

Question on notice

The question from Senator Waters (Hansard proof, p. 18-19) was whether allowing the regulatory body to initiate an own-motion review was a feature of international best practice.

Response

Every comparable jurisdiction allows some form of non-individual action to combat inequality. In some jurisdictions, such as the United States, this has long been a feature of civil rights legislation. There is a clear trend across all comparable jurisdictions to allow for own-motion actions by equality regulatory bodies or commissioners. The lack of this power in the Australian equality body is not in line with international best practice. Smith (2008) has written:

[The Australian Human Rights Commission] has no power to initiate investigations of non-compliance, no explicit power to support complainants in breach proceedings, and no power to enforce judgments or settlement agreements that have been made. The absence of an agency with such enforcement powers distinguishes the anti-discrimination regulatory scheme from US and UK anti-discrimination schemes, which provide for advocacy by a public agency to uphold the legislation. It also distinguishes it from other Australian workplace regulation — for example, occupational health and safety and workplace agreement compliance. [footnote omitted] (Belinda Smith, 'It's about Time - For a New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 117, 132)

The benefit of an own-motion review or action is that it can address more systemic problems, taking pressure off sometimes disadvantaged individuals to bring about institutional or industry change. It can also harness the relevant knowledge and resources of the regulatory body, which can be directed at the most effective and efficient outcome.

As Smith has written:

Anti-discrimination legislation is designed to protect disempowered groups — those who traditionally experience marginalisation and exclusion. Expecting members of such groups to have the time, security and resources to pursue legal action in order to gain compensation and possibly bring about wider change represents a fundamental regulatory weakness.

...

In summary, the absence of an enforcement agency as a public prosecutor serves to characterise discrimination as merely a private matter and one that harms only the victim, not society at large. [footnote omitted] Imposing only a negative rule means that inequality will go unaddressed unless a specific perpetrator can be identified and discrimination can be proven. Limiting enforcement to victims also means that unlawful discrimination will go unaddressed unless there is a victim who is willing and able to complain.

(Belinda Smith, 'It's about Time', 132, 133)

The following are examples from other jurisdictions.

United States

In addition to investigating individual discrimination complaints filed by individuals, the Equal Employment Opportunity Commission (EEOC) has the power to investigate potential discrimination under the various civil rights acts (including sex discrimination) using “Commissioner charges”. These can be on behalf of a person claiming that their equality rights have been harmed or *by a member of the Commission itself* (42 U.S.C. § 2000e-5(b)). The EEOC can also investigate possible age discrimination under the ADEA and potential pay discrimination under the EPA without needing a charge, through what is called “directed investigations.” In conducting an investigation, the EEOC can also gather data regarding the wages, hours, and other conditions and practices of employment in any industry covered under the law. (See 29 U.S.C. § 626 and 29 U.S.C. § 211(a))

South Africa

The South African Equality legislation (PEPUD Act 2000) creates equality courts and allows wide standing in terms of section 20. The human rights commission/gender commission can institute proceedings on its own as well in terms of this section:

Institution of proceedings in terms of or under Act

20. (1) Proceedings under this Act may be instituted by— (a) any person acting in their own interest; (b) any person acting on behalf of another person who cannot act in their own name; (c) any person acting as a member of, or in the interests of, a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members; (f) the South African Human Rights Commission, or the Commission for Gender Equality.

Canada

The recently enacted *Accessible Canada Act* (2019) includes broad powers to the office of the Accessibility Commissioner. Part 5 of the Act gives the Commissioner inspection and other powers, including the power to make production orders and compliance orders and the power to impose administrative monetary penalties.

United Kingdom

The *Equality Act* 2006 gives the Human Rights and Equality Commission the power to: conduct a formal inquiry (Section 16) or investigation (Section 20) issue an unlawful act notice (Section 21); enter into an agreement not to commit an unlawful act (Section 23); take legal proceedings to prevent or restrain an unlawful act (Sections 24 and 25); bring a claim for judicial review (Section 30); conduct a formal assessment of compliance with the Public Sector Equality Duty (Section 31) or issue a compliance notice (Section 32).