

Issues paper – Enforcement of a duty to eliminate discrimination

If a positive duty were imposed, the question will arise as to how the duty will be enforced. Criticisms of the duty to eliminate discrimination in the Victorian Act (the only Australian jurisdiction to enforce a positive duty not to discriminate) include that the VEOHRC must initiate an investigation into potential breaches, breaches may not be initiated by an individual. Thus, the effectiveness of the duty is contingent on the threat of the VEOHRC making an inquiry. As the VEOHRC has only exercised this function once in nine years this threat may be perceived as low.

The Commission seeks submissions on whether individual complainants should have the ability to make a complaint for a breach of the positive duty, or whether any breach may only be investigated at the initiative of the EOC.

Case law has confirmed the limited ability for the judiciary to enforce the positive duty to eliminate sexual harassment and victimisation under section 15 of the Victorian Act and as indicated above, there has been minimal substantive judicial consideration of the positive duty since its introduction in Victoria. Any consideration that has arisen has overwhelmingly been supplementary to alleged discriminatory acts, rather than a standalone attempt at enforcement of the positive duty itself. Some submissions on this issue have detailed examples of the successful implementation of a positive duty in the Victorian Act, such as the positive impact it has had on the Australian Women's Football League. The DDLS states that a discrimination framework can only truly claim to be protective, preventative and prophylactic if a positive duty can be enforced. Its submission refers to the UK Act which contains a positive equality duty that applies to all public sector organisations and all grounds covered by the UK Act, and submits that, in contrast to the Victorian Act, the UK Equality and Human Rights Commission (EHRC) is actively involved in monitoring and regulating compliance. The UK Act recognises that public authorities might need to treat some people more favourably in order to achieve substantive equality as opposed to formal equality. Further, under the UK Act, public authorities are required to annually report on their compliance with this duty. The EHRC can then investigate an authority and issue a compliance notice. On one view, this would ensure duty holders are proactive in making necessary changes. On another view, the requirement to report would be onerous and unnecessary if the duty was being complied with.

An argument in favour of permitting individuals to complain of breaches of the duty, and granting the SAT jurisdiction in respect of breaches, is that the positive duty would have practical effectiveness. Therefore, unlike in Victoria, the Act would encourage proactive compliance with the duty and ultimately lead to a reduction in discrimination.

The Commission also invites submissions on whether the SAT should have jurisdiction in relation to breaches of the duty if one was recognised in the Act.

The Commission invites submissions as to whether, like in the UK, duty holders should be required to publish information in relation to their compliance with the duty and if so, which duty holders.

A full discussion of these issues is in the Discussion Paper at pages 157-58.