

Whose fault is it?

Asking the right question when trying to address discrimination

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Introduction

Is it possible to discriminate without knowing? Can we make distinctions without discriminating? Who is harmed by discrimination? For law to address a problem like discrimination a clear conception of the problem needs to be developed so that the most appropriate regulatory response can be designed. In this article we compare Australian anti-discrimination laws with equivalent laws in the United Kingdom and Canada to illuminate the conception of discrimination that underpins each law and to prompt further debate about the appropriateness of the Australian model. The Federal government proposes to 'consolidate' Australia's anti-discrimination laws¹ so it is timely to consider how these laws could be reformed rather than merely reformatted.

To compare laws in the three different jurisdictions we use a dichotomy developed by Oxford equality law expert Sandra Fredman between *fault*-based models of regulation and *capacity*-based models.² Different conceptions of discrimination prompt different models of regulatory response. If discrimination is seen as the intentional or reckless conduct of misguided or biased individuals, it might be appropriate to design a law that prohibits such conduct and holds those individual perpetrators to account. Under this conception of discrimination, we expect those found to be at fault to provide redress. This is the central feature of a fault-based model of regulation. Alternatively, if discrimination is defined more widely to include all barriers to equality that are built into rules and criteria, practices and the environment, a regulatory response that looks for a person at fault before anything is to be done to address the problem would be misguided. Under this conception of discrimination, the most useful questions might not be about fault, blame or wrongdoing but about capacity – who is in the best position to do something about the problem and how

¹ Attorney-General, Hon Robert McClelland MP & Minister for Finance and Deregulation, Hon Lindsay Tanner MP, Joint Media Release: Reform Of Anti-Discrimination Legislation, 21 April 2010 www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAnti-DiscriminationLegislation (18 August 2011).

² Fredman, S. (2005). "Changing the Norm: Positive Duties in Equal Treatment Legislation." *Maastricht Journal of European and Comparative Law* **12**: 369-398.

much should they do? In this capacity-based model of regulation, responsibility for addressing inequality is more widely shared.

Fredman has used the fault/capacity dichotomy to explain fundamental differences between two regulatory approaches to equality in the UK. The fault-based approach describes the traditional individual complaints-based anti-discrimination laws, while the newer positive duties are described as a complementary capacity-based approach designed to proactively change institutions. As detailed below, the dichotomy works well to explain the underlying difference between the UK's traditional anti-discrimination laws and positive duties. However, complaints-based systems do not necessarily reflect a narrow fault approach. Whether an approach can be described as fault-based or capacity-based comes down to a question of who bears responsibility for promoting equality and what triggers a duty to act – a finding of causation or simply evidence of inequality? Examination of Canadian anti-discrimination law reveals that even an individual complaints model can reflect the assumptions of a capacity-based approach whereby discrimination is assumed to be pervasive, structural and harmful to society thus warranting a collective obligation to address it. As explained below, the key is the definition of discrimination.

After briefly outlining Fredman's dichotomy we demonstrate that the UK and Canada have both moved away from a fault-based approach toward a capacity-based approach, but they have taken different regulatory paths to achieve this. We then show that Australian laws reflect the fault-based approach and there has been little movement along any pathway since their introduction over thirty years ago.

The Fault / Capacity Dichotomy

Fredman argues that a fault-based model of regulating equality assumes three things: that discrimination is an unusual occurrence, carried out as an individual act, and the act harms an identifiable victim. The focus is on discrimination as a wrongful act that inhibits equality and thus must be regulated. Being understood as individual in action and individual in its consequences, a tort-style model of regulation is used to regulate this kind of behaviour by prohibiting the impugned behaviour and requiring any perpetrators to make amends for their aberrant behaviour by compensating the identified victim. While not necessarily framed as a criminal wrong, the wrong is characterised as a morally culpable act for which a perpetrator should be held responsible. Associated with this is a presumption of 'innocence'; behaviour is presumed to be non-discriminatory unless proven otherwise. This means the duty-holder is not required to do anything unless their actions are proven to be discriminatory. In essence, unless a duty-holder can be shown to have directly caused inequality, they bear no responsibility for addressing it.

In contrast, under the capacity-based model the focus is on *inequality* rather than discrimination and responsibility for addressing inequality is shared more widely. The underlying assumptions are that discrimination: is pervasive, embedded in practices, systems, institutions and norms, and the harm is not limited to any identifiable victim. Evidence of inequality triggers a duty to take action to address inequality rather than a search for a particular perpetrator. The notion of equality built into this model assumes all members of society have the potential to develop and contribute to society in a range of ways and that all members are entitled to dignity and the opportunity to develop their

capabilities. Inequality is seen as a product of discriminatory practices or barriers that illegitimately exclude groups and inhibit the development of capabilities.

By focussing on the duties that are central to the regulatory models in the UK, Canada and Australia we are able to illuminate the conception of discrimination and equality that underpins each model.

United Kingdom – Fault-Based Plus Capacity-Based

The UK initially used a fault-based individual complaints-based model to tackle inequality. Discrimination by duty-holders, such as public and private employers and service providers, was prohibited and victims were given the right to take action in employment tribunals or the County Court. In Britain, separate statutory agencies were created to handle race, gender and disability discrimination which were later amalgamated into one agency, the Equality and Human Rights Commission (EHRC), while the Equality Commission for Northern Ireland (ECNI) is responsible for Northern Ireland. The agencies have enforcement powers which they have used with differing degrees of success but they do not offer compulsory conciliation, nor do they receive or investigate complaints. Notably, anti-discrimination laws in Britain did not permit special measures or positive action to promote equality of opportunity, although the Northern Irish law allowed fair participation measures to achieve religious equality.

Within this complaint-based model, changes to the UK laws have been incremental and primarily revolved around the burden of proof. The definition of indirect discrimination is based on the original definition in US Supreme Court's decision of *Griggs v. Duke Power Co.* which places an evidentiary burden on the respondent.³ Once the complainant established that a requirement or condition had a substantially higher impact on them than on a person of a different race or sex, the onus shifts to the respondent to establish that the requirement or condition in question was "justifiable".⁴ Following two European Council Directives, the laws were amended to state that once a complainant has established facts from which it may be presumed that there was direct or indirect sex discrimination in employment, it is for the respondent to prove that there was not.⁵ This is now the rule in respect of all grounds under the new *Equality Act 2010* and moves the UK toward a capacity-based model. The significance of burden shifting is explored below in relation to Canada.

Lawyers, equal opportunity agencies, stakeholders and, ultimately, the government recognised the inherent limitations of the complaints-based system. Two socio-political events led Britain and Northern Ireland to move to a capacity-based system for addressing inequality. First, despite having had anti-discrimination laws for over 20 years, there were great disparities in workforce participation between the Protestant and Catholic communities in Northern Ireland. As part of the peace negotiations, the parties agreed that positive action was required to eradicate inequality and promote harmony between the two communities. A positive duty to promote equality was enshrined in the Belfast (or "Good Friday") Agreement of 10 April 1998 and later in legislation.⁶ Second, the Macpherson inquiry into the racially motivated murder of 'black' teenager Stephen

³ 401 US 424 (1971).

⁴ *Race Relations Act 1976* (UK), s 1(1)(b); *Sex Discrimination Act 1975* (UK), s 1(1)(b).

⁵ EC Burden of Proof Directive 97/80/EC, art 4(1).

⁶ *Northern Ireland Act 1998* (UK), s 75 and Schedule 9.

Lawrence in London revealed institutional racism in the metropolitan police force despite legislation prohibiting race discrimination.⁷ The government introduced a new race equality duty.⁸ Gender and disability duties followed⁹ and in April 2011, a single equality duty across eight grounds came into force.¹⁰

The positive duties in Northern Ireland and Britain are similar in purpose and enforcement mechanisms. For instance, the Northern Irish positive duty places an obligation on public authorities to have 'due regard to the need to promote equality of opportunity' in carrying out their functions. The duty extends to religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, disability, and persons with and without dependants.¹¹ Similarly, the new single equality duty in Britain requires public authorities to have "due regard" to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity between people who share a protected attribute and those who do not, and foster good relations between people who share a protected attribute and those who do not in exercising their functions.¹²

The relevant laws specify particular actions that need to be taken for a public authority in order to comply with the positive duties. Public authorities are required to audit their policies and procedures to assess their impact on equality and revise them if necessary. They must then produce an equality scheme which details how they will meet the positive duty.¹³ In Northern Ireland, the ECNI must endorse an equality scheme and it must conform to its guidelines.¹⁴ Public authorities are required to involve stakeholders in the process of reviewing and developing the equality scheme and related policies, rather than operating in a vacuum.¹⁵ For example, diabetes is prevalent amongst members of the Afro-Caribbean community. To meet its obligations in implementing the race equality duty, the Department of Health structured the National Service Framework for Diabetes to take into account the particular needs of the Afro-Caribbean community.¹⁶

Positive duties are enforced by the EHRC or ECNI which each possess a range of escalating sanctions, starting with encouraging voluntary compliance. If a public authority is found to be non-compliant following an investigation, the commissions can issue a compliance notice. Judicial enforcement and punitive sanctions are available.¹⁷ An affected individual can also enforce the duties through judicial review.¹⁸

⁷ William Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (1999).

⁸ *Race Relations Act 1976* (UK), s 71.

⁹ *Disability Discrimination Act 1995* (UK), ss 49A, 49D; *Sex Discrimination Act 1975* (UK), ss 76A, 76B, 76C.

¹⁰ *Equality Act 2010*, s 149(7).

¹¹ *Northern Ireland Act 1998* (UK), s 75(1).

¹² *Equality Act 2010* (UK), s 149(1).

¹³ *Northern Ireland Act 1998* (UK), Schedule 9, ss 2, 4.

¹⁴ Schedule 9, 6(1).

¹⁵ Schedule 9, s 5.

¹⁶ Colm O'Connide, 'Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law' (Paper presented at Mainstreaming Equality: Models for a Statutory Duty, Equality Authority, Dublin, Ireland, 27 February 2003)

¹⁷ *Ibid* s 75; Schedule 9, ss 1, 11; *Equality Act 2006*, ss 31(1), 32.

¹⁸ *R. (on the application of Elias) v Secretary of State for Defence*.

Positive duties do have limitations. First, the requirement that public authorities 'have due regard' to eliminating discrimination or promoting equality is open textured and does not specify what goal public authorities are aiming for, though courts have started to provide some guidance about what 'due regard' entails. Second, there is a risk that public authorities will focus on the process of complying with the duties, rather than on achieving outcomes. O'Connell has identified what he terms the "'tick-box' mentality" and the bureaucratisation of the compliance process.¹⁹ His concern is that authorities will comply with procedures without turning their minds to achieving actual results. Thus, the effectiveness of positive duties depends on whether compliance can be translated into real outcomes.

The clear benefit of positive duties is that they move away from the fault-based, individualised concept of discrimination to an anticipatory, action-oriented capacity-based approach. Positive duties do not rely on an identified act of unlawful behaviour to activate them, nor are they hindered by the tangled definitions of discrimination. The responsibility for addressing discrimination is no longer borne only by the individual victim; it is shared by bodies capable of foreseeing the impact of their actions and policies on particular groups. Public authorities must take action to address discrimination before a complaint is made and the process of promoting equality is a continuing method of monitoring, engaging with stakeholders, re-evaluating and acting. In respect of the positive race equality duty Fredman wrote:

At the root of the positive duty... is a recognition that societal discrimination extends well beyond individual acts of racist prejudice. Equality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility. Positive duties are therefore proactive rather than reactive, aiming to introduce equality measures rather than to respond to complaints by individual victims.²⁰

Fredman's dichotomy shows that the UK's first attempt to address inequality through the traditional complaints-based model of anti-discrimination laws reflected a fault-based approach, which proved to be inadequate. Over time, and particularly in the last decade, a capacity-based approach has emerged through incremental changes to anti-discrimination laws and the introduction of positive duties on public authorities.

Canada – not all complaints systems are alike

Canada has also introduced positive equality duties,²¹ but here we focus on the complaints-based anti-discrimination laws. What is interesting about these laws is that although they are complaints-based, their gradual development reflects an understanding of discrimination as being more than an individual act for which only an individual perpetrator should be held responsible.

Looking at the federal anti-discrimination statute, the *Canadian Human Rights Act* RSC 1985, c H-6 (*CHR Act*), discrimination is prohibited on a range of grounds including race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, and disability, across a

¹⁹ Colm O'Connell, 'Positive Duties and Gender Equality' (2005) 8 *International Journal of Discrimination and the Law* 91, 101-103.

²⁰ Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145, 164.

²¹ *Employment Equity Act* S.C. 1995, c. 44.

range of fields including employment and the provision of goods, services and accommodation.²² Victims are given the right to bring an action against alleged perpetrators. Complaints are lodged initially with the Canadian Human Rights Commission which has power to investigate the complaint and seek to resolve it through conciliation. Like the UK system, the Commission also has its own power to initiate complaints. Interestingly if a settlement is reached between the parties, it can be rejected or approved by the Commission and, if it is approved, can be made an order of the Federal Court of Canada for enforcement. If the matter is not resolved by the Commission, the matter can be heard by the Canadian Human Rights Tribunal which has broad remedial powers, noted below.

While this model has elements that reflect a fault-based approach, notably a complaints mechanism whereby the victim brings an individual action against an individual perpetrator for a remedy, there are key aspects of it that suggest the underlying assumptions do not strictly match those of the fault model. Granting the administering commission power to initiate investigations without a complainant and to reject settlements between parties suggests the harm of discrimination is not limited to individual victims and that there is a public interest in seeing that settlements are just. While conciliation might be conducted privately, discrimination is not purely a private matter.

Further, there are other elements of the Canadian model that even more clearly demonstrate how a complaints-based model can reflect an understanding of inequality as a public problem for which responsibility needs to be shared. Three such elements are the burden of proof, an obligation to provide reasonable accommodation and a 'unified' definition of discrimination.

It was established very early in the life of the Canadian human rights laws that a complainant did not bear a heavy burden in proving discrimination but was only required to show a prima facie case before the burden shifted to the respondent to establish a justification or defence.²³ While the requirements of a prima facie case have changed over time,²⁴ the notion of a shifting burden has been maintained. This is a small but very significant feature of the rule against discrimination. In terms of underlying assumptions, the shifting burden says that discrimination is not unusual or unlikely and it is not limited to immoral action. It is pervasive and likely and can be subtle, so time and energy need not be spent by victims trying to prove that it has occurred; discrimination can be presumed from evidence of inequality. It recognises that while the respondent should be given a fair opportunity to argue against it and is in the best position to know the true reason for a decision or behaviour, evidence of inequality will be enough to place this burden of proof on the respondent.

A second and related feature of the Canadian model is the obligation to provide reasonable accommodation or adjustments.²⁵ Duty holders under the *CHR Act*, including employers and service providers, are in essence required to make accommodation up to the point of 'undue hardship' in respect of *all* protected groups. The need to interpret equality laws as including such an obligation was characterised starkly by Supreme Court of Canada Justice (later Chief Justice) Beverley McLachlin:

²² There are also complementary provincial human rights laws.

²³ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Bhinder v Canadian National Railway Co.* [1985] 2 SCR 561.

²⁴ [Cite to Judy Fudge re critique of Abella]

²⁵ See section 15 *CHR Act*.

Diverse societies face two choices. They can choose the route of no accommodation where those with power set the agenda and the majority rules prevail. The result is the exclusion of some people from useful endeavours on irrelevant, stereotypical grounds and the denial of individual dignity and worth....

The other route is the route of reasonable accommodation. It starts from the premise of each individual's worth and dignity and entitlement to equal treatment and benefit. It operates by requiring that the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends.²⁶

Under the federal statute it is clear that 'health, safety and costs' can be taken into account in determining undue hardship, and since 1998, the statute has explicitly provided that the duty to accommodate applies in respect of both direct and indirect discrimination scenarios. This duty is very significant. It means, for instance, that an employer must do more than simply treat all employees alike regardless of their disability. It is not enough simply to allow a blind employee to apply for the promotion, the employer is also obliged to provide reasonable accommodation, such as access to electronic versions of relevant documents or Braille signposting, to enable the employee to participate equally. A student with a disability would be entitled to reasonable accommodation (up to undue hardship) from the education provider to enable them participate in education and this might involve timetable adjustments, special equipment, or changes to codes of conduct to take into account the student's different needs.

An obligation to provide accommodation is a clear statement that discrimination is not limited to prejudicial behaviour but can be built into the way we do things and the equipment we use. It says that all duty holders bear at least some responsibility for reviewing their practices and environment and making some changes to reduce barriers to equality. Being a complaints-based system there is still ultimately a determination of fault. However, under these rules the fault or wrong is not necessarily an individual positive action but could be a *failure* to act to make at least reasonable adjustments. The obligation is limited by the terms 'reasonable' and 'undue' in respect of hardship, thereby acknowledging that a duty holder might not be able to achieve equality, but is obliged to make at least a reasonable effort to remove the barriers.

This illustrates how important it is when developing anti-discrimination laws to define discrimination in a way that accurately reflects the problem and will prompt an appropriate response. If discrimination is defined narrowly as *failing to allow* protected groups to participate it will only capture a small proportion of the barriers to inequality. But, if it is defined more broadly to also include *failing to enable* protected groups to participate, then there is a duty to act embedded in an anti-discrimination approach.

The third feature of the Canadian model that suggests a capacity rather than fault approach is the adoption of a 'unified' test for discrimination. The test, established in the case of *Meiorin*,²⁷ incorporates the duty to accommodate and the shifting burden of proof, but also erases the legal distinction between direct and indirect discrimination. In its unanimous judgement the Supreme

²⁶ Madam Justice Beverley McLachlin 'Reasonable Accommodation in a Multicultural Society' Address to Canadian Bar Association Continuing Legal Education Committee and the National Constitutional and Human Rights Section, April 7, 1995, Calgary, Alberta at I.

²⁷ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 ('Meiorin')

Court of Canada described the distinction as ‘chimerical’, ‘vague’, ‘difficult to justify’ and ‘unrealistic’.²⁸ Among other things, this change assists complainants by removing a complex and almost arbitrary distinction from the challenges complainants face in enforcing their right to be free of discrimination in whatever form it manifests.

The new unified test was developed in the field of employment but has since been applied to other fields.²⁹ Under the test, once the complainant has established a prima facie case of discrimination, the burden shifts to the respondent to justify the standard (which may be conduct or a condition) as a ‘bona fide occupational requirement’. The Court held that to justify a standard an employer respondent must establish three things:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose;
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.³⁰

This test has both objective elements in respect of the job (1), and subjective elements to capture intentional discrimination (2). What the third limb does is acknowledge that substantive equality may require some adjustments or accommodation by the employer as well as the employee (3). The test allows for an examination of both the employer’s purpose and the means of achieving the purpose, and builds in an obligation to design workplace standards in a way that is inclusive.

These three factors - shifting burden, reasonable accommodation obligation, and unified test – in a sense combine to transform a negative duty of non-discrimination into a positive obligation to promote equality. They do this by increasing the likelihood or risk that duty-holders will be held to account under a complaints-based model and will be required to show that they have done enough to promote equality. By reducing the litigation hurdles, employers and service providers are exposed to greater pressure to act. Reinforcing this are the wide remedial powers of the court which enable it to order not only compensation but also rectification, punitive damages for intentional and reckless conduct, and the implementation of a special program or plan to eliminate or reduce disadvantages suffered by a protected group.

Australia – still asking who’s at fault

Australia’s anti-discrimination laws are now over three decades old. In their design they were based on the UK’s 1970s fault-based model. However, unlike its British counterpart, the Australian model has not fundamentally changed. Australia’s laws prohibit discrimination on specific grounds in particular fields. The law characterises discrimination perpetrated by individuals as a wrong and

²⁸ *Meiorin* [27] -[29].

²⁹ See *British Columbia (Inspector of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 (commonly known as *Grismer*).

³⁰ *Meiorin* [54].

provide victims with a tort-like right of complaint. Orders can be made compelling the employer or service provider to compensate a victim but only after the harm has been done and the victim has proven that the employer or service provider caused the harm. The law imposes a negative duty on employers and service providers *not* to discriminate but no other obligations. Duty-holders are not required to do anything unless a finding of fault is made.

Under this system, there is little pressure on duty-holders to address discrimination. The pressure is minimised by a number of factors - the complexity of the definitions of discrimination, the heavy burden of proof for complainants, and the enforcement structure.

The law prohibits direct and indirect discrimination but the convoluted, artificial distinction between them presents the first hurdle for the victim. The High Court has taken an extremely technical and narrow approach in interpreting anti-discrimination laws.³¹ In particular, it has articulated a stark distinction between direct and indirect discrimination that does not accord with complainants' experiences. The scope of direct discrimination has been severely limited, to consistency of treatment without any obligation to accommodate difference. So, for instance, a pregnant woman who is late for work due to morning sickness needs only to be treated the same as any other worker who is late. While indirect discrimination prohibits neutral treatment which has a discriminatory effect or impact, this action has been stymied by problems of interpretation and proof. Arguably it contains an obligation to provide some accommodation, up to the point of reasonableness, but this has only been implicit and the burden of proof and enforcement structure have limited the opportunity for it to be tested or given effect.

The second limitation is that the victim bears a heavy burden in proving discrimination. Under the Australian law, there is no mechanism for shifting the burden. Conduct is presumed to be non-discriminatory unless proven otherwise. The victim's task in proving discrimination is made more difficult by the regular application of the *Briginshaw* standard,³² which requires courts to proceed carefully when evaluating the evidence. *Briginshaw* was intended for cases of serious misconduct or cases with serious consequences, yet courts have consistently applied it in direct discrimination cases. This suggests courts are more concerned about tarnishing the image of the alleged perpetrator than addressing inequality. The presence of discrimination in society is not regarded as a starting point; instead, discrimination is seen as a rare event which must be met with suspicion.

Finally, the enforcement structure further limits the pressure experienced by duty-holders. Actions can only be brought by individual victims, for individual remedies through a mostly private forum of conciliation. The statutory agency plays no role in enforcement, being unable to bring actions or support complainants. The agency's only function is to offer the parties a compulsory conciliation service in a confidential setting, the outcome of which it cannot publicise. In this way, discrimination is conceived of as a private concern between the victim and the perpetrator. This process denies the public nature of the harm and society's interest in addressing inequality. With a compulsory conciliation system and a costs jurisdiction, courts determine very few cases annually; victims choose instead to settle confidentially. For those who risk the cost and time of litigation, many

³¹ See, e.g., *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92. [add reference to Smith article on Purvis]

³² *Briginshaw v Briginshaw* (1938) 60 CLR 336.

victims are unable to establish discrimination and for those that do, courts usually award compensation despite the availability of wider, systemic remedies. The pressure on duty-holders is limited because complainants face almost insurmountable hurdles to achieve a finding of fault and private settlement is always a way of discriminators avoiding being held accountable publicly.

There have been some incursions on the fault-based approach, but these have been minor, patchy and inconsistent. The federal *Equal Opportunity for Women in the Workplace Act*, for instance, imposes a positive equality duty, but it only refers to women, and only applies to employment within large organisations. Similarly, there are some limited obligations to provide reasonable adjustments under the *Disability Discrimination Act*, but these are limited to that Act, so this obligation does not extend to other protected groups. The *Fair Work Act* contains a shifting onus of proof in respect of discrimination provisions, and this is proving helpful for complainants, but the Act only applies to employment not other fields in which discrimination occurs. Some states have made more significant progress, starkly highlighting the federal inertia.³³ While these changes are conceived and implemented in isolation, they will not fundamentally challenge the limited, fault-based nature of the model.

Conclusion

If equality is accepted as a social good that benefits all members of a society, regulation that requires responsibility for addressing inequality to be shared is justified. This was certainly a conclusion 128 discrimination law experts reached in 2008, as set out in *The Declaration of Principles on Equality*.³⁴ In nations comparable to Australia, such as the UK and Canada, this has been accepted and built into the design of equality laws. The regulatory trend discernible in these jurisdictions is clearly a move away from an individual fault-based model of discrimination regulation like Australia's which targets only discrimination that can be traced to a wrong-doer. The move is toward a regulatory model that casts a wider net requiring duty-holders not merely to refrain from wrong but also to make at least reasonable efforts to eradicate discrimination and promote equality. In the United Kingdom this is illustrated by the introduction of positive equality duties to supplement the traditional anti-discrimination laws. Alternatively, Canada's complaint-based system of anti-discrimination laws imposes a limited 'positive' obligation on duty holders to provide reasonable accommodation to members of all protected groups.

Australia's anti-discrimination laws epitomise Fredman's fault-based model. They have not significantly developed since their inception, leaving Australia lagging behind international consensus on human rights and equality. The UK and Canada were prompted to develop their equality regulation because of criticisms of their existing fault-based individual claims systems. We have demonstrated that these criticisms apply also and possibly even more strongly to the current Australian model. Yet these criticisms have not translated into reforms. Australia is stuck still asking who's at fault. To avoid achieving nothing more than 'consolidation' of narrow, inadequate, fault-based laws, we need to ask better questions. Addressing inequality is not just about fault. It's also about responsibility and how we share it.

³³ See, e.g., *Equal Opportunity Act 2011* (Vic) [add reference to Allen article on Vic EOA in AJLL]

³⁴ The Equality Trust, *The Declaration of Principles on Equality*, 2008 (UK).