

## GUEST EDITORIAL

# Introduction to the Special Issue *Using Transparency to Achieve Equality*

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### ABSTRACT

This Guest Editorial introduces a Special Issue of *Law in Context* which considers how the collection of large-scale data by government entities and organisations might advance the equality agenda across diverse areas of public life, and how best to manage the risks of this emerging strategy. Drawing on interdisciplinary perspectives and the insights of policymakers, the articles and comments listed below seek to develop new principles to guide government and organisational activity in this novel endeavour.

**Keywords** - Transparency, Equality, Data, Anti-discrimination Legislation, Positive Action

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## Summary

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### 1. TRANSPARENCY AND EQUALITY

The conjunction of transparency and the publication of information and data represent a radical model of promoting equality in public life. However, there is a dearth of critical scholarship to explore the link between transparency and equality, to evaluate existing programmes and to help better balance individual privacy with the social importance of transparency. Transparency offers radical potential to transform the way governments and organisations operate. In the court system, openness and transparency of legal decision-making is fundamental to the rule of law (Wathen 2005; Craig 1997; Raz 1994). This manifests in practice in the need for 'reasoned and public' judicial decisions (Raz 1994, p. 374) and the open-court principle. Transparency in government is also increasingly seen as being fundamental for democratic accountability (Bertot and Choi 2013; Bertot et al. 2010), and is being secured through freedom of information reforms and whistle-blower protection (e.g., Neilsen 2010). At an organisational level, transparency is seen as essential for corporate social responsibility (Dubbink et al. 2008) and building investor and consumer confidence (*The Guardian* 2014). The broader push for transparency is being aided and encouraged by social media, which has democratised the publication and transmission of information (Bertot 2019; Bertot and Choi 2013; Bertot et al. 2010).

While transparency is increasingly recognised as facilitating the public good, it has rarely been considered in relation to the ability to identify and address systemic discrimination and promote equality. Indeed, where jurisdictions primarily rely on individual enforcement of anti-discrimination law to address discrimination, the legislation has tended to focus on the confidential settlement of claims, to the exclusion of transparency and

public accountability. In this context, confidentiality is seen as fundamental for ensuring the effective resolution of claims, by facilitating the willingness of parties to participate in dispute resolution. This risks privatising discrimination claims, and fails to address the structural or systemic aspects of discrimination and inequality (Thornton 1989). As it is increasingly recognised that discrimination is systemic, embedded, and pervasive, confidentiality is being recognised as counterintuitive to the goal of achieving equality, including through growing scrutiny and criticism of non-disclosure agreements (Women and Equalities Committee 2019). It has therefore become important to move beyond traditional, confidential mechanisms in an endeavour to address discrimination (Allen and Blackham 2019). This, then, focuses attention on the radical potential of moving away from confidentiality to its counterpoint: transparency.

Transparency and data collection are already beginning to be incorporated into some government and organisational programs in a bid to address discrimination and promote equality. Accordingly, businesses are being encouraged (or compelled) to collect and report on data about their workforce and customer base as a means of addressing discrimination, including through reporting to the federal Workplace Gender Equality Agency, under the *Gender Equality Act 2020* (Vic), and voluntary programmes like Athena SWAN (Scientific Women's Academic Network) and Science in Australia Gender Equity (SAGE). However, this form of transparency is a very limited, being found to date only in the employment context of large organisations, or confined to the public sector in Victoria, and then only in respect of sex. In contrast, public sector organisations in the UK

are required to fulfil some reporting requirements as part of the specific duties under the Public Sector Equality Duty; similar duties have not yet been adopted in Australia.

Despite the limited transparency currently existing in this area, technological advances, including the digital collection and storage of data, mean that it is becoming easier to obtain and share data, including between government agencies. However, there are substantial risks to individuals in government agencies handing over or sharing information, particularly where de-identified data can unintentionally become identifiable. This may also lead to under-reporting, particularly in regard to disability, as people do not want to self-identify as possessing certain attributes for fear of reprisal. Such risks are currently managed through the Australian Privacy Principles (APPs) and *Privacy Act 1988* (Cth), and similar frameworks at State and Territory levels. However, there has been limited consideration of how these principles can be reconciled with the use of transparency to promote equality, and whether the APPs remain appropriate given the shifts in the way information is gathered, processed and used.

## 2. THE FUTURE

We sought to conclude this work with a blueprint for the future: a set of new principles to guide government and organisational activity in the use of data and transparency in order better to achieve equality. We aimed to explore how the tension between privacy and transparency could be overcome in the attempt to achieve equality across all areas of public life, finding new ways of balancing the need for transparency with privacy and confidentiality, and to develop new principles to guide government and organisational activity in the pursuit of equality.

Transparency and the public disclosure of information are not new concepts in minimising social ills. As famously noted by Brandeis, 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectant; electric light the most efficient policeman' (Brandeis 1995, p. v).

What is new and radical, this special issue argues, is deploying transparency as a means of effecting substantive equality.

## 3. WORKSHOPPING TRANSPARENCY

The articles and comments in the special issue were initially presented at a two-day workshop sponsored by the Academy of the Social Sciences in Australia (ASSA). The workshop profiled the key role of the social sciences, including Law, Sociology, Philosophy, Economics, Industrial Relations and Demography, in the formulation of public policy: by providing a forum to develop and extend existing research on how transparency may advance equality, by testing ideas, scrutinising existing measures, challenging established scholarship and by considering the future development of the area. Policy perspectives were integrated into this critical discussion, with key staff from government agencies asked to comment on the collection and use of data by government (including the impact of privacy restrictions), and to illuminate how it can be used to address workplace gender inequality, sexual harassment, and discrimination, together with enhanced participation by women in STEM disciplines. These workshop presentations crystallised into innovative essays for this special issue.

## 4. ON THE CONTENTS OF THIS ISSUE LIC 37(2)

The special issue begins with an introductory essay by **Margaret Thornton** that overviews the elements of anti-discrimination legislation with its stated aim of effecting equality without regard to race, gender, sexuality and other attributes. Thornton argues that the attainment of equality is nevertheless impeded within a neoliberal climate, not only by the confidentiality of dispute resolution, but also by the privileging of competition policy and profit maximisation, which necessarily produce *inequality*, not equality. She notes that neither class nor social status is a proscribed ground in any Australian legislation, which promotes secrecy and militates against transparency. Pay differentials are key indicia of social inequality that are commonly supported by a lack of transparency. **Daniel Halliday** discusses the

competing perspectives relating to disclosure of pay. While he is generally in favour of pay transparency, he argues that it is complicated by issues pertaining to market morality, privacy, autonomy and publicity, issues that he explores from a philosophical standpoint.

The ensuing cluster of essays considers issues relating to race, ethnicity, gender and sexual orientation, attributes that generally have a long history in the context of the non-discrimination principle. In each case, however, the authors show that equality would be enhanced by greater transparency in specific areas of operation, such as criminal law, demography, parental leave, health, family and workplace policies. The first essay, by **Tamar Hopkins**, argues that statistical data can and should be invoked to prove discrimination by police involving Indigenous people in individual cases. She draws on the tentative use of racial profiling in the UK, the US and Canada to support her thesis. Hopkins then speculates as to the role racial profiling could have played in Australia in the *Haile-Michael* discrimination claim and the inquest into the death of Tanya Day. The second essay, by **Liz Allen**, argues that what is known about ethnic diversity in Australia is based on an outdated measure of multiculturalism. From the perspective of sociodemography, she argues that what is counted matters for equality. Hence, the legacy of the past, including the White Australia policy, has contributed to the tardiness in recognising ethnic diversity. Allen argues that the accurate capture of ethnic identity has an empowering effect, and she considers ways in which this might be achieved. The third essay, by **Marian Baird**, addresses the complex, confusing and incomplete picture relating to data on parental leave in Australia. She argues that the inadequacy of data on the prevalence, use and duration of paid leave to mothers and fathers arises partly because of the two-layer approach whereby some employers provide paid parental leave in addition to the government scheme. In disentangling the various strands of data, Baird identifies the equality gaps that emerge in respect of access. The fourth essay, by **Francisco Perales**, draws on three case studies that address the role of stigma as a driver of sex-

ual orientation in health disparities, myths about children raised in same-sex-parented families and the effectiveness of LGBTIQ+ workplace inclusion policies. Perales argues that drawing on large-scale administrative data can aid in the generation of more nuanced policy-relevant knowledge that highlights inequalities between other minority and majority groups.

Having highlighted some of the gaps in existing legislation and policy that militate against effecting equality, the next two articles adopt a different approach. They both consider new frontiers and emerging areas of transparency, including: how best to balance the right to privacy with principles of transparency and openness in the context of advancing systemic equality. They ask what type of data might better aid the promotion of equality in the employment and non-employment contexts, as well as what are the specific gaps to be addressed in existing data collection and its utilisation. First, **Dominique Allen** points out that although a large amount of data is regularly collected by a range of organisations, it does not filter through to anti-discrimination legislation, mainly because the legislation is premised on a self-regulating model in which complainants are assumed to be able to prove their claims unaided. Allen shows how this assumption is exacerbated by exceptions within the legislation, such as those relating to insurance. The largely voluntary nature of compliance by organisations and the ad hoc nature of data collected by human rights and anti-discrimination agencies further complicates the picture. Allen argues for a more targeted approach to reduce inequality, which also requires the analysis of any data collected. **Alysia Blackham** also argues for positive duties that promote greater transparency as a means of attaining equality, which is not possible through a confidential complaint-based system. She critically reviews examples of both voluntary and mandatory positive duties in the UK and Australia. She shows that voluntarism does not work and argues compellingly that organisations need to be compelled to collect and analyse relevant data. Accordingly, she proposes a positive duty model with specific steps to be followed that are designed to maximise

transparency in order to achieve organisational change.

The final cluster of contributions comprise short essays in the form of comments from statutory officers and policymakers arising from their experiences regarding the benefits of transparency in data collection. First, **Sven Bluemmel**, Victoria's inaugural Information Commissioner, argues that Freedom of Information (FOI) legislation facilitates transparency in government decision-making in order to provide information about government agencies. He shows how a culture of transparency not only creates access to government information, but it also contributes to trust in government. Secondly, **Kate Fairhall and Niki Vincent**, Victoria's inaugural Public Sector Gender Equality Commissioner, show the centrality of transparency as a means of achieving equality under the *Gender Equality Act 2020* (Vic). They discuss the obligations of the approximately 300 entities under the Act that are required to take an annual audit of their workplace in relation to seven key gender equality indicators, the preparation of a plan every four years and the need to report biannually, which is made publicly available in accordance with the principles of transparency. Fairhall and Vincent point out that while gender is the focus of the Act, defined entities are also required to provide data for intersecting axes of difference where possible. Thirdly, **Simone Cusack** discusses the benefits arising from the conduct of a large-scale review by the statutory equality agency under s 151 of the *Equal Opportunity Act 2010* (Vic). This is a voluntary review process in which a public sector duty holder's program is confidentially assessed to determine compliance with the Act, which imposes a positive duty on public sector entities to initiate measures to eliminate discrimination. Cusack focuses on the Victoria Police Review, the only review to be conducted since enactment of the legislation, although she points out that a review of Ambulance Victoria has also been set in train. Fourthly, **Wafa El-Adhami** describes the Science in Australia Gender Equity (SAGE) scheme (related to Athena SWAN elsewhere), which is designed to improve gender equity and diversity in science, technology, engineering, mathematics and medicine (STEMM). In outlining the attributes of the scheme, including the support from universities, Wafa El-Adhami argues that

SAGE has provided a positive and co-ordinated approach to the issue of gender equity in STEMM.

## 5. REFERENCES

1. Allen, D. and Blackham, A. 2019. "Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom." *Melbourne University Law Review*, 43(2): 384-422.
2. Bertot, J. C., 2019. "Social Media, Open Platforms, and Democracy: Transparency Enabler, Slayer of Democracy, Both?" *Proceedings of the 52nd Hawaii International Conference on System Sciences*, <https://scholarspace.manoa.hawaii.edu/bitstream/10125/61631/0782.pdf>.
3. Bertot, J. C. and Choi, H. 2013. "Big Data and E-Government: Issues, Policies and Recommendations." *The Proceedings of the 14th Annual International Conference on Digital Government Research*, <https://dl.acm.org/doi/pdf/10.1145/2479724.2479730>.
4. Bertot, J. C., Jaeger, P. T. and Grimes, J. M. 2010. "Using ICTs to Create a Culture of Transparency: E-Government and Social Media as Openness and Anti-Corruption Tools for Societies." *Government Information Quarterly*, 27: 264-271,
5. Brandeis, L. D. 1995. *Other People's Money and How the Bankers Use It*. St Martin's Press, New York.
6. Craig, P. 2005. "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework." In Bellamy, R. (ed.) *The Rule of Law and the Separation of Powers*. Routledge, London, pp. 95-116.
7. Dubbink, W., Graafland, J and van Liedekerke, L. 2008. "CSR, Transparency and the Role of Intermediate Organisations." *Journal of Business Ethics*, 82(2): 391-406.
8. Neilsen, M. A. 2010. "Public Sector Accountability and Transparency." Parliament of Australia, 12 October.

- [https://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/pubs/BriefingBook43p/publicsectoraccountability](https://www.aph.gov.au/About%20Parliament/Parliamentary%20Departments/Parliamentary%20Library/pubs/BriefingBook43p/publicsectoraccountability) .
9. Raz, J. 1994 *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Clarendon Press, Oxford.
  10. Thornton, M. 1989 "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia." *Modern Law Review*, 52: 733-761.
  11. UK Parliament 2019 *Women and Equalities Committee*.
  12. Wathen, D. E. 2005. "When the Court Speaks: Effective Communication as Part of Judging." *Maine Law Review*, 57(2): 449-462.
  13. "Corporate Transparency: Why Honesty is the Best Policy." 2014. *The Guardian* (Aust), 4 August. <https://www.theguardian.com/sustainable-business/corporate-transparency-honesty-best-policy> .