

Exam Notes – Discrimination

Week 1: Introduction: Lecture

Basic structure of legal form

- Ground or attribute (sex, disability, age etc)
- Area (employment, education, provision of g/s, access to accommodation, advertising, clubs, government functions, insurance, sport)
- Form of discrimination (direct/indirect) (direct: everyone treated the same; indirect: something about a rule or practice that impacts more on others)
- Exceptions & exemptions (ie DDA defence force exempt; re Sport SDA prohibits discrimination up until age of 12 but then allows for differential treatment on gender where physical strength & stamina is an aspect of the sport, SDA exemptions: for sexuality & religious institutions – beliefs of religion effect on employment practices)

Dispute Resolution Process

- Federal – complaints made to AHRC; proceedings in Federal Court or Federal Circuit Court
- Two step process – AHR complaint (conciliation), then FCA/FCC hearing
- People who settle during first step – may have exhausted resources, feel like have no other option, access to justice issues
- Victimization – being subject to adverse treatment because you complained about discrimination

Reform Debate

- Broader human rights debate – no agreement on Bill of Rights or national Human Rights Act
- Instead pursued goal of consolidated federal anti-discrimination laws (process ended in 2013 but highlighted key areas in need of reform)
- Piecemeal changes
- Australian legislative scheme hasn't kept pace with international developments
- There are some evidentiary issues – re who proves discrimination

Other Recurrent Themes

- Need for new regulatory structure – positive duties – less reactive, complaints based system
- Role of legal structures & remedies
- Judicial approaches – a lot of cases lost on very technical points
- Education & cultural change
- Judging & measuring outcome
- People feel like they can't complain – empowerment issues

X v Cth (1999) 200 CLR 177, 211 (Kirby) J: 'The field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief originally granted to them.'

- HIV+ - employment terminated as couldn't perform inherent requirements of job

- HCA said inherent requirements = bleed safely
- Lots of people successful at lower levels (ie tribunal) but not on appeal – interpretation issues – may be why people settle early on

Week 1: Introduction: Textbook

An overview of Australian Anti-Discrimination Law (Chapter 1)

Introduction

- Commonwealth Parliament has no express constitutional power to legislate in regards to discrimination.
- Goals of Aus anti-discrimination laws are not particularly clear.
- Attempt by Gillard/Rudd govt in 2013 to rejuvenate Cth AD laws failed because of insufficient support for a Bill prepared without public consultation.

The Legislative Schemes

- Generally all statutes make it unlawful to discriminate against people on the basis of nominated attributes in relationships & activities associated with work, education, provision of goods & services, access to public places & facilities, the provision of accommodation, membership of some clubs and the administration of govt programs.
- Discriminatory behaviour in the course of all other relationships and activities – in what may be termed ‘private life’ is not regulated by the law
- QLD & TAS – sexual harassment is now unlawful in any circumstances
- Sex Discrimination Act – prohibits discrimination on the basis of marital status, pregnancy, potential pregnancy, family responsibilities, sexual orientation, gender identity & intersex status, as well as on the grounds of sex.
- Direct discrimination – person treated unfairly because of a particular attribute which is protected by AD law, such as their race or sex. Ie refusing to offer a person a job as a coal miner because they are a woman or declining to rent a flat to someone because they’re an Indigenous Australian.
- Indirect discrimination – directed towards the activities which are fair in form but discriminatory in outcome. Occurs when a person requires everyone to comply with the same condition or requirement but more people with a protected attribute are unable to comply with that condition or requirement than people without that attribute and the condition or requirement in question is not reasonable in the circumstances. Ie employer’s stipulation that all people must satisfy the condition or requirement of being above a nominated height in order to undertake a particular job (if more women than men cannot comply as women are on average shorter than men, it will constitute indirect discrimination unless it can be justified as reasonable in the circumstances.
- Very few successful indirect discrimination cases in Aus.
- NT racial vilification is not unlawful – is unlawful in other states
- *Racial Discrimination Act 1975* makes it unlawful to engage in offensive behaviour based on race
- Vic only jurisdiction in Aus that has introduced a statutory duty to take positive steps to eliminate discrimination

- Prohibition against discrimination is a civil remedy provision which means the court can order the payment of a pecuniary penalty (or fine) in addition to providing the employee with an individual remedy

Enforcement of the Law

- AD laws do not establish a regulator with the task of pursuing & prosecuting those people who break the law
- First stage of enforcement model involves lodging a complaint with a government agency – Cth agency is Australian Human Rights Commission
- Recent trend towards awarding much higher sums for non-economic loss in sexual harassment cases, possibly because of changing community attitudes about the unacceptability of this conduct coupled with the appointment of more women to courts and tribunals.
- Injunctive style orders are available but they are rarely sought or made.
- Possibility of an adverse costs order is a major disincentive to litigation under the Cth legislation & in those states where the ‘usual’ costs rules of civil litigation have been applied in AD proceedings.
- ‘usual’ cost rules do not apply in some jurisdictions – tactical consideration when deciding whether to proceed under overlapping Cth or St/Te legislation.

Judicial Responses to the Law

- HCA has considered the individual rights & obligations which arise under AD law in only 6 cases.
- Four of the 6 have involved discrimination on the grounds of disability, 2 have been sex discrimination cases.
- Tribunals have accepted primary responsibility for developing & applying AD law at St & Te level.
- HCA has been unable to provide clear majority statement about the manner in which anti-discrimination law operates.

Week 2: Equality: Lecture

While it is clear that anti-discrimination laws are official statements of formal equality which have great symbolic significance, those laws by themselves have a limited capacity to alleviate the actual or substantive inequality which is experienced by many people because of their race, gender, disability, sexual preference or other attribute which attracts protection by laws of this nature” Textbook p 12.

Formal equality

- “...to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread” - *Anatole France (1879)*
- Three generations of equality – equal treatment, equality of results, rights based approach

Approaches to equality

Formal equality

Treats like alike

Consistency

Does not deal with unequal distribution of power & resources

Comparative

Takes form of direct discrimination

- Haven't moved into 3rd category yet – overseas jurisdictions with positive obligations have moved towards it
- Direct discrimination – two individuals – treat one less favourably because of their attribute
- Comparator – Purvis
- Have to show treated less favourably
- #2 – need to treat people differently so they get an equal opportunity

Equality results

Focus on outcomes may dictate unequal treatment

Recognise different where legitimate to do so

Can extend to special measures and affirmative action

Takes form of indirect discrimination

Equality as full enjoyment of rights

Based on remedying disadvantage

Can be rights based

Focus is neither sameness or difference

Bannovic case example

- Went to HCA
- Women wanting to work in steel industry in Wollongong
- Women applied and had to wait longer for a job opportunity to come up
- Case settled – more jobs became available to women
- Not long after a massive economic downturn occurred and lots of people were laid off
- Women laid off first – not because they were women but because union & employer decided to use last on first off rule (common then)
- This test is apparently neutral but HCA had to decide whether the result that many more women lost their jobs could be attributed to a form of indirect discrimination

Influences

- Constitution law and international law
- Ability to legislate federally has been tied to international law – use international treaties

HR FRAMEWORK 7 CORE UN TREATIES

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
- Convention on the Rights of the Child (CRC).
- Convention on the Rights of People with Disabilities (CRPD).

- Federal legislation on disability in 1993 (came into affect 1993) – convention 2008
- Age discrimination – no treaty but have legislated on it as a matter of international concern

Importance of International Instruments

1. Constitutional validity
 2. Fostering growth anti-discrimination legislation
 3. Dictating substance obligations
 4. Showing way forward
 5. Reporting requirements
 6. Complaints eg Toonen case
- Racial discrimination act uses lots of the wording of CERD
 - Conventions can be used as a template
 - Treaty bodies allow for complaints mechanism – if Aus has ratified that treaty & someone has exhausted all domestic avenues they can make a complaint to treaty body
 - Provide opportunity to challenge things like laws that you couldn't otherwise challenge
 - First complaint in Aus – *Toonen* case
 - Complaint re criminalisation of 'homosexual conduct' in Tasmania
 - Can't challenge laws under anti-discrimination law but can change practices – exception is RDA
 - Complaint – Aus in violation of ICCPR
 - Complaint upheld as violation of privacy & his right to non-discrimination

ILO Discrimination Complaints

(a) any distinction, exclusion or preference made on the basis of **race, colour, sex, religion, political opinion, national extraction or social origin** that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act

Except where inherent requirement of the job or religious institution

- ILO mechanism for discrimination complaints
- AHRC Act – original jurisdiction on implementation of ILO convention & generally with respect to Cth breaches of human rights
- AHRC Act – can make a complaint re discrimination against in employment on any one of yellow highlighted attributes

Additional Grounds declared by Regulations

- Age; medical record; criminal record; impairment; marital status; mental, intellectual or psychiatric disability; nationality; physical disability; sexual preference and trade union activity. (*The Australian Human Rights Commission Regulations 1989* (Cth))

- This avenue is limited because if make a complaint to AHRC they will attempt to conciliate but you can't go anywhere else with the complaint – only thing can do is have commission write a report about the matter & send it to AG/employer
- There is no enforcement on the employer – they do not have to do anything it

Questioning Constitutionality

- *Koowarta v Bjelke –Petersen*
- *Viskauskas v Niland*
- *Metwally v University of Wollongong*
- *Dao v Australian Postal Commission*

“This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.”

- Viskauskas – complaint of racial discrimination – constitutionally invalid because federal legislation covered the field – HCA upheld that & said fed legislation on race trumps state
- Federal legislation says not intended to exclude or limit state laws where they can operate concurrently
- Metwally – can't operate retrospectively
- 4th case – whether federal award prevailed – claim of both sex & race discrimination
- Issue of whether you go federal or state remains as they operate concurrently – about what is better for PI

Federal Hearing Arrangements

Brandy v Human Rights and Equal Opportunity Commission

- Previously in federal area – made complaint, attempted to resolve it, if not resolved conduct hearing at AHRC (HEREOC) – conciliation; tribunal member hear it
- Problem – if respondent didn't comply with the order had to go to federal court & start all over again – hearing de novo
- Introduced legislation to try & give tribunal hearings effect in the federal court unless certain challenges to it
- Registering the outcomes of the decision from the commission then enforced as orders in fed court found to be constitutionally invalid as AHRC was not a court & thus couldn't exercise chp 3 authority (couldn't act as a court)
- After this – no point in commissioner hearings anymore – didn't make any adjustments to how people conduct federal court proceedings – costs follow the event (whoever wrings get their full costs); didn't enable AHRC to bring cases on behalf of individuals (though capacity from amicus curiae)
- This system has had a chilling effect – people don't tend to litigate because they risk having to pay their costs & other parties costs

Constitution issues and state tribunals

- *Attorney General (NSW) v 2UE*

- *Owens v Menzies* (Qld)
- *Commonwealth v Anti-Discrimination Tribunal* (Tas)

Week 2: Textbook

2.1 – Introduction to The Policy Goals of Australian Anti-Discrimination Law

- HCA have consistently maintained that anti-discrimination laws should be interpreted beneficially, very few members of the Court have sought to characterise the goals of the legislation when seeking to apply it in this fashion.
- Justice is a sort of equality.
- Formal equality is the norm underlying Australia's legal system and it is believed adherence guarantees the administration of the law in a fair, just & impartial manner in the interests of the individual
- Substantive equality (equality of result) – special affirmative measures may be undertaken to ameliorate the effects of past harms
- The underlying theory of equal opportunity is that all should be equal at the starting points and those specified factors which are perceived to be irrelevant such as race or sex will not be allowed to hinder the process unfairly
- Equal treatment can in practice perpetuate inequalities