

STUCK AT THE INTERSECTION: ANTI-DISCRIMINATION LAW AND INTERSECTIONALITY IN AUSTRALIA

The Australian Human Rights Commission is undertaking a 'national conversation' to identify reforms for the protection of human rights in Australia. Among the Commission's inquiries is how to recognise intersectionality in federal anti-discrimination law. This article analyses some of the shortcomings under the current law for individuals who possess multiple, co-existing protected attributes, and outlines some remedies to these problems.

I INTRODUCTION

Australian federal anti-discrimination law is enshrined in four substantive Acts – the *Racial Discrimination Act 1975* (Cth) ('RDA'), *Sex Discrimination Act 1984* (Cth) ('SDA'), *Disability Discrimination Act 1992* (Cth) ('DDA') and *Age Discrimination Act 2004* (Cth) ('ADA'). A fifth act, the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') defines the functions of the Australian Human Rights Commission ('the Commission') and the processes of enforcement of the four substantive acts. The soiled nature of the framework reflects a particular social, political and cultural context in which each that Act was passed, reflecting an evolving public consciousness of the identity groups affected by discrimination. The precedent of adding new protections every 8-10 years appears likely to continue, with Morrison Government committing to a Religious Discrimination Act following recommendations of the Report of the Ruddock Expert Panel on Religious Freedom.¹

The basis of Australian anti-discrimination laws is prohibition on discrimination in respect of particular protected attributes, like sex and age, in specified areas, like employment and education, subject to some exceptions. A single-categorisation framework dominates the law, such that complainants must show that they possess one protected attribute and that that attribute is the basis of discriminatory treatment.

There is growing academic and legal recognition of the framework's failure to contemplate how the various protections intersect for people who possess multiple protected attributes and who experience discrimination on the basis of those attributes, also called intersectional discrimination.² This year, the Commission embarked on a national project: *Free and Equal: An Australian conversation on human rights* ('the Conversation'). The purpose of the Conversation is to develop guidance that will inform human rights and equality policy reform in the future.³ One priority outlined by the Commission is to

¹ Mark Fowler, 'What equality of persons demands: Australia's adoption of a Religious Discrimination Act is long overdue', *ABC* (Opinion Article, 20 February 2019)

² Julia Mansour, 'Consolidation of Australian Anti-discrimination Laws, An Intersectional Perspective' (2012) 21(2) *Griffith Law Review* 533, 534.

³ Australian Human Rights Commission, '*Free and Equal: An Australian conversation on human rights Issues Paper 2019*' (Issues Paper, Australian Human Rights Commission, April 2019), 3.

reform federal discrimination law to make it ‘more effective, comprehensive and fairer in its protections’⁴.

This article suggests that the recognition of intersectional discrimination is fundamental to the Commission’s goal. Some of the most vulnerable people in the Australian community have intersectional identities, and equality demands that their unique experience be recognised. This article is divided into five parts: the first part outlines the basis of intersectionality as a theory; the second analyses how intersectionality affects anti-discrimination law; the third establishes the existence of intersectional identities in the Australian community; the fourth analyses some of the problems that may arise for those claimants under the current federal anti-discrimination framework; and the fifth examines briefly how anti-discrimination law might be re-imagined to better protect those who face intersectional discrimination.

II THEORY OF INTERSECTIONALITY

Intersectionality theory recognises that ‘different identity categories can intersect and co-exist in the same individual in a way which creates a qualitatively different experience when compared to any of the individual characteristics involved’⁵. Thus, discrimination faced by elderly women is different from that faced by other women and different from that faced by other elderly people.

Intersectionality was first articulated by Professor Kimberlé Crenshaw in her article *Demarginalizing the Intersection of Race and Sex* in 1989.⁶ Crenshaw examined the experience of African American women in the United States who made discrimination claims under the *Civil Rights Act of 1964*. She found that the single-categorisation framework of discrimination law disadvantaged those claimants, because they experienced a form of discrimination the law did not contemplate: that is, African American women experienced a unique form of discrimination by virtue of being black women, a form of discrimination that is qualitatively different from that of white women or black men. Although much of the academic discussion since has focused on the intersection of race and gender, intersectional scholarship need not be so confined, as experiences of intersectional discrimination are not limited to this dyadic grouping of identities.

As a theory, intersectionality is ‘an area replete with complexity’⁷. Some scholars are concerned that in the process of recognising sub-groups of identities, intersectionality necessarily requires the recognition of a privileged class: an ‘uber-privileged, white, able bodied, heterosexual, cisgender,

⁴ Ibid.

⁵ Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' [2016] (16) *The Equal Rights Review* 73, 73.

⁶ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *Chicago Legal Forum* 139.

⁷ Mansour (n 2) 537.

upper class man'⁸. While that is true, recognising such a class does not necessarily undermine the ability of intersectionality to highlight to unique experience of discrimination faced by people who experience multiple and co-existing forms of subordination. To complicate matters further, others argue that the very creation of protected grounds produces 'inequality in the process of producing difference'⁹.

Importantly, recognising intersectional discrimination involves acknowledging that discrimination law is 'built around a liberal conception of a rights-holder that differs from a comparator at only one point of removal'¹⁰. The result is paradoxical: the law is most effective for people who only deviate from the privileged class in one way and is over-burdensome for claimants whose experience of discrimination does not fit neatly into the single-categorisation framework. An intersectional approach reveals for a more complex understanding of identity and demands a legal framework that has the capacity to meaningfully recognise the experience of intersectional discrimination.

III INTERSECTIONALITY AND ANTI-DISCRIMINATION LAW

In applying intersectionality to discrimination law, it is important to clarify the nature of intersectional discrimination. Multiple discrimination and intersectional discrimination must not be conflated. The former involves adding categories of identity together to produce a cumulative form of discrimination. For example, a disabled woman may experience discrimination on the basis of sex and on the basis of her disability. She may also experience discrimination because of stereotyped ideas held about disabled women as a class, that are not held about all women, or all disabled people. The distinction is rarely made and the terms are often used interchangeably. In 2011, the Government released a discussion paper that, among other things, sought submissions on intersectional discrimination ('2011 Discussion Paper'). Even that paper fell short of a nuanced approach to intersectionality:

Intersectional discrimination is discrimination experienced by a person because of two or more aspects of their identity. For example, a woman from a non-English speaking background may experience discrimination because of both her sex and race or an elderly man with a hearing impairment may experience discrimination because of both his age and disability.¹¹

⁸ Smith (n 5) 78. See also Catharine MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987) 35.

⁹ Mansour (n 2) 536, quoting Leslie McCall, 'The Complexity of Intersectionality' 30(3) *Signs: Journal of Women in Culture and Society* 1773.

¹⁰ *Ibid* 538.

¹¹ Australian Government Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, September 2011) 24 ('2011 Discussion Paper').

Both intersectional discrimination and multiple discrimination are concerned with experiences of discrimination based on more than one ground, however the recognition of multiple discrimination will not adequately address the disadvantage that is faced by those discriminated against on the basis of intersecting protected attributes.

IV INTERSECTIONAL DISCRIMINATION IN AUSTRALIA

There are few cases in Australia where intersectional discrimination is an explicit issue, however this is not to say that such cases don't exist. To the contrary, it is well established that many people in Australia experience intersectional discrimination. It may be that cases of intersectional discrimination don't present themselves as such, as complainants make the decision to pursue their case under one Act over another.¹² The submissions to the Attorney-General's Department in response to the 2011 Discussion Paper highlighted the various experiences of multiply marginalised people. A number of organisations referred to the experiences of Aboriginal people:

*A single Aboriginal woman with young children, who has experienced domestic violence, seeking private rental accommodation could be discriminated against on the basis of her sex, marital status, race or family responsibilities, compounded by prejudice towards victims of domestic violence.*¹³

*An Aboriginal woman who has a degenerative illness affecting her ability to walk, may be constantly harassed by the police for being drunk in a public place – it is a combination of an unfair imputation to her race and a disability that causes the less favourable treatment.*¹⁴

Other organisations pointed to the difficulties social and financial disadvantage can create:

*There is a frequent intersection between homelessness, unemployment, receipt of social security payments and age, mental health or disability and gender.*¹⁵

Our clients are disadvantaged both socially and financially, and they often face disadvantage on more than one level. A snapshot of our client base would show that more than half are women, some suffer from a disability, some are homeless, some have criminal records, about 10% come

¹² Mansour (n 2) 542.

¹³ Australian Domestic and Family Violence Clearinghouse, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (2012) 16.

¹⁴ Legal Aid Queensland, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (1 February 2012) 11.

¹⁵ Public Interest Law Clearinghouse, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (1 February 2012) 22.

*from culturally and linguistically diverse backgrounds. It may be difficult for our clients to identify specifically which area of disadvantage is causing them to be treated less favourably.*¹⁶

*In combination with economic discrimination which, as women, generally affects lesbians more than gay men, a lesbian can often face sex discrimination, sexual orientation discrimination, gender expression discrimination, age discrimination, race discrimination, geographic discrimination, and maybe even disability discrimination, all at once.*¹⁷

Beth Gaze and Belinda Smith posit that ‘most individuals can be characterised by multiple or intersectional attributes of disadvantage’¹⁸. At first blush this may appear to be a generalisation, however even a brief analysis into Australia’s population reveals the scale of diversity in the community: one in every 6 people in Australia are over the age of 65¹⁹ and over a third of them (37%) were born overseas²⁰; one fifth of people speak a language other than English at home²¹; 5.1% of the population have a disability that requires assistance with core activities²² with females more likely to require assistance than males (5.4% compared with 4.8%)²³.

It is impossible to make any concrete conclusions about the intersectional attributes of people who formally bring discrimination complaints to the Commission, as the Commission does not produce disaggregated data to that effect. It would be instructive to know, for example, what proportions of complainants who bring a claim under the ADA also identify as LGBTIQ, of a racial minority or a person with a disability? Do women who belong to a racial minority demonstrate a preference for bringing claims under the SDA over the RDA in circumstances where both sexual and racial discrimination may have played a role? This under-reporting shows how the single-categorisation framework of discrimination dominates institutions’ understanding about identity, which results in law and policy that does not cater for the multiply marginalised.

To the Commission’s credit, it is alert to the difficulties that the current legislative framework creates for those who experience intersectional discrimination. The technical paper *Priorities for federal law reform*, released in August 2019 outlines intersectionality as an objective of the Commission’s

¹⁶ Legal Aid Queensland (n 14).

¹⁷ Australian Lesbian Health Coalition, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, (29 January 2012) 4.

¹⁸ Beth Gaze and Belinda Smith, *Disability and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 85 [49].

¹⁹ Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australian Stories from the Census, 2016: Ageing Population 2016* (Catalogue No 2071.0, 23 October 2017).

²⁰ *Ibid.*

²¹ Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australian Stories from the Census, 2016: Cultural Diversity in Australia* (Catalogue No 2071.0, 28 June 2017).

²² Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australian Stories from the Census, 2016: Core activity need for assistance* (Catalogue No 2071.0, 19 April 2018).

²³ *Ibid.*

proposals for law reform.²⁴ The Commission recognises that ‘protections for different attributes must be able to work together easily – having different tests for different attributes (such that a person has different elements of proof) is burdensome and less effective’²⁵.

V INTERSECTIONALITY AND AUSTRALIAN ANTI-DISCRIMINATION LAW

A *The complaints system*

At a federal level, the Commission has the power to determine complaints of unlawful discrimination under Part II of the AHRC Act. The Commission generally adopts conciliation mechanisms to remedy complaints. In cases where complaints cannot be resolved through the Commission's complaint handling mechanisms, a claim can proceed to the Federal Court or the Federal Circuit Court.²⁶ Only a small proportion of complaints continue to court. In 2017-18, the Commission finalised 2111 complaints, 74% of which were successfully resolved through conciliation.²⁷ The Commission reports that data received indicates that less than 3% of finalised complaints proceeded to court, while 32% were either withdrawn²⁸ or discontinued.²⁹

The complaint process of the Commission has the potential to deal with intersectional claims. The process is generally accessible - it is less formal and less costly than formal court proceedings, and the Commission accepts complaints in a variety of formats. The threshold for bringing a complaint is relatively low, only requiring that a link be made between the conduct alleged and the discriminatory behaviour.³⁰ Further, the Commission will accept and deal with complaints alleging discrimination on the basis of a combination of attributes, as a single complaint rather than as a series of complaints on separate grounds.³¹ In the absence of disaggregated data however, it is difficult to tell how responsive the complaints system is to experiences of intersectional discrimination.

²⁴ Australian Human Rights Commission, *Discussion Paper: Priorities for federal discrimination law reform (2019)* (Discussion Paper, August 2019) 6.

²⁵ *Ibid.*

²⁶ *Australian Human Rights Commission Act 1986* (Cth) s 46PO (*‘AHRC Act’*).

²⁷ Australian Human Rights Commission, *2017-18 Complaint Statistics* (2018) Tables 5 and 7.

²⁸ This category include where a complainant withdraws due to personal circumstances or where they decide not to proceed after reviewing information from the respondent or being provided with information about the law and/or a preliminary assessment of the complaint. A complaint may be discontinued where a complainant does not respond to the Commission's attempts to contact them. This may occur after they have received information from the respondent or been provided with information and/or a preliminary assessment of the complaint.

²⁹ Australian Human Rights Commission, *2017-18 Complaint Statistics* (2018) Table 6.

³⁰ *AHRC Act* (n 26) s 46P.

³¹ Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) 25.

B *Legislative framework and cases*

Each of the federal anti-discrimination Acts acknowledge that discrimination can occur for multiple reasons.³² There is no onus on the claimant to prove that the discrimination they allege was solely or even substantially based on a particular ground. In practice however, this has not proven fruitful ground from which to make intersectional claims.

There are few reported cases that recognise intersectional discrimination: only *Fares v Box Hill College of TAFE* explicitly acknowledges the unique experience of ethnic minority women in the workplace.³³ There are no Australian discrimination cases in which intersectional discrimination has been explicitly recognised. In *DPP v SE*, Justice Bell considered the application for bail by a young Aboriginal person with an intellectual disability.³⁴ In the context of adopting procedures and making determinations under the *Bail Act 1977* (Vic), her Honour recognised the exacerbated position of vulnerability of the applicant, stating:

*The disadvantage and vulnerability suffered by persons who experience discrimination on multiple grounds, or who experience discrimination upon multiple grounds which intersect, are commonly different and greater in nature than is the case with discrimination upon a single ground.*³⁵

This recognition is positive but does little, if anything, to advance the cause of intersectionality in the context of anti-discrimination law.

In cases where intersectional discrimination might exist, the courts deal with the grounds as independent of each other. This perpetuates legal analysis that does not capture the experience of complainants whose experience of discrimination is not, in reality, referable to one protected attribute alone. In *San v Dirluck Pty Ltd* ('San') for example, the complainant, an Asian woman, had to distinguish which remarks made to her were offensive on the basis of sex, and which were offensive on the basis of race.³⁶ Those remarks included colleagues saying 'Good, I haven't seen an Asian come before' and 'That's right, fuck off ching chong, go back home'. By virtue of the law's failure to contemplate intersectionality, a fiction had to be created such that the complainant's experience of discrimination as an Asian woman could not be articulated. The federal anti-discrimination Acts do not acknowledge diversity beyond the group that deviates from the 'norm' by one, thus failing to recognise the specific form of disadvantage that intersectionality creates. In *San*, it is possible that the

³² *Racial Discrimination Act 1975* (Cth) s 18; *Sex Discrimination Act 1984* (Cth) s 8; *Disability Discrimination Act 1992* (Cth) s 10 and *Age Discrimination Act 2004* (Cth) s 16.

³³ (1992) EOC 92-391.

³⁴ [2017] VSC 13.

³⁵ *Ibid* [28].

³⁶ [2005] FMCA 750.

complainant suffered discrimination on the basis that she was an Asian woman - a class of people who are stereotyped as submissive, quiet and unlikely to retaliate.³⁷ While it may not have made a practical difference to the outcome of the complainant's case in *San*, it is nevertheless anachronistic to deny claimants an avenue of redress that acknowledges their whole identity, especially when that identity is the foundation of the discriminatory treatment.

In some cases, the failure of the law to recognise intersectionality renders it impossible for a complainant to establish discrimination on the basis of an attribute that may in fact have played a role in their experience. The determination made in *Wu v Cohen* provides an example.³⁸ The complainant was a Chinese immigrant in Australia, who lodged complaints against her employer under the SDA and the DDA. In her sex discrimination claim, the complainant alleged that the respondent hugged her from behind with his arms around her at breast level, tried to squeeze her bottom, invited her to dinner and made sexually loaded comments. In her disability discrimination claim, the complainant alleged that she suffered discrimination on the basis of a back injury that she suffered at work, by being given less favourable shifts and not being given appropriate support for her back and legs. The complainant succeeded under the DDA but not under the SDA. The determination considered whether a reasonable person would have anticipated that the complainant, as a woman, might have been offended by the respondent's conduct, and found in the negative. Should the Commission have recognised intersectionality, it might have considered whether a reasonable person would have anticipated that the complainant, as a non- English speaking woman with a disability, might have been offended by the respondent's conduct. The latter question would have provided for an analysis that better captured the treatment of the complainant. It is worth noting that the Commissioner had regard to 'stressors' that made the complainant vulnerable, including her immigration to Australia, the political and personal oppression she suffered in China during the Cultural Revolution, and the ongoing separation from her family. Such considerations could have provided a platform from which intersectional identity might have been considered but were not utilised to that effect.

Moreover, the treatment of intersectional claims as independent can also be burdensome for complainants who have to satisfy different tests for each claim they make. In *Maxworthy v Shaw*, the complainant had to satisfy different tests for each of her claims under the SDA and the DDA, even though they arose from the same facts.³⁹ The complainant's employment was terminated after the respondent required her to work long hours despite her childcare responsibilities, which in combination with ill-treatment by the respondent and a lack of appropriate support for her duties, 'led

³⁷ See generally Shruti Mukkamala and Karen L. Suyemoto, 'From Exotic to Invisible: Asian American Women's Experiences of Discrimination' (2018) 9(1) 32-46.

³⁸ *Wu v Cohen* [2000] HJREOCA 36.

³⁹ *Maxworthy v Shaw* [2010] FMCA 1014.

to the exacerbation of her Crohn's disease symptoms'⁴⁰. The Court found it was 'not inconsistent or inappropriate'⁴¹ to find that the real reason for the complainant's termination under the SDA was her family responsibilities and that the real reason for the complainant's termination under the DDA was her disability. A complainant who has suffered discrimination can be required to meet different tests for a single instance of discrimination where the conduct arises as a result of the intersection of more than one protected attribute. To require this level of proof discriminates against intersectional claimants in a manner fundamentally opposed to the purpose of anti-discrimination legislation, by increasing the evidentiary hurdle they must overcome.

VI HOW INTERSECTIONALITY ADDRESSES THE SHORT-COMINGS OF ANTI-DISCRIMINATION LAW

With the exception of the RDA, the substantive anti-discrimination Acts all commit to equality and elimination of discrimination. The purpose of federal anti-discrimination law then, is to eliminate instances of discrimination based on protected attributes, on the assumption that doing so will reduce inequality. This approach affects formal equality but has less impact on substantive quality, that is, equality of results and equality of opportunity, in a way that redresses disadvantage and achieves structural change.⁴² Substantive equality is an elusive goal - there will always be emerging forms of inequality, especially when multiple and co-existing attributes are considered, but that should not prevent the law from aiming to achieve it.

The single-categorisation framework makes the law ill-suited to bringing about substantive equality. It is based on a model of procedural fairness which views the individual as the norm but for the possession of protected attributes. In doing so, it creates a 'fiction of uniformity'⁴³ that does not contemplate the experience of diverse groups within the broad classes of protected attributes. This approach essentialises the experiences of identity groups by assuming that individuals can be characterised by one dominant ground, leaving those with complex identities the problem of 'judicial wrangling' should they bring a claim, or completely outside the scope of protection. Even where the law recognises discrimination based on multiple grounds, those grounds will not be treated as intersectional. Acknowledging intersectional discrimination removes the need for this fiction and importantly, ensures that multiply marginalised people have their experience of discrimination recognised and remedied appropriately.

⁴⁰ Ibid [88].

⁴¹ Ibid [133].

⁴² See generally Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) *International Journal of Constitutional Law*, 712-738.

⁴³ Smith (n 5) 81.

The value of recognising intersectionality in federal anti-discrimination law is not just confined to equal protection and benefit under the law. Dr Mark Nolan suggests there are important psychological and social benefits of recognising intersectional identity; namely that it would acknowledge the ‘complexity and richness of social life’⁴⁴. Memberships and identities in a diverse society are derived from both physical and psychological characteristics and are fundamental to day-to-day social interactions.⁴⁵ The single-categorisation framework of anti-discrimination legislation misrepresents the complexities of an individual's identity, which often comprises of ‘multiple group memberships’⁴⁶. Nolan points out that accurate social categorisation can affirm and legitimise identity, instill pride and self-esteem and give people the confidence to argue for identity-based self-determination.⁴⁷ Thus, the importance of recognising the intersectional identities in the law should not be underestimated.

VII RE-IMAGINING ANTI-DISCRIMINATION LAW

How to best recognise intersectionality in anti-discrimination law should be a priority of the AHRC and the Conversation. To recognise intersectionality meaningfully will require a restructuring of anti-discrimination law, and research into how the intersection of protected attributes creates unique experiences. Australian anti-discrimination legislation should, at the very least, specifically guide courts and decision-makers to consider cases of intersectional discrimination and give weight to the aggravated disadvantage that intersectionality creates. A proposal in the Human Rights and Anti-Discrimination Bill 2012 (Cth) provided that ‘discrimination by unfavourable treatment’ would include unfavourable treatment ‘because the other person has a particular attribute, or a particular combination of 2 or more attributes’.⁴⁸ Such a provision would, at the very least, provide certainty around the acceptance of intersectional claims.

The consolidation of federal anti-discrimination law to create an omnibus Act has been also canvassed as one way to facilitate claims of intersectional discrimination.⁴⁹ Standardising the tests across protected attributes and as well as the definitions of discrimination, harassment and victimisation would go some way in simplifying the process complainants must go through when bringing claims that don’t fit squarely into the single-categorisation framework. That is however, probably not enough to bring about a meaningful change that recognises the realities of intersectional discrimination and achieve substantive equality.

⁴⁴ 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.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid 104.

⁴⁸ Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 19.

⁴⁹ See generally 2011 Discussion Paper (n 11).

More radically, we might consider adopting a flexible and contextual approach to determining whether discrimination has occurred. Both Canada and South Africa adopt this approach. In South Africa, the Court makes comparisons contextually, that is, (a) between all relevant comparators, identified by reference to one, some or all of the attributes possessed by a complainant; and (b) analysing whether patterns of group disadvantage exist for the specific group to which the complainant belongs.⁵⁰ In Canada, the Court adopts a flexible approach in which it is not necessary ‘to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination’.⁵¹ Instead, it recognises the ‘general usefulness’ of comparison but is not bound by a comparator in determining whether discrimination has occurred.⁵²

This article does not have scope to consider the merits of each in depth. What should be taken from these examples however, is that anti-discrimination law need not be confined to a strict comparator analysis or discrete protected attributes. If courts could consider discrimination with reference to structural disadvantage, the law might be better placed to recognise and remedy situations where discriminatory conduct has occurred, but cannot be attributed to a single protected ground of protection. Thus, there are a number of options for the Commission to consider in its search for a framework that captures the experience of those who face intersectional discrimination. An approach that gives the court scope to recognise disadvantage that results from possessing multiple protected attributes, in whatever combination they exist, should be the goal of whatever proposal the Commission makes.

VIII CONCLUSIONS

This article has attempted to demonstrate how those who possess multiple, co-existing protected attributes are not well catered for by federal anti-discrimination law in Australia. I have sought to examine the theoretical basis for applying intersectional theory to anti-discrimination law and argued that when applied, the theory reveals a paradoxical affect: the framework which operates to protect people from discrimination creates significant barriers to enforcing those protections for some of the most disadvantaged people in the Australian community. With respect to reform, I suggest that only an approach that facilitates an analysis of structural disadvantage will adequately address intersectional discrimination. This will require significant legislative change however that should not deter reform.

⁵⁰ *Hassam v Jacobs* (NO) [2009] ZACC 19 (CC) [31] and Shreya Atrey, 'Comparison in intersectional discrimination' [2018] 38, *Legal Studies* 379, 379.

⁵¹ *Withler v Canada* [2011] 1 SCR 396 [41]ff (SCC).

⁵² *Quebec v A* [2013] 1 SCR 61 [169] (SCC).

Intersectionality is certainly not a panacea for all the shortcomings of Australian anti-discrimination law, nor is anti-discrimination law the cure for inequality in our society. Substantive equality requires both policy and legal reform across many areas. Nevertheless, addressing intersectional discrimination through anti-discrimination law is a step towards equality, and one we should seriously consider taking.

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