AN INTRODUCTION TO ANTI-DISCRIMINATION LAW

Anti-discrimination laws have won more, and more varieties of, acceptance in Australia than in any other Western country. We have 9 different kinds of equal opportunity boards, commissions or commissioners, and at least as many courts and tribunals administering State, Territory and Commonwealth anti-discrimination laws. Every level of government espouses equal opportunity policies in its public sector employment. We have a Federal agency, which requires annual affirmative action reporting from corporate employers. Federal industrial laws even seek to achieve anti-discriminatory objectives.

Why is it so? It all began with international politics. Australia has signed treaties that identify discrimination as a fundamental breach of the human right to be treated with respect, and which oblige us to eliminate it or face international criticism.

The first international human rights instrument was the United Nations' 1948 Universal Declaration of Human Rights. Since then we have made many, more specific, international promises: to eliminate race discrimination, discrimination against women, and against people with disabilities, for example. We have promised to eradicate discrimination at work, and to protect the rights of workers with family responsibilities, and the rights of children, for example. The question is, how to do it? Human beings naturally "discriminate" in making choices about public interactions, in education, employment, in buying goods and services or using public facilities or providing or seeking accommodation. It is human to want to be surrounded with people just like ourselves, who make us feel comfortable. A group's rejection of those who do not conform to what is "normal" or acceptable both binds that group together and, at some point, may become so anti-social and destructive to the long-term interests of the wider community as well as to the individuals that it must be stopped.

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1. State anti-discrimination mechanisms

We have learned that moral exhortation is not enough to stop discrimination. Since the late 1970s, starting with NSW, South Australia and Victoria, Australian States have developed institutions to achieve this. They have broadly similar functions - to educate and inform the community about anti-discrimination laws and sometimes to make recommendations about law reform; to receive and try to resolve complaints through conciliation, and to refer unresolved complaints for judicial resolution.

The grounds for complaint and the scope of their coverage are roughly the same, but with infinite varieties in exceptions and amendments. For example, Tasmania's anti-discrimination laws address sex discrimination (and sexual harassment) alone. It is also unlawful, in other States and Territories, under their legislative schemes, to discriminate on the basis of race, disability (or "impairment"), political, industrial activity, religious, marital or parental status, family responsibilities and pregnancy and, in most jurisdictions, age and sexuality too.

These laws and institutions take a broadly similar approach to complaint handling and policy, and they co-exist, within their own boundaries, with Federal anti-discrimination laws, which cover some of the same ground.

Even if someone is treated unfairly because of one of the prohibited grounds, they do not have a right to complain if it did not happen in one of the areas of public life covered by anti-discrimination laws. These include work, education or training, trade or occupational qualifications; you may not discriminate against customers or the public in access to goods and services and facilities such as public halls, or public transport or service in shops, or government. We are not allowed to discriminate in sport, or in club memberships, though it is legal to set up special clubs to preserve minority cultures, and there are some "private" clubs which can discriminate - several which will not admit women members, for instance (these are becoming quite rare, as their "male only" membership drops off).

But if your neighbour shouts sexist abuse over your fence, or a relative makes racist remarks about your Indian friend in his own kitchen, there is nothing anti discrimination law can do about it. However the same words used on a public advertising hoarding could be racial vilification under the Commonwealth Race Discrimination Act or the NSW Anti Discrimination Act.

2. Federal anti-discrimination bodies

In the early 1980s the Commonwealth created its own institution, the Human Rights Commission (which became the Human Rights and Equal Opportunity Commission in 1986) to act as a watchdog on human rights generally, and to perform roughly similar functions. HREOC's mechanisms for protecting and promoting human rights are two-fold.

On the one hand, some people may complain of discrimination under three specific Acts of Parliament, which prohibit discrimination because of someone's race (Racial Discrimination Act 1975), sex, pregnancy, marital status and family responsibilities and sexual harassment (Sex Discrimination Act 1984) and disability and disability harassment (Disability Discrimination Act 1992). If the conciliation process fails, the complainant can insist that the complaint is referred for judicial determination, which ultimately results in a finding that discrimination has occurred, and enforceable orders to put it right, including damages.

At present each of those Acts has a Commissioner who is responsible for the administration of that Act, and for receiving and trying to resolve complaints from individuals that their rights have been breached. In fact this work is done under their direction by staff of HREOC, of which the individual Commissioners are members. HREOC also appoints "hearings commissioners" who act as a quasi-judicial tribunal to hear and determine unresolved complaints. HREOC proceedings are unenforceable except through the Federal Court, because HREOC cannot, constitutionally, exercise judicial power.

HREOC has a broader duty; to watch over and report to the government on the

rights enjoyed - or destroyed - in this country, and to educate the community about their rights and responsibilities. There is no enforceable remedy for the victims of other discrimination than sex, race or disability discrimination even when Australia has agreed to protect them. Children have rights, for example, under the Convention on the Rights of the Child, which Australia signed in 1990, but have no power to enforce their breach, as they can if they are subjected to race or sex discrimination. The HREOC inquiry into homeless children highlighted their plight.

HREOC does receive and try to conciliate complaints about age, "social origin" and sexuality and other grounds of discrimination covered by International Labor Organisation Conventions to which Australia is a party, which are included in a schedule to its Act, but there is no tribunal or court to which they can be sent for determination of the alternative means of dispute resolution fail.

The Commission also has the authority to conduct public inquiries and has done so, to raise awareness of appalling human rights problems or dilemmas, without complaints being made. HREOC has carried out several national Inquiries, the two best-known being into the rights of Homeless Children (1989) and the human rights of people with mental illnesses (1992, 1995). In 1996 the President of the Commission, Sir Ronald Wilson, led an Inquiry into the "Stolen Generations". which is holding public hearings around the country to hear the stories of Aboriginal and Torres Strait Islander people who were taken away from their families and their communities by State welfare authorities, and deprived of their parents' love, their identity and their culture. They were done terrible wrong, in the name of misguided "welfare" policies of not so long ago: the last "round up kids" were taken in the 1970s.

HREOC has 6 Commissioners in all, as well as the Sex, Race and Disability Commissioners, including the human rights, privacy and Aboriginal and Torres Strait Islander Social Justice Commissioners. Their tasks are more complex: the latter, Mick Dodson, for example, monitors progress made - very little has been made - on implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody. His Annual Report is a depressing reminder that

moral rights are easily overlooked, if nobody has the right to enforce them.

The Commission faces almost certain restructuring in the next few years, with the quasi-judicial functions being referred to a specialist function of the Federal Court, but with conciliation and education still being performed by what will probably be a single Commission and its staff under a single piece of human rights legislation.

3. What is discrimination?

"Discrimination" means being excluded or treated less favourably than another person, or assumed to be less able or less talented or to be less deserving, because of assumptions or stereotypical thinking based on one of the prohibited grounds. Essentially "discrimination" is a human rights abuse because it makes distinctions between people because of quite irrelevant considerations - something about their bodies, or their sex, or what they believe, or who their ancestors were, or where they were born - and treats them as a member of a class, not a person on their individual merits.

(a) Direct discrimination

Some discrimination is "direct." For example, if an Aboriginal child applied to be accepted into a school and was refused because the school chose not to take Aboriginal students perhaps because it assumed they were less intelligent, or more likely to cause trouble this would clearly be a breach of the Commonwealth's Race Discrimination Act.

Discrimination can be deliberate and blatant. In one Victorian example, an Aboriginal couple who wanted to rent a caravan as emergency accommodation for a few weeks in a country town, were refused. The caravan rental business owners said they "didn't rent to Aboriginals", apparently because they thought their other customers (not Aboriginal) in the country town would not patronise them if they did. The company agreed that there was nothing wrong at all with the couple personally, but they maintained their position, humiliated the couple, who found it

very difficult to find somewhere to live, and appeared to rely on their right to run their businesses as they saw fit. When the complaint about race discrimination was heard, the hearings commissioner (it was a HREOC race discrimination complaint) ordered the discriminators to pay damages of more than $20,000 to the couple, and to make two public apologies in the local newspaper. The Commissioner said a public apology would teach the townspeople that gross race discrimination was intolerable, and costly. More often the discrimination is less obvious. Nonetheless, if there is a causal connection between the person's race, sex or other ground covered by discrimination laws and "less favourable treatment" the discrimination is "direct" even if it may be more difficult to prove.

(b) "Indirect" discrimination

Sometimes the real reason someone is treated in a less favourable way is not because of a prejudice, but because there are rules and practices which have developed over time, and seem fair because they apply to everyone. If they have a very unfair effect on a group of people classified by one of the grounds (a racial group, for instance) who cannot meet their requirements, they are "discriminatory" too, in an indirect way.

For example, every Australian child has an equal right to a free, State-provided education. This is a right, which is explicitly protected by Australia's ratification of the UN Convention on the Rights of the Child. Most education systems purport to provide universal and free education, at least at primary level, and substantially in secondary school too.

However some children are disadvantaged in an education system if it is designed for a majority to which they do not belong: migrant children who speak another language than English, for example and, of course, many Aboriginal children. It is very hard to participate in a school program which expects parents to support children doing their homework, and does not make allowances for parents who cannot, or for poor or overcrowded or noisy living conditions, or families whose life experiences and expectations are not geared towards "white," or Christian, or English customs.

That was why, in Victoria in 1992, two Aboriginal students complained about the loss of a spectacularly successful Aboriginal education program by the closure of a public school which took all kinds of children - not, by any means, all Aboriginal - called Northland Secondary College. They did not argue that the State government intended or even considered it relevant that they were Aboriginal students, when deciding to save money by closing it down. They succeeded in proving that the standard education system, which "applied to everyone", was indirectly discriminatory for Aboriginal students, if the "Northlands" program was dropped from it. That Northland program provided a "whole school environment" which was sympathetic to Aboriginal experience and traditions, which involved all the students and their parents and extended family and the teachers in the school, and the students thrived and succeeded, because of it. When the school was closed most of the Aboriginal children simply could not fit into "mainstream" classes and dropped out of the other schools. These two children proved that there was a requirement or condition placed on their access to public education that they "fit into" an education system, which did not take their background and needs into account. To "save money" by denying them an education which they could enjoy because it was designed with their interests in mind was to deprive them of an education because they were Aboriginal. The consequences were so catastrophic that it was open to the Equal Opportunity Board, the specialist tribunal, to find that the economic objectives of the State government were not so important as to override them, and so the decision was an unreasonable one. The courts ordered the school to be reopened.

4. The remedy for discrimination

Making a complaint of discrimination is not like prosecuting or suing somebody in the ordinary way. The process is much the same under State, Territory or Federal laws: a complaint has to be made in writing; it is investigated by Commission (or Board) staff, and if it seems to have substance to it, the primary remedy is "conciliation" with which the respondent can be forced to participate. Commonly, the parties can be obliged to provide information, give statements and attend

meetings (though they cannot be forced to "agree").

Conciliation is a kind of mediation within a statutory framework, a process of talking through differences, and coming to a resolution by agreement of the parties themselves with the help of a conciliator, where engagement can be coerced, but the parties may still choose to resolve or not settle their differences.

If that process fails the complaint can be referred to a specialist tribunal - or one of the traditional courts exercising a special statutory function - to be decided after a trial, with witnesses being called and cross examined. The tribunal can make orders to put the wrong right - including damages - and these orders can be enforced.

5. "Affirmative action" and government "access and equity" programs

HREOC and the Territory and State government-appointed anti-discrimination bodies do not handle every kind of anti-discrimination law or policy. Over the last 21 years governments have developed their own anti discrimination policies and practices to ensure that the ill effects of past discrimination are put right, and that their own programs and employment practices do not discriminate against people. Industry, commerce and industrial organisations have also acted. They are encouraged to do this: complaining is a very clumsy way to eradicate discrimination.

The Affirmative Action Agency is a Federal government body which monitors large companies' reports on programs for promoting women's interests in their organisations, but HREOC has nothing to do with it, and if they don't report they get "shamed" in a report to Parliament by the AAA. It seems to work.

Other ways of encouraging compliance with anti-discrimination law are found in government policies in their own public employment structures and programs, both "equal opportunity" and special, positive or affirmative action programs for women, people with disabilities, Aboriginal and Torres Strait islanders, and migrant or

overseas-trained employees, for example.

Affirmative action is a way of eliminating the present effects of past discrimination. It is mean to be temporary, a kind of "positive discrimination" to break down the barriers to equality. It encourages those who have been denied equal opportunity by past discrimination to get past that hurdle. Sometimes it is a special program to let people from disadvantaged backgrounds get started at work without formal qualifications, and learn on the job, or extra training, or experience or mentoring. HREOC and the State and Territory Commissions, Commissioners and Boards do not enforce these programs: properly constructed "affirmative action" is not discriminatory, because it is designed to eliminate discrimination too.

HREOC Commissioners also have power to make sure that industrial awards are not discriminatory, and sometimes they intervene in industrial or other litigation. The Sex Discrimination Commissioner, for example, has intervened several times in the Industrial Relations Commission over discriminatory industrial awards. The Human Rights Commissioner intervened in the Electoral Office's prosecution, in 1996, of Albert Langer which ended up with his being imprisoned for contempt, because the case was about the right, under the International Covenant on Civil and Political Rights, to freedom of political speech. These cases are unusual, but show the lengths to which HREOC can, and occasionally will, go to protect fundamental human rights.

6. What happens when people complain?

Most people's first contact with HREOC is through one of its local agents - sometimes the State or Territory Equal Opportunity or Anti Discrimination Commission or Tribunal - by telephone, for advice (in some States, such as Victoria, the State body receives complaints of discrimination against State and Federal anti-discrimination laws, by agreement). Then they decide whether to make written complaints.

People are complaining more and more every year.

Table (from Vol 1, No 2, March 1996. 3-4, of the Newsletter of Equal Opportunity and Human Rights Consulting, Gerard Bremault

Statute	***1993/4***	***1994/5***	***1966***
Sex Discrimination Act 1984 (C'w)	1304	1523	16.8%
Racial Discrimination Act 1975 (C'w)	448	707	57.8%
HREOC Act 1986 (C'w)	71	368	418.3%
Disability Discrimination Act 1992 (C'w)	302	1219	303.6%
Anti-Discrimination Act 1977 (NSW)	1293	1508	16.6%
Equal Opportunity Act 1984 (Vic)	646	1049	62.4%
Anti-Discrimination Act 1991 (Quld.)	304	709	133.2%
Equal Opportunity Act 1984 (SA)	472	544	15.3%
Equal Opportunity Act 1984 (WA)	435	544	(7.1%)
Discrimination Act 1991 (ACT)	73	90	23.3%
TOTAL	**5418**	**8196**	**51.3%**

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Though many people think of "equal opportunity" as rights for women, this chart shows that biggest growth in complaints is from people with disabilities The Disability Discrimination Act, passed in1992, has had a significant effect on awareness of the effects of discrimination on service providers. For example, in 1995 a profoundly Deaf man complained that he was discriminated against by the telephone company, Telstra, which would not sell him a special device (a "TTY" machine), saying they sold only hand pieces which people with some hearing could use. He succeeded in proving that it was indirectly discriminatory to provide access to a national telecommunications system in a way, which looked "fair" because the same rules applied to everyone, but which Deaf people could not use. Telstra was ordered to provide TTYs for Mr Scott, the man who complained, and to 21,000 other Deaf Australians. It was an expensive lesson about enforceable rights.

The steps in handling a written complaint to HREOC are:

1. A written complaint is looked at to see whether or not it alleges an act that would be "discrimination" if the claims were true, under anti discrimination laws by a Commission officer.

2. If so, the complaint is assigned to an investigator, who gives notice to the person (or the company) named as responsible (the respondent); talks to the person who complained (the complainant) and witnesses to see what the issues are. Usually they will ask the respondent to reply in writing before they decide what to do next.

3. The Commissioner has the power to decide that the complaint "lacks substance" during this phase, and decide not to take any further action. If she or he does not, then the conciliator usually arranges a conciliation conference, where both parties meet with the conciliator to discuss the claim, and try to work out a mutually satisfactory (or mutually unsatisfactory) outcome: apologies, reinstatement, training, references, or even the payment of money.

4. If the parties can agree, they usually sign a simple agreement and that is an end of the matter.

5. If they cannot agree, then the complainant can choose to refer the complaint to a public hearing.

In fact, most complaints are settled during investigation or negotiation. HREOC reported that, in 1994/1995:

21% of its finalised complaints were resolved by conciliatio

33% were discontinued or withdrawn by the complainants,

35% were disallowed or declined during the year.

Only 6% of the complaints were referred to HREOC for he

Similar kinds of results are reported from most other jurisdictions.

What is particularly interesting is the outcome of some of those cases. Overall, about 40% of the sex discrimination

cases were decided, after a hearing, in favour of the complainant: an astonishing **98%** of sexual harassment complaints were decided in favour of the person complaining. Far fewer race complaints were successful, and (so far) only a handful of disability discrimination complaints went to a hearing at all: these get settled.

7. What is the future?

The future of anti-discrimination laws is not unclouded. The public expects that there will be such laws, though there is a significant backlash in some areas. It is possible that the traditional courts will come to hear and determine unresolved complaints, instead of specialist tribunals, at least on a Federal level. After the "Brandy" case (Brandy was the appellant's name), when the High Court found that HREOC could not be a judicial tribunal because it was not given judicial status under the Constitution, the Commonwealth government reviewed the way human rights were protected in Australia. It decided not to continue to have separate Acts dealing with sex, race and disability discrimination, but one "human rights" statute, which makes a lot of sense. It decided to establish a special human rights division of the Federal Court instead of the "hearings commissioners". It also decided to review the structure of the Commission, so that Commissioners were not constantly competing for funds to handle "their" Acts. The Coalition government has indicated that it will build on these reforms, but that it may cut the Commission's resources and some of its functions. How far, and what effect this will have, is simply not knowable.

We made a decision, decades ago, that discrimination in some areas of public life was so anti-social that it should be eliminated. The lesson of the last 12 years is that there can be no "rights" unless there is an effective remedy for those who believe theirs have been denied. Policies and programs designed to eliminate discrimination must, ultimately, have some kind of sanction for their breach. Anti-discrimination laws are meant to provide an alternative for people whose choices are denied. They are meant to be informal, easily accessible; confidential, conciliatory, and empowering - all qualities that lawyers and courts don't often

demonstrate. It takes courage, or desperation, to claim those rights and certainly to use legal remedies. They are not easy to use. A complainant must be prepared to defend charges of incompetence, dishonesty, emotional instability, guilt and blame for any detriment they have suffered; the challenge of public cross-examination and scrutiny of their private lives and beliefs; challenges to their memory and character; financial loss; delays, humiliations, rebuffs and the long, silent, questioning looks of their families (especially their children) and their friends, who believe they have become "obsessed".