes that outlaw discrimination against all races or genders and introduce legislation that seeks to protect only socially excluded racial or gender groups. What Collins points to, however, is the need for measures beyond simply neutral, formal equality focused anti-discrimination laws, to bring about meaningful social results. Such measures could include carefully designed affirmative action programs that seek to directly tackle either economic disadvantage or social exclusion, by applying criteria that do not evoke solely racial or collective identity. Indigenous Australian academic Larissa Behrendt, for example, argues that the effectiveness of positive discrimination measures can be improved by acknowledging the interrelationship between class and racial or gender disadvantage. She suggests that affirmative action programs should target both race and class:

> programs [could] directly target the most economically disadvantaged. ... if 40% of the poorest sector is indigenous, quotas should aim at making sure that 40% of affirmative action program recipients are from that group.[54]

Both Behrendt and Collins acknowledge the rhetorical and political power of framing laws on the basis of factors other than collective identity.[55] Importantly, they also address the critique of the liberal focus of anti-discrimination laws by explicitly acknowledging the need for positive measures to bring about equality (or social inclusion).[56]

So-called 'third generation' discrimination laws seek, like Collins and Behrendt, to confront the historical focus of legislative instruments in this area upon procedural and formal equality. The Western Australian government, for example, has adopted a *Policy Framework for Substantive Equality* that seeks to examine how discriminatory but neutrally applied practices have become embedded in public sector practices.[57] In Northern Ireland the Equality Commission has a more

41. See Patmore's argument for a substantive rather than formal reading of anti-discrimination provisions: Glenn Patmore, 'Moving Towards a Substantive Conception of the Anti-Discrimination Principle: *Waters v Public Transport Corporation of Victoria* Reconsidered' (1999) 23 *Melbourne University Law Review* 121.

42. Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535.

43. See Elizabeth Dickson, ' Disability Discrimination in Education: *Purvis v New South Wales (Department of Education and Training)*, Amendments of the Education Provisions of the *Disability Discrimination Act 1992* (Cth) and the Formulation of Disability Standards for Education' (2005) 24 *The University of Queensland Law Journal* 213, 213.

44. *Street v Queensland Bar Association* (1989) 168 CLR 461, Gaudron J 571.

45. New South Wales Law Reform Commission, above n 39, ch 3, 3.50.

46. Ibid, ch 3, 3.9.

47. Robert Woodson, 'Affirmative Action is No Civil Right' (1995–1996) 19 *Harvard Journal of Law and Public Policy* 773, 775 & M Maddox ' Affirmative Action: Liberal Accommodation or Radical Trojan Horse' (1998–99) 14 *Australian Journal of Legal Studies* 1,8.

48. See Hugh Collins, 'Social Inclusion: A Better Approach to Equality Issues?' (2004–2005) 14 *Transnational Law and Contemporary Social Problems* 897 & Collins, above n 30.

49. Collins, above n 48, 913.

50. Ibid.

51. Collins, above n 30, 23.

52. See Lea VanderVelde (2004–2005) 14 *Transnational Law and Contemporary Problems* 919.

53. Collins, above n 30, 27.

54. Larissa Behrendt, 'Meeting at the Crossroads: Intersectionality, Affirmative Action and the Legacies of the Aborigines Protection Board' (1997) 4 *Australian Journal of Human Rights* 101, 111.

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powerful ability to force government departments to implement measures to bring about substantive equality.[58] 'Third generation' solutions seek to move beneficial laws out of 'neutral' and into 'drive' by emphasising the need to take positive measures to bring about beneficial policy results.

Conclusion

This article has discussed the manner in which Australian anti-discrimination law understands individual and collective identities. It has been suggested that in many ways laws in this area do not adequately reflect the complexity of individual and collective identity and the reality of how discrimination is experienced. Notably anti-discrimination laws in Australia largely ignore the phenomena of intersectionality, while also demonstrating a potential to essentialise some collective attributes. Further the 'neutrality' of key anti-discrimination statutes, at times, results in the beneficial nature of this body of law being overlooked by courts and tribunals.

It has been suggested that there are a number of practical measures which can be taken to ensure that anti-discrimination law better reflects the complex reality of how discrimination is experienced. Further, it has been suggested that the method of legislating to achieve particular outcomes (such as 'social inclusion') rather than simply to protect those with certain attributes, avoids the complexities involved with defining collective identities and their relationship to how discrimination is experienced. Importantly, it has been argued that attempts to bring about either 'substantive equality' or 'social inclusion' must, if they are to offer anything more than procedural protections, rely on broader measures than the enforcement of anti-discrimination statutes. It has been argued that 'third generation' solutions, recognising the need for positive measures based on grounds other than simply collective identity status, must be embraced.

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The paper on which this article is based won the 2006 University of Western Australia Equity and Diversity Office Prize in Law. The author would like to thank Daniel Stepniak and Associate Professor Rob Stuart for their assistance.

55. See ibid, 111 and Collins, above n 48, 899.

56. See Behrendt, above n 54, 112 and Collins above n 48, 42–43.

57. Equal Opportunity Commission *The Policy Framework for Substantive Equality* (2004).

58. See *Northern Ireland Act 1998* (UK) s 75 & Equality Commission for Northern Ireland http://www.equalityni.org at 29 February 2008.