Affirmative action, merit AND police recruitment

Margaret Thornton

Detractors of affirmative action have instilled a sense of fear in the community by equating it with appointment by virtue of sex or race alone, without regard to merit.

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Elucidating affirmative action

Affirmative action (AA) is a novel mechanism that is designed to change the profile and culture of a workplace in the interests of women and/or designated groups through the initiation of measures at the institutional level. It is also intended to foreclose the possibility of future harms and to remove the burden on individual complainants arising from the formal hearing of discrimination complaints that are not conciliated.[1] As a relative newcomer to our language, AA is a much-maligned and misunderstood term. Its detractors have succeeded in instilling a sense of fear within the community by equating it with the appointment of personnel by virtue of sex or race alone, without regard to merit.[2] As a result, few Australian employers have been prepared to initiate AA programs voluntarily.

In light of this timidity, a radical proposal by Victoria's Chief Commissioner of Police, Christine Nixon, specifying that half of all new recruits to the force should be women, deserves a closer look. Because gender-conscious selection programs disturb settled expectations about the identity of the normative male police officer, questions are inevitably raised about such programs and the merits of the beneficiaries.[3] I nevertheless wish to refute the myth that AA necessarily means the appointment of unqualified personnel. I will pay particular regard to the Victorian initiative.

AA does not possess a precise denotation, although dectractors invariably equate it with the use of quotas. In fact, AA encompasses a wide range of proactive measures designed to overcome a history of exclusion and discrimination against women and designated groups, particularly Aboriginal and non-English-speaking background people, as well as people with disabilities. Women are the primary targets of the Victoria Police proposal, although there is also a focus on Asian and Islamic groups.

Measures such as the use of gender-inclusive language, the circulation of images of women police in advertising and recruitment material, and the encouragement of women to apply for positions (which Victoria Police have already adopted) are weak forms of AA that are unlikely to evoke adverse public reaction. The provision of flexible conditions of work is likely to be more contentious as the schedules of co-workers may have to be altered to accommodate the special needs of those with family responsibilities. Nevertheless, the idea that work and family can be 'balanced' has entered public discourse and is beginning to be accepted as the legitimate responsibility of employers.[4] In contrast, the use of quotas is a strong form of AA that continues to be controversial.

The rationale for the strong form of AA within Victoria Police has to be understood in terms of both the under-representation of women and the intransigence of an outdated culture of masculinity. In respect of the former, women presently constitute 17.7% of Victoria Police, the lowest ratio in Australia. In respect of the latter, there is evidence that

women have been subjected to sexual harassment, discrimination in promotion and conditions of work, as well as victimisation if they complain.[5] Some instances have crystallised into formal complaints under the *Equal Opportunity Act 1995* (Vic) (EOA).[6]

The literature reveals that discriminatory and harassing practices are generally more common in masculinist workplaces where women are regarded as interlopers.[7] The hope is that women will feel unwelcome and leave. The creation of a hostile workplace environment within the police force has in fact contributed to a high attrition rate for women. The desire on the part of the Victorian Commissioner to change this culture suggests that prophylactic or preventative measures are warranted.

The construction of merit lies at the heart of the resistance to quotas. Merit, like AA, is another elusive concept, which possesses no objective denotation but takes its meaning from its context. It nevertheless possesses a descriptive, as well as an evaluative, element.[8] The descriptive element refers to the enumeration of qualifications, skills and years of experience that a person has, but qualifications mean little without someone evaluating their worth in the context of particular workplace norms. This process of evaluation is necesssarily a subjective one; qualifications cannot be weighed up scientifically in a test-tube. The application of merit is nevertheless assumed to be a foolproof way of producing 'the best person for the job'. Time has allowed it to acquire a veneer of objectivity so that the evaluative process is disguised.

Benchmark Men, that is, those who are white, Anglo-Celtic, heterosexual and able-bodied, have traditionally dominated masculinist institutions like the police force. As a result, it has come to be assumed that they must be the best people. Accordingly, decision makers persist in appointing and promoting those who look most like themselves. 'It's like looking in a mirror', said one member of a recruitment panel when asked what image he held of the 'best person'.[9] The essential subjectivity of determining who is the best person for the job has allowed the status quo to be perpetuated, institutionalised and normalised. It then becomes very difficult to change. As Rosabeth Moss Kanter has said of this phenomenon: 'The more closed the circle, the more difficult it is for 'outsiders' to break in. Their very difficulty in entering may be taken as a sign of incompetence ...'.[10]

Affirmative action and the law

Because of the exclusionary practices against women and Others arising from the closed circle mentality, affirmative action initiatives, including quotas, have been deemed to be the appropriate remedial measure in discrimination class actions in North America. Individual complaint-based mechanisms cannot counter the prevailing construction of the 'best person'. For example, race quotas have occasionally been ordered by United States courts following a finding of the existence of egregious discrimination over a long period. It should be noted, however, that quotas in employment are generally found only at the base-level entry.[11] The Canadian Supreme Court has held that discrimination arising from disadvantage justifies special programs, which are constitutionally valid under the Charter.[12]

Sex-conscious preferences at the point of selection have been upheld in a number of countries. In the United States, the under-representation of women in non-traditional jobs was a relevant factor considered by the Supreme Court in upholding an AA plan in which sex was one of many factors that could be taken into account. The employer was commended for its moderate and graduated approach that visited 'minimal intrusion on the legitimate expectations of other employees'.[13] The European Court has also upheld a discretionary preference for equally qualified women candidates in positions where women are under-represented.[14]

In all these jurisdictions, there is a preference for the flexibility of 'soft quotas' over 'hard quotas', that is, discretionary rather than fixed. The United States has been deeply divided over the use of university quotas to facilitate the admission of minority students into faculties of law and medicine if it meant that a formally better qualified white student missed out. A quota in favour of racial minorities was struck down by the Supreme Court in *Bakke*, a case that became a *cause célèbre* in AA jurisprudence.[15] Despite trenchant criticism by conservatives over the last 25 years, the principles of *Bakke* have survived and were recently affirmed by the Supreme Court in *Grutter*.[16] The majority of the Court agreed that race was a legitimate factor to be taken into account in law school admissions to ensure diversity within the student body.

In Australia, an ultra-cautious stance has been adopted in respect of AA initiatives of all kinds — by legislatures and courts — as well as by employers, as the urban myths pronouncing on the pernicious effects of AA have proliferated and wafted across the Pacific. The *Equal Opportunity for Women in the Workplace Act 1999* (Cth), which replaced the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth), is extremely modest legislation, with little more than symbolic effect.[17] This legislation does not mandate AA, as such, but the preparation of equal opportunity plans by employers with more than 100 employees. The legislation creates no avenue of complaint and confers no right of redress. It might nevertheless be noted in passing that, weak though the *Equal Opportunity for Women in the Workplace Act* is, it stresses the centrality of the merit principle to any action taken by an employer (ss 2A(a); 3(4)). The fear that the Act might somehow be construed as encouraging hordes of 'unqualified women' into the workplace had to be assuaged. It might be noted that Victoria Police, as a state instrumentality, falls outside the ambit of the Commonwealth legislation.

Because of the individual complaint-based character of anti-discrimination legislation in Australia, classwide remedies have not been ordered by tribunals or courts to ameliorate discriminatory harms as noted in the overseas examples. It has also been made clear at formal hearings that the remedial focus of the legislation is limited to compensating the complainant alone, even when an altruistically minded complainant has specifically sought a remedy designed to have broad systemic effect.[18]

Sex Discrimination Act 1984 (Cth), s 7D nevertheless permits the initiation of 'special measures' in order to secure equality.[19] A comparable provision is included in *Racial Discrimination Act 1975* (Cth), s 8(1).[20] *Disability Discrimination Act 1994* (Cth), s 5(2) permits 'different accommodation or services' for people with disabilities.

No open-ended provision for special measures on the ground of sex is included in the Victorian EOA. The philosophical assumption underpinning the Act, as with anti-discrimination legislation generally, is that of equal treatment. This is despite the fact that the raison d'être of the legislation was to improve conditions for women within the public sphere and the market. The stress on gender neutrality within the legislation has created a fear on the part of employers, including Victoria Police, that anything that might be construed as different or less favourable treatment towards male applicants could give rise to complaints of discrimination. Indeed, this fear is not baseless, as a disproportionate number of sex discrimination complaints, both in Australia and elsewhere, are lodged by men.[21]

In light of the acceptance of a strict equal treatment approach, it is believed that the only way an AA proposal involving quotas can be immunised against complaints of sex discrimination by aggrieved men is to apply for a formal exemption under the auspices of anti-discrimination legislation. EOA s 83 allows for application to the Victorian Civil and Administrative Tribunal (VCAT) for a temporary exemption for a period of up to three years, although it is possible to apply for a renewal. In light of the five-year time-scale, during which it is hoped to increase the percentage of women in Victoria Police to 25%, a further application would be necessary, assuming that the first is successful.

It may be, however, that Victoria Police is being unduly cautious in applying for an exemption under the EOA because of the fear of a backlash towards 50% of recruits with different characteristics from the norm, albeit equally well qualified. However, VCAT will not grant an exemption 'unnecessarily'. The discrimination that would arise in the absence of an exemption must be clear, in which case VCAT will:

> Consider all the circumstances put before it including whether the exemption would promote an objective of the Act, whether the exemption is within the spirit although not with in [sic] the letter of one of the express exception provisions and any other matters that relate to the public interest. Whether, for example, there is a broad public interest which justifies the granting of the exemption.[22]

Over successive generations, Anglocentric masculinity has asserted itself as the key, albeit unstated, criterion of merit. Thus, as pointed out above, when 'outsiders' are appointed, there are cries of reverse discrimination because settled expectations are disturbed.[23] If the application for exemption by Victoria Police is granted, the hope is that it will foreclose challenges on the part of unsuccessful Benchmark Men.

Policing merit

Let us have a closer look at the specified criteria for recruitment to Victoria Police: '*sensitive, good judges, community-minded, fit, well-educated and good communicators*'. On any of these criteria, how could it be argued that the merit principle would be subverted if half of the police recruits were women, some of whom come from non-Anglo backgrounds? It is worth deconstructing the ubiquitous concept of merit in this case to show that the 'best people' are not necessarily Anglo-Celtic and male.

Men certainly do not have a monopoly on sensitivity, judgment or community-mindedness. Indeed, in light of the limited experience of most of them in caring for others,[24] together with their higher levels of criminality,[25] one might venture to suggest the converse. Similarly, in terms of fitness, the scales are tilted against men in terms of the incidence of heart attack[26] and lung cancer,[27] as well as lifestyle factors and life expectancy generally.[28]

Women recruits are also likely to be better educated. More young women than young men complete high school, and more women than men complete bachelor's degrees.[29] Furthermore, women's communication skills are in no way inferior. On the contrary, both primary and secondary school testing reveal that girls consistently out-perform boys in verbal and linguistic skills.[30] Thus, far from being inferior on the merits, women are likely to be the superior candidates as they appear to outrank men on every criterion.

Essentialising though all these assertions about the characteristics and behaviour of men and women appear to be, they are empirically verifiable. Perhaps the concern that women could one day dominate the police force is the sub-text of the vociferous opposition to Commissioner Nixon's initiative. Sexual politics inform not only the animus towards AA but the construction of merit itself, as I have suggested.

Rather than decrying the recruitment of more women and the likelihood of falling standards, the detractors should look to the evidence which would seem to suggest that the calibre of Victoria Police would be dramatically improved if more women were to be appointed. However, social change is invariably contentious, particularly in masculinist workplaces that have long pursued what is tantamount to an AA policy in favour of Benchmark Men. The rhetorical sway of merit always needs to be interrogated with regard to the context in which it operates.

References

1. For a detailed critique, see Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990). See also Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325.
2. See, eg, Gabriël Moens, *Affirmative Action: The New Discrimination*, (Centre for Independent Studies, Sydney, 1985).
3. See, eg, Leela de Kretser, 'Police Jobs for the Girls', *Herald Sun* (Melbourne), 29 April, 2003, 1; Editorial, *Herald Sun*, 30 April 2003, 20; Leela de Kretser and Mark Buttler, 'Men Just Won't Cop it; Police Quotas Queried', *Herald Sun*, 30 April 2003, 11; Opinion, *Herald Sun*, 2 May 2003, 18; Opinion, *Herald Sun*, 3 May 2003, 26; Opinion, *Herald Sun*, 6 May 2003, 18.
4. Australia ratified ILO Convention No 156: *Workers with Family Responsibilities* in 1990. In 1992, the ground of family responsibilities was included as a proscribed ground within the *Sex Discrimination Act 1984* (Cth). All states and territories, except South Australia, now include parental status, or a cognate term, as a ground in their anti-discrimination legislation: *Anti-Discrimination Act 1977* (NSW) Part 4B; *Equal Opportunity Act 1995* (Vic), s 6(1); *Anti-Discrimination Act 1991* (Qld), s7(1)(d); *Equal Opportunity Act 1984* (WA), s 35A; *Anti-Discrimination Act 1998* (Tas), s 16(i); *Discrimination Act 1991* (ACT), s 7(1)(e); *Anti-Discrimination Act 1992* (NT), s 19(1)(g). See also Sex Discrimination Commissioner, *Pregnant and Productive* (Report of the National Pregnancy and Work Inquiry, Human Rights and Equal Opportunity Commission, Sydney, 1999); Barbara Pocock, *The Work/Life Collision* (2003).
5. Liz Porter, 'Police Pay Out on Harassment', *The Sunday Age* (Melbourne), 18 May 2003, 9; Liz Porter, 'Force Begins Blitz on "Macho" Police' and 'Battling the Brotherhood', *The Sunday Age,* 8 June 2003, 1, 13.

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