Question 14

"*The need for harmonisation becomes obvious upon even a cursory examination in this field.*"[1]

Introduction

This submission is written from the perspective of a large company. It focuses on discrimination in the workplace.

The project to consolidate Australia's anti-discrimination laws ('the Project') represents a real opportunity for 'win-win' policy outcomes, for the benefit of both workers and employers. Difficulties of construction, proof and comprehension have dogged the existing legislative framework for too long. This has created a real danger that individuals suffer wrongful discriminatory barriers without access to a useful legal remedy.[2]

From the perspective of employers, it is well known that discrimination reduces engagement.[3] Further, busy managers stand to gain from a simplified equality Act which is makes it easier to comply with and is cheaper to implement.

The Project reflects a worldwide trend in equality law. The International Labour Office recently observed that globally,

> progress has been particularly marked by the adoption, in many countries, of new or revised legal provisions aimed at non-discrimination and equality. As regards the thrust

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1 Belinda Smith, 'Anti-Discrimination Law' in Carolyn Sappideen, Paul O'Grady, Joellen Riley, Geoff Warburton, *Macken's Law of Employment* (Law Book Co, 7th ed, 2011), 584.

2 Kirby J (as he then was) described Australian anti-discrimination law as 'littered with the wounded' in *X v Commonwealth* (1999) 200 CLR 177, 213.

3 See, for example, Clive Johnson and Jackie Keddy, *Managing Conflict at Work*, (KoganPage, 2010), 3-4; Equalities Review Panel, *Fairness and Freedom: The Final Report of the Equalities Review*, 2007 (United Kingdom).

> of the new legislation, two major trends are evident: equality and non-discrimination legislation is covering an increasingly broad set of grounds for discrimination; and it provides more comprehensive protection in employment and occupation.[4]

Rather than a simple rationalisation, the opportunity exists now for Australia lead the way in best practice. The increasing focus on the promotion of diversity, maximising the pool of available talent, represents the new frontier in diversity law.[5]

This paper considers the following questions posed by the Attorney-General:[6]

- 1 (definition of discrimination);
- 2 (burden of proof); and
- 27 (Commission's role).

Appended to this submission are some suggested wordings of relevant sections of a new *Diversity Act*.

Definition of discrimination

Key difficulties with the current 'comparator' model of defining discrimination are that it:

1) relies too heavily on inferences not drawn from actual evidence; and
2) is an invitation for sophistry.

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4 Director-General of the International Labour Organisation, *Equality at Work: The Continuing Challenge* (2011) [58].

5 Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) 352.

6 Attorney-General's Department, 'Consolidation of Commonwealth Anti–Discrimination Laws' (Discussion Paper, Attorney General's Department, 22 September 2011).

These difficulties are illustrated by the seminal case on the definition of 'direct' discrimination, *Purvis v New South Wales (Department of Education and Training*).[7] That decision held, in short, that a boy suffering from a behavioural condition was not excluded from school because of the condition, but rather his poor behaviour. Compared with other children who behaved badly, he was treated just the same and so hence was held not to have suffered direct discrimination.

However, the assessment relied on judicially imagined chain of events how another child without the disability 'would have' been treated.[8] *Purvis*, in a nutshell, captures the problems caused by relying on a 'comparator' to define discrimination. It was not in dispute that the boy had behavioural issues. There is every likelihood that but for his condition, he would not have been excluded from the school. However, the court's imagined comparator behaved badly and would have been excluded on that basis. It was apparently not material that the comparator lacked the disability.[9]

This provides a 'stark illustration'[10] of the difficulties attendant in a comparator analysis. The comparator definition does not really 'get at' the real problem. The real social wrong is that the sufferer experiences the mistreatment *because of* their attribute. As Owens and Riley put it:

> In cases involving a woman seeking leave for pregnancy, comparing her to someone else needing leave is never really the point. She needs temporary leave from work because

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7 (2003) 217 CLR 92 ('*Purvis*').

8 See, for example, 224.

9 See, for example, Gleeson CJ, [11].

10 Neil Rees, Katherine Lindsay, Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (The Federation Press, 2008) [4.2.15].

> she is pregnant, and she is disadvantaged if she is not granted it. Removing all consideration of the relevant characteristic usually renders the exercise meaningless.[11]

It is submitted that the 'comparator' should be treated for what it is and nothing more: an analytical tool. Compared with white telegraph pole technicians, the requirement to have a high school diploma did have a disparate impact on African-American applicants in the 1970s.[12] However, it is simply not informative to compare the sufferer of the mistreatment to a notional comparator in some cases. Where the circumstances are more unique, and it is submitted that *Purvis* is one such case, the court's definitional task should be to consider the actual detriment experienced and ask what the cause of it was. The boy was excluded because of his disability.

On making such a finding in *Purvis*, the court could have turned its mind as to whether asking the school to continue to have the student on campus would impose an unjustifiable hardship on it.[13] The court might have found that while the boy did suffer a detriment because of his disability, the analysis could then turn to what justifiable hardships could be imposed on duty holders in such circumstances. It is submitted that this would have been a better outcome, rather than creating broad definitional pronouncements based on circumstances which were relatively unique. The difficulty with the comparator approach, as Fredman has pointed out, is that the disadvantaged are only delivered the advantage that the comparator enjoys.[14] This may do little to achieve real progress.

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11 Above at n 5, 363.

12 See *Griggs v Duke Power Co* 401 US 424, 91 S.Ct 849 (1971).

13 See s 29A *Disability Discrimination Act 1992* (Cth).

14 S Fredman, 'Pregnancy and Parenthood Reassessed' (1994) 110 *Law Quarterly Review* 106, cited above at n 5, fn 14, 350.

It is submitted that the focus should be turned away from simply proscribing discrimination and instead be on promoting diversity in the marketplace. The 'values of human dignity and individual freedom, social justice and cohesion'[15] require promoting diversity, not just simply eliminating discrimination. 'Diversity management' means giving all individual workers the chance to 'develop their own talents. Equality becomes 'the responsibility of governments, organisations and individuals to generate change by positive action.'[16]

Burden of proof

It is submitted that there should not be a reverse burden in cases of unlawful discrimination. It is conceded that an employer is best placed to know why it took action that it did. This is because '[p]roving the reason for an action or decision that exists in another person's mind, where all the evidence is controlled by the other person and they are not required to give any reason, is very difficult.'[17] However, the practical effect of a reverse burden is that small employers will be at a disadvantage when compared to large employers.

Large companies are likely to have sophisticated and well-resourced human resources departments. Small employers are more likely to be managed by 'generalist' management practitioners. These individuals may be required to attend to issues as diverse as taxation, company law, business development/marketing, performance management, recruitment, preparation of employment contracts and policies and, of course, equal employment opportunity.

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15 International Labour Office, *Time for Equality at Work* (2003).

16 Above at n 5, 352, citing Bob Hepple, *Work Empowerment and Equality* (International Institute for Labour Studies, Geneva, 2000), 8.

17 Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation track record 2000-2004' (2005) 11(1) *Australian Journal of Human Rights* 171, [50].

Small employers then are going to be less likely to have kept detailed records explaining why the imputed management action was taken.

Large or small, it hardly seems fair that an employer can be held liable for the simple reason that, all things being equal, they have the burden of proving their innocence. In civil cases determined on the balance of probabilities, the allocation of the burden of proof can be decisive in determining liability. For example, Kiefel J held in *Sharma v Legal Aid Queensland*[18] that although the evidence disclosed the 'possibility' of racial discrimination, this was nothing more than a possibility and so a finding of discrimination could not be made.[19]

Contrast this finding with the recent case of *Stephens v Australian Postal Corporation*.[20] The applicant alleged adverse action on the basis of his disability and the exercise of his workplace rights, in contravention of the general protections provisions of the *Fair Work Act 2009* (Cth).[21] That Act imposes a reverse burden on employers and others alleged to have breached these general protections.[22] The employer had failed to lead evidence which satisfied the court that the relevant adverse action was not undertaken for a prohibited reason.[23] This is because:

- there was an 'almost total lack of contemporaneous documentation as to the investigations and deliberations' leading to the decision to terminate the applicant's employment;

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18 [2001] FCA 1699.

19 [64].

20 [2011] FMCA 448.

21 'FW Act.'

22 Section 361.

23 [7].

- the court held reservations about the reliability of the manager's evidence due to 'his poor memory and guarded presentation as a witness';
- the surrounding circumstances pointed 'to unexplained unfairness of procedures';
- 'the disproportionality of the decision'; and
- 'the unexplained failure of Australia Post to call a significant witness from its Human Resources department' who advised the manager.[24]

Smith FM held that there was therefore

> a substantial doubt whether there might not have been an additional, unstated, reason for terminating Mr Stephens' employment. *A hypothesis has not been dispelled from my mind* [emphasis added] on the balance of probabilities, that the decision might have been materially influenced by the relevant manager's and his advisors' knowledge of Mr Stephens' pending workers' compensation claim....[25]

On a public policy level, it is remarkable that a finding could be made against the employer because a mere 'hypothesis' was not 'dispelled' from the mind of the judge. The first factor mentioned, namely, the lack of contemporaneous documentation, introduces a compliance burden which proposes a heavier burden on small rather than large employers. It is inequitable and unfair that small employers should be expected to keep detailed records of all of its management actions, as though a large company with the support of many human resources employees.

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[24] Above at n 23.

[25] Above at n 23.

There is also a coherence problem. Unfair dismissal law explicitly requires Fair Work Australia to have regard to the effect of the size of the employer's business and the presence of dedicated human resources specialists on the fairness of the dismissal.[26] By contrast, a finding of a breach of the general protections can apparently be based, at least in part, by an absence of 'contemporaneous documentation' on the part of employers recording and justifying each management action. The size of the employer's establishment is not required to be assessed.

Now, of course, Australia Post is not a small employer. It would be reasonable to expect it to keep records of decision-making, particularly with regard to termination of employment. The difficulty, it is submitted, is in relation to small employers. Such employers need easy-to-follow, clear guidelines which educate them as to what they need to do to comply with the laws, rather than expecting a well-developed and sophisticated human resources department. Large employers too can benefit from guidance in this regard.

It is submitted that what would be more appropriate than allocating a reverse burdens on employers would be to do two things:

1) **Introduce codes of practice to eliminate discrimination** to the extent that is reasonably practicable.

2) **Enable the Australian Human Rights Commission[27] to act on its own motion** in a no-fault inquisition.

Codes of Practice

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[26] Subsections 387(f) and (g), FW Act.

[27] 'AHRC.'

In the same way that Safe Work Australia is currently developing codes of practice to assist all employers in eliminating risks to occupational health and safety under new national laws,[28] codes of practice could be developed to explain to employers what they need to do to promote diversity.

Currently, there exists a positive duty to eliminate discrimination under Victorian law.[29] Section 15 of the EO Act provides that employers (among others) are required to take 'reasonable and proportionate' measures to eliminate discrimination, harassment or victimisation 'as far as possible.' The Victorian Equal Opportunity Commission is empowered to investigate in certain cases and make any order it sees fit.[30]

An issue with this new duty is the lack of clarity around at what point an employer can be confident that it has complied. The Explanatory Memorandum to the Bill[31] explains the thinking behind the creation of the positive duty:

> The complaints-based system places the burden on the individual to complain and not on the organisation to comply. The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response. It may involve organisations doing such things as—
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> - identifying potential areas of non-compliance;

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28 See, for example, Safe Work Australia, 'Preventing and Responding to Workplace Bullying' (Draft Code of Practice, Safe Work Australia, September 2011).

29 *Equal Opportunity Act 2010* (Vic) ('EO Act').

30 Section 139, EO Act.

31 Explanatory Memorandum, Equal Opportunity Bill 2010, 15-16.

- developing a strategy for meeting and maintaining compliance (such as undertaking training or establishing policies);

- reviewing and improving compliance where appropriate.

Although this provides a good level of explanation, employers are still left wondering whether the actions they do take meet the appropriate standard, until a court or a tribunal makes an order. For example, say an employer has been asked by an employee on unpaid parental leave to extend the leave for several months beyond two years. In eliminating discrimination, does the section require the employer to:

1) treat the person like anyone else requesting a leave extension which exceeded their statutory entitlement?

2) treat the person the same as other parents (who in most cases would only seek 1 to 2 years' parental leave)?

3) allow the person the extension, in order to facilitate greater participation of young parents in ongoing employment?

If the employer is being asked to promote equality in order to eliminate discrimination, the question the author would have is 'Which equality is that?' It was noted recently in relation to job applications that '[e]quality of participation in the workplace requires employers not only to *allow* a diverse range of people to apply for the job, but also to *enable* a diverse range of people

to perform the job.'[32] The compliance issue for the practical businessperson is always going to be on what they actually have to do to comply – so they can get back to growing their business.

A way forward would be to provide employers with a code of practice, the proper application of which is to act as a defence to a claim of unlawful discrimination. Industrial law provides a precedent for this. Small employers can be relieved of liability for unfair dismissal where they can show that they complied with the Small Business Fair Dismissal Code.[33] Of course, in addition, the many codes of practice in occupational health and safety law provide inspiration for a set of equal opportunity codes of practice in this regard.

AHRC's role

The principle of 'free disposition' holds that 'the party seeking to enforce legal rights bears the burden of substantiating the material facts upon which those rights depend.'[34] In civil cases, this has the consequence that 'the plaintiff bears, as a general rule, both evidential and persuasive burdens in relation to each and every material fact essential to establishing the cause of action.'[35]

The difficulties this can cause in discrimination claims are all too obvious. It has been observed that 'the Australian anti-discrimination laws are based on an individual complaints model and individual remedies, which means that these laws are limited in addressing large scale systemic issues.'[36] The employer's immediate focus when presented with an unlawful discrimination

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32 Above at n 1.

33 See section 385, FW Act.

34 Andrew Ligertwood & Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) [6.10].

35 Above at n 34.

36 Kate Eastman, 'Anti-Discrimination Law' in Carolyn Sappideen, Paul O'Grady, Geoff Warburton, *Macken's Law of Employment* (Law Book Co, 6th ed, 2009), 660.

claim is defending the claim. Opportunities for prevention and self-regulation are necessarily a lower order priority than defending the claim at hand.

A string of *obiter* comments from tribunal members of the Anti-Discrimination [ADT] of New South Wales[37] lend support for the proposition that a less adversarial model than that which currently exists could be pursued. In *Walker v State of New South Wales*,[38] the bench was unable to find for the applicant despite suspecting that a better run case could have had a different outcome. The applicant was self-represented, and was not able to provide necessary Points of Claim and written evidence prior to hearing.[39] A consequence was that 'it was not completely clear [to the ADT] which substantive provision of the [relevant anti-discrimination] Act the applicant relied upon and whether he claimed to have been the sufferer of direct or indirect discrimination, or both.'[40] The ADT commented that

> Whilst the [ADT] is directed by s 96 of the Act to conduct an *inquiry* into each complaint referred to it by the President of the Anti-Discrimination Board, [it] does not have the capacity to gather evidence in support of a complaint.... [I]n this case... with appropriate evidence, it may have been possible to mount claims of direct and/or indirect discrimination... In these proceedings we have ... not sought to 'fashion' a case for the applicant because there is insufficient evidence to do so and because the [ADT]'s impartiality could be questioned were it to present the applicant's case for him. What we

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37 'ADT.'

38 [2003] NSWADT 13.

39 [9].

40 [9].

> have done is consider any argument in support of the applicant's complaints which reasonably arises from the evidence presented to the [ADT].[41]

These comments were recently cited by the ADT, when it held that technical deficiencies in the presentation of the applicant's evidence meant that it could not find for the applicant on those points, whether or not a legally represented applicant might have succeeded.[42] It said that it is 'not for the [ADT] to obtain for itself, or to direct the Applicant to obtain, the requisite evidence.'[43]

Ligertwood and Edmond rather glibly justify the civil burden of proof on the plaintiff on the basis that '[t]o allow otherwise would encourage vexatious litigation, although other measures could be taken to prevent this.'[44] It is submitted that one such 'other measure' would be to re-define the AHRC's role as one of inquisitor. A no-fault inquisition into alleged discriminatory conduct should be considered.

While this may appear somewhat alien to the tradition received from British law of fault-based, adversarial-style proceedings, it is submitted that commission-driven inquiry is an established Australian tradition. The process of award making is a largely inquisitorial one[45] and is not fault-based. Although parties, often with diametrically opposed interests and positions, can make submissions as to the appropriate form of order, it is Fair Work Australia that makes the order. It constructs an award with a degree of intervention in proceedings to which a court

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41 [11].

42 *Craig-Bennet v Great Western Area Health Service* (EOD) [2011] NSWADTAP 38, [70].

43 [70].

44 Above at n 34, fn 38, [6.10].

45 See, for example, *Re: Clothing Trades Award 1982*, Australian Industrial Relations Commission, 26 November 1990.

would be unable,[46] considering statutory social objectives located in the *Fair Work Act 2009* (Cth). It makes its determination based on its view of the nature of the order that should be made,[47] not any one particular party.

Because it would be the AHRC's case, it would act as 'gate-keeper' in relation to the pursuit of vexatious claims. The applicant would retain an effective evidential burden, in the sense that it would need to bring cite relevant material facts and evidence in its application. However, once the AHRC conducted a preliminary review and decided that there was a *prima facie* case, it would become its case and it could choose whether or not to inquire.

A greater role for the regulator is not something which is so alien to diversity law in the common law world. In Canada, for example, it is only the Canadian Human Rights Commission[48] which can bring an action before the relevant tribunal.[49] The CHRC conducts its investigations and seeks to conciliate the complaint, and then it brings forward its action to the tribunal if it decides that the case should be pursued.[50]

An inquisitorial role for the Australian Human Rights Commission would not be so different from this model. In much the same way as a coroner reaches his or her findings, the Commission could reach its decision as to the merits of a case and be given to make its orders accordingly. It would be open to a person aggrieved by a finding to challenge it on an

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46 Witness the various statements put out by the Australian Industrial Relations Commission during the award modernisation process: Australian Industrial Relations Commission, *Award Modernisation*, Australian Industrial Relations Commission, http://www.airc.gov.au/awardmod/fullbench/statements.htm.

47 See, for example, the award modernisation proceedings which have been underway since 2008 and are currently reviewing existing enterprise awards: Fair Work Australia, *Award Modernisation*, Fair Work Australia http://www.fwa.gov.au/index.cfm?pagename=awardsawardmod.

48 'CHRC.'

49 Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975* (2008), [2.2].

50 Above at n 49.

administrative basis, as he or she could in relation to a finding of a Full Bench of Fair Work Australia.[51]

Conclusion

Australia's discrimination laws represented a dramatic step forward when they were first introduced. They were a radical change from what had been available to workers experiencing social barriers to their individual progress.

Another step forward is now appropriate to achieve best practice. Business is already getting on board with promoting diversity.[52] In much the same way as government added social value by introducing award modernisation and occupational health and safety law harmonisation, the Project represents an opportunity to demonstrate further relevance and sensitivity to actors in the modern workplace.

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51 See, for example, *Visscher v The Honourable President Justice Giudice* [2009] HCA 34.

52 See, for example, Australian Human Rights Commission, *Male Business Leaders Champion Best Practice for Gender Equality*, 12 October 2011, http://www.hreoc.gov.au/about/media/news/2011/93_11.html.

Appendix

Selected Proposed Sections of an Australian *Diversity Act 2012* (Cth)

Part 1 Discrimination in Employment

SECTION 1 Irrelevant characteristics

(1) A person must not subject another person to a detriment because of that other person's

(a) race;

(b) sex;

(c) carers' responsibilities;

(d) disability;

(e) age;

(f) sexual orientation; or

(g) religion.

(2) 'Detriment' includes:

(a) adverse action;

(b) harassment;

(c) measures which appear neutral but disadvantage a person with one or more of the attributes listed in subsection (1).

Note: 'Adverse action' is defined in section 342 of the *Fair Work Act 2009* (Cth).

(3) ‘Sex’ includes a person’s

(a) pregnancy or potential pregancy;

(b) marital status; or

(c) breastfeeding.

(4) The prohibition in subsection (1) does not apply if the detriment is lawful under another provision of this Act.

SECTION 2 Lawful detriments

(1) It is lawful to subject a person to detriment which would otherwise breach section 1 where it is:

(a) a genuine occupational requirement;

(b) undertaken in accordance with an equality code of practice issued by the Minister;

(c) necessary to avoid imposing an unjustifiable hardship on the employer;

(d) a special measure undertaken to address unlawful detriment experienced by another person; or

(e) required under another law.

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