LAW4129 – Law and Discrimination

Week 1- Discrimination and equality

OVERVIEW:

- In week 1, we will start with a low-stress, low-stakes, and (hopefully) fun introduction to the unit! We will focus in particular on the ideas that are fundamental to discrimination law: equality and belonging. We will consider what belonging means and how this can differ from person to person, how different types of equality require different legal responses, and what discrimination really means as a social and legal phenomenon.
- We will also discuss how the unit will run, preparation required for class, assessments, communication, and the way the seminars will run – interactively, with lots of time for discussion, and grounded in real-world case studies!

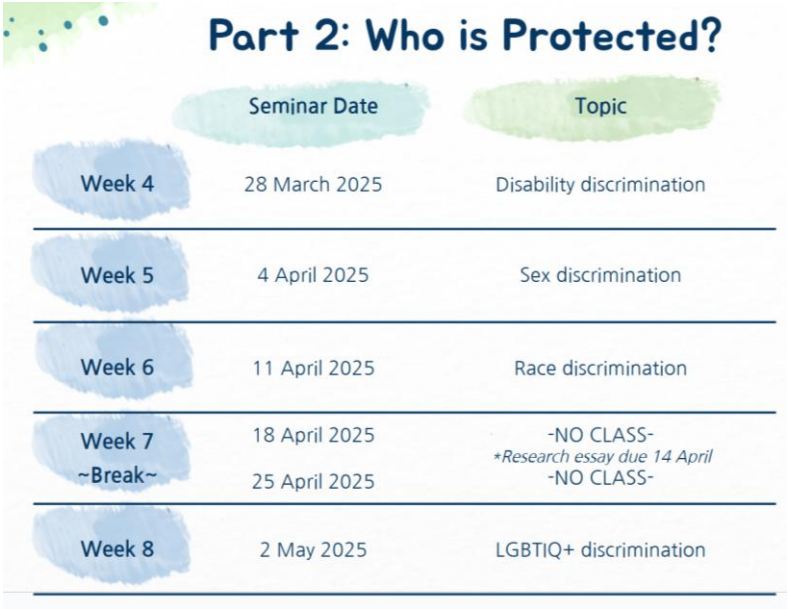
CONTENT:

Overview:

Part 1: What is Discrimination?



Part 2: Who is Protected?



Part 3: How Should the Law Change?



Part 3: How Should the Law Change?

	Seminar Date	Topic
Week 9	9 May 2025	Discrimination law reform
Week 10	16 May 2025	Case study 1: religious discrimination
Week 11	23 May 2025	Case study 2: sexual harassment
Week 12	30 May 2025	-NO CLASS- *Law reform assessment due 21 May

Why should we care about discrimination law?

1. Being able to live authentically matters
2. Being able to bring our whole self to all aspects of our life matters
3. Living free from judgement and stigma and prejudice matters
4. Feeling accepted and supported matters
5. Feeling that you belong matters
6. Being treated fairly and equally matters

We should be able to do all of this without needing law to intervene. But we haven't. Discrimination has occurred in every recorded society in history, without exception.

Discrimination law does the legal work of inclusion and belonging. It's the way we foster and further everyone's right to be their best authentic selves. And it's our last port of call when all other attempts to address inequality & discrimination have failed.

Why should we care about discrimination law? 2.0

But if all of that sounded like preachy nonsense I came up with in a fever dream (which isn't far off), then some more concrete legal points might help:

1. Discrimination laws were **a direct, global response to World War II to ensure the horrors of the Holocaust could never happen again**.
2. Discrimination laws are the main way in which Australia has **enshrined and enforced human rights** in our domestic legal system.
3. Civil rights, women's rights, Indigenous rights, disability rights and LGBTIQ+ rights **have all progressed far more in the last 50 years, since the inception of discrimination laws**, than in any previous point in history.
4. Discrimination law is, by some distance, the **area of law most frequently considered by law reform inquiries and submissions** in Australia.

And also it's pretty cool and fun?

What do we mean by 'equality'?

- Formal equality
- Equality of opportunity
- Equality of outcome
- Substantive equality

Substantive equality - according to the Sandra Fredman article:

- Accommodate difference and achieve structural change
- Redress disadvantage
- Address stigma, stereotyping, prejudice, and violence
- Enhance voice and participation

Why do people discriminate?

- Difference
- Privilege
- Stigma Power

Themes throughout this unit

- Belonging
- Lived experience
- Intersectionality
- Law reform

Week 2 – Framework and operation

OVERVIEW

- In week 2, we turn to our first substantive week of content! Yay – if you like that kind of thing, at least.
- We will begin by exploring the legal foundations of discrimination laws and how they interact across federal, state and territory levels. We will briefly consider the historical development of discrimination laws, which were largely created on the back of the post-World War II inception of the United Nations Charter and the United States civil rights movement in the 1960s.
- The bulk of the class will be dedicated to familiarising ourselves with Australian discrimination legislation, with a focus on its framework and operation. Using the *Equal Opportunity Act 2010* (Vic), we will work through the structure, layout and construction of discrimination laws and how they operate. Rather than going into all the details of the legislation (that's the entire unit), we will instead do a higher-level review to become more familiar with its anatomy
- We will also start to frame discrimination law protections as comprising of five distinct parts:
    - Attribute (*eg sex*)
    - Area (*eg education*)
    - Prohibition (*eg direct discrimination*)
    - Exception (*eg religious body*)
    - Enforcement (*eg processes, remedies*)

DO:

- *Equal Opportunity Act 2010* (Vic), whether via Moodle, the Reading List, or the Victorian Legislation website. Make sure it's the latest version (on the opening page it should say 'Authorised Version incorporating amendments as at 14 December 2022').
- Familiarise yourself with the legislation by skim-reading the following sections before class (it looks like more work than it is! These are mostly very short sections). We will then do an exercise on these sections in class:
    - section 6 (attributes)
    - section 7 (meaning of discrimination)
    - section 8 (direct discrimination)
    - section 9 (indirect discrimination)
    - section 12 (special measures)
    - section 18 (discrimination against employees)
    - section 40 (educational authority must make reasonable adjustments for person with a disability)
    - section 75 (things done with statutory authority)
    - section 83A (religious educational institutions: employment)
    - section 92 (what is sexual harassment?)
    - section 109 (vicarious liability of employers and principals)
    - section 125 (what may the tribunal decide?)

CONTENT

Substantive equality - according to the Sandra Fredman article:

- Accommodate difference and achieve structural change
- Redress disadvantage
- Address stigma, stereotyping, prejudice, and violence
- Enhance voice and participation

Overview:

- A Short History of Australian Discrimination Law
- Framework: What does a discrimination law look like?
- Operation: A Tale in Five Parts - But actually it's three today?

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A Short History of Australian Discrimination Law

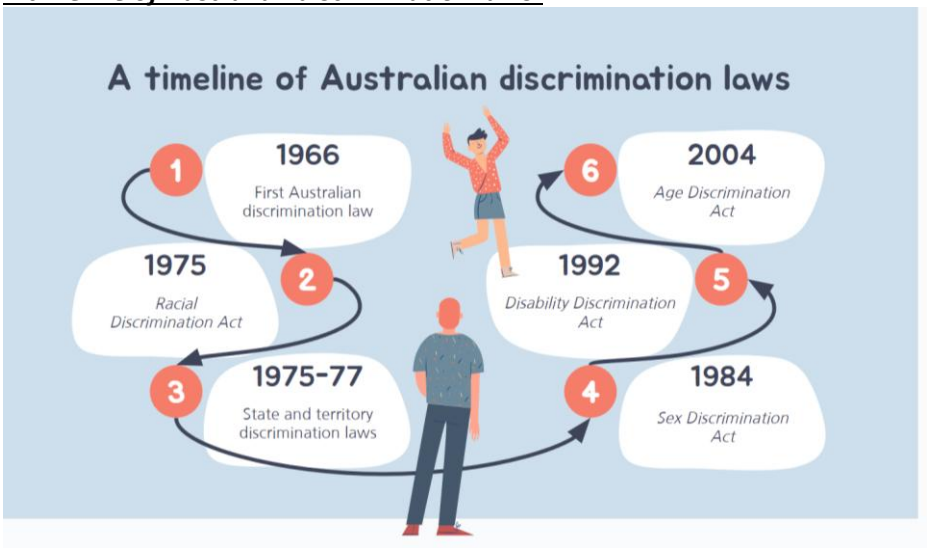
International human rights law as the birthplace of discrimination law (Gaze & Smith textbook chapter)

- United Nations & Charter 1945: Response to horrors of WWII
- UDHR 1948: Codify & declare universal set of human rights
- ICERD 1965: To eliminate all forms of racial discrimination
- ICCPR & ICESCR 1966: The 'International Bill of Rights'
- CEDAW 1979: To eliminate all forms of sex discrimination
- CRPD 2006: Codify & declare rights of persons with disabilities

UDHR 1948:

- Art 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- Art 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A timeline of Australian discrimination laws:



The Commonwealth's express powers

- External affairs
- Human rights
- Discrimination

- Immigration
- Corporations

Resolving the conflict: Section 109

- ***Viskauskas v Niland* (1983)** – oh no, this is a nightmare
    - But led to the introduction of s 6A in the RDA: *'This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.'*
    - Similar provisions now found in the SDA, DDA and ADA
- ***University of Wollongong v Metwally* (1983)** – crisis averted, we all G
    - Bad result for Metwally, but enshrined the concurrent federal and state/territory discrimination law system

➔ **And so it has remained ever since! *(With a slight wrinkle in 2018 which we'll come back to in Week 10 when we turn to the Religious Discrimination Bill...)***

Framework

The framework of Australian discrimination law:

- Attribute – who
- Area – where
- Prohibition – what
- Exception – when
- Enforcement - how



Other points:

- **Attributes - The WHO (LATER)**
- **Areas – The WHERE (Rees, Rice & Allen textbook chapter)**
    - Largely confined to the **public sphere**, thereby ripe for state regulation
        - employment, education, goods and services, accommodation
    - The **private sphere** is largely untouched, and/or excepted from prohibitions
        - e.g. babysitters at home — s 24 *EOA*
    - But the public-private divide is now increasingly blurry, and the application of discrimination laws even more so
        - Eg: Airbnb entire home v private room — shared accommodation exception in s 59 *EOA*

➔ *Consider: does discrimination law cover enough of society to be truly transformative?*

- **Prohibitions - The WHAT (LATER)**
- **Exceptions – The WHEN**
    - Domestic services

- Care of children
- Genuine occupational requirements
- Political employment
- Welfare services
- Youth wages
- Early retirement schemes
- Terms of qualification
- Educational institutions for groups
- Standards of dress and behaviour
- Age-based admission schemes
- Insurance
- Credit providers
- Disposal by will or gift
- Shared accommodation
- Welfare measures
- Accommodation for students
- Accommodation for commercial sexual services
- Clubs for minority cultures
- Clubs for particular age groups
- Single-sex clubs
- Competitive sporting activities
- Statutory authority
- Compliance with court orders
- Superannuation
- Charities
- Religious bodies
- Religious schools
- Legal incapacity
- Protection of health and safety

- **Enforcement – the HOW**
  - Federal: almost entirely contained in the Australian Human Rights Commission Act 1986 (Cth)
  - State/territory: usually contained in the final Part of each respective discrimination statute
    - Some court/tribunal procedures are also set out in their own respective legislative instruments
      - ✓ eg Victorian Civil and Administrative Tribunal Act 1998 (Vic)
    - Note also the role of the respective Human Rights Charters
      - ✓ eg Charter of Human Rights and Responsibilities Act 2006 (Vic)

Accessible seating not available online

Type of outcome	Conciliation
Contravention	Discrimination
Attribute	Impairment
Area	Supplying goods or services
Outcome	Review accessible seating requirements in consultation with the complainant and a disability advocacy organisation Review policies and procedures Agreement to implement accessible seating booking process for all venues
Year	2021–2022

Summary

The complainant, a man with a disability, wanted to book tickets to a sporting match and required accessible seating. General seats were available for purchase online, but the complainant was unable to view accessible seating or book tickets for accessible seating online, and had to fill out an online form and wait for a call back. After multiple phone calls and emails to follow up his request, he was finally able to speak to the ticket seller and buy a ticket 11 days later.

He made a complaint to the Commission of impairment discrimination in the area of goods and services. At conciliation, the venue agreed to consult with the complainant and a disability advocacy organisation to review accessible seating requirements, and the ticket seller agreed to review their policies and procedures. Changes had already been made for a recent event so people could book accessible seats online. The ticket seller also agreed to consult with the complainant on ways to improve their accessible seating booking process and committed to rolling out the new system for all its venues by the end of the year.

https://www.qhrc.qld.gov.au/resources/case-studies/impairment

Take away points:



Week 3 – Prohibitions and attributes

OVERVIEW:

- In week 3, we conclude Part 1 of the unit (What is Discrimination?).
- This week, we turn to how our discrimination laws define, and prohibit, discrimination on the basis of protected attributes. Discrimination laws prohibit a range of conduct: including vilification, victimisation, harassment, failing to make reasonable adjustments, assisting discrimination, and requests for information. The focus this week is on how we decide which protected attributes should be included in discrimination laws, and on the two main prohibitions of conduct on the basis of those attributes: direct discrimination and indirect discrimination.
- As you will see, direct discrimination prohibits unequal treatment on the basis of a protected attribute, while indirect discrimination prohibits unequal impact to a group that shares a protected attribute (with one big exception – where it is 'reasonable'). We will consider the policy implications of these prohibitions and how they apply in real-world scenarios.
- Next week, we move to Part 2 of the unit – 'Who is Protected?'. We will explore four key areas of discrimination protection in Australia: disability discrimination, sex discrimination, race discrimination, and LGBTIQ+ discrimination. In Part 2 will also begin to incorporate into our classes a stronger focus on case studies and law reform, to help build your skills for both the research essay and the law reform assessment.

DO:

- As one of your readings this week, I have set a piece I wrote for The Age in September 2021 on why two-dose vaccine mandates in hospitality venues would not constitute unlawful indirect discrimination on the basis of any protected attributes (what a throwback to all our pandemic-related trauma)
- The world has changed a lot since then, and employers are now increasingly imposing return-to-office mandates. These mandates require employees to return to the office a set number of days per week, rather than allowing work-from-home.
- Using what you have learnt from the readings this week, do you think return-to-office mandates would be 'reasonable' under our indirect discrimination laws on the basis of any protected attribute? Think about your answer, write a few reflective dot-points, and come to class prepared to discuss. Feel free to rely on your own values, views and experiences (especially if you have experienced a return-to-office mandate yourself); these are, indeed, a crucial feature of assessing reasonableness in indirect discrimination.

Summary:

- Liam Elphick argues that "no jab, no entry" policies, which mandate COVID-19 vaccinations for access to venues in Victoria, do not constitute discrimination. While some people claim these policies are discriminatory, Elphick explains that discrimination laws protect individuals based on inherent traits like sex, race, or disability, not choices like vaccination status. Businesses have the right to set entry conditions, and such policies are reasonable to reduce the spread of COVID-19 in public spaces. Though there may be exceptions for people unable to be vaccinated for medical or religious reasons, the policy aligns with health and safety regulations. As long as the mandates comply with public health orders, businesses are legally justified in enforcing them.

Question:

- Return-to-office mandates could potentially be considered "reasonable" under indirect discrimination laws, but this would depend on how they impact individuals with protected attributes, such as disability, family responsibilities, or health conditions.
- Indirect discrimination occurs when a policy, practice, or rule appears neutral but disproportionately impacts a particular group, and this could be the case with return-to-office mandates. For example, employees with disabilities, those with chronic health conditions, or those caring for young children may face difficulties complying with a return-to-office policy. These groups may argue that the mandate indirectly discriminates against them if they are unable to meet the requirements due to their circumstances.

- However, if the return-to-office policy is implemented with sufficient flexibility—such as allowing employees to work from home under specific conditions or providing reasonable adjustments for those who need them—the mandate could be deemed reasonable. This would align with the principles of ensuring fairness and equal opportunity in the workplace, in line with Australian anti-discrimination laws.
- In short, the reasonableness of return-to-office mandates would depend on the balance between the employer's need for in-person work and the potential disproportionate impact on employees with protected attributes. Businesses would need to assess and potentially adjust their policies to ensure they are not indirectly discriminating against certain groups while fulfilling their operational needs.

CONTENT:

International Day for the Elimination of the Racial discrimination



- The International Day for the Elimination of Racial Discrimination is observed annually on the day the police in Sharpeville, South Africa, opened fire and killed 69 people at a peaceful demonstration against apartheid "pass laws" in 1960.
- In 1979, the General Assembly adopted a programme of activities to be undertaken during the second half of the Decade for Action to Combat Racism and Racial Discrimination. On that occasion, the General Assembly decided that a week of solidarity with the peoples struggling against racism and racial discrimination, beginning on 21 March, would be organized annually in all States.

News articles:

- **LNP accused of 'outrageous betrayal' after halting implementation of anti-discrimination law reform The Guardian Andrew Messenger 14.03.25**
    - The Queensland government has indefinitely delayed implementing anti-discrimination law reforms, sparking widespread criticism. Attorney General Deb Frecklington announced plans to postpone the Respect at Work and Other Matters Amendment Act 2024, citing concerns about an "unnecessary burden" on organisations and issues related to criminal record protections.
    - The reforms, the most significant since 1991, were developed after extensive consultation, including a review by the Queensland Human Rights Commission following a scandal at Citipointe Christian College. The legislation aimed to expand workplace discrimination

protections and introduce new protected classes, including homeless people and those with an irrelevant criminal record.
    - Queensland's human rights commissioner, Scott McDougall, expressed frustration, stating concerns about the reforms had never been raised before. Union and advocacy groups condemned the delay as a betrayal, particularly for workers, people with disabilities, and domestic violence survivors. Critics argue the reforms had undergone years of consultation and should not be stalled without clear justification.
- **Apple accused of discrimination for telling employee to stop wearing jewellery supporting Gaza ABC News David Estcourt 12.03.25**
    - A former Apple retail worker, Khaled Dibb, has accused the company of racial discrimination after being told to stop wearing jewellery supporting Palestine, as it allegedly made others feel "unsafe." Dibb, who worked at Apple's Chadstone store in Melbourne, claims he faced months of workplace harassment from colleagues and customers, including being filmed, spat at, and falsely accused of anti-Semitism.
    - Apple formally directed him to remove the jewellery in May 2024, citing workplace safety and morale concerns. The company denied discrimination, arguing the issue was highly sensitive and could escalate tensions. However, Dibb alleges Apple failed to protect him from harassment and selectively enforced rules, allowing other employees to wear politically or culturally expressive items.
    - Employment law expert Dr Giuseppe Carabetta noted that businesses struggle to balance free speech with workplace harmony, and courts typically favour employers in such disputes. Apple is expected to defend the allegations at a Melbourne tribunal.

Today's overview:

- Legal Essay Writing and AI
- Attributes: Who's protected, and why?
- Prohibitions What even is 'discrimination'?

Legal Essay Writing and AI

Use of AI in your essay what you can and cannot do

- You are not permitted to use AI tools to write your essay, or generate your argument/s: You must draft and write the content of your essay independently, without AI assistance. Copying responses from AI or using AI to produce written text for inclusion in your essay is strictly prohibited. All writing must be your own.
- You are permitted to use AI tools for any other purposes in this assessment, such as: Planning your essay, clarifying key concepts or terms, developing your research strategy, brainstorming ideas, engaging with counter-arguments, checking your structure, refining language or grammar, proofreading, or reducing word count.

Use of AI in your essay how you do it:

- If you use AI tools in this assessment: (1) it forms part of your marking criteria (under 'Presentation'), and (2) you must include a brief AI acknowledgement statement (max 100 words) at the start of your essay, outlining how you used AI tools. Instructions on writing this acknowledgement are available via Monash University's Learn HQ here.
    - This statement does not count towards your word limit, so long as it is 100 words or fewer. Any words beyond this will be counted in your word limit.
- If you do not use AI tools in this assessment: (1) it does not form part of your marking criteria, and (2) you do not need to include an AI acknowledgement

Use of AI in your essay your responsibilities

- AI is a tool, not an authority. AI-generated content is not always reliable, may contain errors, can rely on out-of-date information, and can fabricate references or sources – especially in law. You are responsible for independently validating and verifying any AI-generated responses on which you rely; a failure to do so may be academic misconduct
- If unauthorised use of AI is suspected in your essay, this will be managed as an allegation of academic misconduct as per existing disciplinary processes.