Lecture 3 - Direct Discrimination

Direct Discrimination
- Complex statutory provisions
- Judicial interpretations
- Proving direct discrimination

- What are we saying is unacceptable?
- Some specific offences under some anti-discrimination law - but quite narrow.

Breadth of International Instruments
- Did we follow the wording of what was described as discriminatory?

CERD Article 1
- "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field."

• very similar to Australian legislation - often we have adopted a narrow construction that divides all discrimination into direct and indirect.

CEDAW Article 1
- For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

* could have used this language but we adopted a legal approach to discrimination - direct vs indirect.
* Binary approach common internationally - different approach (Canada) wording simply says you cannot discriminate and leave it to Courts to decide whether the treatment has a form of differential treatment
* Aus law = prescriptive - dont leave it open to interpretation

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<th>Waters v Public Transport Commission</th>
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<td>- “….direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race).</td>
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<td>* when are people in the same situation? and what things matter for that purpose?</td>
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<td>- On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such “equal” treatment is that the former is in fact treated less favourably than the latter.</td>
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<td>* first disability case to go to HC</td>
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<td>* introducing different ticketing system was discrimination against people living with mobility impairments.</td>
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- not getting a job because of discrimination or not getting a job because you don't meet the criteria
  - is the criteria reasonable?

| IW v The City of Perth | - people living with HIV in perth had created a group for suffers and wanted to have drop in centre for people of the same situation - put in application - rejected by Council.
  - HC - not successful
  - Judges said council wasn't providing a service
  - Other judges - council providing service, but they haven't refused to provide the service - simply rejected the application.
  - Other judges - Wasn't discrimination because the people had no standing to bring the claim, only the people had the attribute, not the group.
  - rightly categorised as a direct discrimination case but technicalities meant the case failed. |

**Sex Discrimination Act 1984 s 5**

For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the sex of the aggrieved person if, by reason of:

A. the sex of the aggrieved person
B. a characteristic that appertains generally to persons of the sex of the aggrieved person; or
C. a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

- B an C are called characteristic extensions - not treating you badly because you're a woman, treating you this way because you might take maternity leave/get pregnant.

**Disability Discrimination Act 1992 s 5**

Direct disability discrimination

1. A person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

2. A person (the **discriminator**) also discriminates against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
   (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
   (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

3. For the purposes of this section, circumstances are not **materially different** because of the fact that, because of the disability, the aggrieved person requires adjustments.

Two aspects to direct discrimination

**Differential treatment**

- **Less favourable** (cf. unfavourable) treatment in comparison to someone without relevant attribute but is in similar circumstance
  
  -> What is the **relevant treatment**; show that **less favourable**; need **comparator** (real or hypothetical) and identify **relevant circumstances**
- person with disability v non-disability; person of a certain race v someone not of that group = how would they have been treated

**Causation**
- treatment was because of attribute
  -> Is intention or motive required - No, but how do you prove this aspect where little evidence - inferences.
- may create a problem because you lack the proof.

* not concerned with any hidden purpose or effect
* dont rely on intention or motive - we focus on the causal connection between the treatment and the attribute.

| Wardley v Ansett (Sex) | - Ansett powerful airline  
|                        | - first contested anti-discrimination case  
|                        | - Applied to Ansett for a trainee pilot - had an interview, waited a while, and didn't get the job despite qualifications.  
|                        | - Made complaint under Vic EOA - discrimination on sex  
|                        | - Ansett did not hire any women - denied allegations of discrimination.  
|                        | - Raised objections:  
|                        |   • Pilot needed strength even though no strength test to be a pilot  
|                        |   • unions would object  
|                        |   • women's menstrual cycles made them unsuitable for pilots despite gynaecological evidence to contrary  
|                        |   • pregnancy and childbirth would disrupt a woman’s career where it would disrupt safety and incur additional costs for airline  
|                        | - Board - women child bearing potential cannot limit a woman job.  
|                        | - Appealed all the way to the HC but unsuccessful  
|                        | - Deborah Wardley (recently married) - asked about her intentions in elation to children - no immediate plans to have children but could possibly do so in future.  
|                        | - Male applicants at same time were not asked the same question about plans in relation to children.  
|                        | - Ansett - would take maternity leave soon, it should be relevant to consideration.  
|                        |   • comparing her to a man (who also might take leave) what would be the outcome?  
|                        |   • Approach rejected - taking of maternity leave only arose because of her sex - inherently linked to female characteristics.  
|                        | - Pure supposition she will stay away from work when having children.  
|                        | - Inherently bound up with her sex.

*Purvis v NSW*
** Purvis v NSW (Disability) **

- Child with behavioural difficulties - Daniel Hoggan - suffered multiple disabilities stemming from accident as a child.
- Foster child of the Purvis' - live on CC in NSW - because of behaviour at school (some anti-social, some violent), after period of being suspended on numerous occasions = **expelled**
- Take matter to HR
- Circumstances in which his comparison occurs includes all his anti-social and violent behaviour?
  - or compare Daniel Hoggan and his behaviour with someone that has a similar behaviour.

Decision at HREOC
- Commissioner held Hoggan's behaviour so closely connected to his disability that less favourable treatment on the ground of his behaviour = discrimination on the ground of his disability.
- To determine the discrimination issue, Mr Hoggan's treatment by the state had to be compared to that of a student without his disability and therefore without his disturbed behaviour.

Rejected by High Court
- "All of the impugned conduct can be identified and that is what legislation requires. Therefore his violent actions towards teachers and others formed part of the circumstances in which he was said to have been treated less favourably then other students."
- Court said yes - no differential treatment - not related less favourably - treated same as someone without disability in relevant circumstances
- No discrimination under first limb.
- Kirby in minority - relevant operator is someone without the disability - if person had behavioural issues and it was sex discrimination case might take into account
  - Behaviour was intrinsic to his disability.
- Majority - drew distinction between disability itself and the behaviour manifestation of the disability.

** Post Purvis **

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<td>Y suffered from psychiatric disorders which translated into anti-social behaviour in workplace</td>
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<td>Employer - he cant perform the requirements of the job</td>
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<td>Held</td>
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<td>You don't have to go to that point as there's no discrimination</td>
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<td>would have treated someone without that disability with anti-social behaviour in same way.</td>
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<th>Thompson v Orica (2009) FCA 939</th>
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<td>Treatment when she came back to workplace after taking leave.</td>
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<td>Comparison of someone not a female in same circumstances how they would have been treated.</td>
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- Because HC said no explicit obligation to make accommodations - changed direct discrimination legislation to make reasonable adjustments (s 5(2)).