29 September 2023

NSW Law Reform Commission

By email: nsw-lrc@justice.nsw.gov.au

Dear Commissioner

Anti-Discrimination Act review – call for preliminary submissions

1. We wish to make a preliminary submission to the Commission's review.

2. We generally support the views expressed by the Public Interest Advocacy Centre in its paper *Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act*[1]. However, we have chosen to restrict our submission to the issue of national harmonisation of anti-discrimination laws in Australia, which as practitioners we consider to be a matter of urgent and practically significant priority.

3. This submission addresses paragraphs 1, 11 and 12 of the Terms of reference, in particular, although it has relevance to most of the Terms more generally.

Background – the cross-jurisdictional status of anti-discrimination laws

4. Australian anti-discrimination law currently comprises 13 different pieces of legislation: five Commonwealth acts and one in each of the eight states and territories. They overlap and, although they cover largely the same range of types of discrimination, there are myriad inconsistencies in coverage, definitions and application.

5. As noted by the Australian Human Rights Commission in 2019, "There are some grounds of discrimination that are covered in some states and territories but not at the federal level. In

[1] https://piac.asn.au/wp-content/uploads/2021/08/PIAC-Leader-to-Laggard-The-case-for-modernising-the-NSW-Anti-Discrimination-Act.pdf

MARQUE Lawyers Pty Ltd | ABN 92 132 461 066
Level 4, 343 George Street, Sydney NSW 2000
p +61 2 8216 3000 | f +61 2 8216 3001
www.marquelawyers.com.au

practical terms, this means that whether you are protected against discrimination depends on your postcode and where you experienced discrimination."[2]

6. For victims of discrimination, it is self-evidently difficult to simply work out which laws apply and where they can go for redress. For our business clients, it is equally challenging. Corporations generally are bound by both Commonwealth and state/territory laws, and many businesses are obliged to maintain complex compliance matrices to ensure that they are observing the various laws applicable in the different places where they do business. For online businesses, the problem is all the more imposing, raising extremely tricky jurisdictional questions.

7. In sum, what this means is that it's hard even for lawyers to navigate the cross-jurisdictional mess, and that nobody else has much hope on their own without expert legal advice. Consequently, the law fails in its duty to serve the public interest.

Human rights are universal

8. Obviously, human rights do not differ across state borders, nor should their protection by the law. This is not a legal subject for which there is any rational basis to suggest that there are social or environmental differences between states and territories that justify different legal regimes.

9. Australia is a party to seven core international human rights treaties. Rational debate can be conducted on the extent to which the rights that these treaties cover should be protected in domestic Australian law, but that must logically be a national conversation. This is not a field of law where there is a good argument for competitive federalism.

Historical attempts at harmonisation

10. In 2008, the harmonisation of anti-discrimination laws was placed on the agenda of the Standing Committee of Attorneys General by the Rudd government. Agreement was reached to establish a working group to develop options for consideration, however the attempt was quickly abandoned by the Council of Attorneys General in 2009-2010.[3]

11. In 2013, a substantive attempt to consolidate the various federal anti-discrimination laws into a single act was abandoned, again, it is fair to conclude, because it was ultimately seen as politically too hard. The then-federal government had not proposed any harmonisation process

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[2] AHRC discussion paper, *Free and Equal*, October 2019: https://humanrights.gov.au/sites/default/files/document/publication/ahrc_discrimination_law_reform_2019_resized.pdf

[3] Id., p.35

with the states and territories in conjunction with this reform, but did encourage the Standing Council on Law and Justice to continue work on harmonising the various legislative regimes.

12. It is self-evident that anti-discrimination law is a politically and ideologically fraught subject, because it engages many interest groups with values-based positions that are often diametrically opposed. This is particularly so in relation to the more "controversial" forms of discrimination such as religious, gender and sexual orientation, where powerful groups assert rights that are in conflict with each other. Because of this, any reform is very difficult to achieve, and governments shy away from the fight because the political capital involved is not seen to be justified by the achievable ends. This is understandable but not acceptable as a reason to tolerate a system of laws that is, frankly, a mess.

Benefits of harmonisation

13. Most importantly, harmonisation would ensure that all Australians are afforded equal protection under the law regardless of jurisdiction, as should follow from the universality of the protected attributes and rights.

14. Harmonisation would produce significant psychological benefits; see the paper by Mark Nolan, "The Legal and Psychological Benefits of Nationally Uniform and General Anti-Discrimination Law in Australia".[4]

15. Harmonisation would have major benefits for businesses and other entities who have the obligation of compliance with anti-discrimination regimes. We agree with the observations made by the Department of Prime Minister and Cabinet in 2013, in its *Regulation Impact Statement on the Consolidation of Commonwealth Anti-Discrimination Laws*[5]:

> "The current arrangements are inefficient with coverage of attributes varying across both Commonwealth and State and Territory legislation, with this inconsistency resulting in much uncertainty for businesses and individuals as to their rights and responsibilities. This uncertainty has resulted in added complexity and costs for businesses in understanding their obligations." (page 4)
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> "In addition, many businesses are also subject to State and Territory anti-discrimination laws. These varying laws can require different practices throughout national offices or require multiple

[4] (2000) 6(1) Australian Journal of Human Rights 79; http://classic.austlii.edu.au/au/journals/AUJlHRights/2000/5.html

[5] https://oia.pmc.gov.au/sites/default/files/posts/2012/11/anti-discrimination-ris.pdf

exemptions to be sought, imposing an excessive regulatory burden on businesses and significant uncertainty." (page 22)

16. Harmonisation would signal to the Australian community and other countries that this country has a progressive attitude to human rights and champions their protection, in keeping with our historical reputation as a leader in this field (and contrary to the regressive trend of more recent decades). A harmonised regime, as difficult as it would be to achieve, would also ultimately depoliticise the broad issue of human rights.

17. A harmonised regime would make it far easier to approach future reform efforts, avoiding the atomised jurisdiction-by-jurisdiction debate that presently exists. It would save all governments the wasteful expenditure of duplicated resources.

Why New South Wales?

18. New South Wales was the first state or territory to enact an anti-discrimination law, with the *Anti-Discrimination Act 1977* coming only two years after the first Commonwealth law, the *Racial Discrimination Act 1975* (Cth) was passed. In 1982, New South Wales was also the first jurisdiction to include homosexuality as a protected attribute, and in 1989 it was the first to prohibit racial vilification.

19. Reform has to start somewhere. While it is well overdue for New South Wales to be reviewing its own out-of-date anti-discrimination law, the fact that is now doing so provides a golden opportunity for a larger ambition to be pursued.

20. Ideally, the Commonwealth would combine with all states and territories to take on a national project for harmonised anti-discrimination laws. However, there is no need to wait for that to reach the federal agenda; the initiative can come from the states. New South Wales is ideally placed to lead the conversation.

21. The hardest law reforms deliver the highest social benefits.

Yours sincerely

Michael Bradley
Managing Partner