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DISCRIMINATION - THE AUSTRALIAN RESPONSE

Hon Justice Michael Kirby *

Australia

NOT SUCH A "FAIR GO SOCIETY"

Most Australians believe that they live in an egalitarian society. Perhaps their conception is best captured by what we Australians laconically and frequently call the right to a "fair go".

History, however, casts a somewhat different light on Australia's attitude to basic human rights. The settlement of Australia from 1788 onwards by successive waves of immigrants led to the expropriation of the traditional lands of the indigenous population by the British colonists and other arrivals. By early in the nineteenth century the entire Australian continent had been claimed in the name of the British Crown. Only recently, since the decision of the High Court of Australia in *Mabo v. The State of Queensland*[1] in 1992, has native title been recognised, and even then, it has been limited to special classes. The degradation of the Aboriginal people of Australia extended to the subversion of their culture through a programme of forced assimilation into white society, including usually

forced conversion to Christianity by outback missions, and often the removal of their childern by the state, such children to be raised by white families. Aborigines were not entitled to vote in government elections, or eligible to be counted in a census, until the 1960s[2].

Australia's poor record of racial discrimination extended well beyond its own indigenous people, including the Torres Strait Islanders. For much of the twentieth century Australia maintained an official discriminatory immigration practice called the "White Australia Policy", which evinced a formal preference for British and European migrants. It was upheld by law. Until the 1960s this policy had the support of virtually all Australian leaders, political parties, the churches and the trade union movement.

Until the concept of multiculturalism emerged in Australia in the 1970s, a negative attitude was officially displayed towards those who did not adopt the culture and language of the dominant white population. In this respect, Australian values were not so very different from those of the white settlers in South Africa. All that was different was the ratio between the white settlers and the indigenous people.

CONSTITUTIONAL PROTECTIONS

There is no general prohibition of discrimination in Australian law akin to that which exists, for example, in the equal protection clause of the American Constitution. However, on its face, the Australian Constitution contains various provisions which guarantee certain basic human rights. Placitum 51(xxxi) of the Constitution provides that the acquisition of the property of any State or person under Federal law shall be on just terms. Section 80 affords a trial

by jury for offences against Federal laws. Section 92 protects freedom of movement among the States[3].

Section 116 prohibits the Federal legislature from discriminating on religious grounds. Section 117 protects an interstate resident, who is an Australian citizen, from the operation of a law, wherever the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an interstate resident[4].

The leading judgement in the *Mabo* decision mentioned above, included the suggestion that the Australian common law will itself have to adapt to international human rights standards[5]. Perhaps, in this way, Australia will secure the protection of basic rights supplementing the common law[6].

The Federal legislature has powers under the Australian Constitution which are capable of being used for the protection of human rights. These powers, contained in section 51, enable the Federal legislature to make relevant laws, inter alia, with respect to naturalisation and aliens, marriage, people of any race, immigration and emigration, the influx of criminals and external affairs. All of these heads of federal power provide ripe subject areas for discrimination and thus for federal laws prohibiting and redressing it.

Despite the plethora of constitutional powers which could support Federal anti-discrimination legislation, the most widely used power remains placitum 51(xxix), the foreign affairs power. This power has been held to entitle the Federal Parliament to enact domestic legislation based on international treaties to which Australia is a signatory and also to enact laws upon matters of international concern, external to Australia[7].

FEDERAL ANTI DISCRIMINATION LEGISLATION

The proliferation of Federal and State anti-discrimination statutes since the mid 1970s signifies recognition and concern at every level of government that discrimination has been, and continues to be, a serious problem facing Australian society. In the 1990's, classes within Australian society, such as women, Aborigines, migrants, homosexuals and the physically and intellectually impaired, continue to be the victims of discriminatory treatment by virtue of their special attributes.

There are four major Federal anti-discrimination statutes. The Racial Discrimination Act 1975 (Cth) (RDA) is based on the International Convention on the Elimination of All Forms of Racial Discrimination. The RDA covers the both the Federal and State governments and their instrumentalities. Under the RDA it is unlawful to discriminate on the ground of race of a person or of a relative or associate of that person. Trade unions can lodge complaints on behalf of members under the RDA.

The Sex Discrimination Act 1984 (Cth) (SDA) is based on the International Convention on the Elimination of All Forms of Discrimination Against Women. The SDA also covers Federal government and instrumentalities. Under the SDA it is unlawful to discriminate on the ground of a person's sex, marital status or pregnancy.

The SDA expressly applies to the Crown in the right of the States, generally to State government departments, in education, accomodation, land, administration of Federal laws and programmes and application forms, ecetera.

The Disability Discrimination Act 1992 (Cth) (DDA) purports to cover the whole of Australia including the crown in the right of the States, state government and instrumentalities. The term "disability" is broadly defined in the DDA. It includes physical, sensory,

intellectual and psychiatric impairment, mental illness and the presence in the body of organisms causing disease. The last part of the definition is intended to cover people who are HIV positive or who have AIDS.

The definition also includes a disability which presently exists, which existed in the past and one which may exist in the future, as well as a disability which is imputed to a person. An employer has a defence to an allegation of discrimination on the ground of disability if the person is unable to carry out the inherent requirements of the job or would, in order to carry out those requirements, require services or facilities which it would impose unjustifiable hardship on the employer to provide.

The Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOCA) is enacted in pursuance of Australia's obligations under the Discrimination (Employment and Occupation) Convention 1958 (ILO 111), the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

The HREOCA establishes the Human Rights and Equal Opportunity Commission. The Commission administers the HREOC Act, the RDA, the SDA and the DDA. The functions of the Commission, performed on its behalf by the Commissioners and the staff of the Commission, include inquiry into whether enactments, acts or practices are consistent with human rights. It also provides conciliation, advice to government, education in relation to human rights and promotion of human rights and of equality in employment.

The Commission has the primary function of inquiring into alleged infringements of the SDA, RDA and DDA, which respectively prohibit discrimination on the grounds of sex or race in employment, education,

accomodation, disability and other areas.

In order to eliminate duplication of Federal and State services, under co-operative arrangements with New South Wales, Victoria, Western Australia and South Australia, State anti-discrimination bodies can, with some exceptions, receive and investigate complaints arising under relevant Federal legislation on behalf of the Federal Commission.

The Commission's decisions may have an impact upon the administrative decision makers in several respects. First, policy formation leading to the drafting of new legislation is likely to be affected by the Commissioner's powers to make inquiry as to whether an enactment, or proposed enactment, would be inconsistent with a human right. If it is, or may be, that right may become the subject of an inquiry, conciliation and a determination. This may lead to a review of government policy. That happened, for example, when the criteria applied by the Federal Department of Education for the grant of benefits under the Tertiary Education Allowance Scheme were found to discriminate against students who could not complete the normal workload expected of other students.

STATE ANTI DISCRIMINATION LEGISLATION

Every state in Australia, except Tasmania, has its own anti-discrimination legislation. The Northern Territory was the last to enact such legislation in 1992. Discrimination is one of the relatively few areas of law in Australia where the applicable legislation at both federal and state levels are almost identical. The federal laws have a "savings clause" so that State laws will not be invalid as long as they can operate concurrently with federal laws. This provision is, of course, subject the Constitutional provision on inconsistency (s. 109). Some State legislation also

covers the additional grounds of discrimination on the grounds of political or other belief or activity.

The New South Wales Anti Discrimination Act 1977 (NSW) (ADA) makes it unlawful to discriminate on the grounds of sex, including sexual harassment and pregnancy, race, including colour, nationality or ethic origin, marital status, physical impairment and homosexuality in certain area of public life including employment, the provision of goods and services, accomodation, public education and registered clubs. The unlawful reason for discrimination need not be a 'dominant' reason. It is sufficient that it be a significant reason to fall within the prohibition mandated by the Act.

In summary, the common grounds specified in the various Federal and State anti-discrimination laws are as follows:

Race and related grouds.

Race is covered by all laws. Related grounds of colour, and national or ethnic origin are covered by the Federal, New South Wales and Victorian legislation. Federal law includes prohibition on discrimination in immigration. It extends to discrimination based on the race of an associate or relative, as a prohibited ground. New South Wales and Victoria specify nationality as a ground.

Sex and related grounds.

Sex and marital status are prohibited grounds in all existing legislation. Sexual harrassment has been held to be discrimination on the ground of sex. It is also separately identified as an unlawful act in the statutes of Victoria, South Australia, Western Australia and the Commonwealth. Pregnancy is a prohibited ground in the Federal legislation and in the South Australian and Western Australian legislation. It is an aspect of sex discrimination in New South Wales. In Victoria pregnancy, which is a characteristic of the

female sex, would fall within sex discrimination on that ground. Homosexuality and sexuality are prohibited grounds in New South Wales, South Australia and Queensland respectively. Attempts to introduce a sexuality ground into the Victorian legislation were defeated in Parliament, but the fact of being a parent, childless or of being a de facto spouse is a prohibited ground in Victoria.

Disability or impairment.

Physical disability or impairment is a prohibited ground in New South Wales, Victoria, South Australia and Western Australia. Intellectual disability or impairment is a prohibited ground only in New South Wales, Western Australia and Victoria. The statutes contain complex definitions of what amounts to a physical or intellectual impairment. Statutory exemptions limit the field of impairment discrimination more than other grounds of discrimination.

Lawful religious or political belief or activity

A lawful religious or political belief or activity is a prohibited ground of discrimination in Victoria. Western Australia prohibits discrimination on the basis of a religious or political conviction. The Commonwealth and the other States do not deal with this ground at all. In the Federal sphere, s. 116 of the Australian Constitution provides certain prohibitions on religious discrimination.

Victimisation

In each State, any action taken against a person who has lodged a complaint of discrimination because they have lodged a complaint (known as victimisation) is unlawful. This is so even if the original complaint is unsuccessful.

Discrimination in employment on other grounds

Discrimination in employment on grounds not covered by Federal or State legislation (such as age, medical record or political belief) may be dealt with by the Human Rights and Equal Opportunity

Commission. The Commission will attempt to conciliate between the employee and employer, but, in the absence of any legal prohibition, if conciliation fails, no other legal action can presently be taken.

Each Act includes specific exemptions for certain activities which would otherwise be prohibited discrimination. These include bona fide occupational qualifications, life insurance and superannuation, most sporting activities, single sex and religious or educational institutions and charities. In addition, there is provision for individual temporary exemptions to be given. The width of the statutory exemptions has been criticised on the grounds that they sometimes remove the incentive for an organisation to create non-discriminatory methods of conducting its activities.

AFFIRMATIVE ACTION LAWS

There is also an exemption in all of the Australian legislation for special measures designed to remedy the effects of past discrimination on disadvantaged groups. This leaves the way open for affirmative action programmes to be implemented.

Affirmative action programmes cover a wide range of activities. However, basically they refer to actions taken to reduce the disadvantages faced by members of groups which have suffered discrimination in the past, such as Aborigines, women, and people with disabilities. They range from providing English classes for migrants to ensuring that job selection and promotion committees contain adequate numbers of women.

The implementation of affirmative action schemes is an acknowledgement that statutes which prohibit discrimination cannot eliminate structural discrimination in the workforce, however helpful they might be in individual cases. The Affirmative Action (Equal Opportunities for Women Act 1986 (Cth), requires most public and

private sector employers to phase in affirmative action schemes in relation to recruitment and promotions over a three year period.

The Act does not require the filling of mandatory quotas of female employees. It requires employers to set up and apply an "affirmative action programme" which is designed to review and monitor their employment practices to eliminate discrimination against women, and to ensure that they take steps to promote equal employment opportunity for women. The Federal legislation follows similar schemes operated by the Commonwealth and a number of State governments within their public services for many years.

SOME LEADING CASES - THE RESPONSE OF COURTS AND TRIBUNALS

Under the provisions of the ADA both direct and indirect discrimination are unlawful. Direct discrimination is treating someone unfairly or unequally simply because they belong to a group or category of people. Some recent Australian decisions illustrate examples of direct discrimination.

In *Metwally v. University of Wollongong*[8], the Equal Opportunity Tribunal held that the university, through its employees, had unlawfully discriminated against an Egyptian Ph.D. student on the ground of his race. The student's supervisors and other staff had allegedly adopted an antagonistic attitude to him which resulted in his work suffering. This attitude manifested itself in the form of racist remarks and slurs, including an affront to the student's Islamic beliefs. The case became embroiled in the courts in a constitutional argument concerning the validity of the provisions of the State Act (under which Mr. Metwally had lodged his complaint) after the Federal Act on racial discrimination (RDA) was enacted. The High Court held that the State Act was overridden by the Federal

statute. In this way Mr Metwally lost his complaint under State Law[9].

In *Leves v. Haines & Ors*[10], the Equal Opportunity Tribunal held that direct discrimination on the ground of sex had occurred, where the choice of elective subjects offered by a Girls' High School was based on the general imputation of "domestic" characteristics of females, leading to the failure to introduce industrial arts subjects to the Girls' High School. Less favourable treatment occurred as the complainant had diminished access to the benefits of provision of scholastic and vocationally relevant schools. The finding was upheld in the courts[11].

In *Waterhouse v. Bell*, the compainant was refused registration as a racehorse trainer by the Australian Jockey Club (AJC) because she was married to a person who had been "warned off" all racecourses as a result of his involvement in a horse substitution scandal. The New South Wales Court of Appeal found that the refusal by the AJC to grant a licence to the complainant was based on a characteristic imputed to married women, namely, that all wives are liable to be corrupted or influenced to do wrong by their husbands. On that basis, the Court held that the refusal constituted discrimination against the complainant on the ground of marital status[12].

In *Anstee v. Allders International Pty Ltd* the complainant alleged she had been discriminated against on the ground of her sex in her employment by Allders International. The compainant was given notice by Allders, in accordance with company policy, her employment would be terminated on her sixtieth birthday. The Equal Opportunity Tribunal held that Allders had afforded the complainant conditions of employment which were less favourable than those afforded to a

man[13]. She had been dismissed, whereas a man would not have been dismissed. The decision was effectively upheld in a challenge brought to the State Supreme Court[14].

In *Squires v. Qantas Airways Limited*, the complainant alleged that Qantas had discriminated against women in the recruitment, promotion and placement of cabin crews. Qantas conceded that up to June 1983, females were not afforded the same promotional opportunities as male flight attendants. However, Qantas argued that the complainant had not been discriminated against on the ground of her sex because Qantas was complying with two industrial awards negotiated in 1974 covering Airline Hostesses (F) and Flight Stewards (M) respectively. The Tribunal, however, was unable to find anything in either award which would provide Qantas with a defence under the Act, or which could support an argument that Qantas did not discriminate on the ground of sex because it had relied on one of the relevant industrial awards[15].

In *Bugden v. State Rail Authority*, the complainant alleged that he had been discriminated against on the ground of physical impairment due to his colour blindness. The State Rail Authority (SRA) relied on an exception in the ADA which states that discrimination on the grounds of physical impairment will not be unlawful where it is reasonable having regard to any limitations on the capacity of the physically impaired person to carry out the work required to be performed in the relevant job or requires special facilities or services which would be needed by the person.

The Equal Opportunity Tribunal found that the SRA had acted under a general policy of not employing colour blind people in the relevant depots, and that this was not reasonable in the circumstances because the complainant could have performed his particular work duties without special facilities[17]. It is now very clear from this

case that an employer must consider the specific attributes of a job applicant and the specific requirements of the job very carefully before refusing the application on the basis of a perceived impairment of the applicant.

In *Hill v. Water Resources Commission* the complainant alleged to the Equal Opportunity Tribunal that she had been the victim of sexual harrassment at the hands of co-workers in the Water Resources Commission, that the Commission had discriminated against her on the grounds of her sex and that the Commission, as the responsible employer, was found liable.

The Tribunal found that the Water Resources Commission, as the employer, had taken little or no effective action to stop the behaviour of its male employees, despite frequent complaints by Ms Hill and another employee[18]. This case confirms that employers can be liable under the ADA for the acts or ommissions of their employees. The case also confirms that sexual harrassment is unlawful under the ADA, even though it is not expressly referred to in the Act.

CASES OF INDIRECT DISCRIMINATION

Indirect discrimination occurs where there is a requirement, for example, a rule, policy, practice or procedure, that is the same for everyone, but which has an unequal or disproportionate effect on a particular group. Unless the requirement is "reasonable in all the circumstances" it will be indirectly discriminatory.

For indirect discrimination to be established it must be shown that

(i) the discriminator required the complainant to comply with a requirement or condition.

(ii) a substantially higher proportion of persons of a different

status than the complainant are able to comply with the requirement or condition than persons of the same status as the complainant.

(iii) the complainant must not be able to comply with the requirement or condition, and

(iv) the requirement or condition is unreasonable in the circumstances.

The leading case on indirect discrimination in Australia is *Australian Iron and Steel v. Banovic*[19]. In that case, thirty four female ironworkers employed, or formerly employed, by Australian Iron and Steel Ltd (AIS) at its Port Kembla steelworks complained to the Equal Opportunity Tribunal on the basis that AIS had discriminated against them in the following three ways-

1. AIS had earlier denied women employment opportunities as ironworkers, because they were women, but at the same time had offered men similar employment;

2. AIS policy to retrench ironworkers based on the length of service discriminated against women on the grounds of their sex because AIS had only recently changed its policy and commenced to employ women; and

3. AIS had discriminated on the basis of sex by actually dismissing some of the women on the basis of this "last on, last off" policy.

The issue of indirect discrimination arose, although the "last on, first off" policy appeared neutral as between people of different sexes, because of the effect of the past discriminatory hiring practices, whereby the employment of women was delayed in preference to the employment of men. This meant that a higher proportion of the female members of the workforce, as compared to the male members, were retrenched.

The majority of the High Court of Australia held in this case that the system of reverse gate seniority could not be regarded as reasonable even though its result was that men and women were retrenched in the AIS workforce in proportion to their respective numbers. This could only be done and be reasonable if those numbers were not themselves the result of prior discrimination. See *Australian Iron and Steel Pty Ltd v. Banovic*[20].

The ADA also provides that public acts of racial vilification are against the law in certain circumstances. To amount to racial vilification, there must be a public act which incites hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of their race. However, unlike the Victorian and Western Australian anti-discrimination legislation, religious discrimination is not a ground for complaint under the NSW ADA.

It was recently proposed that the ADA should be amended, in line with the findings of the NSW Anti-Discrimination Board's Inquiry into HIV and AIDS Related Discrimination, to make it unlawful to vilify persons, or groups of persons, on the ground homosexuality or HIV infection, whether real or assumed. A Bill for that purpose has been introduced into the New South Wales Parliament. It has been strongly criticized in the media upon grounds of derogation from rights to freedom of expression.

THE MACHINERY TO COMBAT DISCRIMINATION

In each State there is an agency established to receive and investigate complaints of discrimination and to attempt to conciliate between the parties concerned. Anyone who believes that they have been a victim of discrimination can contact this agency in person, or by telephone or letter to discuss their concerns. If the agency is to take any further action, such as conciliation, a formal complaint must

be lodged with it within a specified time limit, usually of one year from the act of discrimination alleged.

In New South Wales this agency is the Anti-Discrimination Board. In Victoria, South Australia and Western Australia, it is the Commissioner for Equal Opportunity. All these agencies can deal with complaints under State or Federal legislation. In Queensland, Tasmania and the Northern Territory, complaints under Federal laws can be made to offices of Human Rights and Equal Opportunity Commission.

If a complaint cannot be settled by conciliaton, it can go to a formal hearing in the Federal Human Rights and Equal Opportunity Commission, or in the Equal Opportunity Tribunal (New South Wales, South Australia and Western Australia) or in the Equal Opportunity Board (Victoria).

While laws prohibiting discrimination have helped to reduce some of the more blatant and objectionable forms of discrimination, the experience in Australia over a decade of the operation of these laws demonstrates that they have not by any means provided a complete solution to problems faced by disadvantaged groups. Strong and enforceable laws against discrimination are very important for the self respect and defence of groups such as Aborigines, women, migrants, gays and people with disabilities. They should not, however, be seen as self implemented still less as a panacea for social inequality.

One of the more sanguine observers on the operation of anti discrimination legislation in Australia, Professor Margaret Thornton of La Trobe University, has offered this evaluation on the effect of the legislation and case law so far[21]

> "... *Anti-discrimination legislation does represent a halting step towards formal recognition of the fact that white, Anglo-Celtic, heterosexual, able-bodied men have power in our*

society and that they will inevitably exercise it in their own interest. Heretofore, the universality of liberal legalism has sought to deny this truth. It may be that legislation can practically deal with only the more excessive manifestations of social power exercised over subordinates. In spite of its inability to fulfil the unrealistic expectations that it transforms our society so that the scales of justice are not perpetually tipped in favour of the powerful, anti-discrimination legislation does serve an important symbolic and educative function. First, the deontological dimension underscores the right of individual women and minority group members to be treated fairly. Secondly, the collective dimension asserts the dignity and worth of women and minorities, and rejects entrenched classwide stereotyping. Thirdly, the public interest dimension, embodied in the legislative texts, confirms the fact that equal treatment is a matter of societal concern; it is not just the private concern of those who are deleteriously affected. These three strands are collectively empowering women and minority group members... "

BEYOND LEGISLATION - CHANGING ATTITUDES

Anti-discrimination laws can help rectify some wrongs. They can also assist in setting standands of acceptable and unacceptable social conduct. In many countries, including Australia, such laws have begun with useful work on racial and religious prejudice. They have then moved into prejudice on the ground of gender. Now they are tackling other causes of prejudice: such as age, handicap, disability and sexual orientation or HIV status. There is a common enemy here. It is stereotyping. In the context of HIV/AIDS that enemy impedes the spread of educational messages and the self esteem of those who must

Oreceive them. However, to be truly successful in combating discrimination and sustaining the effort, we must begin at the source of the problem: in the minds of those whose behaviour we must hope to modify – for their own protection, for the protection of others and for the protection of society.

This is why human rights education is now assuming such an important role in Australian strategies to control unfair discrimination. The province of law is limited. But it is still real. And it may help to build a society in which protecting the fair go is translated from a national mythology into day to day experience for all Australians.

FOOTNOTES

* President, Court of Appeal of New South Wales, Australia. Chairman of the Executive Committee of the International Commission of Jurists.

1. (1992) 175 CLR 1.
2. See Constitution Alteration (Aboriginals) 1967 (No. 55 of 1967).
3. See *Cole v. Whitfield* (1988) 165 CLR 360.
4. See *Street v. Queensland Bar Association* (1989) 168 CLR 461.
5. See *ibid* n 1 above, p 34 (Brennan J).
6. See M.D. Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 Uni NSWLJ 1.
7. See *The Commonwealth v. Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.
8. (1984) EOC 92-030.

9. See *The University of Wollongong v. Metwally* (1984) 158 CLR 447. See also *Viskauskas v. Niland* (1983) 153 CLR 280.
10. (1986) EOC 92-167.
11. See *Haines v. Leves* (1987) 8 NSWLR 442 (CA).
12. See *Waterhouse v. Bell* (1991) 25 NSWLR 99 (CA).
13. (1985) EOC 92-132.
14. See *Allders International Pty Ltd v. Anstee & Ors* (1986) 5 NSWLR 47 (SC).
15. (1985) EOC 92-102; (1985) EOC 92-135; 12 IR 21; 12 IR 30 (EOT)
16. See *Qantas Airways Ltd v. Gubbins* (1992) 28 NSWLR 26 (CA).
17. (1992) EOC 92-434.
18. (1985) EOC 92-127.
19. (1989) EOC 92-271 (EOT).
20. (1989) 68 CLR 165.
21. Thornton, M. (1990) The Liberal Promise; Anti-Discrimination Legislation in Australia. Oxford University Press, p. 261.