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Submission to the Attorney General's Department:

Responses to questions 5 and 10 of the Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws

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EXECUTIVE SUMMARY

1. Oxford Pro Bono Publico has chosen to respond to questions 5 and 10 in the Discussion Paper issued by the Australian Attorney-General's Department in September 2011:[1]

   - Should public sector organizations have a positive duty to eliminate discrimination and harassment?
   - Should the consolidated bill protect against intersectional discrimination? If so, how should this be covered?

2. These questions were chosen because we believe that they are on the cutting edge of equality theory and practice today. They also involve issues and debates that are central to many of the other questions raised in the Discussion Paper.

3. In these submissions we argue that the consolidated anti-discrimination legislation should impose positive duties on both public and private sector organizations, and that this legislation should recognise intersectional discrimination. We go on to make recommendations on how these measures should be incorporated into the legislation, using examples drawn from discrimination laws in Canada, South Africa, the European Union,[2] the United Kingdom, the Republic of Ireland, the United States and India to identify 'best practice'.

4. In response to question 5, we make the following recommendations:

1. The consolidated anti-discrimination legislation should impose a positive duty to eliminate discrimination and harassment on public *and* private sector organisations.

(a) The precise nature and extent of the positive duty on private organisations may be made dependent on the nature and size of the organisation.

(b) The positive duty should be substantive rather than procedural, requiring duty-bearers to take 'reasonable' steps to prevent and eliminate discrimination and harassment.

(c) The substantive duty to prevent and eliminate discrimination and harassment should be supplemented by more specific duties. These should include duties to:

- review policies and practices for potential discrimination and to assess their impact on protected groups;
- prepare equality plans and timelines for implementation;

[1] Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper. (September 2011).

[2] Note that these submissions do not cover discrimination law under the European Convention of Human Rights (ECHR), the human rights instrument adopted by the members of the Council of Europe (CoE). The CoE is independent from the European Union, albeit that they have overlapping membership.

- involve protected groups in the preparation and implementation of these plans; and
- report to the relevant authorities on steps taken to implement these plans.

Guidelines should be issued to assist duty-bearers in understanding their duties.

(d) The legislation should establish a 'compliance pyramid', providing enforcement measures ranging from guidance and training through to penalties and sanctions. This enforcement mechanism should be implemented by a state agency or agencies. In the public sector, judicial review can add a further dimension to this enforcement model.

5. In response to question 10 we recommend:

2. The consolidated legislation should protect against multiple and intersectional discrimination.

(a) The consolidated legislation should contain an explicit statement that discrimination may occur on the basis of two or more protected attributes (multiple discrimination) or on the basis of a combination of these attributes (intersectional discrimination).

(b) Effective protection against intersectional discrimination requires an open list of protected attributes.

(c) There should be no cap on the number of grounds or combinations of grounds of discrimination that may be alleged in any case.

(d) Effective protection against intersectional discrimination requires the abandonment of the comparator test. Instead, the consolidated legislation should adopt a version of the detriment test.

6. This document is structured in two parts:

- Part A sets out our submissions and recommendations;
- Part B sets out the research used to formulate our submissions. We hope that this will be a useful research tool for any reader interested in exploring these issues in greater depth.

PART A: SUBMISSIONS

INTRODUCTION

7. Discrimination is a complex wrong. It can be isolated or systemic, conscious or unconscious, and can be committed by action or inaction. It is also not easily proved, and the process of proving it can be harrowing and costly, both for the alleged victim and the alleged perpetrator. Victims' experiences of discrimination are equally complex and are not readily reducible to neat categories. These complexities require innovative solutions.

8. We argue that positive duties to eliminate discrimination and harassment and the recognition of intersectional discrimination are such solutions. We make a case for recognising these measures in the consolidated legislation, drawing on Australia's obligations under international human rights law. Furthermore, we use examples of discrimination laws in Canada, South Africa, the European Union,[3] the United Kingdom, the Republic of Ireland, the United States, and India to make recommendations on how best to incorporate these measures within Australia's consolidated anti-discrimination legislation. These jurisdictions were selected based on the sophistication of their anti-discrimination laws and the expertise of our members.

9. The need to consider international law is particularly significant in the wake of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), requiring all proposed legislation to be compliant with the rights and fundamental freedoms contained in seven core international human rights instruments.[4] While the importance of international law in Australia has been long established,[5] the Act places a heightened level of scrutiny on Federal legislative drafters to ensure that all proposed legislation is human rights compliant. Accordingly, our submissions have been drafted with these obligations in mind.

10. The comparative component to these submissions is also of great importance. As Professor Fredman highlights: '[c]omparative law is of great value, particularly in the equality field, where

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[3] Note that these submissions do not cover discrimination law under the European Convention of Human Rights (ECHR), the human rights instrument adopted by the members of the Council of Europe (CoE). The CoE is independent from the European Union, albeit that they have overlapping membership.

[4] Section 3(1) of the Act specifies the seven core instruments as: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities.

[5] For example, see *Queensland v Commonwealth* (1989) 167 CLR 232, 239 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ noting that although Australian courts 'do not administer international law, they take cognizance of international law in finding facts and they interpret municipal law, so far as its terms admit, consistently with international law'.

there is increasing cross-pollination across different jurisdictions. Similar questions are asked in a diversity of jurisdictions, and it is illuminating to compare and contrast the answers given.'[6]

QUESTION 5: SHOULD PUBLIC SECTOR ORGANISATIONS HAVE A POSITIVE DUTY TO ELIMINATE DISCRIMINATION AND HARASSMENT?

1) INTRODUCTION

11. Our submission on this question has two parts. First, we present the arguments in favour of a proactive duty and the relevant international obligations which, we argue, require its adoption. Second, we make recommendations on how this positive duty should be framed, drawing on examples from various jurisdictions.

12. We will adopt the Discussion Paper's division of positive duties into three categories: duties to make 'reasonable accommodation' (question 3), duties to implement 'special measures', commonly referred to as 'affirmative action' (question 4), and 'positive duties to eliminate discrimination and harassment' (question 5). References to 'positive duties' in these submissions should be understood to mean positive duties of the third variety. We will not address duties to make reasonable accommodation or to adopt special measures in any detail. Nevertheless, we emphasise that the three categories of positive duties must be seen as a complementary package of measures to promote equality.

2) THE OBLIGATION TO ADOPT POSITIVE DUTIES

a) Arguments for positive duties

13. Discrimination and harassment, by their nature, cannot be addressed by imposing negative duties alone. Discrimination can be perpetrated by action and inaction, as is evident in the fact that the failure to make reasonable accommodation is widely considered to be a form of discrimination. Furthermore, discrimination and harassment are not merely isolated acts by individual wrongdoers. They are often ingrained in organisational culture, providing a climate conducive to further acts of discrimination and harassment. This requires the imposition of positive duties on organisations to take proactive steps to address these problems.

[6] Sandra Fredman, 'Equality Law: A Comparative Study' (Seminar of the European Network of Legal Experts in the Non-Discrimination Field, Utrecht, 2011).

14. Negative duties go hand-in-hand with a tort-style model of enforcement, based on victim-initiated proceedings, adversarial court processes and backward looking remedies. This model has proved inadequate in addressing discrimination and harassment. It is reactive, responding to acts that have already occurred rather than attempting to prevent their occurrence. Furthermore, its deterrent effect is often negligible, reliant as it is on the courage and resources of the victim to make a complaint and to pursue legal proceedings. The difficulty in proving discrimination and harassment - particularly where it is systemic in nature - means that the majority of claims are unsuccessful. This is evident in that fact that only two per cent of the 17,500 sex discrimination cases heard by employment tribunals in the United Kingdom in 2010 were successful.[7] The adversarial process poses additional challenges, as equality becomes a site of contestation, rather than opening up channels for constructive dialogue. The backward-looking and individual-focused nature of the remedies is often insufficient to address systemic discrimination and harassment. Finally, this system is also very costly, both for the litigants and for the state.

15. This is not to say that there is no place for a tort-style system or that the system cannot be improved by appropriate reforms. Instead, it indicates that the tort-style approach must be supplemented by positive duties. Such a system would place duties on those in the best position to prevent or eliminate the discrimination or harassment.[8]

16. These arguments apply to the public and private sectors with equal force. In most cases private sector organisations, particularly employers, will be in the best position to prevent and eliminate discrimination and harassment within their field of operations. Concerns over the regulatory burden and commercial implications of imposing positive duties on the private sector may be accommodated by imposing duties that are appropriate to the size and nature of the organisation. However, these concerns do not justify the complete exemption of the private sector from these duties. Furthermore, positive duties can be economically beneficial. Preventing and eliminating discrimination and harassment can improve productivity[9] and enable private organisations to avoid drawn-out and costly litigation.

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[7] Ministry of Justice Tribunals Service, *Employment Tribunal and EAT Statistics 2009-10* (2010) available at <http://www.tribunals.gov.uk/Tribunals/Publications/publications.htm>. Statistics for race, age, sexual orientation and disability discrimination cases were equally dismal, with success rates of three per cent, two per cent, five percent and three percent respectively.

[8] For a more in-depth examination of these arguments, see Sandra Fredman *Discrimination Law* (2nd edn, OUP 2011) ch 6.

[9] See International Labour Organisation, *Equality at Work: The Continuing Challenge* (ILO 2011) xiv, <http://www.ilo.org/global/topics/equality-and-discrimination/lang--en/index.htm> accessed 20 January 2012; Organisation for Economic Co-operation and Development (OECD), 'The Price of Prejudice: Labour Market

b) International law obligations

17. International human rights instruments do not merely impose negative duties on state parties to refrain from discrimination, but also require positive steps to prevent and eliminate discrimination and harassment. These international obligations are outlined in detail in Part B. Here it suffices to focus on the most relevant provisions:

- Article 26 of the International Covenant on Civil and Political Rights (ICCPR) requires '*equal and effective protection* against discrimination on any ground' (emphasis added). The Human Rights Committee has gone further by interpreting the art 2 prohibition on discrimination as requiring states to 'take all steps necessary … to *put an end to discriminatory actions, both in the public and the private sector*, which impair the equal enjoyment of rights' (emphasis added).[10]
- This proactive duty is made explicit in art 4(1)(e) of the Convention on the Rights of People with Disabilities (CRPD), art 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and art 2(1)(d) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) which require state parties to take 'all appropriate measures' to eliminate discrimination on the basis of disability, sex and gender and race by any person, organization or private enterprise.[11]
- It is further echoed in the art 2 of the Convention on the Rights of the Child, requiring states to take 'all appropriate measures' to protect children from discrimination 'on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'[12]

18. 'Effective protection against discrimination' and 'all appropriate measures' to eliminate discrimination clearly require public entities to take proactive steps. Furthermore, for the reasons provided above, effective protection against discrimination and harassment can only be achieved by extending these positive duties to the private sector.

Recommendation 1.: The consolidated anti-discrimination legislation should impose a positive duty to eliminate discrimination and harassment on public and private sector organisations.

Discrimination on the Grounds of Gender and Ethnicity' in *OECD Employment Outlook 2008* (OECD 2008) <http://www.oecd.org/dataoecd/36/17/43244511.pdf>.

[10] United Nations Human Rights Committee (UNHRC), 'General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)', 29 March 2000, UN Doc CCPR/C/21/Rev 1/Add 10, para 4. See ICCPR, Part B, para 2.

[11] See CERD, CEDAW and CRPD, Part B.

[12] See CRC, Part B, para 9.

3) FRAMING THE POSITIVE DUTY

19. All of the jurisdictions in this study recognise proactive duties of some kind, providing useful examples of how to frame these duties. In this section we will use these country studies to make recommendations on four issues:

a) Private sector duties;

b) The form of the positive duty;

c) The content of this duty;

d) Monitoring and enforcement.

a) Private sector duties

20. The majority of countries in this study extend some positive duties to the private sector, although this is dependent on the nature of the duty and the nature and size of the organisation:

- The Canadian Employment Equity Act requires all employers with more than 100 employees to adopt employment equity programmes aimed at eliminating barriers to the employment of designated groups. Furthermore, pay equity legislation in Ontario and Quebec imposes positive duties on all employers with more than ten employees to develop pay equity schemes aimed at preventing and eliminating discriminatory remuneration practices.[13]
- The South African Employment Equity Act imposes positive duties to eliminate discrimination and harassment on all employers, but it imposes more extensive obligations on employers with more than 50 employees. Chapter V of the Promotion of Equality and Prevention of Unfair Discrimination Act (South African Equality Act) extends positive duties to promote equality and to eliminate discrimination to all persons not covered by the Employment Equity Act, however, these provisions have not yet been brought into force.[14]
- The Indian Supreme Court has derived a positive duty to take proactive steps to prevent and eliminate sexual harassment from the Indian Constitution. This duty applies to all employers and 'responsible persons' in other institutions and has been codified in draft sexual harassment legislation. Furthermore, draft disability legislation promises to extend proactive duties to prevent discrimination to the private sector.[15]
- Recent EU law suggests a movement toward imposing proactive duties on the private sector. Art 26 of the Recast Sex Directive imposes a positive duty to encourage public and

[13] See Canada, Part B, para 11ff.
[14] See South Africa, Part B, para 28ff.
[15] See India, Part B, para 75.

private actors to 'take effective measures to prevent all forms of discrimination on grounds of sex ... in access to employment, vocational training and promotion.'[16]

21. The exceptions are the United Kingdom (except for Northern Ireland)[17] and the Republic of Ireland, which largely confine proactive duties to the public sector and private organisations exercising a public function.[18]

22. We recommend that positive duties should apply to public and private organisations. However, if these positive duties are restricted to public organisations, the definition of a public organisation must include private organisations performing public functions. Furthermore, this definition must include private organisations performing functions 'contracted out' by the state, so as to avoid the dilution of equality duties through privatisation.[19]

Recommendation 1(a): The precise nature and extent of the positive duty on private organisations may be made dependent on the nature and size of the organisation.

b) The form of the duty

23. The proactive duty can be framed as a mere procedural requirement, requiring decision-makers to take into account the need to eliminate discrimination and harassment, or as a substantive requirement, requiring duty-bearers to take concrete action to achieve this goal.

24. The UK Equality Act of 2010 adopts the procedural model, requiring public authorities to 'have due regard to the need to … eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act'.[20] In a similar vein, the Irish government has adopted a policy of 'equality proofing' or 'mainstreaming' requiring decision-makers to take into account equality concerns in formulating policies and legislation.[21]

25. In contrast, there are numerous examples of the substantive approach to positive duties.

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[16] See The European Union, Part B, para 48.
[17] Private sector employers in Northern Ireland are under a positive duty to ensure fair participation of Roman Catholic and Protestant employees in their workforce in terms of Part VII of the Fair Employment and Treatment (Northern Ireland) Order, 1998. See further C McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' (1999) 22 Fordham Int'l L.J. 1697, for further discussion of positive duties in Northern Ireland. A full examination of Northern Ireland's discrimination laws is beyond the scope of these submissions.
[17] National Development Plan (Ireland) 2007 – 2013,
[18] See United Kingdom, Part B, para 57; and Republic of Ireland, Part B, para 64ff. Although other proactive duties such as duties of reasonable accommodation also apply to private sector organisations.
[19] Cf *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 where the UK House of Lords held that a private organisation providing a publicly funded service was not performing a 'public function' for the purpose of the UK Human Rights Act.
[20] Section 149(1)(a). See United Kingdom, Part B, para 53ff.
[21] See Republic of Ireland, Part B, para 69.

- Section 5(a) of the Canadian Employment Equity Act requires employers to identify and eliminate barriers to the employment of marginalised groups resulting from the employers systems, policies and practices. Furthermore, s 247(3) of the Canadian Labour Code requires employers to make 'every reasonable effort to ensure that no employee is subject to sexual harassment'.[22]
- Section 5 of the South African Employment Equity Act places a general duty on all employers, including state organs, to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.'[23] This approach is further reflected in section 24 of the South Africa Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) which imposes a responsibility on all persons to promote equality and to eliminate discrimination.[24]
- The Irish Disability Act 2005 requires that 'a public body shall in so far as practicable take all reasonable measures to promote and support the employment by it of persons with disabilities.'[25]

26. This substantive approach is preferable, as it requires action to be taken to eliminate discrimination and harassment, rather than merely requiring a box-ticking exercise. It also focuses attention on the concrete steps taken and the actual results achieved, rather than focusing narrowly on the decision-making process. As a result, we recommend that the duty should be framed in a substantive way, as a duty to take reasonable steps to prevent and eliminate discrimination and harassment.

Recommendation 1(b): The positive duty should be substantive rather than procedural, requiring duty-bearers to take 'reasonable' steps to prevent and eliminate discrimination and harassment.

c) The content of the duty

27. A duty to take 'reasonable steps' provides insufficient guidance to duty-bearers. Legislation or regulations should therefore set out clear requirements for compliance with this duty. This can be supplemented by non-binding codes of good practice to further assist public and private bodies to understand their duties.

28. While clarity and guidance are important, it would be exceedingly difficult if not impossible to specify all of the obligations flowing from this general duty in advance of actual cases. Nor

[22] See Canada, Part B, paras 18 and 21.
[23] See South Africa, Part B, para 30.
[24] See South Africa, Part B, para 40.
[25] See Republic of Ireland, Part B, para 67.

would such precision be desirable, as it is important to allow duty-bearers a measure of autonomy to develop policies and practices suitable to their environment. In this way, the law can harness the creativity of duty-bearers. This can be achieved by requiring duty-bearers to formulate equality plans which set targets and strategies to eliminate discrimination and harassment and timetables for the implementation of these measures. This should be supplemented by a duty to involve protected groups in the planning process to ensure that these plans are responsive to their needs.

29. The jurisdictions covered in this study provide useful guidance on how to frame these specific duties:

- Section 153 of the UK Equality Act provides for regulations to be issued to give further content to the duty to have 'due regard' under s 149(1). In England, these regulations impose relatively light duties on public authorities, merely requiring them to publish information showing their compliance with the s 149(1) duty and to identify and publish one or more equality objectives they seek to achieve.[26] In comparison, Wales has imposed more extensive duties, requiring public authorities to identify the steps they will take to achieve the equality objectives listed in s 149(1), to develop a timetable for achieving these objectives and to monitor the progress and effectiveness of these steps.[27]
- The Canadian Employment Equity Act elaborates on the duty to identify and eliminate barriers to the employment of designated groups by requiring employers to conduct a review of employment systems and practices to identify barriers; to develop an employment equity plan, specifying measures to be taken to eliminate these barriers and a timetable for the implementation of these measures; to take reasonable steps to implement and monitor the implementation of this plan; and to prepare annual reports on the implementation of the plan. Furthermore, s 15 of the Act requires employers to consult with their employees' representatives in the formulation and implementation of these plans. The government has also issued a comprehensive set of guidelines to assist employers in complying with the positive duty to prevent harassment under the Labour Code.[28]
- The South African Employment Equity Act, which is modelled on the Canadian Employment Equity Act, requires employers of more than 50 employees to conduct a review of employment policies and practices to identify discrimination and harassment; to

[26] Equality Act 2010 (Specific Duties) Regulations 2011/2260, regs 2 and 3. See United Kingdom, Part B, para 55.
[27] Equality Act (Statutory Duties) (Wales) Regulations 2011/1064, regs 3,4,5 and 8. ibid, Part B, para 56.
[28] See Canada, Part B, para 18.

prepare equality plans, setting out goals and timelines for implementation; and to prepare reports on these plans and the steps taken to implement them. This is supplemented by a duty to consult with employees or their representatives in the formulation of these plans and reports. The Minister of Labour has also produced a set of codes of good practice, further elaborating on the positive duties required under the Act, covering sexual harassment, disabilities and integrating employment equity into human resources policies, among other topics.[29] When it is brought into force, Chapter V of the South African Equality Act will impose duties on the state, any persons directly or indirectly contracting with the state and certain designated private associations, such as societies, clubs or sporting associations, to develop equality plans, to implement and monitor these plans and to prepare reports on these plans.[30]

Recommendation 1(c): The substantive duty to prevent and eliminate discrimination and harassment should be supplemented by more specific duties. These should include duties to:

- review policies and practices for potential discrimination and to assess their impact on protected groups;
- prepare equality plans and timelines for implementation;
- involve protected groups in the preparation and implementation of these plans; and
- report to the relevant authorities on steps taken to implement these plans.

Guidelines should be issued to assist duty-bearers in understanding their duties.

d) Monitoring and enforcement

30. The success of proactive duties is heavily dependent on the motivation and initiative of individual actors within organisations. However, a purely voluntary compliance model is unlikely to be effective in eliminating discrimination and harassment. A balance is therefore needed to ensure a strong compliance mechanism that nonetheless leaves space for individual initiative.

31. This can be achieved by developing an 'enforcement pyramid'.[31] At the first tier, organisations should be provided with support, in the form of guidance and training in their duties. Second, where non-compliance is detected, the regulatory body should engage with the organisation to determine a solution. If that fails, a compliance order should be issued, setting out the steps required for compliance. Finally, if that proves unsuccessful then sanctions should be imposed. These sanctions could be complemented by a package of incentives for organisations that meet or exceed their obligations. This model requires the appointment of a state agency or agencies,

[29] See South Africa, Part B, paras 36-38.
[30] South Africa, paras 39-43.
[31] See Fredman (n) 323.

such as the Australian Human Rights Commission, with the power to monitor, investigate and enforce compliance with these duties.

32. This 'enforcement pyramid' is evident in the compliance mechanisms developed in Canadian and South African law:

- In the Canadian province of Ontario, pay equity legislation requires employers to develop pay equity plans setting out how they will achieve the elimination of gender-based pay discrimination in the workplace. Should a complaint arise over this plan or its implementation, a review officer is appointed to investigate the matter and to try to effect settlement without the escalation of the dispute. The review officer is also empowered to order an employer or bargaining agent to take particular remedial steps but if he or she finds that a settlement cannot be reached, the Pay Equity Hearings Tribunal is notified and a hearing commences.[32] Similar mechanisms are provided for under the Canadian federal Employment Equity Act.[33]
- The South African Employment Equity Act requires labour inspectors to monitor the development and implementation of equality plans and to issue compliance orders where breaches are discovered. The Department of Labour is also empowered to institute ad hoc reviews of employers' equality plans and the steps taken to implement them. The legislation provides a number of penalties for non-compliance, including fines and disqualification from receiving state tenders, together with a package of incentives for compliance.[34]

33. In the case of public sector positive duties, the possibility of judicial review adds a further dimension to the enforcement model. This has been the primary mechanism for enforcing the public sector positive duty under the UK Equality Act and has resulted in a proliferation of litigation. However, given the limitations of litigation discussed above, enforcement should not be made entirely dependent on privately initiated litigation.[35]

Recommendation 1(d): The legislation should establish a 'compliance pyramid', providing enforcement measures ranging from guidance and training through to penalties and sanctions. This enforcement mechanism should be implemented by a state agency or agencies. In the public sector, judicial review can add a further dimension to this enforcement model.

[32] See Canada, Part B, para 15.
[33] Canada, para 19.
[34] See South Africa, Part B, para 36.
[35] See United Kingdom, Part B, 58ff.

TABLE 1: POSITIVE DUTIES – COUNTRY COMPARISON

	1. Recognition of Positive duties?	1(a) Duty bearers?	1(b) Substantive or procedural duty?	1(c) Supplemented by specific duties?	1(d) Enforcement mechanisms?
Canada	Yes.	Public and private sector.	Some legislation creates substantive duties, others only procedural duties.	Yes.	Complaints, reporting, monitoring, investigations, sanctions and incentives.
South Africa	Yes.	Public and private sector.	Substantive.	Yes.	Complaints, reporting, monitoring, investigations, sanctions and incentives.
EU	Yes.	Public and private sector.	Procedural.	No.	Monitoring bodies (race and sex), precise mechanisms vary between Member States.
UK	Yes.	Public sector.	Procedural.	Yes.	Monitoring by equality body, judicial review.
Ireland	Exceptionally for disability and harassment.	Public sector and private sector.	Substantive, in the case of disability and harassment; procedural, in the case of mainstreaming (as required by policy).	No.	Primarily complaints.
India	Yes.	Largely public sector, but also some private sector duties.	Substantive.	Yes (sexual harassment and disabilities Bills)	Under-developed.

QUESTION 10: SHOULD THE CONSOLIDATED BILL PROTECT AGAINST INTERSECTIONAL DISCRIMINATION? IF SO, HOW SHOULD THIS BE COVERED?

1) INTRODUCTION

34. We submit that the consolidated anti-discrimination legislation should contain an explicit statement that discrimination includes discrimination on two or more protected attributes or on the combination of these protected attributes. Furthermore, this should be supported by adopting a 'non-exhaustive list' model where a number of protected attributes are identified but courts are left with scope to identify discrimination on grounds which are 'analogous' to those enumerated. There should also be no limit on the number of grounds of discrimination that may be alleged in any case and the test for discrimination should not require a comparator.

35. Before proceeding to these submissions, it is important to clarify terminology. The Discussion Paper defines intersectional discrimination as 'discrimination experienced by a person because of two or more aspects of their identity'.[36] This appears to conflate two closely-connected concepts: 'multiple discrimination', involving discrimination on more than one protected attribute, and true intersectional discrimination, where discrimination is based on the *combination* of two or more attributes. For example, a black woman may experience racial discrimination and gender discrimination. This is multiple discrimination. A black woman may also experience a unique form of discrimination by virtue of being a black woman, a form of discrimination that is not experienced by white women or by black men. This is intersectional discrimination, as the discrimination is based on the combination of these attributes. This distinction is rarely made, as is evident in the commentaries on international human rights instruments where multiple and intersectional discrimination are referred to interchangeably. However, this distinction is important, because the mere recognition of multiple discrimination in the legislation will not guarantee that the courts will recognise intersectional discrimination. These submissions will argue for the express recognition of both multiple and intersectional discrimination.

36. Our submission has two parts. The first presents the arguments in favour of protecting against multiple and intersectional discrimination and sets out the relevant international human rights obligations that require this protection. The second presents recommendations on how the consolidated legislation should frame the protection against these forms of discrimination.

[36] Discussion Paper, 24.

2) THE OBLIGATION TO PROTECT AGAINST MULTIPLE AND INTERSECTIONAL DISCRIMINATION

37. Effective protection against discrimination requires efforts to place 'those who currently are marginalized in the centre'.[37] Protecting against multiple and intersectional discrimination sensitises the legal system to the overlapping and multiple ways in which discrimination is experienced, and provides a more responsive tool to assist those who are the most vulnerable and disadvantaged.

38. There are two primary arguments for recognising these forms of discrimination. First, individuals' identities and the discrimination they may experience are not captured by identifying them with a single protected attribute, nor is it captured merely by tallying up the protected attributes that they possess. A failure to recognise this results in a failure to fully comprehend the nature of discrimination.

39. Second, a failure to recognise multiple and intersectional discrimination produces significant legal obstacles. Litigants may face substantial difficulties where they are required to plead the alleged grounds of discrimination separately. Furthermore, a victim of discrimination may be left without judicial recourse where he or she is unable to categorise the discrimination into a neat status category. For example, in early intersectionality cases in the United States, black women experiencing systematic discrimination were unable to benefit from protections against sex or race discrimination because their experience was not shared by white women or black men.[38]

40. At the international level, human rights instruments are showing an increasing focus on multiple and intersectional discrimination. At the Fourth World Conference on Women in Beijing in 1995, attention was drawn to the fact that age, disability, socio-economic position, and membership of a particular ethnic or racial group could create unique barriers for women. A framework for recognising this intersectional discrimination became a key part of the Beijing Platform for Action. It explicitly recognises that 'women face particular barriers because of various diverse factors in addition to their gender' and that there was a pressing need to ensure equal enjoyment of rights 'for all women and girls who face multiple barriers to their

[37] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 212.
[38] See *DeGraffenreid v General Motors Assembly Division* 413 F Supp 142 (US Federal Court of Appeals); see also Fredman (n) 143.

empowerment and advancement'.[39] This heightened awareness of multiple and intersectional discrimination is reflected in international human rights law:

- In General Recommendation 24, the Committee on the Elimination of Discrimination Against Women highlights the particular vulnerability of migrant, refugee and internally displaced women and the intersection between gender, age, socio-economic status and religion in relation to access to health care;[40]
- General Comment 28 on the International Covenant on Civil and Political Rights highlights the manner in which discrimination against women is often 'intertwined' with discrimination on other grounds and urges States Party to address the way such grounds affect women in a particular way;[41]
- In several General Comments the Committee on Economic, Social and Cultural Rights has indicated that the ICESCR should be interpreted to cover intersectional discrimination;[42]
- General Recommendation 32 on the International Convention on the Elimination of All Forms of Racial Discrimination explains that the grounds of discrimination enumerated in CERD include discrimination on intersecting grounds;[43]
- General Comment 3 on the Convention on the Rights of the Child concerning highlights intersectional discrimination suffered by rural children infected with HIV and discussed the intersection between gender discrimination, discrimination on the grounds of HIV-status and age. Finally it highlights the double disadvantage suffered by children 'experiencing discrimination on the basis of both their social and economic marginalisation and their, or their parents', HIV status.'[44]

  The Convention on the Rights of Persons with Disabilities explicitly addresses this issue in art 6, noting that 'States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms'.[45]

Recommendation 2: The consolidated legislation should protect against multiple and intersectional discrimination.

[39] Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, Chapter II – Global Framework [32]-[33].
[40] See CEDAW, Part B, para 91.
[41] See ICCPR, Para B, para 83.
[42] See General Comments 5, 16 and 20. ICESCR, Part B, para 84.
[43] See CERD, Part B, para 86.
[44] See CRC, Part B, para 92.
[45] See CRPD, Part B, para 93.

3) PROTECTING AGAINST INSTERSECTIONAL DISCRIMINATION?

a) Explicit inclusion of multiple and intersectional discrimination in the legislation

41. To avoid confusion, the consolidated bill should contain an explicit statement that multiple and intersectional discrimination are included within the prohibition on discrimination. Such a statement puts beyond doubt the ability to claim multiple and intersectional discrimination, and has been adopted in Canada[46] and in the proposed amendment to the EU Equal Treatment Directive.[47]

42. The legislation should clearly distinguish between multiple and intersectional discrimination. For example, s 3.1 of the Canadian Human Rights Act defines discriminatory practices as 'practice[s] based on one or more prohibited grounds of discrimination [multiple discrimination] or … on the effect of a combination of prohibited grounds [intersectional discrimination]'. [48] The legislation could also include examples of intersectional and multiple discrimination to provide interpretational aids to the courts and other bodies tasked with the enforcement of the prohibition on discrimination.

Recommendation 2(a): The consolidated legislation should contain an explicit statement that discrimination may occur on the basis of two or more protected attributes (multiple discrimination) or on the basis of a combination of these attributes (intersectional discrimination).

b) Open list

43. The protection against intersectional discrimination is significantly hampered by adopting a closed list of protected attributes.

44. While a list of protected attributes affords a degree of certainty, it should also provide some degree of flexibility. The benefits of flexibility are demonstrated by the Canadian Supreme Court judgment in *Corbiere v Canada*[49] where the Court found that the claimant had been discriminated against on the analogous ground of 'aboriginality-residence'. While aboriginality is recognised as a protected characteristic under the s 15 of the Canadian Charter, residence is not. Furthermore,

[46] See Canada, Part B, para 97.
[47] See EU, Part B, para 123.
[48] See Canada, Part B, para 97.
[49] [1999] 2 SCR 203. See Canada, Part B, para 100-103.

it unlikely that residence alone would be considered a protected characteristic. Nevertheless, because s 15 adopts an open list of protected grounds, the Court was able to find that the unique combination of aboriginality and residence amounted to a protected characteristic deserving of protection. This allowed the Court to respond appropriately to the claimant's unique experience of discrimination.

Recommendation 2(b): Effective protection against intersectional discrimination requires an open list of protected attributes.

c) No cap on the number of grounds of discrimination

45. We submit that there should be no limit on the number of grounds of discrimination that may be claimed in any case.

46. A number of jurisdictions in this study impose limits on the number of grounds of discrimination that may be alleged in a single case, or impose other procedural obstacles:

- Section 14 of the UK Equality Act, if it is brought into force, would allow for claims on no more than two grounds of discrimination.[50]
- Ireland poses no restriction on the number of grounds of discrimination that may be alleged in any case, but each claim must be alleged and proved separately, thus barring the recognition of intersectional discrimination.[51]
- The United States jurisprudence has limited multiple discrimination to a combination of only two grounds (ie. the 'sex plus' approach). The concern was that without such limitation protected subgroups would exist for every possible combination of race, colour, sex, national origin and religion and that anti-discrimination legislation would be 'splintered beyond use and recognition'.[52]

47. These restrictions are entirely arbitrary. Furthermore, they have the deeply disturbing result that 'the more a person differs from the norm, and the more likely she is to experience … discrimination, the less likely she is to gain protection.'[53]

[50] See UK, Part B, para 128.
[51] See Ireland, Part B, para 129
[52] *Judge v Marsh* 649 F Supp 770 (1986) at 779 (US District Court, District of Columbia) in Fredman (n) 142.
[53] Fredman ibid.

48. The rationale for these restrictions appears to be the fear that multiple and intersectional discrimination will create a 'Hydra-headed monster' of ever-increasing and expanding grounds of discrimination and the proliferation of discrimination claims. However, jurisdictions such as Canada[54] and South Africa[55] have proved that these concerns are unfounded. Both recognise multiple and intersectional discrimination and place no limits on alleged grounds of discrimination. Neither has seen an explosion of claims. Instead, their recognition of intersectional discrimination has allowed courts 'to respond with appropriate sensitivity to a situation of multiple disadvantage.'[56]

Recommendation 2(c): There should be no cap on the number of grounds or combinations of grounds of discrimination that may be alleged in any case.

e) No need for a comparator

49. While the issue of a comparator is addressed in question 1 of the Discussion Paper,[57] it is inextricably bound with the protection against intersectional discrimination. The comparator test establishes discrimination by comparing the treatment of the complainant to the treatment of others who lack the protected attribute. Such a comparison becomes increasingly difficult, if not impossible, when the complainant's discrimination results from the intersection of a number of attributes. As a result, the absence of a comparator in intersectional cases is often identified as the 'Achilles heel' of intersectional discrimination.

50. Jurisdictions such as Canada have overcome this problem by relying on the 'detriment test'. This test focuses on the experience of the particular individual, asking if they have experienced detriment or disadvantage because of the differential treatment on the basis of protected or analogous grounds, or some combination of these grounds.[58] Moreover, the Court of Justice of the European Union has demonstrated that it is comfortable working with an understanding of discrimination legislation that does not require the identification of a comparator.[59]

[54] See Canada, Part B, para 100ff.
[55] See South Africa, Part B, para 116ff.
[56] Fredman (n) 143.
[57] See for example the submissions contained in the Discrimination Law Experts' Rountable Report, 29 November 2010 (updated 31 March 2011), p 6.
[58] See Canada, Part B, para 104.
[59] Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567 (ECJ), [24].

51. Consequently, when considering the definition of discrimination, care should be taken not to include a comparator test which might undermine protection against intersectional discrimination.

Recommendation 2(d): Effective protection against intersectional discrimination requires the abandonment of the comparator test. Instead, the consolidated legislation should adopt a version of the detriment test.

TABLE 2: INTERSECTIONAL DISCRIMINATION – COUNTRY COMPARISON

	2 Recognises multiple and intersectional discrimination?	2(a) Form of recognition?	2(b) Open list?	2(c) Number of grounds?	2(d) Comparator?
Canada	Yes.	Recognised in Constitution as interpreted by Supreme Court; recognised in provincial human rights tribunals.	Open-list in Constitution; Closed list in provincial Human Rights Codes.	Unlimited.	No (at least at Constitutional level).
South Africa	Yes.	Recognised in Constitution and statutes as interpreted by the courts.	Yes.	Unlimited.	Undecided.
EU	Undecided.	Legislative proposals tabled.	No.	Undecided.	Undecided.
UK	Yes (not yet implemented).	Statutory recognition.	No.	Two.	Yes (but the comparator may be hypothetical).
Ireland	No	-	No	-	-
USA	Yes.	Developed in case law.	No list at Constitutional level; closed list in Federal instruments.	No more than two protected characteristics.	Yes.
India	No	-	No	-	-

PART B: SUPPLEMENTARY RESEARCH

INTRODUCTION

1. In Part B we set out the substantive research used to formulate our submissions in Part A. We hope that this will be a useful resource for further investigation of these issues.

QUESTION 5: SHOULD PUBLIC SECTOR ORGANISATIONS HAVE A POSITIVE DUTY TO ELIMINATE DISCRIMINATION AND HARASSMENT?

1) INTERNATIONAL LAW

a) ICCPR

2. Positive obligations under the International Covenant on Civil and Political Rights (ICCPR)[60] can be discerned from the language of arts 2, 3 and 26. In General Comment 28, the United Nations Human Rights Committee (HRC) interpreted these positive duties as obligating the State Parties to take *all necessary steps to eliminate discriminatory actions, both in the public and the private sector*, which impair the equal enjoyment of rights.[61] This is specifically emphasised in relation to art 26 which requires States to act against discrimination by public and private agencies in all fields.[62] HRC General Comment 31 further elaborates on the positive obligations of State Parties in relation to the public and private sectors.[63]

b) ICESCR

3. The International Covenant on Economic, Social and Cultural Rights (ICESCR)[64] mandates State Parties to *ensure the equal right* of men and women to the enjoyment of rights set forth in the ICESCR in art 3. In General Comment 16,[65] the Committee on Economic, Social and Cultural Rights (CESCR) indicated that this obligation should be interpreted to include undertaking

[60] International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.
[61] United Nations Human Rights Committee (HRC), 'General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)', UN Doc CCPR/C/21/Rev.1/Add.10.
[62] ibid [31].
[63] HRC, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (This General Comment clarifies the interrelationship between the obligations upon State under the ICCPR and in turn the State's obligations to ensure that the private individuals and entities of that State are obligated to respond to the positive measures under the ICCPR in addition to the positive obligations which are specifically mentioned as devolving upon the private bodies of State Parties) ibid [4].
[64] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.
[65] United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 16: Article 3 (The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights)', UN Doc E/C.12/2005/4.

temporary special measures for realizing de facto or substantive equality and non-discrimination.[66]

4. CESCR General Comment 20[67] suggests that State Parties should adopt measures to incentivise the public and private sector to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance.[68]

c) CERD

5. The International Convention on the Elimination of all Forms of Racial Discrimination[69] (CERD) marks a shift from a bare guarantee of non-discrimination to establishing a requirement for special measures aimed at ensuring the development and protection of certain racial groups or individuals.[70]

6. The art 4 duty to eliminate apartheid is the most robust, as the CERD Committee in General Recommendations 1 and 7 interpreted this duty as a mandatory obligation upon State Parties to adopt immediate and positive measures to eradicate all incitement to or acts of such discrimination.

d) CEDAW

7. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[71] condemns discrimination against women and obligates State Parties to pursue by *all appropriate means* a policy of *eliminating discrimination* against women through a host of enlisted measures.[72]

8. In General Recommendation 23,[73] the CEDAW Committee stressed that States parties must take all appropriate measures to eliminate discrimination against women in the political and public life of the country.[74]

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[66] ibid [15].
[67] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment 20: Art 2(2) (Non-Discrimination in Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/20.
[68] ibid [9]-[39].
[69] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969), 660 UNTS 195.
[70] ibid, arts 1(4), 2(2), 3, 4, 5, 7.
[71] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13.
[72] ibid arts 2, 3, 4, 5.
[73] Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 23: Political and Public Life', UN Doc A/52/38.

e) CRC

9. The Convention on the Rights of the Child (CRC)[75] obligates State Parties to take *all appropriate measures* to ensure that the child is protected against all forms of discrimination.[76] The Committee on the Rights of the Child in General Comment 5[77] has explained that non-discrimination obligations under art 2 of CRC require positive duties to eliminate conditions that cause discrimination.[78]

f) CRPD

10. The Convention on the Rights of Persons with Disabilities (CRPD), [79] the most recent international human rights instrument, abounds with provisions placing positive duties on State Parties to combat discrimination. Principally, art 4 requires States Parties to take 'all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'. States Parties are further obligated to take effective and appropriate measures to eliminate discrimination in all matters relating to: marriage, family, parenthood and relationships (art 23); education (art 24), health (art 25), work (art 27), adequate standards of living (art 28) and participation in political and public life (art 29).

2) COUNTRY STUDIES

a) Canada

i) Overview

11. In Canada, positive duties to eliminate discrimination and harassment are found in a number of federal and provincial statutes. These duties can be grouped into three categories: pay equity, employment equity and sexual harassment.

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[74] ibid [1]-[15].
[75] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.
[76] ibid, art 2.
[77] United Nations Committee on the Rights of the Child, 'General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child', UN Doc CRC/GC/2003/5.
[78] ibid [6].
[79] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3.

ii) *Positive duties and their enforcement*

aa) Pay equity

12. Section 1(1) of the Canadian Human Rights Act imposes a general prohibition on the establishment or maintenance of pay inequity in employment. However, it does not require employers required to take specific measures to promote pay equity.[80]

13. In contrast, provincial pay equity legislation contains extensive positive duties to eliminate gender discrimination. For example, the Ontario Pay Equity Act 1990, requires employers to 'establish and maintain compensation practices that provide for pay equity in every establishment',[81] and to this end, public and larger private sector employers must prepare and implement a 'pay equity plan'[82] for employees in each of its establishments. This duty applies to all public sector employers and to private sector employers with ten or more employees.[83] The Quebec Pay Equity Act 1996 also covers both public and private sector employers, but exempts enterprises employing fewer than ten employees,[84] and imposes obligations on an ascending scale on enterprises with 10-49 employees, 50-99 employees, and 100+ employees.[85] The Manitoba Pay Equity Act 1985 requires government and the Civil Service Commission to 'take such action as may be necessary to implement pay equity throughout the civil service'.[86]

14. As to definitions of 'public sector', the Ontario Act defines the private sector as 'all of the employers who are not in the public sector',[87] and then gives a detailed list public sector employers in the Schedule. The Manitoba Act does not take the list approach, but instead defines the public sector as 'the civil service, Crown entities and external agencies',[88] and defines each of these terms.

15. The following discussion of compliance and enforcement uses the Ontario Act as an example. Employers (and bargaining agents, where appropriate) have to produce a pay equity plan before a given mandatory posting date, with smaller enterprises given more time to do so.[89] In line with s 16(1), all directly implicated actors – employers, bargaining agents and employees – can inform

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[80] See Côté & Lassonde, Status Report on Pay Equity in Canada (National Association of Women and the Law: 2007), 7.
[81] Section 7(1).
[82] The required contents of the pay equity plan are set out in considerable detail in Part II.
[83] Ontario Pay Equity Act, s 3(1).
[84] Quebec Pay Equity Act, s 4.
[85] The obligations for each category of employer are laid out in Chapter II, Divisions I - III.
[86] Manitoba Pay Equity Act, s7(1).
[87] Ontario Act, s 1(1).
[88] Manitoba Act, Part I, "Definitions".
[89] Ontario Act, s 10.

the Pay Equity Commission of a problem with the fulfilment of positive duties, triggering an investigation by a review officer whose mandate is to try to effect settlement without the escalation of the dispute. There is further scope for complaints to the Commission in Part IV, again triggering an investigation by the review officer. At this stage, he or she can order an employer or bargaining agent to take particular remedial steps pursuant to s 24, but otherwise, if he or she finds that a settlement cannot be reached, the Pay Equity Hearings Tribunal is notified and a hearing commences. This system shares clear parallels with that of Quebec, where the Pay Equity Commission takes primary responsibility for complaints, but parties aggrieved at its decision can have recourse to the *Commission des relations du travail.*[90] At the same time, the scope for provincial variation is made clear by the much stronger emphasis on process in the Quebec Pay Equity Act. Thus ss 16-17 require large employers to set up a 'pay equity committee' composed of a majority of employee representatives to create a pay equity plan.

bb) Employment equity

16. Employment equity is defined as 'a strategy designed to obliterate the present and residual effects of [workplace] discrimination',[91] against designated groups, including women, aboriginal peoples, persons with disabilities and members of visible minorities. The federal Employment Equity Act states in s 4 that the Act applies to large private sector employers as well as various 'portions of the federal public administration'. Its application can also be extended to other large public bodies by executive order.[92]

17. Section 5(a) states that one of the ways that employers shall implement employment equity is by 'identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law'. Following this review, employers are required to develop an employment equity plan, specifying measures to be taken to eliminate barriers to employment and a timetable for the implementation of these measures, and to take reasonable steps to implement and monitor the implementation of this plan.[93] Furthermore, s 15 of the Act requires employers to consult with their employees' representatives in the formulation and implementation of these plans. The Employment Equity Regulations confirm that the employer's review of its own practices and the development of its equality plan must cover recruitment, promotion and dismissal, as well as the

[90] See Chapter VI, Division I of the Quebec Act.
[91] Abella, Report of the Commission on Equality in Employment (Ottawa: Government of Canada 1984).
[92] Employment Equity Act 1995, s.4(1). The "portions" referred to are laid out in the Financial Administration Act.
[93] ibid, s 10-13.

reasonable accommodation given to the special needs of designated groups.[94] Section 15 of the Act requires employers to submit annual reports to the Department of Human Resources and Skills Development setting out the steps they have taken to implement their employment equity plans.

18. Annual reports on employment equity compiled by the Department of Human Resources and Skills Development offer useful insights into the practical application and effect of the Employment Equity Act. Examples of good practice by particular employers are given, and every Report devotes a chapter to identifying an impressively compliant employer, deemed an 'Employment Equity Success Story'. Furthermore, each Report contains an Annex in which individual employers are awarded 'Performance Ratings'. These features allow the Report to disseminate good practice, and further incentivise employers to comply so as to receive favourable mentions and to avoid the stigma of a low performance rating.

19. Part II of the Employment Equity Act provides that compliance officers working for the Canadian Human Rights Commission are empowered to conduct a compliance audit of any employer, and if they find a breach, they must inform the employer and seek a written undertaking to take specified remedial measures.[95] Where no such undertaking is forthcoming, the officer must notify the Commission which in turn can issue a direction requiring compliance.[96] At this stage, either party can take the issue further by requesting that an (ad hoc) Employment Equity Review Tribunal considers the issue.[97] Section 30 states that the Tribunal may confirm or rescind the Commission's direction, and can also make different orders subject to limits laid out in s 33, such as that it may not order the creation of a quota system. Further, the relevant Minister may levy a monetary penalty of up to $50,000 on any private sector employer which fails to comply with its reporting obligations (s 36).

20. At present, only Quebec has enacted provincial employment equity legislation. The 2001 Act Respecting Equal Access to Employment in Public Bodies aims to help four groups broadly similar to those protected by the federal Act.[98] It only applies to certain categories of public bodies and then only if they employ 100 or more persons. It requires those employers to

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[94] Employment Equity Regulations 1996, Regulation 9.
[95] Employment Equity Act, s 25(1).
[96] ibid, s 25(2).
[97] ibid, s 28(1).
[98] The Act refers not to disabled but to 'handicapped' persons, and to 'members of visible minorities *because of their race or the colour of their skin*' (emphasis added).

establish an equal access employment program (s 10). Section 13(4) confirms that the program must comprise 'equal opportunity measures, and if needed, support measures to eliminate discriminatory management practices'.

cc) Sexual Harassment

21. The Canadian Labour Code of 1985, contains a positive duty to eliminate sexual harassment which applies to all employers. Section 247.3 sets out the general duty on employers to 'make every reasonable effort to ensure that no employee is subject to sexual harassment'. Further, s 247.4 requires all employers to make a policy statement concerning sexual harassment 'after consulting with the employees or their representatives'. In line with s 247.4(2), certain provisions must be included, among them a statement explaining how sexual harassment complaints can be brought to the employer's attention, and also a statement that appropriate disciplinary measures will be taken against any person under the employer's direction who subjects any employee to sexual harassment.

22. As to enforcement, an inquiry can be ordered into a particular establishment's practice (s 248(1)), and under s 249, the Minister may designate a labour inspector to inspect premises and records for the purposes of Part III of the Code (which includes s 247). Further, under s 256(1), employers can be fined up to $5,000 for contravening 'any provision of this Part', and s 259 confirms that further fines will be levied if they fail to comply.

iii) Assessment

23. The legislation discussed above has not resulted in immediate and significant progress for those groups who it seeks to protect. Thus Malhotra notes that 'little progress has in fact been made in the employment rates of people with disabilities',[99] and the Ontario Pay Equity Commission recently indicated that 'as much as a quarter or a third of (the) gap in salaries between men and women can be attributed to discrimination in the workplace'.[100]

24. Nevertheless, the positive-duty pay equity model is viewed as far more successful in tackling pay inequality than the non-proactive model in s 11 of the Human Rights Act. A Pay Equity Task Force set up by the Canadian Human Rights Commission, heavily influenced by the Ontario and Quebec models, recommended that federal pay equity law move away from the current reactive

[99] Malhotra, "A Tale of Marginalization: Comparing Workers with Disabilities in Canada and the United States" (2009) Journal of Law and Social Policy 79, 81.
[100] Ontario Pay Equity Commission Report (2009-2010), 5.

framework towards a proactive method, on the basis that this would be a better way of tackling systemic discrimination.[101] Côté and Lassonde agree, arguing that the complaints-based model means that 'the burden of real and effective implementation of pay equity is unjustly placed upon the party with the less means, ie individual workers'.[102] They note that Quebec moved from a complaints-based to a proactive model in 1996, and research 'unequivocally indicates that the approach was a success',[103] with shrinking inequalities and greater recognition by employers of the positive benefits of pay equity. Weiner explains that systemic discrimination is better tackled by proactive duties because they impose deadlines rather than relying on complaints, and extend to all female jobs in organisations rather than just those engaged by a particular complaint.[104]

25. Beyond this general consensus, debates have arisen about the proper scope of proactive pay equity duties. One such debate concerns whether small enterprises should be exempted or subjected to lesser positive obligations. The Pay Equity Task Force recommends that only employers with fifteen or more employees be covered by new federal legislation, but that Oversight Agencies are empowered to develop methodologies and criteria suitable for employers of that size. Goldhar thinks such an approach is misguided, given that small employers 'most often pay lower wages, are engaged in non-standard forms of employment, and increasingly employ female employees'.[105]

26. Another debate related to scope asks whether the coverage of pay and employment equity legislation should be extended to cover more disadvantaged groups. The Pay Equity Task Force's research indicated that all four groups protected in employment equity also suffer relative disadvantage when it comes to compensation, which is partly attributable to discriminatory practices. Kendall and Eyolfson have argued that lesbians and gay men should be included within the remit of employment equity legislation.[106] However, Bilson suggests that while women may require the particular protection of pay equity, other groups' disadvantage is caused by barriers in recruitment, so they are better helped by employment equity.

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[101] Pay Equity Task Force, "Pay Equity: A New Approach to a Fundamental Right" (Ottawa: Pay Equity Task Force, 2004).
[102] Côté and Lassonde (n) 7.
[103] ibid.
[104] Weiner, "Effective Redress of Pay Inequities" (2002) 28 Canadian Public Policy S101, S106.
[105] ibid, 143.
[106] Kendall & Eyolfson, "One in Ten But Who's Counting: Lesbians, Gay Men and Employment Equity" (1996) 27 Ottawa Law Review 281.

27. Malhotra notes that the focus on the employment relationship has meant that there are now 'significant' positive duties in the workplace, but this does little to address discrimination in other areas of public life, such as education or public transport.[107] This suggests that the proactive model of addressing discrimination and harassment should be extended beyond the employment context.

b) South Africa

i) Overview

28. South Africa's anti-discrimination law consists of three primary instruments: the s 9 right to equality and the prohibition on discrimination in the Constitution,[108] the Employment Equity Act[109] and the Promotion of Equality and the Prevention of Unfair Discrimination Act[110] (Equality Act). Sections 9(3) and (4) of the Constitution prohibit discrimination by the state or any other person on a wide range of listed grounds and require legislation to 'prevent or prohibit' discrimination. The Employment Equity Act and the Equality Act give effect to this constitutional requirement, imposing positive duties on public and private actors to identify and eliminate discrimination.

29. The Employment Equity Act applies to all employers and employees (excluding the army and intelligence services) while the Equality Act applies to all persons to whom the Employment Equity Act does not apply.[111] Unlike anti-discrimination laws in other jurisdictions, these statutes are comprehensive, dealing with discrimination on all recognised grounds rather than on a piecemeal basis.

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[107] Malhotra (n) 105.

[108] Constitution of the Republic of South Africa, 1996. Section 9 provides:

> '(1) Everyone is equal before the law and has the right to equal protection and benefit
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[109] 55 of 1998.

[110] 4 of 2000.

[111] See section 5(3) of the Equality Act.

ii) Positive duties and their enforcement

aa) Employment Equity Act

30. The Employment Equity Act not only prohibits discrimination,[112] but goes further by providing that: '[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.'[113] The Act defines discrimination as including harassment on any of the listed grounds.[114]

31. These positive duties to eliminate discrimination and harassment take two forms: a) positive duties arising from the prohibition on discrimination and b) duties of affirmative action which are defined to include duties to make reasonable accommodation and to adopt measures to eradicate discrimination and harassment.

32. First, the Act makes an employer liable to pay damages for any acts of discrimination or harassment by its employees[115] where the employer has been made aware of this conduct and fails to take steps 'necessary steps to eliminate the alleged conduct'.[116] However the employer will not be liable if it can show that it did 'all that was reasonably practicable' to prevent or eliminate this conduct.[117] This places a positive duty on an employer to respond appropriately to acts of discrimination and harassment. For example, where an employer is aware of ongoing sexual harassment but fails to take action to prevent it, it will be liable to pay statutory damages to the victim.[118] Furthermore, as is outlined in the Code of Good Practice on the Handling of Sexual Harassment in the Workplace,[119] issued in terms of the Act, the failure to adopt a harassment policy or to make employees aware of this policy must be taken into account in determining whether the employer has taken all necessary steps to eliminate harassment.[120]

33. A significant limitation on this duty is that the employer is only held liable where it has knowledge of the offending conduct. Thus, an employer cannot be held liable under s 60 where it was not made aware of this conduct, even where it has failed to put in place sufficient safeguards to prevent or eradicate discrimination and harassment or ought to have been aware of

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[112] Section 6.
[113] Section 5.
[114] Section 6(3). The Employment Equity Act adds family responsibility, HIV status, and political opinion to the list of grounds enumerated in section 9(3) of the Constitution (see n).
[115] Section 60(3).
[116] Section 60(2).
[117] Section 60(4).
[118] This was the outcome in *Ntsabo v Real Security CC* 2003 (24) *ILJ* 2341 (CC), the first sexual harassment case heard under the Employment Equity Act.
[119] General Notice 1357 *Government Gazette* 27865 of 4 August 2005.
[120] Item 7.3.

it.[121] A further limitation is that employers' incentives to adopt positive measures are made a function of its employees' willingness and ability to litigate.

34. Secondly, the Act requires all employers with over 50 employees (or with turnover above a specified amount), municipalities, and organs of state to adopt 'affirmative action' measures for people from 'designated groups', which are defined to include black people, women and people with disabilities. 'Affirmative action' is broadly defined to include positive measures to identify and eradicate discrimination against members of the designated groups, to make reasonable accommodation for these individuals as well as duties to promote workplace diversity.[122]

35. These positive duties require all designated employers to develop an employment equity plan that set out what steps they will take to implement these duties, the goals and targets they seek to achieve and the timeline for implementation.[123] This plan must be developed following a full evaluation of the organisation, considering all possible areas where discrimination may occur,[124] as well as consulting fully with the employees' trade unions or other appropriate representatives. Employers are then required to report to the relevant authorities ever year (for organisations with over 150 employees) or every two years (for those below this threshold) on the steps taken to implement the plan.

36. These duties are enforced through various mechanisms. Employees or their trade unions may report breaches of the Act to labour inspectors. Labour inspectors are also empowered to investigate organisations on their own initiative, to issue compliance orders and to apply to have these made orders of the Labour Court. Finally, the Director-General of the Department of Labour can institute ad hoc reviews of employers' employment equity plans and the steps take to implement the plans and can make recommendations on matters arising from this review. If the employer fails to heed these recommendations the matter can be referred to the Labour Court.

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[121] This approach was adopted in *Mokoena v Garden Art (Pty) Ltd* (2008) 29 ILJ 1196 (LC), paras 43 where the Labour Court held that there can be no liability for sexual harassment where the employer was not subjectively aware of it.
[122] Section 15(2).
[123] Section 20.
[124] The Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 *Government Gazette* 27866 of 4 August 2005, sets out extensive guidelines for identifying discriminatory practices in each phase of the employment relationship, including recruitment, selection, appointment, training and skills development, employment conditions, promotions, termination of services.

37. Failure to comply with the Act can result in serious consequences, including being disqualified from receiving State tenders[125] as well as substantial fines for failing to adequately prepare, implement or submit report on the employment equity plan.[126] This is coupled with incentives, such as awards for notable efforts to promote equality.

38. The Employment Equity Act has been widely applauded as adopting a progressive approach to positive duties.[127] Most importantly, it gives employers a degree of autonomy to develop their own plans and targets, thus overcoming the problems associated with the external imposition of rigid norms on organisations. However, with greater autonomy comes a greater burden on the authorities to monitor these plans and their implementation to ensure that employers are making concerted efforts to identify and eradicate discrimination and harassment. The Employment Equity Commission, a statutory body created under the Act, has repeatedly acknowledged the failure to effectively monitor and enforce the Act. Employers routinely fail to develop employment equity plans and to submit reports to the Director-General. However, very few compliance orders or fines are issued.[128] This is largely attributable to a lack of capacity: South Africa has a mere 1095 labour inspectors for an economically active population of 17 million.[129]

bb) Promotion of Equality Act and Prevention of Unfair Discrimination Act (Equality Act)

39. Chapter V of the Equality Act imposes positive duties on the state and all persons to promote equality, including the elimination of discrimination and harassment. However, this portion of the Act has not yet been brought into force. As a result, the precise nature of these positive duties is not yet clear, as the required regulations and codes of conduct have not yet been finalised.

40. As a brief overview, section 24 of the Act provides that the state and all persons have a responsibility to promote equality. The most extensive positive duties are placed on the state, as it is required to develop action plans to eliminate discrimination; adopt codes of practice to deal with discrimination and harassment; and to conduct education campaigns to make the public

[125] Section 53.
[126] Section 50(1)(g) read with Schedule 1.
[127] See for example the favourable comments on the Act by the Committee for the Elimination of Racial Discrimination 'Concluding Observations: South Africa' (19 October 2006) UN Doc CERD/C/ZAF/CO/3, para 7 and the Committee on the Elimination of Discrimination Against Women 'Concluding Observations: South Africa' (5 April 2011) UN Doc CEDAW/C/ZAF/CO/4, para 33.
[128] Employment Equity Commission, 'Annual Report 2009-10' (2010) 37 and 'Annual Report 2008-9' (2009) 49 <http://www.labour.gov.za/documents/annualreports> accessed 20 January 2012.
[129] Department of Labour, 'Strategic Overview of Labour Inspections in South Africa' (Presentation delivered at the National Inspector's Conference, 2011) <http://www.labour.gov.za/downloads/documents/useful-documents/occupational-health-and-safety/DDGNxawe.pdf> accessed 20 January 2012.

aware of the Act, among other duties.[130] Cabinet Ministers are under a further duty to audit all laws, policies and practices to identify and eliminate discriminatory elements and to formulate equality plans which are to be submitted to the Human Rights Commission for review.[131]

41. The Act also imposes positive duties on 'any person directly or indirectly contracting with the State or exercising public power' to adopt equality plans, to implement and monitor these plans and to report on these plans.[132] Thus, it appears to extend the positive duties under the Employment Equity Act to the range of organisations and entities not covered by that Act.

42. The Act further imposes a duty on all persons, including NGOs and community-based organisations, to promote equality 'in their relationships with other bodies and in their public activities'. It is yet to be seen how these will be interpreted and applied. The Act goes on to mandate regulations to 'require companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations, where appropriate, in a manner proportional to their size, resources and influence, to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality.'

43. Thus, Chapter V of the Act envisages a comprehensive range of positive duties on public and private entities, albeit with greater focus on the duties of public entities. However, the long delay in bringing these sections into force reflects the complexity of translating these aspirations into practical effect.

iii) Assessment

44. The South African anti-discrimination legislation, particularly the Employment Equity Act, is laudable in that requires proactive measures to respond to discrimination and harassment; it extends these positive duties to both public and private entities; these duties are comprehensive, as they require efforts to respond to and to eliminate ongoing acts of harassment and discrimination and to prevent their occurrence; and they are flexible, allowing organisations to develop plans and targets that suit their unique circumstances. However, the implementation and of these measures has been inhibited by the state's limited capacity to monitor and enforce these laws.

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[130] Section 25(1).
[131] Sections 25(4) and (5).
[132] Section 26.

c) European Union[133]

i) Overview

45. The incidence of proactive equality duties in EU law is sporadic and context-specific. The constitutional arrangement of the Union means that the duties are often formulated vaguely. The individual Member States are left to fill in the gaps and implement the duties in harmony with the existing provisions of their national legal systems.

ii) Positive duties and their enforcement

46. Positive duties to prevent discrimination are fragmented across a number of legal instruments. In the Treaty of the Function of the European Union (TFEU) itself there is an obligation on Member States and private employers to '*ensure* that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'[134] The Treaty also impresses a positive duty on the European Council to publish regular reports on the performance of its discrimination-related functions.[135]

47. More broadly, art 19 confers competence upon the Council to take action 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'[136] In this vein, the Council has enacted a number of discrete, sector-specific legal instruments which comprise proactive equality duties.[137] It has also sponsored three significant pieces of secondary legislation that take steps to eliminate discrimination on the grounds of race,[138] sex[139] and religion or belief, disability, age or sexual orientation.[140] Each contains a positive duty to initiate dialogues with interested parties.[141] The Race and Recast Sex Directives

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[133] As indicated in n above, this research covers the European Union discrimination law and does not address the position under the European Convention on Human Rights (ECHR), the human rights instrument adopted by the members of the Council of Europe (CoE).
[134] Art 157(1) TFEU. The duty is owed by private parties as well as public bodies. See Case 149/77 *Defrenne v Sabena* [1978] ECR 1365 (ECJ).
[135] Art 25 TFEU.
[136] Art 19 TFEU.
[137] See, for example, Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.
[138] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive).
[139] Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L35/1 (Recast Sex Directive).
[140] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Employment Directive).
[141] Race Directive arts 11-12; Recast Sex Directive arts 21-22; Framework Employment Directive arts 13-14.

also require the designation of a public body to monitor proactively the performance of each Member State under those instruments.[142]

48. The Recast Sex Directive is a particularly sophisticated regulatory device.[143] In addition to the features of its siblings, it imposes a positive duty to encourage public and private actors to 'take effective measures to prevent all forms of discrimination on grounds of sex...in access to employment, vocational training and promotion.'[144] Most interestingly it comprises a provision which aims to 'mainstream' gender equality issues into public decision-making processes:

> 'Member states shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.'[145]

49. Finally, the Charter of Fundamental Rights of the European Union appears to generate two further positive duties which apply to the Union's institutions and its Member States in certain circumstances.[146] Art 21 prescribes that any discrimination based on a non-exhaustive list of unlawful grounds 'shall be prohibited', whilst art 23 requires that 'equality between men and women...*be ensured* in all areas.'[147]

iii) Assessment

50. The EU's 'gender mainstreaming' duty is its most ambitious regulatory project in this field and has attracted the most critical analysis. There have been appeals for its expansion to other areas of discrimination, such as discrimination in the asylum context,[148] but they have not yet been taken on board.

51. Some have criticised the duty's failure to dovetail with the positive action carve-outs that exempt "affirmative action" policies from EU law's prohibitions on discrimination.[149] If those carve-outs are insufficiently generous, enthusiastic subscribers to the "mainstreaming" project will labour under the threat of legal action for unlawful reverse discrimination. This yields an important lesson: a "mainstreaming" initiative must be delicately balanced with a corresponding

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[142] Race Directive art 13; Recast Sex Directive art 20.
[143] Recast Sex Directive Art 29Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[144] ibid art 26.
[145] ibid art 29.
[146] Charter of Fundamental Rights art 51(1).
[147] Emphasis added.
[148] Bell, *'Mainstreaming equality norms into European Union asylum law'* (2001) 26 Eur L Rev 20.
[149] Barmes, *'Equality Law and Experimentation: The Positive Action Challenge'* (2009) 68 CLJ 623, 636.

carve-out for "affirmative action" policies or a chilling effect will be exerted over compliance. It appears that EU law may have been too parsimonious on this front.[150]

52. Furthermore, it has been suggested that 'mainstreaming' duties are rarely successful as standalone regulatory devices. Their effectiveness tends to depend upon their coincidence with a political appetite for genuine reform. As Fredman explains, 'proactive models are highly dependent on political commitment and vulnerable to the vagaries of political change'.[151] In this light, Stratigaki observes that the 'gender mainstreaming' experiment has been most successful where 'gender equality coincided with other EU priorities, such as economic priorities of the European Employment Strategy or in policy areas that fell under the responsibility of feminist commissioners'.[152] The upshot is that 'in hostile equality policy environments...mainstreaming may be conceived and applied as an alternative to positive action and used to downplay the final overall objective of...equality'.[153] She concludes that '[e]ight years after its launch, gender mainstreaming has so far failed to affect core policy areas or radically transform policy processes within the European institutions.' [154]At the very least, then, governments should be sensitive to the fact that 'mainstreaming' initiatives must be complemented by a concerted and unwavering political effort to change attitudes towards discrimination.

d) United Kingdom

i) Overview

53. The UK Equality Act of 2010 has codified the 'patchwork'[155] of positive duties that subsisted under the former race, disability and sex discrimination statutes.[156] The re-branded duties take two particular forms. First, there is a procedural duty to pay 'due regard' to certain objectives tethered to the overarching idea of non-discrimination. Second, there is a more substantive duty to make 'reasonable adjustments' to the provision of certain services. The latter has been canvassed thoroughly by the Cambridge Pro Bono submission and will not be re-surveyed.[157]

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[150] See Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363 (ECJ) where it was held that an initiative to redress the imbalance of male and female public-sector workers was lawful only insofar as it applied to 'tie-break' situations and only after each candidate had benefited from highly individualized consideration.

[151] Fredman, *'Changing the Norm: Positive Duties in Equal Treatment Legislation'* (2005) 12 Maastricht J Eur & Comp L 369, 369.

[152] *'An ongoing conflict in EU gender equality policy'* (2005) 12 Eur J of Women's Studies 165, 165.

[153] ibid 168.

[154] ibid 181.

[155] Hepple, *'Enforcing Equality Law: Two Steps Forward, Two Steps Backwards for Reflexive Regulation'* (2011) 40 Industrial LJ 315, 318.

[156] See Race Relations Act 1976, S 71; Disability Discrimination Act 1995, Ss 49A-D; Sex Discrimination Act 1975 S 76A-C.

[157] See Cambridge Pro Bono Project, *Equality for All: Submission on Australia's proposed reform of anti-discrimination legislation*, section 4.3.2 < http://www.law.cam.ac.uk/File/Equality%20for%20All.pdf> accessed 20 January 2012.

ii) Positive duties and their enforcement

54. The idea of a proactive duty to pay 'due regard' to equality objectives was first introduced to UK law in 2000.[158] The Equality Act 2010, which supersedes all previous measures, comprises two such duties. Section 1 requires a defined list of public authorities to give due regard to the need to 'reduce the inequalities of outcome which result from socio-economic disadvantage'. The government has announced that this provision will not, after all, be implemented.[159] The strain has thus been assumed exclusively by s 149(1), which is formulated in the following terms:

> '(1) A public authority must, in the exercise of its functions, have due regard to the need to-
>
> a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

The second 'equality of opportunity' objective is fleshed out by s 149(3):

> '(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant characteristic and persons who do not share it involves having due regard, in particular, to the need to-
>
> a. remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> b. take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> c. encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.'

The third 'fostering good relations' objective is expanded upon by s 149(5):

> '(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-
>
> a. tackle prejudice, and
>
> b. promote understanding.'

[158] Race Relations (Amendment) Act 2000, S 2.
[159] See Cambridge University submission, 43.

55. The procedural duty outlined in s 149 thus becomes a complex and multi-faceted obligation of consideration. It is also amenable to detailed refinement by governmental regulation.[160] So far, the English government has issued regulations which mandate a select group of public authorities to publish a report on their performance under the s 149 duty.[161] This obligation complements a range of duties to disclose equality-related information under the 2010 Act.[162] In addition, the government has required each of the specified authorities to nominate at least one objective which it will adopt in order to bolster compliance with its s 149 duties.[163]

56. Interestingly, the devolved Welsh Assembly has issued a more robust scheme of Regulations which requires the addressees of s 149 to publish a record of the steps they intend to take to enhance their performance under the 'due regard' duty. They must publish a timetable within which those steps are to be achieved[164] and proactively monitor their compliance.[165] They are also obligated to consult interested parties about their action plans.[166] The analogous draft Regulations in Scotland also supply more detailed guidance on compliance, including a uniform duty to carry out an impact assessment and a procedural 'mainstreaming' initiative.[167]

57. The general duty to pay 'due regard' is incumbent on a pre-defined register of public actors.[168] It also bites on any person who exercises a 'public function'.[169] The meaning of that phrase has been harmonised with the meaning that it is given under the jurisprudence of the UK Human Rights Act 1998.[170] It is therefore inapplicable to private persons who are performing functions 'contracted out' by public authorities.[171] It is also clearly inapplicable to persons exercising purely private functions. Nonetheless, it applies to a broad range of public decision-makers. For example, it spans from the routine decisions that are made by a police officer on the beat to the complex determinations that are made by local authorities when compiling their annual budgets.

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[160] Equality Act 2010 s 153.
[161] Equality Act 2010 (Specific Duties) Regulations 2011/2260, reg 2.
[162] Equality Act 2010, s 78 (employer's obligation to disclose information about equal pay (not yet in force)); s 106(2) (political parties' obligation to publish information about diversity of candidates); s 138(4) (negative inferences may be drawn from a person's failure to respond to an information disclosure request).
[163] Equality Act 2010 (Specific Duties) Regulations 2011/2260, reg 3.
[164] Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011/1064, reg 3(2).
[165] ibid regs 3 and 8.
[166] ibid regs 4 and 5.
[167] See <http://www.scotland.gov.uk/Topics/People/Equality/PublicEqualityDuties> last accessed 20 January 2012.
[168] Equality Act 2010, s 150(1).
[169] ibid s 149(2).
[170] ibid s 150(5).
[171] *YL v. Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

58. The s 149 equality duty does not disclose a private cause of action.[172] Nonetheless, it can be invoked as a ground for judicial review.[173] This has resulted in an 'upsurge in litigation'.[174] The courts, for their part, have received s 149 cases enthusiastically. In a much-cited passage, a domestic judge has described the 'public sector equality duty' as a 'salutary requirement which must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation...I express the hope that the government will note this point for the future.'[175] A further initiative for encouraging compliance with the duty lies with the Equality and Human Rights Commission (EHRC). The Equality Act 2006 mandates the EHRC to assess compliance with s 149[176] and, if necessary, issue a compliance notice requiring the addressee to publish written information about how it will resolve its failure to satisfy its procedural duty.[177] As Hepple notes, however, the enforcement capacity of the Commission has been diminished by a significant fall in funding and a political motion to curb the scope of its duties.[178]

59. In their response to this proliferation of judicial review applications the domestic courts have walked an interpretive tightrope between permitting the s 149 duty to degrade into an unproductive 'box-ticking' exercise and expanding it to a full-blown substantive duty to achieve real results. As Fredman observes, courts have tended towards the latter interpretation.[179] In an important case in which Birmingham City Council's annual budget was successfully challenged, Walker J scrutinised the substance of the Council's decision. He considered that a mere consideration of the equality issues at hand '[was] not the same thing...as doing what [s 149(1)] seeks to ensure: namely to consider the impact of a proposed decision and *ask whether a decision with that potential impact* would be consistent with the need to pay due regard to the principles of disability equality'.[180]

60. Case law on the practical steps that must be taken to discharge the duty has been rather uneven. For instance, the performance of an 'Equality Impact Assessment' is, in some cases, a mandatory

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[172] Equality Act 2010, s 156.
[173] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213.
[174] Bell, *'Judicial enforcement of the duties on public authorities to promote equality'* [2010] PL 672.
[175] *Elias* (n) [274] (Arden LJ). Her Ladyship was referring to the precursor to the s 149 duty under the Race Relations Act 1976.
[176] Equality Act 2006, s 31.
[177] Equality Act 2006, s 32.
[178] Hepple (n).
[179] Fredman, *'The Public Sector Equality Duty'* (2011) 40 Industrial LJ 405, 420 'there has been a valiant attempt to insist on compliance in substance rather than form'.
[180] *R (W) v Birmingham City Council* [2011] EWHC 1147 (Admin), [2011] ACD 84 [179] (emphasis added). The case was decided under the rubric of the Disability Discrimination Act 1995.

activity.[181] In other cases, it has been held to be unnecessary.[182] In one case, the *ex post facto* execution of an Impact Assessment was considered to be appropriate.[183] It remains unclear whether or not the decision maker is required to make explicit reference to s 149 in order to discharge its duty of consideration.[184] The procedural requirement is tailored to the specific decision at hand.

iii) Assessment

61. The success of the 'public sector equality duty' has been difficult to measure. This is due to the fact that it is framed as a procedural obligation to consider equality of opportunity rather than a substantive duty to achieve equal outcomes.

62. This broad duty to consider abstract objectives requires secondary legislation to give it greater precision. Fredman notes that the objectives articulated under s 149(1) are 'notoriously open-textured'[185] and that more detailed guidance is required. The regulations issued under s 149(1) go some way toward addressing this concern. However, this regulatory flexibility also exposes duty-bearers to political volatility. Some commentators have already criticised the half-hearted regulatory effort of the incumbent coalition government. For example, Hepple is dissatisfied with the absence of a general duty of consultation.[186] Socio-legal research by Conley and Page suggests that the old duty to carry out an Equality Impact Assessment in set scenarios will be missed.[187] Overall, there is a balance to be struck between regulatory flexibility and legislative standardization.

63. The public sector equality duty is a procedural one. If a decision is impugned for non-compliance with s 149, it is open to the public authority to reach the same substantive decision via an improved procedural route. Fredman considers this to be a nod towards a 'reflexive' form of governance that 'aim[s] to harness the energy and initiative of local actors, who are best acquainted with the problems and potential solutions.'[188] This aim has been obstructed by the influx of litigation relating to s 149. Under a reflexive model of regulation, judicial review should

[181] See *R (on the application of Kaur) v London Borough of Ealing* [2008] EWHC 2062, [43].
[182] *AC v Berkshire West Primary Care Trust* [2010] EWHC 1162 (Admin) [51].
[183] *R (EHRC) v Secretary of State for Justice* [2010] EWHC 147 (Admin).
[184] Compare *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 [36] and *Kaur* (n) [43].
[185] Fredman (n) 411.
[186] Hepple (n) 326-327.
[187] Conley and Page, *'The gender equality duty in local government: the prospects for integration'* [2010] Industrial LJ 321, 323.
[188] Fredman (n) 408.

be a 'last, not a first resort'.[189] It has also been frustrated by the substantive interpretation which s 149 has been afforded by judges.[190] These developments suggest that it may be prudent to concede to a more substantive style of regulation. Fredman has proposed a duty to 'take all proportionate steps' towards achieving the articulated goals.[191] This formulation would achieve a balance between a deferral to the 'energy and initiative' of the public official (it does not dictate precisely what steps must be taken) and a meaningful duty to achieve results on the ground.

e) Republic of Ireland

i) Overview

64. Equality law in Ireland is primarily reactive. As a general rule, the law does not require employers or service providers to be pro-active in promoting equality. Positive action is permitted rather than required.[192] Although the Constitution contains an equality provision, the courts have interpreted it in a formal rather than substantive way, leading to criticisms that the jurisprudence is 'too weak'.[193] Ireland's current equality legislation receives much of its grounding in obligations arising under EU law, which primarily focuses on the employment context.[194] The equality legislation applies to both public and private sectors alike. EU legislation requires certain positive measures, specifically in relation to the gender ground.[195] Ireland has responded by imposing positive obligations upon the public sector, however these initiatives have been undertaken by means of policies rather than uniform legislative obligations, leading critics to comment that '[t]hese policies are usually not given detailed shape by means of legislation, leaving it very much open to the discretion of various state bodies as to how they should "consult" and carry out impact assessments'.[196] Therefore, while Ireland has made efforts towards recognising and implementing a positive public sector duty, it has not gone far enough in placing such a duty firmly in legislation.

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[189] ibid 427.
[190] *Birmingham City Council* case (n).
[191] Fredman (n) 410.
[192] Niall Crowley, *An Ambition for Equality* (Irish Academic Press 2006) 66. Beyond the disability grounds, Irish legislation 'does not encompass any requirements on employers or service providers to be proactive in promoting equality'.
[193] Brid Moriarty and Anne Marie Mooney Cotter, 'Human Rights Law' (OUP 2004) 188. Bunreacht na hEireann, Art 40.1 provides 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to individual differences of capacity, physical and moral, and of social function.'
[194] Brid Moriarty and Eva Massa, Human Rights Law 3rd Edition (OUP 2011) 268. See section 3 above.
[195] Recast Sex Directive Art 29.
[196] Colm O'Cinneide, 'Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law' Mainstreaming Equality: Models for Statutory Duty – Conference Report 27th February 2002, http://www.equality.ie/index.asp?locID=107&docID=93 accessed 5 January 2012 24.

ii) Positive duties and their enforcement

aa) The Legislation

65. Irish equality legislation prohibits discrimination on the basis of ten grounds.[197] The Irish Employment Equality Acts 1998 to 2008 prohibit discrimination within employment[198] while the Equal Status Act 2000 amended by the Equality Act 2004, prohibits discrimination by those who sell goods, provide services, dispose of accommodation and are in charge of an educational establishment.[199] The Acts apply to both the public and private sector.[200]

66. Discrimination in the form of positive measures is permitted rather than required under the Equal Status Act 2000 and the Employment Equality Act 2004.[201] However, in relation to harassment, s 14A (1) of the Employment Equality Act 2004 provides that the employer is liable where 'the circumstances of the harassment are such that [the] employer ought reasonably have taken steps to prevent it'.[202] As illustration, in the case of *A Complainant v A Company*, a company was penalised for failing to establish a satisfactory system to investigate and respond to complaints of harassment.[203] The equality officer ordered the employer to draft an equality policy and make it available to all staff.[204] The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 states that employers '*should*' adopt harassment policies.[205] The existence of a policy can provide a defence to an employer to a claim of harassment.[206]

67. Exceptionally, legislation requires positive measures for disabled persons. Section 16 of the Employment Equality Act 2004 applies to both the public and private sectors and requires

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[197] Equal Status Act (Ireland) 2000, s 3(2) gender, marital status, family status, sexual orientation, religion, age, disability, race, membership of the traveller community, and victimisation.

[198] Employment Equality Act (Ireland) 1998, s 8.

[199] Equal Status Act (Ireland) 2000, s 5, 6 and 7.

[200] Brid Moriarty and Eva Massa, (n) 294. The state is not specifically included in the service provider definition but according to the Law Society 'the law will cover the State regardless'.

[201] Equal Status Act (Ireland) 2000, s 14(b) 'Nothing in this Act shall be construed as prohibiting preferential treatment or the taking of positive measures…'; Employment Equality Act (Ireland) 1998, s 24 (as amended) 'provisions of act are without prejudice to measures (a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments'; Section 33 (as amended) 'measures (a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than Gender); (b) to protect the health or safety at work of persons with a disability; or (c) to create or maintain facilities for safeguarding or promoting the integration'.

[202] Section 14A (1): 'For the purposes of this Act, where – (a) an employee…is harassed or sexually harassed either at a place where the employee is employed…or otherwise in the course of his or her employment by a person who is – (i) employed at that place by the same employer, (ii) the victim's employer, or (iii) a client, customer or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it.'

[203] *A Complainant v A Company* [DEC-E2002-014].

[204] ibid [6.2].

[205] Maeve Regan, *Employment Law* (Tottel Publishing 2009) 432.

[206] ibid.

'reasonable accommodation' by the employer unless such measures would pose a disproportionate burden on the employer.[207] Section 47 of the Disability Act 2005 applies to the public sector and states that 'a public body shall in so far as practicable take all reasonable measures to promote and support the employment by it of persons with disabilities.' Section 48 also provides for a follow up 'monitoring committee' which is required to compile annual reports on compliance.[208] The committee must include representatives of people with disabilities.[209] Various bodies have been established to fulfil these requirements.[210] The National Disability Strategy Stakeholder Monitoring Group meets twice a year, and government department representatives must present six-month progress reports specifying how specific goals are being achieved.[211] However, there is no uniform positive duty placed upon the public sector that spans across the prohibited grounds.

bb) EU measures

68. The EU has required various initiatives for positive action measures.[212] Article 29 of the Gender Equal Treatment Directive 2006 requires member states to 'actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provision, policies and activities.[213] This directive has been described as providing a potential catalyst for a unified public duty in Ireland: '[t]he transposition of the Directive into our equality legislation should establish a legal basis for equality mainstreaming in the public and private sectors'.[214] Mainstreaming is described as a requirement 'that government and public bodies should attempt to weave policies of equality and non-discrimination into the

[207]Employment Equality Act (Ireland) 2004 s 16(3)(c) provides a number of factors to determine content of 'disproportionate burden'. These include financial costs, scale and financial resources of employers business and the possibility of obtaining public funding or other assistance.

[208] Disability Act (Ireland) 2005 s 48(1) 'A Minister of the Government shall establish a committee (which shall be known as "a monitoring committee") in respect of the public bodies in relation to which he or she is the relevant Minister'.

[209] Disability Act (Ireland) 2005, s 48(4).

[210] National Disability Strategy Monitoring Group, Senior Officials Group on Disability, The Disability Stakeholders Group. Dr. Eilionoir Flynn, 'Implementing and Monitoring Ireland's National Disability Strategy: Who, How and When?, (December 20120) <http://search.nuigalway.ie/search?access=p&entqr=0&output=xml_no_dtd&sort=date%3AD%3AL%3Ad1&ie=UTF8&client=nuig_frontend&q=Implementing+and+Monitoring+Ireland's+National+Disability+Strategy%3A+Who%2C+How+and+When%3F&ud=1&site=nuig_all&y=9&oe=UTF8&proxystylesheet=nuig_frontend&ip=129.67.137.134&x=27&filter=0> accessed 19 January 2012.

[211] ibid 5.

[212] See 'European Union' above, paras 45-52.

[213] Recast Sex Directive Art 29, discussed above para .

[214] Niall Crowley, 'Mainstreaming Equality Foundations in the Irish Context', Mainstreaming Equality: Models for Statutory Duty – Conference Report 27th February 2002, 24 <http://www.equality.ie/index.asp?locID=107&docID=93> accessed 20 January 2012.

fabric of decision making across all spheres of government'.[215] Ireland has implemented its obligations through a series of policy initiatives.

cc) Policy Initiatives

69. Gender mainstreaming is included in both the 2000 to 2006 and the 2007 to 2013 National Development plans. The 2007 Plan includes various positive actions that are intended to 'invest in the development of women in preparation for and as participants in the labour market and in all levels of decision making in order to achieve true gender equality in Ireland.'[216] One such action is 'equality proofing'. The Department of Justice, Equality and Law Reform chair the Working Group on Equality Proofing.[217] 'Equality Proofing' intends to illuminate any negative results of policy on any category of persons protected by equality legislation.[218] The Working Group collaborates with the Equality Authority to provide assistance to other Departments to proof their policies. The Working Group has helped draft guidelines on the undertaking of disability proofing of Memoranda for Government.[219] The Equality Mainstreaming Unit seeks to address labour gaps in Ireland. The Unit provides support packages for programme providers, consultancy support for enterprises, support packages for Trade Union and Employer network and resource materials to support good practice in combating discrimination. A 'Measure Committee' oversees the Unit, comprised of various governmental departments, vocational bodies, NGOs and the Equality Authority.[220]

70. The Equality Authority (hereafter 'the Authority') was established under Part V of the Employment Equality Act 1998. The Authority's mandate encompasses working towards the elimination of discrimination in areas covered by the Acts, promoting equality of opportunity, providing information to the general public, reviewing the operation of the Acts and making recommendations to the Minister.[221] According to the National Development Plan 2007-2013, 'the Equality Authority, in collaboration with the Department, will develop a measure to support an equality mainstreaming approach across all labour market programme providers'.[222] The Authority can draw up codes of practice to end discrimination and once the Minister approves a

[215] C McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' [1999] Fordham Int'l L.J. 22.
[216] National Development Plan (Ireland) 2007 – 2013, 268.
[217] The Equality Authority Annual Report 2010, 63.
[218] National Development Plan (Ireland) 2007 – 2013, 269.
[219] The Equality Authority Annual Report 2010, 63.
[220] <http://www.equality.ie/index.asp?locID=322&docID=-1 > accessed 20 January 2012.
[221] Employment Equality Act (Ireland) 1998, s 39.
[222] National Development Plan 2007-2013, 269.

code, it becomes admissible in evidence in proceedings under the Act.[223] The Authority recently created an 'Equality Benefit Tool' which was showcased to public sector organisations in 2010, and included 'templates for equality action planning, equal status reviews, equality screening, equality impact assessment, producing equality policies…'[224] The Tool is an adaptable template to help organisations make the most of equality for employees, customers or service users.[225]

71. The government introduced the Gender Equality policy in 2000 and later introduced the Policy on Diversity in the Civil Service in 2002, which spans all nine grounds of the Employment Equality legislation.[226] The 2002 Diversity Policy commits the civil service to ensuring equality of opportunity in employment matters and places responsibility for implementation on Heads of Departments.[227]

iii) Assessment

72. The Equality Authority recommends the establishment of a public sector duty to promote equality across all of the nine grounds covered by the legislation.[228] According to the Equality Authority, such a duty would allow the public sector to take up its 'leadership role' in ensuring that diversity is a 'central focus in the workplace of the future' and promoting an approach to equality that would spill over to the private sector.[229] The Authority points out that legislative change would ensure that approaches to equality are 'proactive, planned and systematic' rather than voluntary.[230] According to the Authority, the individual enforcement model is 'inadequate in dealing with more complex and deeply rooted patterns of exclusion and inequality.'[231] Niall Crowley, CEO of the Equality Authority provides recommendations for a legal duty to mainstream. This duty would include clear goals, participation by those discriminated against, a role for the Authority in reviewing standards, and clear sanctions for failure to mainstream.[232] He argues that these duties would build upon the foundation already achieved in the Irish context.[233] Crowley points out the beneficial and preventative nature of a unified statutory duty

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[223] Employment Equality Act, s 56.
[224] The Equality Authority Annual Report 2010, 63.
[225] <http://www.equality.ie/index.asp?locID=348&docID=-1> accessed 20 January 2012.
[226] Civil Service Equality Initiatives Report (2006), 3.
[227] ibid 7.
[228] 'Building an Inclusive Workplace, Equality Authority Submission to the Forum on the Workplace of the Future', (2004), 39.
[229] ibid.
[230] ibid, 38. Crowley (n) 113 'the voluntary nature of current provisions and the uncertainty around their scope has meant they are not deployed adequately or to sufficient effect.'
[231] ibid, 37.
[232] Crowley (n) 5.
[233] ibid, 9.

'secures an institutional practice that prevents discrimination happening'.[234] Irish law would have the advantages of efficiency and certainty if a unified duty were implied across the grounds. Additionally this would assist individuals claiming on the basis of multiple grounds.

f) India

i) Overview

73. In India, positive duties to seek out and eliminate discrimination are primarily understood as obligations to guarantee and enforce special measures - known in India as 'reservations' - for marginalised sections of society. This commitment is embodied in arts 15 and 16 of the Indian Constitution which allow for reservations in public employment and education, and has been extended by the Constitution (Seventy-Fourth Amendment) Act 1992 which requires mandatory reservation for women, Scheduled Castes and the Scheduled Tribes in municipalities. The Indian Supreme Court has consistently held that reservations are a vital tool to eliminate discrimination and inequality.[235]

74. This focus on reservations has led to the relative neglect of proactive duties directly targeted at preventing and eliminating discrimination and harassment. However, recent developments suggest a greater shift toward these duties.

ii) Positive duties and their enforcement

aa) Sexual Harassment

75. In the absence of express Constitutional or statutory provisions, the Supreme Court of India has been proactive in positively obligating the government and private-sector to eliminate and prevent harassment. The judgement in *Vishaka v State of Rajasthan*[236] is a leading example. The apex court held that:

> 'In...the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose.'

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[234] Crowley (n) 111.

[235] See *Ashoka Kumar Thakur v Union of India* AIR 1997 SC 3011 (Supreme Court of India); *Chattar Singh v State of Rajasthan*, AIR 1997 SC 303 (Supreme Court of India); *State of Kerala v NM Thomas*, (1976) ILLJ 376 SC (per Mathew J) (Supreme Court of India); *CA Rajendran v Union of India*, (1968) IILLJ 407 SC (Supreme Court of India).

[236] AIR 1997 SC 3011 (Supreme Court of India).

76. The guidelines that the Court proceeded to develop apply to '[e]mployer[s] or other responsible persons in work places and other institutions'. They require duty-bearers to '*prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required*'. Similarly the obligation to take preventive steps includes the duty to create *appropriate work conditions* in respect of work, leisure, health and hygiene to further *ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.*

77. While the *Vishaka* judgement stressed the urgent need for sexual harassment legislation, it took thirteen years for the legislature to develop the Protection of Women Against Sexual Harassment at Workplace Bill 2010. This Bill covers both private and public spheres in its definitions of 'employer' and 'workplace'. Chapter VI sets out the 'Duties of Employer', including the positive obligation of providing a safe working environment, sensitising employees, and providing assistance to women who wish to lodge complaints.

bb) Disabilities

78. In its current form, the Rights of Persons with Disabilities Bill 2011 (RPWD Bill) will also impose positive duties on public and private sectors. The Bill provides that '[a]ll committees against sexual harassment shall be under a duty to promote and protect the right of all women with disabilities to a safe working environment; in fulfilment of this duty the committees shall inter-alia: undertake appropriate awareness raising programmes and devise accessible complaint mechanisms.'[237] Furthermore, the RPWD Bill provides that the failure to provide reasonable accommodation amounts to direct discrimination, thus imposing a positive duty to provide for reasonable accommodation and accessibility.

ee) Enforcement

79. Enforcement mechanisms are largely absent. The Sexual Harassment and RPWD Bills offer few details on the enforcement of the positive duties. In addition, there appears to be a lack of capacity and political will to implement these measures, as seen in the State's response to the *Vishaka* judgment. In *Medha Kotwal Lele v Union of India*[238] the Supreme Court emphasised the need for implementation of its guidelines laid down in *Vishaka* and issued a series of directions to the Central and the State Governments for proper and systematic implementation of the same. However, an application filed with the Labour Commissioner in Maharashtra in 2007

[237] Cl 8.
[238] WP (Crl) No 173-177 of 1999 (26th April 2004) (Supreme Court of India).

revealed that despite the Supreme Court's directions in *Medha Kotwal*, no concrete measures had been taken to eliminate sexual harassment at workplaces.[239]

iii) Assessment

80. There are positive signs that India will move toward a proactive model of addressing discrimination and harassment. In addition, there is building academic and scholastic discussion of a single equality and non-discrimination statute which will cover both the public and private sectors.[240]

[239] 'Who's protecting the working women?' (3 January 2009) *Deccan Herald*.

[240] 'Towards an Anti-Discrimination Law in India' Conference was organised on 11-12 December 2010 at India Habitat Center, New Delhi to deliberate and brainstorm over the need for an anti-discrimination legislation whose objectives and framework respond to the need of the hour anti-discrimination/sex equality <http://www.lawyerscollective.org/womens-rights-initiative/anti-discriminationsex-equality.html> accessed 31 December 2011.

QUESTION 10: SHOULD THE CONSOLIDATED BILL PROTECT AGAINST INTERSECTIONAL DISCRIMINATION? IF SO, HOW SHOULD THIS BE COVERED?

1) International Law

81. Multiple and intersectional discrimination have received greater international attention since the Fourth World Conference on Women held in Beijing in 1995. The resulting Beijing Platform for Action explicitly recognises that 'women face particular barriers because of various diverse factors in addition to their gender' and that there was a pressing need to ensure equal enjoyment of rights 'for all women and girls who face multiple barriers to their empowerment and advancement'.[241]

82. This growing awareness of multiple and intersectional discrimination has influenced the interpretation of the major international human rights instruments and no doubt motivated the express recognition of multiple discrimination in the 2009 Convention on the Rights of People with Disabilities.

a) ICCPR

83. While there is no explicit reference to multiple or intersectional discrimination in the ICCPR, the Human Rights Committee has in its General Comments interpreted the art 26 prohibition on discrimination as including these forms of discrimination. This is evident in General Comment 28[242] where the HRC recognised that:

> 'Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.'

[241] Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, Chapter II – Global Framework [32-33].

[242] UN Human Rights Committee (HRC), 'General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)', 29 March 2000, UN Doc CCPR/C/21/Rev.1/Add.10, [30] available at: <http://www.unhcr.org/refworld/docid/45139c9b4.html> accessed 20 January 2012.

b) ICESCR

84. The Committee on Economic, Social and Cultural Rights have, in their General Comments, made it clear that the ICESCR should be interpreted to cover intersectional discrimination. In General Comment 20[243], the Committee recognises the problem when it states:

> 'Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.'[244]

The Committee then advocates a 'flexible approach' to the ground of 'other status' which is enumerated in Art 2(2) of the Covenant. The Committee gives a list of additional prohibited grounds, but highlights that these are not exhaustive. Among other possible prohibited grounds, it explicitly refers to:

> 'the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability' [245]

85. Furthermore, General Comment 5, [246] regarding persons with disabilities, acknowledges that:

> 'Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected'.[247]

And, in General Comment 16, [248] the Committee highlights that:

> 'Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.'[249]

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[243] CESCR, 'General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/20, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html> accessed 20 January 2012.
[244] ibid, [17].
[245] ibid, [27].
[246] CESCR, 'General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/20, <http://www.unhcr.org/refworld/docid/4a60961f2.html> accessed 20 January 2012.
[247] ibid, [19].
[248] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, E/C.12/2005/4, available at: http://www.unhcr.org/refworld/docid/43f3067ae.html
[249] ibid, [5].

The Committee then goes on to state that the concept of equality should be given 'substantive meaning'[250] and 'understood comprehensively'[251] such that the rights in the Covenant are equally enjoyed 'in practice'.[252]

c) CERD

86. The Committee on the Elimination of Racial Discrimination (CERD), has issued a number of General Recommendations which explicitly refer to the need to address multiple and intersectional discrimination.

87. This is most prominent in General Recommendation 32,[253] where the committee stated that:

> 'The "grounds" of discrimination [in the Convention] are extended in practice by the notion of "intersectionality" whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention.'

88. In the preamble of General Recommendation 15,[254] the Committee recognised the intersection between gender discrimination and racial discrimination when it stated:

> '…some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination.'[255]

89. The Committee also addressed the issue of multiple discrimination in General Recommendation 29,[256] where it suggested that parties:

> 'Take into account, in all programmes and projects planned and implemented and in measures adopted, the situation of women members of the communities, as victims of multiple discrimination, sexual exploitation and forced prostitution;

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[250] ibid, [6].
[251] ibid, [7].
[252] ibid, [6].
[253] CERD, 'General Recommendation 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination', 24 September 2009, UN Doc CERD/C/GC/32, <http://www.unhcr.org/refworld/docid/4adc30382.html> accessed 20 January 2012.
[254] ibid, [7].
[255] CERD, 'General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993)', UN Doc. A/48/18 (1994), [114].
[256] CERD, General Recommendation 29 on Article 1, Paragraph 1, of the Convention (Descent)', 1 November 2002.

> … Take all measures necessary in order to eliminate multiple discrimination including descent-based discrimination against women, particularly in the areas of personal security, employment and education'.[257]

90. General Recommendation 31,[258] regarding the administration and function of the criminal justice system, also urged special attention be given to women and children as persons discriminated against because of their descent, as 'they are susceptible to multiple discrimination because of their race and because of their sex or their age'.[259]

d) CEDAW

91. The Committee on the Elimination of Discrimination Against Women has also referred to problems arising from intersectionality in its General Recommendations. In CEDAW General Recommendation 24,[260] discussing women and health, the Committee highlights the particular vulnerability of migrant, refugee and internally displaced women.[261] This shows its concern with the intersection between gender and citizen status. In the same Recommendation the Committee also highlighted the intersection between gender and socio-economic factors in relation to women's health,[262] as well as gender and age in relation to access to health care.[263] Furthermore, CEDAW General Recommendation 25[264] explicitly acknowledges the problem of intersectional and multiple discrimination and recommends measures to alleviate it:

> 'Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.'[265]

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[257] ibid.
[258] CERD, General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System', 2005.
[259] ibid, [2].
[260] CEDAW, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)', 1999, UN Doc A/54/38/Rev.1, chap. I, <http://www.unhcr.org/refworld/docid/453882a73.html> accessed 20 January 2012.
[261] ibid, [6].
[262] ibid, [12b].
[263] ibid, [24]-[25].
[264] CEDAW, 'General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)' (2004), <http://www.unhcr.org/refworld/docid/453882a7e0.html> accessed 20 January 2012.
[265] ibid, [12].

e) CRC

92. The Committee on the Rights of the Child has also addressed intersectionality in some of its General Comments on the Convention on the Rights of the Child (CRC). General Comment 3, [266] regarding HIV/AIDS and the rights of the child, refers to the combined problem of discrimination against children infected with HIV and discrimination against those in rural areas.[267] The same General Comment also discusses the intersection between gender discrimination, discrimination on grounds of HIV infection and age.[268]

f) CRPD

93. The Convention on the Rights of Persons with Disabilities explicitly addresses multiple discrimination in art 6, where it affirmed that: 'States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.'

94. Other documentation relating to the Convention also recognises multiple discrimination. The Guidance for Human Rights Monitors,[269] in explaining the meaning of discrimination, states:

> 'Persons with disabilities might also experience multiple forms of discrimination; for example, a woman with disabilities might experience discrimination on the basis of sex as well as disability. The recognition of the principle of non-discrimination in article 3 underlines the importance of considering discrimination in all its forms.'[270]

2) Country Studies

a) Canada

i) Overview

95. Section 15 of the Canadian Charter of Rights and Freedoms, enacted in Part I of the Canadian Constitution Act 1982, guarantees the right of natural persons to equality:

> 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

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[266] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), 2004, available at: http://www.unhcr.org/refworld/docid/453882a7e0.html
[267] ibid, [5].
[268] ibid, [6].
[269] UN Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors*, available at http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf
[270] ibid, at p20

96. This provision is an example of the 'non-exhaustive list' model,[271] where a number of 'suspect' grounds are identified but courts are left with scope to identify grounds which are 'analogous' to those enumerated.[272] In *Law v Canada,*[273] the Supreme Court of Canada confirmed that intersectional grounds could come within s 15. Iacobucci J held that there was 'no reason in principle … why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s 15(1).'[274] The Court has since upheld a s 15 claim brought on the intersectional ground of "Aboriginality-residence".[275]

97. At the legislative level, the Canadian Human Rights Act is the most important item of federal human rights legislation. A 1998 amendment inserted s 3.1, which makes express provision for intersectional discrimination claims: '(f)or greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.' As Pothier notes,[276] and as the words 'for greater certainty' suggest, this amendment seemingly was not intended to change the law.

98. Human rights legislation or codes prohibiting discrimination within the purview of the provincial legislatures are in force in all Canadian provinces. The equality provisions in all such instruments take the form of an exhaustive or non-exhaustive list of individual grounds, and none provide expressly for intersectional discrimination claims. However, there are clear instances of provincial courts and tribunals taking an intersectional approach to claims made under provincial human rights instruments. Thus in *Baylis-Flannery v DeWilde (No.2),*[277] in a claim brought under the Ontario Human Rights Code 1990, the Human Rights Tribunal of Ontario stated that 'reliance on a single axis analysis where multiple grounds of discrimination are found, tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against'.[278]

99. Further, in *Monsson v Nacel Properties*,[279] the British Columbia Human Rights Tribunal allowed a claim for discrimination in housing under the province's Human Rights Code, stating that it was

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[271] Fredman, *Discrimination Law* (n), ch. 3.
[272] See for example *Egan v Canada* [1995] 2 SCR 513.
[273] [1999] 1 SCR 497.
[274] ibid 554-5.
[275] *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203.
[276] Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 C.J.WL. 37, 62.
[277] (2003) 48 C.H.R.R. D/197 (Ont. H.R.T.).
[278] ibid [144].
[279] (2006) CHRR Doc. 06-743, 2006 BCHRT 543.

the 'intersection of his race, colour, age and sex… that led to the discrimination'.[280] It is worthwhile noting that this approach was adopted notwithstanding that the grounds in the Code were presented as a list of alternatives.

ii) Application

100. The Supreme Court's approach to intersectional discrimination under s 15 has been to treat intersectional grounds (properly viewed as unique and thus distinct from their constitutive grounds) as 'in principle' no different from any other non-enumerated ground. Thus both majority and minority judgments in *Corbiere* agree that the proper approach is to assess whether the claimed intersectional ground is 'analogous' to those enumerated in s 15. In *Law,* Iacobucci J stated that the determinant of whether a ground was analogous was whether it would 'serve to advance the fundamental purpose of s.15(1)',[281] and that this was to be determined 'on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group.'[282]

101. In *Corbiere,* the majority led by McLachlin and Bastarache JJ appeared to take a narrower approach, arguing that the fundamental question was whether an alleged ground shared the common element connecting the enumerated grounds. They identified this common element in the fact that '(t)hey often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.'[283] This test echoed the earlier statement of the majority in *Egan,* to the effect that sexual orientation was an analogous ground because it was 'either unchangeable or changeable only at an unacceptable personal cost'.[284] They stated that other factors mentioned in the jurisprudence, such as history of disadvantage or status as a discrete and insular minority, 'may be seen to flow from' the central concept of immutability.

102. Applying the test of actual or constructive immutability, the majority found Aboriginality-residence was a ground as it was a characteristic essential to a band member's identity, likening it with other constructively immutable characteristics like religion and citizenship. They further emphasised that recognising this ground did not mean that 'residence' was an analogous ground

[280] ibid [33].
[281] *Law* (n) [93].
[282] ibid.
[283] *Corbiere* (n) [13].
[284] *Egan* (n).

on its own, thus accepting by the same token that intersectional grounds need not be comprised solely of grounds which are protected individually.

103. L'Heureux-Dubé J, in a judgment concurred in by the three other judges, came to the same result as the majority but with conflicting reasoning. She began from the premise, affirmed in *Law*[285] but expressly refuted by the majority, that the judgment as to whether a ground was analogous had to be purposive and contextual. She cited various contextual factors identified in the Court's jurisprudence as indicating a relationship between the ground and the purpose of s 15(1): as well as actual and constructive immutability, she referred to the 'fundamental nature of the characteristic', whether those with the trait are 'lacking in political power, disadvantaged or vulnerable to becoming disadvantaged', and whether the ground is included in federal and provincial human rights codes.[286] Further, she emphasised that none of these factors were necessary to a finding of an analogous ground. After all, the test for analogous grounds had to be–

> 'flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect, and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.'

She then found the intersectional ground analogous because the choice of whether to live on reserve was fundamental; the group was a discrete and insular minority which had suffered disadvantage; and living off reserve was in many cases forced on members of the group or was a choice made at high personal cost. She also took the intersectionality analysis further in recognising the "double disadvantage" which differential treatment of off-reserve band members imposed on Aboriginal women.[287]

104. A particular concern arising from the Supreme Court's approach to intersectional discrimination is the need for claimants to identify a 'comparator group'. In *Corbiere,* the majority identified the comparator as resident band members, and in *Hodge v Canada*,[288] the Court re-affirmed its own role in assessing whether the claimant has identified the correct comparator group. However, in the recent judgment of *Withler v Canada (Attorney-General),*[289] the Court, specifically acknowledging the difficulties that the mirror comparator group requirement posed for claims of intersectional discrimination, concluded that under s 15(1), '(i)t is unnecessary to pinpoint a particular group

[285] *Law* (n) [41].
[286] *Corbiere* (n) [60].
[287] ibid, [72].
[288] [2004] 3 SCR 357.
[289][2011] 1 SCR 396.

that precisely corresponds to the claimant group'.[290] In the Court's view, this provided the flexibility needed to accommodate intersectional claims. Thus the position would now seem to be that the claimant must merely show that the intersectional ground is analogous, and that the challenged distinction on that ground is discriminatory.[291]

105. Under the Canadian Human Rights Act, s 3.1 arguably allows intersectional discrimination claims to be brought so long as the grounds which intersect come within the exhaustive list in s 3(1). It is difficult to say much about the application of section 3.1 in light of the lack of jurisprudence on the issue.[292] However, one notable difference between claims under the Act and under s 15 of the Charter is clear. A claim like that in *Corbiere* may have failed because 'residence' is not itself an analogous ground. While s 15(1) leaves scope for intersectional grounds of this nature, the exhaustive list model used in the Act means that intersectional grounds can only be made up of constituent grounds which are enumerated in the Act.

106. Tribunal decisions brought under provincial human rights codes indicate an increasing willingness to adopt an intersectional analysis. In *Radek v Henderson Development (Canada) Ltd,*[293] the tribunal accepted a discrimination claim under the British Columbia Human Rights Code on the grounds of race, colour, ancestry and disability, and acknowledged that 'these grounds cannot be separated out and parsed on an individual basis.'[294] The tribunal found that the respondent's employee had discriminated against the claimant on the basis of stereotype, and while this was particularly clear in relation to the claimant's race, colour and ancestry, disability was also a factor as the claimant's impaired walk had also influenced the way she was treated. Thus the tribunal accepted that even when discrimination was based more 'clearly' on one characteristic than another, this did not preclude an ultimate finding that the discrimination was intersectional and combined all of those characteristics. Another example of an intersectional analysis came in *Frank v A.J.R Enterprises Ltd,*[295] where the tribunal found the 'essence of (the) complaint'[296] to be the intersection of sex and race. The tribunal found the respondent had assumed that the

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[290] ibid, [63].
[291] The most recent Court jurisprudence suggests a distinction is discriminatory if it creates a disadvantage by perpetuating prejudice or stereotyping: see *R v Kapp* [2008] 2 SCR 483, [17]; *Withler* (n) [61].
[292] See MacKay & Kim, 'Adding Social Condition to the *Canadian Human Rights Act*' (Canadian Human Rights Commission, 2009), 79.
[293] [2005] B.C.H.R.T.D. No. 302.
[294] ibid, [463].
[295] (1993), 23 C.H.R.R. D/228.
[296] ibid, D/234.

claimant was a prostitute, and ejected her from its hotel on this basis. This was contrary to the code because it disregarded 'the basic dignity, humanity and feelings of Aboriginal women'.[297]

107. Finally, provincial case-law has regularly considered the intersectional nature of a claim to be relevant to the determination of remedies. In *Baylis-Flannery,* the tribunal found that the impact on the claimant of discrimination on account of being a black woman was 'more than the sum of the parts'.[298] They awarded her general damages for all of the enumerated grounds of discrimination that she suffered, and on the separate head of mental anguish, awarded more than they would have for a single ground 'because (of) the impact of the intersectional discrimination'.[299] This case was relied on in *S.H v M[…] Painting,*[300] where the same tribunal stated that the intersectional nature of the discrimination had implications for the impact of the discrimination on the claimant, who was accordingly awarded greater damages for injury to dignity, feelings and self-respect. In *Comeau v Cote,*[301] the British Columbia Tribunal awarded higher damages because the intersectionality of prohibited grounds had a greater impact on the claimant than discrimination on either ground, taken in isolation, would have.

iii) Assessment

108. Prior to the decisions in *Law* and *Corbiere,* various commentators had criticised the Supreme Court's maintenance of a 'single axis' approach. In a hugely influential article, Nitya Iyer argued that such an approach 'obscures the complexity of social identity',[302] causing all focus to fall upon one characteristic, and further causing several claimants with compelling claims to fall through the cracks where they were unable to fit within the narrow conception of discrimination embodied in such a model. There was a sense that the strides made in intersectionality theory had been 'ignored'[303] by the Supreme Court, though some commentators acknowledged that the consensus on theory left the question of 'how to incorporate an intersectional approach into the equality jurisprudence'.[304] Thus the two 1999 decisions were greeted as a 'positive development'[305] which, according to Aylward, provided the foundation for a better analytical structure of intersectional claims.[306]

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[297] ibid.
[298] Above (n) [145].
[299] ibid, [149].
[300] (2009) HRTO 595.
[301] (2003) BCHRT 32.
[302] Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 Queen's L.J. 179, 181.
[303] Aylward, 'Intersectionality: crossing the theoretical and praxis divide', (2010) J. of Critical Race Inquiry 1, 8.
[304] Grabham, '*Law* v *Canada*: New Directions for Equality Under the Canadian Charter?', (2002) 22 OJLS 641, 650.
[305] Pothier (n), 51.
[306] Aylward (n), 13-14.

109. Nevertheless, the position of the majority in *Corbiere* has been attacked as failing to fully embrace the notion of intersectional discrimination as elucidated in the literature. Criticism has been levelled at the judgment of Bastarache and McLachlin JJ because of their insistence that determining analogous grounds should not involve a contextual analysis. Grabham argues that determining whether a ground is analogous necessarily involves assessing the social position of the allegedly analogous group, and 'this cannot be done out of context'.[307] Aylward notes that the majority considered that the subsequent stage of whether there was discrimination provided the proper point at which to import a contextual analysis, but this means that if a ground is found not to be an analogous, the claimants will never be able to 'contextualise' their treatment in the social and legal history of Canadian society's treatment of that group.[308] Thus the argument suggests that the majority's test introduces an unwelcome rigidity which does less to recognise the complexity of experiences of discrimination than the *Law* Court or the judges led by Heureux-Dubé J.

110. Moreover, the appointment of immutability as the organising notion for the analogous ground analysis has left many commentators unimpressed. For Aylward, this focus takes attention away from what in her view is the real problem which antidiscrimination law seeks to address, namely 'society's discriminatory treatment of (the) individual or group'.[309] Grabham agrees, noting how even many of the analogous grounds are not immutable in the ordinary sense, and criticising the notion of 'constructive immutability' as vague.[310] Réaume notes that the majority fails to explain what they consider justifies this 'retreat' from the more open-ended and multi-faceted approach of the *Law* Court.[311]

111. One school of thought has gone further and argued that intersectional discrimination can only be properly tackled by an approach which dispatches with grounds altogether. The alternative of a 'groups' based approach was notably advocated by L'Heureux-Dubé J in *Egan,* who claimed that any approach tied to grounds was to some extent 'distanced and desensitized from real people's real experiences'.[312] Her argument has been adopted by commentators with explicit reference to intersectional discrimination. Thus Gilbert argues that L'Heureux-Dubé's approach would help 'in unpacking compound, complex, and intersectional discrimination claims, which

[307] Grabham (n) 652.
[308] Aylward (n) 45.
[309] ibid 46.
[310] Grabham (n) 652.
[311] Réaume, "Discrimination and Dignity" (2003) 63 Louisiana Law Review 645, 662 (n 57).
[312] ibid 552.

will undoubtedly become the primary task of the courts as equality challenges develop'.[313] This claim as to the likely prevalence of intersectional claims is supported by statistics suggesting that 48% of all claims brought to the Ontario Tribunal between April 1997 and December 2000 cited more than one ground of discrimination.[314] This school of thought is however highly contested, notably by Pothier, who contends that it would be a mistake to abandon grounds. According to Pothier, grounds connect us to the history and context of a particular group's treatment, and cannot be dismissed as ancillary as in many cases, they are crucial to understanding why a particular group suffers continuing disadvantage.[315]

112. There seems to be a stronger consensus that the 'exhaustive list' model of the Human Rights Act is too inflexible to deal effectively with the problem of intersectional discrimination. Much of the commentary argues for an expanded list of grounds in section 3(1). MacKay and Kim, arguing for the addition of 'social condition', describe at length how this ground tends to intersect with several of the enumerated grounds. They note that extending the ground in this way would help claimants whose 'real lived experience… may not be a neat and clean fit with the current enumerated grounds'.[316] They further suggest that the current model fails to adhere to human rights principles. At a more theoretical level, Iyer argues that the law-makers who select the appropriate grounds largely come from the dominant social group so their selection represents that group's perception about what social characteristics are relevant. This can cause difficulties, but one way of mitigating those is to ensure that the list of characteristics remains open.[317]

113. A final concern arising in the commentary relates to perceived inconsistencies in the approach to cases of intersectional discrimination at all levels of the judiciary. Reviewing the jurisprudence of its own and other provincial Human Rights Tribunals, the Ontario Human Rights Commission concludes that 'in some cases, the analysis takes into account the effect of the existence of multiple grounds, while in others the decision-makers tend to revert back to a sequential analysis of each ground in isolation.'[318]

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[313] Gilbert, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 McGill L.J. 627, 649.
[314] Ontario Human Rights Commission, 'An intersectional approach to discrimination: discussion paper" (2001), 11.
[315] Pothier (n).
[316] MacKay and Kim (n) 81.
[317] Iyer (n).
[318] Ontario HRC Report (n) 22.

114. Thus in contrast with *Baylis-Flannery,* the Ontario Board of Inquiry in *Crozier v. Asselstine*[319] refused to give added damages on the basis of intersectionality while accepting that the respondent's treatment amounted to both sexual harassment and harassment for sexual orientation. The Supreme Court has also drawn criticism for its decision in *Gosselin v Quebec.*[320] MacKay and Kim suggest that although the claimant's situation involved an intersection of poverty, age and possible disability, the Court was 'unwilling to adopt this holistic approach to the case'.[321] Canadian intersectional discrimination jurisprudence is still its infancy, and judges may need some time to familiarise themselves with the nuances of intersectional analysis before they can be expected to apply such an analysis consistently.

b) South Africa

i) Overview

115. Section 9(3) of the Constitution recognises the possibility of discrimination on multiple grounds by prohibiting discrimination on 'on one or more grounds'. This formulation is duplicated in the prohibitions of discrimination in s 6(1) of the Employment Equity Act and s 1 of the Equality Act.[322] The Constitutional Court has gone further by recognising the possibility of intersectional discrimination. The guiding principle behind this recognition was articulated by Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*:[323]

> '[R]ights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.'[324]

As the judgment goes on to explain, this concern for a person-centred, contextual inquiry requires-

> 'the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in

[319] (1994), 22 C.H.R.R. D/244.
[320] [2002] SCC 84.
[321] MacKay and Kim (n) 81.
[322] See para 28 above.
[323] 1999 (1) SA 6 (CC).
[324] ibid [112].

certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate.'[325]

ii) Application

116. The South African courts have had little difficulty in addressing discrimination claims on multiple grounds where they have arisen.[326] The Court has also used intersectional discrimination to adopt a nuanced and context sensitive understanding of discrimination.

117. This is demonstrated in the Court's judgment in *Hassam v Jacobs NO & Others*[327] where the Court held that the exclusion of spouses in polgygnous Muslim marriages from the Intestestate Succession Act amounted to discrimination on the overlapping grounds of religion, gender and marital status. It would have been exceedingly difficult for the Court to reach this conclusion had it not adopted a flexible approach to the grounds. This was because spouses in monogamous Muslim marriages were entitled to inherit under the Act. As a result, spouses in polygynous Muslim marriages were not discriminated against merely on the grounds of religion or sex. Nor was the discrimination merely on the grounds of marital status, as spouses in polyganous African customary law marriages are entitled to inherit under South African law. Instead, the discrimination arose from the unique confluence of the three identities: being female, Muslim and in a polygynous marriage.

118. This approach has also been evident in the string of discrimination cases which extended some of the legal protections and benefits of marriage to same-sex life partners,[328] prior to the legalisation of same-sex marriage in December 2006. In these cases, the Constitutional Court held that the discrimination could not be understood merely as discrimination on the discrete grounds of marital status or sexual orientation. Instead, the discrimination arose from the

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[325] ibid [113].

[326] See for example, *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) SA 563 (CC) where the Court found that the customary rule of male primogeniture, excluding black females and young persons from inheriting from the intestate estate of the deceased, amounted to discrimination on the basis of sex, race, age and birth.

[327] 2009 (5) SA 572 (CC).

[328] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), striking down immigration legislation that spouses of permanent residents to join their partners in South Africa, but denied this benefit to same-sex couples; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC), concerning a challenge to legislation allowing surviving spouses of judges to continue to receive benefits after the death of the judge, but denying this benefit to same-sex life partners; and *Gory v Kolver NO & Others* 2007 (3) BCLR 249 (CC), where the Court held that the Intestate Succession Act was invalid for not including same-sex life partners who had undertaken reciprocal duties of support.

unique combination of these grounds as same-sex partners in committed, long-term relationships were denied the opportunity to marry on the basis of their sexual orientation and were thus excluded from the range of benefits attached to marriage. Their position was thus distinguishable from heterosexual couples in life partnerships and same-sex couples in short-term relationships.

iii) Assessment

119. The Constitutional Court's recognition of intersectional grounds of discrimination has allowed it to develop a more nuanced and sensitive understanding of the discrimination faced by individuals. Perhaps what is most striking is how few cases of intersectional discrimination have reached the courts, particularly in light of South Africa's diversity. Thus, far from resulting in a proliferation of discrimination claims, there appears to be a need for greater efforts to assist marginalised sub-groups in bringing claims.

c) European Union

i) Overview

120. At face value the EU approach to intersectional discrimination is underdeveloped. There is little acknowledgement of the concept in the primary legal materials. The Race Directive and Framework Employment Directive incorporate the idea of 'multiple' discrimination only indirectly through their preliminary Recitals.[329] A communication document which preceded the Framework Employment Directive made an oblique allusion to the fact that grounds of discrimination may combine to produce peculiarly vicious forms of disadvantage.[330]

ii) Application

121. It remains to be seen whether these cursory references will prompt judges to 'read up' the provisions on direct and indirect discrimination to include intersectional forms of discrimination. The Court of Justice of the European Union (CJEU) has not yet squarely confronted the issue.[331]

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[329] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive), recital 14; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Employment Directive), recital 3. Both acknowledge that 'women are often the victims of multiple discrimination'.

[330] Commission, 'Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation' COM (1999) 565 at 6.

[331] See Burri and Schiek, *Multiple Discrimination in EU Law: Opportunities for legal responses to intersectional gender discrimination?* (2009) [2.3(b)] < http://ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009_en.pdf>, accessed 20 January 2012, for an account of several cases in which the issue of intersectionality has played a highly tangential and unacknowledged role.

122. The fragmentary style of EU discrimination law may obstruct any such reading because claimants will find it difficult to 'combine' grounds of discrimination across multiple legislative instruments. Nonetheless, The CJEU has demonstrated that it is comfortable working with an understanding of discrimination legislation that does not require the identification of a comparator.[332] This might count as a move towards an intersectional understanding of discrimination given that the absence of a comparator in intersectional cases is often identified as the 'Achilles heel' of providing an effective legal remedy to the victims of multiple discrimination. Furthermore, as Fredman observes, the recent expansion of the grounds of unlawful discrimination recognised by EU law might facilitate an incorporation of the concept of intersectionality.[333]

123. Even if the law in its present state does not supply an effective response to intersectional discrimination, there are movements at an institutional level by EU legislators towards greater explicit recognition of intersectionality. In April 2009 the European Parliament tabled an amendment to a proposed equal treatment Directive[334] that would bring the issue of multiple discrimination to the fore. Its amendment was framed in the following terms:

> 1. This Directive lays down a framework for combating discrimination, *including multiple discrimination*, on the grounds of religion or belief, disability, age or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.
> 2. *Multiple discrimination occurs when discrimination is based:*
>   a. *on any combination of the grounds of religion or belief, disability, age or sexual orientation, or*
>   b. *on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of*
>   i. *sex...*
>   ii. *racial or ethnic origin...*
>   iii. *nationality.*
> 3. *In this Directive, multiple discrimination and multiple grounds shall be construed accordingly.* [335]

[332] Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567 (ECJ), [24].
[333] Fredman, *'Double Trouble: multiple discrimination and EU law'* (2005) European Anti-Discrimination Law Review Issue 2, 16.
[334] Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426 final (Proposed Equal Treatment Directive).
[335] European Parliament legislative resolution of 2 April 2009 (P6_TA(2009)0211). Amendments of the European Parliament in italics.

124. The amended proposal goes on to require the Commission to report on the legal frameworks that are available to regulate multiple discrimination in the EU and makes provision for the Directive to be revised if more robust measures are required.[336] The proposal is presently working its way through the legislative machinery.[337] In its wake, it is interesting to note that a European Commission-sponsored Report found that a 'vast majority of [Member States'] experts favour Community legislation [to combat multiple discrimination]'.[338]

iii) Assessment

125. Individuals in the EU are by no means immune from multiple discrimination. Fredman observes that the issue tends to be prominent amongst female migrant workers.[339] In this light, the muted response of EU law to the problem of intersectionality is disappointing.

126. In a Commission-sponsored Report it was found that an effective response to intersectionality has been obstructed by a hierarchical and fragmentary approach to the protected grounds of discrimination.[340] For example, Bell questions the wisdom of requiring Member States to designate bodies to monitor their performances under the Race and Recast Sex Directives but not under the Framework Employment Directive, which protects against discrimination on the grounds of religion and belief, age, disability and sexual orientation.[341] Such a sporadic approach to discrimination law frustrates recognition of the fact that individuals may be the victim of multiple grounds of discrimination.

127. If the law is to recognise 'compound' grounds of discrimination, it is imperative that each individual ground is protected on an equal footing. The approach of the European Parliament to the proposed Equal Treatment Directive may, in this respect, be progressive.[342] By averring to all of the recognised grounds of discrimination in a single provision, judges are likely to feel more comfortable producing conglomerates grounds. As Fredman notes, an even more robust approach would incorporate a *non-exhaustive* list of grounds.[343] This would remove any interpretive impediment to recognising hybrid grounds of discrimination.

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[336] Proposed Equal Treatment Directive art 16(2).
[337] < http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196 > accessed 5 January 2012.
[338] Burri and Schiek (n) [3.6].
[339] Fredman (n) 14.
[340] Burri and Schiek (n) [2.1].
[341] Bell, *'Article 13 EC: The European Commission's anti-discrimination proposals* (2000) 29 Industrial LJ 79, 83.
[342] See text to n .
[343] Fredman (n) 16-17.

d) United Kingdom

128. The United Kingdom's position on multiple and intersectional discrimination has been usefully canvassed in Cambridge Pro Bono's submissions.[344] As a result, it will suffice to briefly summarise the position under s 14 of the Equality Act of 2010:

- Section 14 prohibits discrimination on the basis of only two protected characteristics;
- It adopts a closed-list of protected characteristics which is severely under-inclusive as it excludes grounds such as pregnancy and marital status;
- It requires a comparator test, as the claimant must demonstrate that the alleged perpetrator has treated her 'less favourably than [the perpetrator] treats or would treat a person who does not share either of those characteristics' (s 14(1)).
- This section has not yet been brought into force.

e) Republic of Ireland

i) Overview

129. Discrimination is prohibited by the Employment Equality Acts 1998 to 2008 and the Equal Status Acts 2000 to 2008. This legislation prohibits discrimination on the basis of ten grounds.[345] Part III of the 1998 Act prohibits discrimination between men and women and Part IV prohibits discrimination on the basis of all other grounds. The focus on gender reflects the origin of the legislation in EU law.[346] The Equal Status Acts 2000 to 2008 prohibit discrimination on all nine grounds. Irish legislation requires a comparator to prove discrimination.[347] The law does not provide for intersectionality, and each claim is reviewed separately and is not examined collectively.[348] However one discriminatory act may give rise to multiple wrongs and therefore the grounds of discrimination 'are not mutually exclusive'.[349] Still, each ground must be pleaded separately within the same case. In *Freeman v Superquinn* the labour court overturned the recommendation of the equality officer as the officer dealt with three grounds of discrimination as one issue and did not consider each ground separately.[350]

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[344] Cambridge Pro Bono (n) 22.
[345] Equal Status Act (Ireland) 2000, s 3(2) gender, marital status, family status, sexual orientation, religion, age, disability, race, membership of the traveller community, and victimisation.
[346] Brid Moriarty and Eva Massa (n) 281.
[347] Crowley (n) 68; Equal Status Act 2000 s 3(b)(i)' a person who is associated with another person is treated, by virtue of that assocation, less favourably than a person who is not so associated is, has been or would be treated'.
[348] Frances Meenan, 'Ireland', Multiple Discrimination in EU Law, Opportunities for legal responses to intersectional gender discrimination? ec.europa.**eu**/social/BlobServlet?docId=3808&langId=en accessed 5 January 2012, European Network of Legal Experts in the Field of Gender Equaltiy, Susanne Burri and Dagmar Schiek, European Commission, Unit EMPL/G/2, 2009. 72.
[349] ibid.
[350] *Freeman v Superquinn* DEC-E/2002/13.

ii) Application

130. The difficulties of the lack of intersectionality in Irish law are highlighted by Frances Meenan in her examination of the case of *Doyle v Jury's Doyle Hotel*.[351] Here a long-term part-time women worker claimed discrimination on the grounds of sex and age in relation to pension entitlements, as the company she worked for only permitted access to their pension scheme by part-term workers after she had crossed the company's self imposed age limit. The tribunal examined the company statistics and held that a difference of 14.4 percent between males and females in part-time employment did not constitute evidence of discrimination on the grounds of sex. It then went on to examine the age claim, and held that the fact that the employer only permitted part time staff into its pension scheme after the complainant was beyond the age required was coincidental and did not infringe s.72(1) Pensions Act 1990. This provision allowed an age bar where appropriate and necessary because of a legitimate object of the employer as long as it did not discriminate on the gender ground. By viewing the claim as two separate grounds the tribunal found no discrimination. A holistic view of the matter may have afforded a more favourable outcome for the claimant.

131. Difficulties also arise regarding choice of venue issues. Under the gender ground a claimant can bring her claim to the equality tribunal, where a maximum of two years gross remuneration is imposed, or in the Circuit Court where there is no cut-off point for awards. However if the claimant wishes to pursue an additional non-gender ground they must bring it to the Equality Tribunal. Therefore, to avoid multiple proceedings, a claimant must choose between efficient litigation or greater potential compensation.

iii) Assessment

132. While Frances Meenan describes the current state of legislation with multiple grounds as 'relatively satisfactory', she goes on to state that 'a definition of multiple discrimination or 'intersectional discrimination' would be useful, with the clarification that a claim brought on a number of grounds shall be investigated together as a 'compound' ground and that a prima facie case does not have to be proved on two grounds'.[352] According to Colm O'Cinneide, 'overlapping forms of discrimination will remain a constant thorn without the introduction of a general duty' and he warns about 'hierarchies of inequality' becoming established if a general duty is not introduced.[353] An acceptance of unified claims would allow tribunals and Courts to

[351] *Doyle v Jury's Doyle Hotel* DEC-P2009 – 001.
[352] Meenan (n) 76.
[353] O'Cinneide (n 4) 18.

assess the individual circumstances of the particular claimant and provide a more appropriate response.

d) United States of America

i) Overview

133. At a constitutional level, the Fourteenth Amendment of the United States Constitution frames the equality guarantee in broad, open-textured language, stating that no State may 'deny any person within its jurisdiction the equal protection of the laws'. This broad definition has generally allowed the Court to determine which legislative classifications should be regarded as invidious. They have done so through the creation of a three tier-framework. Most classifications are required to have a mere rational connection to a legitimate State interest. However, any classification which refers to a 'discrete and insular minority' is inherently suspect and subject to a 'more searching judicial inquiry'.[354] So far, only alienage, race and ancestry have qualified for this test of strict scrutiny. For other grounds such as age[355] and disability,[356] the less intense 'rational basis' scrutiny has been deemed sufficient. Gender has attracted an intermediate scrutiny test with the State required to produce a justification which is 'exceedingly persuasive' i.e., that the discriminatory classification is substantially related to the achievement of important governmental objectives.[357]

134. At the Federal level[358] equality legislation has developed in a piece-meal fashion however there is greater clarity in the characteristics that are protected. The most important instrument is Title VII of the Civil Rights Act of 1964 which prohibits discrimination based on sex, race, colour, religion or national origin by employers (public or private) of 15 or more employees.[359] Title VII also prohibits discrimination based on race, colour, religion or national origin (but not sex) by private and public entities in access to public accommodations (e.g. hotels, restaurants and theatres).[360] The Equal Employment Opportunity Act of 1972 extended federal employment discrimination law to state employees. Title IX of the Civil Rights Act 1964 which prohibits discrimination on race, colour, or national origin (and since 1972, sex) by publically funded educational institutions and by public entities that receive funds from federal government. In

354 *United States v Carolena Products Co* 304 US 144, 58 S Ct 778 (1938).
355 *Massachusetts Board of Retirement v Murgia* 427 US 307.
356 *Cleburne v Cleburne Living Centre* 473 US 432 (1985) (US Supreme Court).
357 *Craig v Boren* 429 US 190, 97 S Ct 451 (1976); *Orr v Orr* 440 US 268, 99 S Ct 1102 (1979); *Michael M v Superior Court, Sonoma City* 450 US 464, 101 S Ct 1200 (1981); *United States v Virginia* 116 S Ct 2264 (1996).
358 It is beyond the scope of this report to analyse US State legislation in this area.
359 (42 USC 2000e-2 (2006) and 42 USC 2000e(b) (2006)); amended in 1972 to prohibit employment discrimination by public as well as private employers. (92 PS 261).
360 42 USC 2000a(a)-(b) 2006.

addition, Title VI prohibits discrimination based on race, colour or national origin in any 'program or activity' receiving 'federal financial assistance'. Age is covered by the Age Discrimination in Employment Act, which forbids age discrimination against people who are age 40 or older. Disability is covered by the Americans with Disabilities Act, as amended, or the Rehabilitation Act. Sexual orientation is not mentioned.

ii) Application

135. US law has tended to frame its equality protections around the assumption that each individual belongs to a single, well-demarcated identity group. Judges and law-makers have been hesitant to open claims to multiple sub-groups. In 1980 in the case of *Jefferies v Harris County Community Action Assn* the 5th circuit of the USA Federal Court of Appeals accepted that black women constituted a distinct subgroup and discrimination could exist even where there was an absence of discrimination against black men and white women.[361] However, later decisions of the court limited multiple discrimination to a combination of only two grounds (ie. the 'sex plus' approach). The concern was that without such a limitation protected subgroups would exist for every possible combination of race, colour, sex, national origin and religion and that anti-discrimination legislation would be 'splintered beyond use and recognition'.[362]

iii) Assessment

136. While the breadth of the constitutional guarantee in the Fourteenth Amendment allows for a dynamic and encompassing identification of protected status grounds, in practice, as the US experience demonstrates, the Courts have been hesitant to open up new grounds, leaving the US lagging behind other similar western democracies in the scope of its equality protections.

137. While the acceptance by US courts of multiple discrimination is extremely important, the limit of two combined grounds is, as Fredman highlights 'both artificial and paradoxical. The more a person differs from the norm, and the more likely she is to experience multiple discrimination, the less likely she is to gain protection.'[363]

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[361] *Jefferies v Harris County Community Action Assn* 615 F 2d 1025 (5th Cir 1980).
[362] *Judge v Marsh* 649 F Supp 770 (1986) at 779 (US District Court, District of Columbia) in Fredman, *Discrimination Law* (2nd edition, OUP 2011), 142.
[363] Fredman, *Discrimination Law* (n), 142.

f) India

i) Overview

138. Despite the enormous heterogeneity and diversity in Indian society, intersectional and multiple discrimination have only begun to be addressed in Indian law. Traditional jurisprudence indicates that claiming under a single ground is the accepted norm and combining two or more grounds in a claim has not been a legally recognised strategy.

139. Article 15(1) of the Indian Constitution states that: '[t]he State shall not discriminate against any citizen on grounds *only of* religion, race, caste, sex, place of birth or any of them.'[364] The term 'only' has been interpreted restrictively in the Indian Constitutional jurisprudence so as to exhaust the list of specific grounds for claiming discrimination.[365] For instance, sex discrimination is construed narrowly and may not encompass gender discrimination.[366] The phrase 'on grounds *only of*' is also textually interpreted to mean that a discrimination claim should be premised on *one /any* of the specified grounds and not a combination of them. Axiomatically, intersectional discrimination is passable in the India context; for instance, multiple discrimination based on two enumerated grounds, viz. *Dalit* women, or multiple discrimination based on an enumerated and a non-enumerated ground, viz. disabled women.[367]

140. Some statutes address intersectional issues. For example, the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 specifies punishment for offences of atrocities against women belonging to a Scheduled Caste or a Scheduled Tribe.[368] Several programmatic interventions have been specifically designed to 'compensate' *Dalit* women, taking into account the gendered aspect of structural discrimination against *Dalits*.[369] For instance, the District Primary Education Programme aims to improve government schools in rural areas and particularly focuses on the situation of women and girls of lower castes. These measures include distribution of free educational materials to girls from disadvantaged sectors of society (e.g *Dalit* girls, rural girls, etc); guaranteeing female representation on Village Education Committees

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[364] Emphasis supplied.
[365] Indira Jaising, 'Gender Justice and the Supreme Court' in B Kirpal and Others (eds), *Supreme but not Infallible* (OUP, New Delhi 2000) 296.
[366] *Air India v Nargesh Meerza*, (1981) 4 SCC 335 (Supreme Court of India). Cf *Naz Foundation v. Govt. of NCT of Delhi*, WP(C) No.7455/2001, 2 July 2009 (High Court of Delhi).
[367] Ratna Kapur and Brenda Cossman, 'On Women, Equality and the Constitution: Through the Looking Glass of Feminism' [1993] *National Law School Journal* 1, 2-3.
[368] Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989, s. 3(1)(xi)-(xii).
[369] See Oliver Mendelsohn, 'Compensatory Discrimination and India's Untouchables' in Penelope Andrews (ed), *Law in Context: Gender, Race and Comparative Advantage. A crossnational Assessment of Programs of Compensatory Discrimination*, (Vol 15(2), The Federation Press 1999) 51.

responsible for school operations; and ensuring equality in gender representation among school employees.[370]

ii) Application

141. The Supreme Court of India has read art 15(1) restrictively by pursuing the term 'only' in the text of the provision. In *Anjali Roy v State of West Bengal*,[371] the Court found that no violation of art 15(1) could be claimed on grounds not enumerated in the text. The case of *Air India Cabin Crew Association v Yeshawinee Merchantf*[372] is an illustration of the rejection of intersectionality. The case involved a challenge to the mandatory retirement age of 50 years for women crew at Air India.[373] The Supreme Court held that the mandatory retirement age was neither arbitrary nor discriminatory under arts 15 and 16 of the Constitution since 'it is not a discrimination against females *only on ground of sex*'.[374]

142. Nevertheless, in the seminal case of *Naz Foundation*, the Delhi High Court held that the prohibition on discrimination also applied to grounds which are *analogous* to those specified in art 15. This holding was premised on personal autonomy invoked by the Court as the value which underlies the protection against discrimination in art 15. This purposive approach allows viable arguments to be made in favour of the expansion of grounds and the possible recognition of intersectionality.

iii) Assessment

143. There is growing international pressure and demand for recognising intersectional discrimination, especially in the case of *Dalit* women. The CEDAW Committee in 2001 urged the Indian Government to adopt temporary special measures with respect to education, employment and health to ameliorate the position of *Dalit* women and girls, who face both caste and gender barriers, and noted that the country must track the progress of these measures in its periodic report.[375] Similarly *The Hague Declaration on the Human Rights and Dignity of Dalit Women*[376] was an emphatic step which helped mount pressure on South Asian nations like India to begin

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370 'District Primary Education Programme' <http://www.educationforallinindia.com/page81.html> accessed 29 December 2011.
371 AIR 1952 Cal 822 (High Court of Calcutta).
372 AIR 2004 SC 187 (Supreme Court of India).
373 A similar challenge was upheld by the Supreme Court in *Air India v Nergesh Meerza*, 1982 SCR (1) 438.
374 ibid [49].
375 Committee on the Elimination of Discrimination Against Women, 'Committee's Approach to Article 4, Paragraph 1 of the Convention' (2001) Report by the Secretariat, CEDAW/C/2001/II/5/.
376 'The Hague Declaration on the Human Rights and Dignity of Dalit Women' (21 November 2006) <http://www.indianet.nl/pdf/haguedeclaration.pdf> accessed 31 December 2011.

developing legal strategies for recognising and addressing multiple discrimination against *Dalit* women.

144. Domestically, the Kundu Committee Report (2008) has also recommended the adoption of a 'diversity index' for understanding how identities and subordination interact. This proposed 'diversity index' is sensitive to characteristics including religion, caste and sex.

145. Importantly, the proposed RPWD Bill is premised on an intersectional understanding of rights of persons with disabilities. It recognises that intersectionality is central to the concerns of persons with disabilities as religion, race, caste, tribe, age, sex, gender identity, sexual orientation and other statutes interact with disability in myriad ways and produce complex experiences of discrimination.[377] For example, clauses 7, 8, 9 and 11 envisage measures to eliminate discrimination against women and girls with disabilities.

[377] RPWD Bill, cl 2(28).