NSW LAW REFORM COMMISSION

PRELIMINARY REVIEW OF ANTI-DISCRIMINATION ACT 1977

SUBMISSION

Emerita Professor Margaret Thornton
ANU College of Law
The Australian National University

1 Modernisation and simplification: There is a strong case for rewriting and simplifying the Act, particularly as it has been subject to a proliferation of amendments over the years. Not only is it difficult for an ordinary person to comprehend but it is also understood by comparatively few lawyers, other than a small number of highly paid barristers who specialise in defending corporate respondents.

It is notable that most Australian jurisdictions have recently updated their legislation, so there are plenty of models close to home from which to choose. However, I recommend that particular attention be paid to the *Anti-Discrimination Act 1991* (ACT), which is one of the updated pieces of legislation, for it is written in plain English and is very accessible.

The inclusion of simple hypothetical examples in the text of the legislation is another way of making the legislation more user-friendly that is recommended.

2 Range of attributes

It is recommended that the list of protected attributes be expanded considerably as the present grounds are rather narrow. For example, the ground of homosexuality does not encompass *gender identity* or *intersex status*, as included in the federal *Sex Discrimination Act*, for example, although '*transgender*' is referred to in regard to the registration of a person's birth, but this falls short of addressing discrimination on the ground of transgender status in public life.

A person's *immigration status*, for example, is not necessarily included within the ground of race, which would exclude a substantial cohort of affected people being denied redress. There are also various other contemporary issues, such as the collection and use of genetic information that were not envisaged in 1977 and which should be considered for inclusion in a modernised Act.

The list of 24 protected attributes included in the ADA (ACT) presents a desirable model and it is recommended that the list of attributes be set out similarly rather than being set out in different sections seriatim as in the ADA, for the present ordering requires the reader to pore through the detail relating to each ground to ascertain what differences there might be between them. This is time-consuming and off-putting to the ordinary person trying to gather basic information appropriate for their case.

Class discrimination is one of the most significant manifestations of discrimination in Australia (Thornton, 'Social Status: The Last Bastion of Discrimination' (2018) 1 *Anti-Discrimination Law Rev* 5), although it is not presently proscribed by any Australian legislation. The ADA(ACT) includes accommodation status as a protected attribute but it is recommended that the ADA might go somewhat further in recognising class discrimination.

ILO 111, to which Australia is a party, includes social origin, although the phrase is a little dated and not easily understood. Nevertheless, as stereotypical assumptions are commonly made about individuals on the basis of home address or school attended (which may be a proxy for class), the Commission might turn its mind to this vexed issue. In view of the large number of immigrants from the Indian diaspora, such a categorisation might also address the issue of caste.

In addition to a list of protected attributes, I recommend that the Act also include provision for their *intersection*. In the US, the concept of sex plus race was developed about thirty years ago to deal with the unique form of discrimination faced by African-American women, when the harm to which they were subjected did not clearly fit neatly into the grounds of either race or sex. Gender plus age, as well as gender plus disability, are other examples where an intersectional approach would be appropriate.

3 Areas of operation

At present, a 'public act' is defined only in the context of racial vilification. I would suggest the inclusion of a focus on 'public life', which is defined at the outset. The majority of complaints tend to be lodged in the area of employment, although access to goods and services and education, produce significant complaints from people with disabilities. However, a more general definition of 'public life' could include harassment or vilification in the street, or denial of access to public places, areas that are not presently covered.

4. Tests of discrimination

I support the inclusion of direct and indirect discrimination in the legislation but recommend that the language be simplified somewhat as the tests are central to understanding whether discrimination has occurred or not. I suggest ADA (ACT) s 8 as a useful model for the wording. To provide some hypothetical examples in the text to illustrate the difference between direct and indirect discrimination is recommended.

5 Vilification

While it is appropriate to criminalise serious racial vilification, I recommend that this offence be moved to the criminal law. As the aim of anti-discrimination legislation is to remedy a harm in accordance with the tenets of the 'make whole' principle of the civil law, it is confusing to include criminal sanctions for serious offences in the same instrument. A note in the text could cross-reference the relevant section in the *Crimes Act.*

6 Harassment

Sexual harassment, as presently defined in the Act, does not distinguish between sexual harassment and sex-based harassment, which has now been included in s28AA of the *Sex Discrimination Act 1984* (SDA) 'unwelcome conduct of a seriously demeaning nature by reason of the person's sex'. (The different manifestations of sexual harassment have been elaborated upon in Thornton, 'Sexual Harassment losing Sight of Sex Discrimination' (2002) 26 *Melbourne Uni L Rev* 422).

There would be no reason why harassment that was race-based, disability-based, sexuality-based or age-based should not also be similarly proscribed, although I would not wish to see

sexual harassment, as presently defined and proscribed, diluted in view of its extent and impact on women, as recent studies emanating from #MeToo have shown.

7 Positive obligations

The experience of Australian complaint-based anti-discrimination legislation over half a century has underscored the limitations of this model, which places the onus on individual complainants to bear the psychological and financial cost of seeking justice following a violation of the legislation. There is inevitably an inequality of power between the complainant and the respondent as in an employment situation where the respondent could be a large corporation with substantial resources and a monopoly over the evidence.

While it may be possible for the complainant to secure a remedy through conciliation, a *proactive stance* whereby the respondent is encouraged to undertake some preventative action is undoubtedly preferable. The positive duties under the *Equal Opportunity Act 2010* (Vic) (EOA) and the *Gender Equality Act 2020* (Vic) are models that might be followed, although the model recently developed by the SDA in respect of sexual harassment is stronger. The essential point about positive action is that it communicates to organisations a sense of what are the appropriate standards with it should be complying. Without such an action, complaints are ad hoc and organisations blunder along in the dark without any real sense of what preventative action they ought to take.

Reasonable adjustments for people with disabilities are essential in a positive human rights environment and are included in the *Disability Discrimination Act 1992* (Cth) and the *Fair Work Act 2009* (Cth). At the state level, they are also now the norm as is apparent in the recently updated anti-discrimination legislation.

8 Exceptions, special measures & exemptions

The ADA was originally marked by an excessive number of exceptions. Although no longer the case, the inclusion of many exceptions undermines the commitment to the non-discrimination principle. While it might be perceived to be radical, it is recommended that the legislation include *no exceptions*.

Instead, it is recommended those who wish to be exempted from the operation of the Act should apply for an *exemption* for a finite period of and assume the onus of justifying an exemption or a continuation of an existing exemption. A permanent exception ignores changing social norms as well as changes in actuarial and/or statistical data.

Similarly, it is suggested that *no special measures* provision should be included in the Act but that those wishing to develop a special measure should do so by applying for an exemption from the operation of the Act.

9 Complaints procedures and remedies

Present *complaint procedures* are satisfactory, although it is noted that few representative complaints are lodged. It is recommended that specific reference be made to such complaints being made by a *union* (s87C). However, an action instituted by a union should not require the approval of the President; secondly, a representative complaint should not require a class that is so numerous that joinder is impracticable; a union should be able to represent a small class if appropriate.

Burden of proof – reverse onus: At present, the burden of proving discrimination rests with the complainant, even though the respondent is likely to have a monopoly over the evidence, including access to witnesses in the case of an employment situation. The present system produces skewed outcomes that favour respondents, as is apparent when we consider litigation data. It is recommended that a reverse onus should apply once the complainant has adduced a prima facie case that discrimination has occurred and that the respondent was the perpetrator. The reverse onus applies in US discrimination law in this way. In any case, it is not foreign to Australia as it is well established under the *Fair Work Act 2009*. The reverse onus would undoubtedly lead to more equitable outcomes.

Remedies: The cap on damages of $100,000 should be lifted. The discretion regarding an appropriate remedy should be left to the Tribunal.

Remedies should not be restricted in the case of a representative complaint. Damages and all other discretionary remedies should be available to the group

10 The Anti-Discrimination Board (ADB)

It is recommended that the ADB be empowered to initiate actions of *own motion* regarding class wide or systemic discrimination. The ADB is in a better position to recognise systemic discrimination and initiate action itself in view of the confidentiality surrounding discrete individual complaints. Systemic discrimination actions may address cases in which complainants are similarly situated and there are similar issues of fact to be addressed, or it can address cases involving instances of discrimination involving a corporation or state government entity operating state-wide.

It is recalled that in the early years of operation of the ADA, there were multiple actions instituted by women teachers employed by the NSW Department of Education, but each one was dealt with separately when the facts lent themselves to a systemic discrimination complaint, had that been possible. As it was, these actions unnecessarily contributed to the cost to the public purse and angst for the complainants by being dealt with separately.

The ADA relies on individual complainants to carry the burden of running such cases, which is very much a 'hit and miss' affair as it may mean that the cases that should be heard do not see the light of day, whereas those that are less worthy may proceed to litigation depending on the vagaries of the individual complainants. While conciliation is the modus operandi of the ADA, it is sometimes important that a case be litigated. Not only is it heard in public, it results in a written judgment.

It is notable that anti-discrimination jurisprudence is poorly developed. Unfortunately, there are few judges in general jurisdictions who have expertise in the area. Had the *Mabo* case been conciliated in private rather than being heard by the High Court with the production of a significant written judgment, it would have had no impact on the public consciousness. Own motion actions by the ADB allow it to select appropriate public interest cases, which it can run as test cases.

Legal education: It is noted that only a few law schools teach courses in Discrimination and the Law and, even if offered, it is likely to be offered as an elective only, not a compulsory course. This means that only a small number of students are able to acquaint themselves with the legislation. Numbers may be further limited by a cap being placed on enrolments and a

course may be offered only in alternate years or less frequently. Perhaps the ADB could encourage more law schools to offer such a course.

11 Comparator jurisdictions

Rather than play a passive role, other bodies tend to be more active than the ADB. For example, the US Equal Opportunity Commission has the discretion (and funding) to exercise own motion litigation in the public interest as it considers appropriate.

The Canadian Human Rights Commission also plays a more active role then the ADB. Not only does it conduct compliance audits among employer organisation, it may appear and give evidence in actions before the Canadian Human Rights Tribunal.

In terms of Australian jurisdictions, WA, Queensland, ACT and NT have all recently updated their legislation and Victoria has established an effective regulatory regime after developing a positive duty more than a decade ago in its general jurisdiction and a more focused duty in its recent gender-based legislation. At the federal level, considerable work has been done on sexual harassment, in particular, at the federal level, with specific issues, such as costs, are still under consideration.

12 Interaction with Commonwealth

The maintenance of concurrent operation between the state and federal laws is desirable, but every effort should be made to obviate conflict in drafting the new legislation.

At present, complainants make judgments about what is best for them. The issue of costs in the case of litigation is a factor. Whereas, the federal legislation imposes no upper limit in respect of damages at the formal level, the rule that costs lie where they fall is a disincentive for applicants to lodge under the federal legislation. On the other hand, the absence of an upper limit in the quantum of damages may be an attraction for some complainants.