COMMITMENT AND DETERRENCE: CAN AUSTRALIA'S ANTI-DISCRIMINATION LEGISLATION ACHIEVE RACIAL EQUALITY FOR INDIGENOUS PEOPLES?

LORETTA de PLEVITZ*

'A federal law…is urgently required'

Australia stands alone among OECD countries in having no Bill of Rights or constitutional guarantees of racial equality. Nor is there any special protection or recognition of the original inhabitants of Australia in the Australian *Constitution*. Though over 90% of Australians voted in a referendum in favour of amending the *Constitution* for the benefit of Indigenous people in 1967, the only powers gained were enabling rather than protective. The federal parliament was now able to count Indigenous people in the census and pass special laws affecting them.[1] This latter power includes the power to make laws to the detriment of Indigenous people.

In the years immediately following the 1967 referendum it became clear that the incumbent conservative federal government had little intention of exercising its new power to pass beneficial laws. Frustrated at the lack of progress, the Australian National Tribal Council split from more conservative activist groups in 1970 and issued a *Policy Manifesto* drafted by prominent Australians including Pastor, later Sir Doug, Nicholls (Yorta Yorta/ Djadjawurung), Governor of South Australia, and the poet and activist Oodgeroo Noonuccal (Noonuccal). It included a demand for anti-racism legislation:

> A federal law prohibiting all forms of racial discrimination is urgently required both as an indication of the commitment of the Australian people to racial equality and as a practical measure designed to discourage and overcome individual instances of discrimination and prejudice.[2]

The Tribal Council's demand for a federal law was a strategy to meet the situation which had persisted since white settlement. Under the Australian *Constitution*[3] a federal anti-discrimination act can override discriminatory state

---

* Dr. Loretta de Plevitz lectures in discrimination law at the Queensland University of Technology, Brisbane. She has published extensively on human rights for Australian Indigenous people including a critique, written with her son a geneticist, of how biology and Anglo-Australian law conceptualise Aboriginal identity.

[1] Section 127 *Constitution* was repealed to effect the census power; and s 51(xxvi) amended to encompass 'the Aboriginal race'.

[2] National Tribal Council *Policy Manifesto*, 5. Legal Aid and Protection, adopted 13 September 1970, reproduced in Bain Attwood and Andrew Markus, *The struggle for Aboriginal Rights: A documentary history* (1999) 249.

[3] Section 109 *Constitution* provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the

laws. On federation the colonies, now states, retained their complete legislative and executive powers over Aboriginal and Torres Strait Islanders. Even in 1970 they were continuing to exercise those powers by moving people off their land, confining them to reserves, taking their children from them, and denying them the right to equal education and equal pay.

No anti-discrimination legislation on the basis of race had ever been enacted in Australia, apart from a 1966 South Australian state act[4] which in any case could have no legislative effect in the more racist areas of the country such as Queensland, Western Australia, and the Northern Territory. As it turned out, the South Australian act was not a success, most likely because it made racial discrimination a criminal offence and there was police reluctance to enforce the law. The Act was repealed in 1976.

Australia's anti-discrimination legislation

The Australian Labor Party formed federal government in 1972 and three years later ratified the *International Convention on the Elimination of all Forms of Racial Discrimination 1966* (ICERD).[5] Based on its external affairs power[6] the federal parliament then enacted the *Racial Discrimination Act.*[7] Over the next quarter of a century the states and mainland territories followed suit,[8] passing comprehensive legislation prohibiting victimisation, harassment,[9] vilification[10] (conduct which incites hatred, ridicule or contempt against a group), and discrimination on grounds such as religion, sexuality, gender identity and political activity, as well as race, age, sex, and disability. To be unlawful the discrimination must have occurred in a specific area of public life such as work, goods and services, education, accommodation, insurance or the administration of government programs and laws.

In the first 11 years of its existence the *Racial Discrimination Act 1975* held out much hope as a tool for overcoming the oppressive regimes of the states. The first major success was the High Court case of *Koowarta v Bjelke-Petersen.*[11] For nearly 100 years Aboriginal people in Queensland had been forced to live on reserves requiring permission to leave them, and had to work

---

inconsistency, be invalid.'

[4] *Prohibition of Discrimination Act 1966* (SA).

[5] *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). The Convention entered into force for Australia on 30 October 1975.

[6] Section 51(xxix) *Constitution.*

[7] Federal legislation has since been passed on disability, sex and age discrimination.

[8] *Anti-Discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1984 (SA); *Equal Opportunity Act* 1984 (WA); *Discrimination Act* 1991 (ACT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1992* (NT); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1998* (Tas).

[9] Though all acts prohibit sexual harassment, racial harassment is addressed only in the Western Australian Act: *Equal Opportunity Act 1984* (WA) ss 49A-49D.

[10] Generally introduced from the mid 1990s onwards.

[11] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

for their board and keep. In 1976 the Aboriginal Land Fund Commission, an incorporated association of Winychanam people from around Aurukun in the far north of the state, decided to purchase the leasehold of a pastoral property to be run as a business for and by Aboriginal people. The transfer of the lease however was subject to the consent of the Queensland Minister for Lands.[12] He refused on the grounds that the state government did 'not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.'[13]

On behalf of his people, John Koowarta claimed that the refusal was contrary to the recognition of human rights protected by the *Racial Discrimination Act* 1975 (Cth). Queensland argued that the Act was invalid as being outside the power of the federal parliament. By a narrow margin of 4 to 3, the judges held that the external affairs power in the federal *Constitution* allowed the passing of domestic legislation based on Australia's ratification of ICERD in 1975. The federal *Racial Discrimination Act* was therefore valid and could override the state's refusal pursuant to s 109 *Constitution*, allowing Koowarta and his people to complete the transfer.

Shortly afterwards, the High Court unanimously agreed on the validity of this power.[14] The stage was now set for what was to be the most important legal decision for Indigenous rights in 20th century Australia, the Mabo cases. The plaintiffs were Meriam elders from Murray Island, one of the Eastern Islands of the Torres Strait which lie between Australia and New Guinea. In 1879 the islands had been declared part of the colony of Queensland. In 1985 the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act*. It purported to abolish the Islanders' rights and systems of laws, customs, traditions and practices in relation to their ownership of, and dealings with, the land, seas, seabeds and reefs of their islands. The Torres Strait Islanders who asserted that they had exercised these rights 'since time immemorial' challenged the state enactment on the grounds that it was contrary to the *Racial Discrimination Act*. The High Court agreed: the discriminatory state legislation was invalid because it targeted Torres Strait Islanders and was inconsistent with the federal act.[15] This left the way open for the next step, *Mabo (No 2)*,[16] where the High Court acknowledged that Indigenous rights to land and sea survived white settlement and continued to exist, unless they had been extinguished by acts of the executive or the legislature. The Koowarta and Mabo victories had demonstrated that the *Racial Discrimination Act* could deliver racial equality by overriding discriminatory state legislation but could it discourage and overcome individual instances of discrimination and prejudice? Even more importantly, was it an indication for Indigenous peoples that other Australians were committed to racial equality?

---

[12] pursuant to s 286 *Lands Act 1962* (Qld).
[13] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 176.
[14] *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1.
[15] *Mabo v Queensland (No 1)* (1988) 166 CLR 186.
[16] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

The *Policy Manifesto's* goals

This paper sets out to assess the legislation against the two objectives expressed in 1970 by the National Tribal Council. The Manifesto's words 'an indication of the commitment of the Australian people to racial equality' suggest that its drafters hoped anti-discrimination legislation would have at least a symbolic impact; but the following phrase 'and as a practical measure…' indicates that they expected the legislation to work. Thus the two objectives were a carrot and a stick – the legislation would demonstrate that Australia was committed to social justice for Indigenous people; this to be enforced by providing sanctions against the discrimination, harassment, victimisation and vilification which had plagued Indigenous Australians since 1788.

I have chosen to use these two objectives as benchmarks rather than other measures such as international law standards, for three reasons. Firstly, and most importantly, lacking in most state and federal government policy and planning, is respect for and reference to the Indigenous voice.[17] Secondly, the anti-discrimination legislation itself proclaims that equality can be achieved by facilitating the participation of citizens in the economic and social life of the community[18] and educating the community to be 'appreciative and respectful of the dignity and worth of everyone'.[19] These objectives demand that the voices of Indigenous citizens be heard, not just those of legislators. Thirdly, it is a key assertion of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*,[20] drafted by Indigenous peoples from around the world over many years, that Indigenous people be involved in all policy-making which affects them.

Available tools for analysis

A more comprehensive evaluation than this one might investigate issues such as the lack of understanding of systemic racism by the gatekeepers - the staff who accept or reject complaints, and judicial incomprehension of the nature of discrimination, especially racism. I will focus on one question only: is the legislation capable of fulfilling the Manifesto's goals? To do this the paper applies an analysis confined to the nature and language of the legislation itself, its judicial interpretation, and the complaint handling system, information available in the public domain. This narrow scope is necessary because there is a lack of freely available information about the number, types and outcomes of

[17] Indigenous people name this as one of the greatest hurdles to dialogue with government, for example see the Human Rights and Equal Opportunity Commission report, *"I want respect and equality": A summary of consultations with civil society on racism in Australia* (2001).
[18] *Equal Opportunity Act 1984* (SA) Long Title.
[19] *Anti-Discrimination Act 1991* (Qld) Long Title 6(c).
[20] *United Nations Declaration on the Rights of Indigenous Peoples 2007*, (A/RES/61/295), specifically Articles 18 and 19.

complaints made by Indigenous people under the legislation.

Publicly available material such as anti-discrimination commission annual reports gives numbers of complaints made by ground or area. The major difficulty however is that apart from the Human Rights and Equal Opportunity Commission (HREOC) and the NSW Anti-Discrimination Board there are no freely available statistics or data on Indigenous complaints.[21] When asked why, commissions explained that they do not separate out different ethnic groups under the heading of racial discrimination.[22] I have a number of issues with this: firstly, racial discrimination is not the only type of discrimination suffered by Indigenous people and it would be beneficial for government planning, for example in relation to health and education service delivery, to see the full range of Indigenous complaints. Secondly, there is a clear intention on the part of commissions to set aside resources to benefit Indigenous people. These are usually in the form of separate units which provide advice about complaints and education about the legislation. To be accountable, commissions should provide details of the use of their legislation. Thirdly, the lack of complaint statistics raises the important question, are Indigenous people actually using the legislation?

What then is available to use for analysis? For the purposes of public education, a number of commissions publish, in brochures and on websites, a few 'case studies' of Indigenous complaints without personal identifiers. However these are almost always examples of positive outcomes for the complainants, and are often recycled from year to year. Without specific information or the resources to mount a more comprehensive enquiry, let me turn then to the legislation itself.

'commitment of the Australian people to racial equality'

There is certainly no shortage in the legislation of aspirational commitments to racial equality. Equality before and under the law, and the right to equal protection and benefit without discrimination are promised through three different, but overlapping means: equality of opportunity, equal participation in society, and respect for international human rights norms. According to the long titles, objects and purposes clauses, and preambles to the acts, these fine goals can be accomplished by eliminating, preventing or prohibiting discrimination and harassment[23] and other objectionable conduct in

---

[21] The latest NSW Anti-Discrimination Board statistics are found in its 2006-2007 *Annual Report*, Aboriginal and Torres Strait Islander complaints. See:
<http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/vwFiles/ADBAnnualReport06-07.doc/$file/ADBAnnualReport06-07.doc>
at 1 July 2008 and the *Human Rights and Equal Opportunity Commission Annual Report 2006-2007* Table 10 Indigenous status – Complaints. See:
<http://www.humanrights.gov.au/about/publications/annual_reports/2006_2007/4.html>
at 1 July 2008.

[22] In preparing this paper I contacted a number of commissions, some of which were able to offer me informal assessments of the use of their legislation by Indigenous people.

[23] *Racial Discrimination Act 1975* (Cth) Long Title; *Discrimination Act 1991* (ACT) s 4(a)

certain circumstances[24] or in certain areas of activity including work, education and accommodation.[25]

Nevertheless the application of the legislation reveals a serious shortcoming: judicial interpretation extends the scope of the legislation back only to the time it was enacted – it fails to acknowledge and redress the effects of our racist past. Its main focus is on the present. This became clear in the Stolen Wages case, *Bligh and others v State of Queensland.*[26] The case also illustrates that a government's legislative commitments to racial equality do not always match its actions.

During more than three-quarters of the 20th century many Indigenous workers were denied the right to equal pay for equal work. In 1985 and 1986 eight elders from Palm Island in Queensland wrote letters of complaint to the Human Rights and Equal Opportunity Commission (HREOC) which administers the *Racial Discrimination Act*. They alleged breaches of the Act in that they had been underpaid, if at all, during the time they were working for the government on the Palm Island Aboriginal Reserve. They had received no long service leave or sick pay, having to keep working when sick or be sacked. Some of them had worked under those conditions and wages from 1943 to 1984 when an industrial award was handed down with pay and conditions comparable to other workers. The elders claimed that they were treated in this way because they were Aboriginal. This denial of the basic right to equal pay for equal work affected the workers' capacity to establish their own homes and to provide educational opportunities for their children.

After preliminary activity by the Human Rights and Equal Opportunity Commission the investigation lapsed, and in 1990 the Commission advised the complainants that the matter seemed to be resolved in that Indigenous workers were now receiving award wages and there was little chance of recovery of 'back payment of wages'. The complainants' solicitors disputed this and demanded a renewed investigation. An unsuccessful conciliation conference was finally held in 1995. In 1996 the matter went to a public hearing before the Commission. More than ten years had passed since the letters of complaint.

Among Queensland's untenable arguments was that if it had paid the workers less (which it denied) it was a special measure for their benefit in that it had provided training so that the workers could become equipped to 'assimilate' into the white workforce. In fact most of the complainants possessed trade certificates which they had gained on the mainland, and had only returned to work on the reserve to be with their families. Commissioner Carter dismissed the state's arguments and held that the low wage and poor conditions, rather than advance Indigenous rights, had had the opposite effect:

---

and (b); *Anti-Discrimination Act 1992* (NT) s 3(b) and (c); *Equal Opportunity Act 1995* (Vic) s 3(b) and (c); *Equal Opportunity Act 1984* (WA) s 3(a) and (b); *Equal Opportunity Act 1984* (SA) Long Title; *Anti-Discrimination Act 1998* (Tas) Long Title.

[24] *Anti-Discrimination Act 1977* (NSW) Long Title; *Discrimination Act 1991* (ACT) Long Title; *Equal Opportunity Act 1995* (Vic) s 3(a); *Equal Opportunity Act 1984* (WA) s 3(d).

[25] *Anti-Discrimination Act 1991* (Qld) Long Title and s 6(1).

[26] (1996) EOC ¶92-848.

human rights had been denied. However he held that the underpayment of wages on the basis of race was unlawful only from the date of the passing of the *Racial Discrimination Act* in 1975; prior to that there was no legal or constitutional protection against racism - an employer could discriminate on the basis of race. The Commissioner ordered the Queensland government to apologise and pay the successful complainants $7000 each. The Queensland government resisted and finally had to be ordered to do so by the Federal Court, six years after it had loftily proclaimed that its own *Anti-Discrimination Act* was necessary 'to ensure that determinations of unlawful conduct are enforceable in the courts of law'.[27]

'designed to discourage and overcome individual instances of discrimination and prejudice'

There is a serious imbalance between government moneys allocated to the two *Policy Manifesto* objectives, equality and deterrence. Most of the economic resources of the commissions which administer the legislation goes into dealing with the second, specifically the complaint system. Very little of commissions' budgets is spent on public education and practically none on public advocacy; only the federal Human Rights and Equal Opportunity Commission consistently takes a role in intervening in cases and advocating on the basis of international human rights principles. For all commissions, the powers to investigate systemic discrimination are minimal and under-funded.

Usually deterrence is associated with the penalties and punishments of the criminal law. Contrary perhaps to what the National Tribal Council had hoped, unlawful discriminatory conduct is generally dealt with in the legislation as a civil matter, that is, the complainant has to prove a case against the respondent on the balance of probabilities, and if successful, the respondent must provide the complainant with a remedy. The few criminal offences in the legislation[28] include victimisation (where a person has suffered a detriment because they have made or intend to make a complaint under the legislation), and serious vilification (conduct which publicly incites violence against a group), though this is not a criminal offence in the *Racial Discrimination Act*.[29]

The goal of deterrence is expressed in the legislation through three objectives:[30] prohibiting certain conduct; investigating and conciliating complaints of discriminatory conduct;[31] and providing redress for those affected.[32] It is implemented principally through the mechanism of an

---

[27] *Anti-Discrimination Act 1991* (Qld) Long Title 5(c).

[28] There are a small number of other criminal offences including separating a visually impaired person from their guide dog.

[29] The Australian government placed a reservation on ratifying Article 4 ICERD which demands that States Parties must declare racial vilification an offence punishable by law.

[30] The *Racial Discrimination Act* has no objects section. However its deterrence objectives are clear from the *Human Rights and Equal Opportunity Act 1986* (Cth).

[31] *Anti-Discrimination Act 1998* (Tas) Long Title.

[32] *Anti-Discrimination Act 1992* (NT) Long Title; *Equal Opportunity Act 1995* (Vic) s 3(d); *Equal Opportunity Act 1984* (WA) Long Title; *Racial and Religious Tolerance Act 2001*

individual formulating a complaint with the expectation that the respondent who has unlawfully contravened the Act will be directed to provide them with a remedy. Every jurisdiction provides a wide range of remedies from compensatory damages to orders to stop discriminating or change processes. Reported cases however reveal that there is a tendency to order respondents to pay damages rather than effect institutional change.[33] Generally the damages, which range from a few hundred dollars to (rarely) over a hundred thousand dollars,[34] are not significant enough to change respondents' attitudes. Racial discrimination against Indigenous people tends to attract damages of around one to two thousand dollars.[35] It is cheaper for business or government entities to budget to settle in conciliation rather than change practices.

Perhaps the major success the legislation has had in discouraging instances of systemic discrimination and prejudice against Indigenous people was that accomplished by a HREOC inquiry held in 1990 in Mareeba, a small town in the north of Queensland. One can draw from this case-study that certain elements are required for effective deterrence: more than one complainant; Indigenous commission staff to assist and support the complainants in formulating their grievance; the Commission sitting as an open forum in the place where the discrimination was happening; and remedies handed down which attacked the systemic nature of the discrimination.

The basis of the Mareeba complaints was that even 15 years after the enactment of the *Racial Discrimination Act* Indigenous people could not enjoy their right of equal access to 'any place or service intended for use by the general public such as…hotels'.[36] They were refused service, although they could buy bottles and takeaways 'round the back' for inflated prices. After a number of Indigenous people lodged complaints against the publicans,[37] HREOC held a public enquiry in the town. Most complaints were substantiated. The nature of the orders handed down penetrated the racism in the town: the hotels' owners or managers were ordered to pay at least $1000 to each successful complainant and to publish a public apology in the local newspaper. More significantly however the Commissioner ordered copies of the judgments to be sent to the Queensland Licensing Commission so that it could consider whether the publicans were fit and proper persons to hold a licence, and to the Queensland Attorney-General suggesting the liquor licensing laws could be amended to make racist refusal of service unlawful. These orders reverberated

(Vic) s 1(b).

[33] CCH, *Australian and New Zealand Equal Opportunity Law Library* (Damages awarded in reported equal opportunity cases) ¶89-960.

[34] For example $160,000 for discrimination on the basis of being a carer and $125,000 for sexual harassment.

[35] An exception was *Wanjurri v Southern Cross Broadcasting* (2001) EOC ¶93-147 where five Nyungah elders were awarded $10,000 each for racial vilification.

[36] ICERD art 5(f).

[37] *Mungaloon v Stemron Pty Ltd* (1991) EOC ¶92-345; *Tabua v Stemron Pty Ltd* (1991) EOC ¶92-346; *Wason v Stemron Pty Ltd* (1991) EOC ¶92-347; *Petersen v Delacey* (1991) EOC ¶92-348; *Whiting v Delacey* (1991) EOC ¶92-349; *Gutchen v Delacey* (1991) EOC ¶92-350; and *Williams v Delacey* (1991) EOC ¶92-351.

throughout Australia, and overt racism significantly diminished in hotels. Unfortunately this approach has seldom been repeated and HREOC no longer has the power to enforce its findings.

No special legislative protection for anti-discrimination legislation

Anti-discrimination legislation is made up of ordinary acts of the parliaments. They have no special status and can be repealed, overridden or displaced by later legislation or executive measures on the same topic. For example, though the 2007 executive and legislative acts authorising the Australian Defence Force (ADF) invasion of Indigenous communities in the Northern Territory treat Indigenous people less favourably than other Australians, the federal government might successfully argue its later legislation could override the earlier *Racial Discrimination Act*.

This however would be a feeble argument in the face of reference to Australia's express commitment to racial equality made when it signed the *International Convention on the Elimination of all Forms of Racial Discrimination*. Therefore the federal government, with the support of the then Labor Opposition, adopted three legislative strategies to negate the effect of the *Racial Discrimination Act* and the Northern Territory anti-discrimination legislation. The fact the Parliament felt compelled to do so strongly suggests that its members believed that the *Racial Discrimination Act* not only has symbolic importance for Indigenous people, but that the Act can be used effectively against racist governments.

The *Northern Territory National Emergency Response Act 2007* specifically excludes the operative sections of the *Racial Discrimination Act*.[38] It also renders null and void any attempt by the Northern Territory legislature to offer its Indigenous citizens racial equality rights through anti-discrimination or similar legislation.[39] Further, to protect itself from a challenge of overt racism, the federal government inserted into its *Northern Territory National Emergency Response Act 2007* a section stating that its actions are special measures.[40] Special, or welfare, measures exist as exemptions in all anti-discrimination legislation around Australia, although only the Queensland Act's objectives overtly refer to them.[41]

For the ADF to go uninvited into Northern Territory communities is prima facie racially discriminatory; no other citizens are treated in this way. However the anti-discrimination legislation allows acts of positive discrimination in order to advance the human rights of the peoples targeted. These so-called special measures aim to promote equality of opportunity. The meaning, requirements and application of special measures are found in Article 1(4) *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD). They must benefit some or all members of a class

---

[38] *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2).
[39] *Northern Territory National Emergency Response Act 2007* (Cth) s 133(1) and (2).
[40] *Northern Territory National Emergency Response Act 2007* (Cth) s 132(1).
[41] *Anti-Discrimination Act 1991* (Qld) Long Title 7.

based on race, colour, descent, or national or ethnic origin, and be for the sole purpose of securing adequate advancement of the beneficiaries so that they can enjoy and exercise human rights and fundamental freedoms on an equal footing with others. However they can only last until that objective is achieved, and must not lead to separate rights. Consistent with the spirit of ICERD and other human rights conventions, the Australian High Court has added that that the targeted group must agree with the measure, it cannot be imposed without their consent:

> The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[42]

While the Northern Territory intervention has a "sunset clause" of five years,[43] it is clear that little or no prior consultation or agreement with the 'beneficiaries' took place before the communities were invaded.

Coverage by the legislation

The legislation was drafted to protect the human rights of all Australians, not just Indigenous Australians. No separate legislation to deal with the particular issues raised by discrimination against Indigenous people has ever enacted, and they are only mentioned by name in the *Racial Discrimination Act 1975* (Cth)[44] and the much later Victorian *Racial and Religious Tolerance Act 2001*.[45] Indigenous complaints receive no special treatment under the acts. Indeed the legislation covers not only complaints by minority groups, but also discrimination by the minority against members of the majority. In *Bell v ATSIC & Gray & Brandy*,[46] Bell, a white man, successfully complained under the *Racial Discrimination Act* that an Indigenous man had used derogatory language towards him.[47]

Only natural persons are said to be able to suffer discrimination and therefore have standing to make a complaint under the legislation. A group based on shared ethnicity or nationality can only complain as individuals joined

---

[42] *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J). In that case the High Court found that a South Australian act which allowed the Pitjatjanjara people to exclude strangers, including other Indigenous people, from their lands was a special measure designed to enable them to live on their land in accordance with their traditions and customs.

[43] *Northern Territory National Emergency Response Act 2007* (Cth) s 6.

[44] Section 10(3) *Racial Discrimination Act 1975* (Cth) which renders null and void any law which purports to manage property owned by an Aboriginal or a Torres Strait Islander without their consent or which prevents or restricts them from terminating the management of their property.

[45] *Racial and Religious Tolerance Act 2001* (Vic) Preamble.

[46] [1993] HREOCA 25 (22 December 1993).

[47] That finding was not challenged on appeal to the High Court: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

together in a representative or class action alleging they were subjected to the same contravention in the same circumstances. In some jurisdictions a group or organisation set up to protect the welfare of persons with particular attributes can lodge a complaint of vilification. Here the legislation is recognising that vilification is derogatory of a whole group, not just an individual.[48] However no such option is available for complaints of discrimination or harassment.

Cultural differences

The form and process of the legislation is very much tailored to the cultural background of its drafters. For example, in all jurisdictions the major and most often awarded remedy for discrimination, harassment or vilification is money, even though the legislation allows for orders of an apology or structural change. Moreover the system is adversarial, replicating the mainstream legal system of plaintiff against defendant. It invites complaints by an individual who is characterised as a victim of a discriminator. The complaint-based system ignores the dimension of social exclusion and perpetuates a view of Aboriginal or Torres Strait Islander persons as individual victims of racism, rather than nations asserting their inherent and collective rights. Unlike Canada and New Zealand, there is no Bill of Rights in Australia which could provide a positive benchmark for the assertion of such rights.

The Australian vernacular phrase of 'not getting a fair go' probably comes closest to recognising a denial of human rights. Interestingly this phrase has been adopted by the majority of the anti-discrimination commissions and appears on their websites and in their materials: the first statement on the WA commission's home page is 'Everybody deserves a "fair go"'; the NSW and Victorian commissions' home pages link to pages about 'Your right to a fair go'; the Northern Territory commission banner is 'promoting a fair go for all territorians'; and the Queensland commission provides a 'fair go' video as a guide to the legislation, while the Victorian commission offers 'fair go' brochures. Nevertheless in practice getting a 'fair go' means an individual has to make a complaint about a specific incident.

Lodging a complaint

To lodge a complaint a person must formulate their unease in terms of an incident which happened on a particular day and was perpetrated by a particular person; there are no means of formulating a general experience of racism. The person aggrieved must present their case within certain limited parameters: it must be on the basis of an attribute, contain a description of discriminatory conduct which took place in a specified area of public life within the last six or twelve months (depending on the jurisdiction), and be lodged as either an individual or representative complaint. It must be in writing. Choosing whether to lodge it with the federal or a state commission can require

[48] For example, *Anti-Discrimination Act 1991* (Qld) s 134(3).

specialist advice: the acts cover different attributes and areas, and the public hearing processes are different: a court in the federal jurisdiction, a tribunal in the states. The choice of venue may have legal implications in that a complaint which may involve federal matters needs to be made under the federal legislation to avoid the effect of s 109 *Constitution*. A wrong choice may also have monetary implications in terms of legal costs and awards, for example the limit on compensation in NSW is $40,000.[49] To avoid forum-shopping a complaint which has already been lodged in one jurisdiction will not be considered by the other.

The process of lodging a complaint and proceeding to conciliation is very similar in all jurisdictions. However only the federal *Human Rights and Equal Opportunity Act* specifically directs its commission to take reasonable steps to provide appropriate assistance to a complainant to formulate their complaint and reduce it to writing.[50] The state and territory legislation appears to take the view that commission staff should be seen to be even-handed and assist neither party. It would be helpful however if the state or territory practices followed the HREOC example because Indigenous legal aid services are often not available for civil matters.

The commission must then accept or reject a complaint. This decision can be left very much in the hands of those who process the complaints. The grounds on which a complaint can be rejected include that the circumstances are not covered by the legislation, for example exclusion from school on the basis that a student's hair is dyed pink, or that the complaint is 'frivolous, vexatious, or lacking in substance'. Sometimes why a complaint is not accepted may not be clear to the complainant. After I had lodged a long and detailed complaint alleging discrimination I received the following reply:

> … your complaint does not set out reasonably sufficient details to indicate an alleged breach of the Anti-Discrimination Act 1991.[51]

In a previous letter I had been told:

> … your complaint does not appear to come under the Act…it is also arguable that this time limitation may attract the exemptions contained in section 74 and 75 the Act.[52]

In fact the sections quoted had no relevance to my complaint. These replies however would surely have intimidated someone already emotionally vulnerable because of discrimination and not familiar with the law, into abandoning the complaint. Though it is possible to appeal against the decision not to accept a complaint, in the Queensland jurisdiction for example this means going to the Supreme Court to ask for a judicial review, hardly the cheapest or most user-friendly path. In practice therefore, a complainant is at the mercy of commission staff's interpretation of the validity of the complaint.

---

[49] *Anti-Discrimination Act* 1977 (NSW) s 108(2)(a).
[50] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46P(4).
[51] Letter to author from Delegate of the Anti-Discrimination Commissioner, 11 April 2007.
[52] Letter to author from Delegate dated 15 February 2007.

There are no publicly available statistics in any jurisdiction on how many complaints from Indigenous people have been rejected at this entry point.

If it is accepted, the commission sends a copy of the complaint to the respondent for comment. Both parties have the opportunity to respond in writing to issues raised by the other. If the matter does not settle beforehand, the parties must attend a compulsory conciliation conference, the outcome of which remains confidential to the parties. The laudable aim of the conference is to try to achieve resolution of the complaint without formalities or incurring legal costs. Indeed probably around 90% of complaints are settled in this way.[53] The anti-discrimination commissions tend to interpret their role, not as advocates for complainants, but as peacemakers providing workable and uncontroversial solutions which satisfy both complainant and respondent. A certain pressure is applied to get people to settle their complaint in conciliation rather than proceeding to the next step - a public hearing. Because conciliation is confidential to the parties, the process of complaint is a major restriction on the free flow of precise information on the efficacy of the legislation.

There are many reasons why parties do not go onto the public hearing and settle in conciliation or allow their complaint to lapse: the hearing looks like or is in a court; complainants may not have the money for lawyers to represent them; or they fear having to pay the respondent's legal costs if they lose. If they do proceed however to a public hearing, the record of the decision provides one of the few accurate sources of information about who, how and why people use the legislation to address their problem. These case reports are published on the internet[54] and in printed form. The case studies cited in this paper are from such reports.

Has the legislation fulfilled the Manifesto's goals?

The explicit aim of the *Policy Manifesto* was to alert Australian society to Indigenous concerns. Anti-discrimination legislation was seen as one way of addressing those concerns. However as this overview has shown, it is very difficult to tell 38 years later whether the legislation has made much inroad into the systemic discrimination encountered on a daily basis by many Indigenous people because the public is not privy to the number and type of Indigenous complaints and their successes and failures. That means that complainants cannot estimate their chances and have no indication of the institutional capacity to enforce the legislation with respect to Indigenous rights.

People who are been discriminated against, harassed or vilified are vulnerable and unwilling to take steps which might reinforce their negative experiences. If they are to take the risk of bringing a complaint, then they want to have confidence that some benefit may accrue, not just in monetary terms in the form of damages, but through remedies that produce ongoing change. Equal

[53] Rosemary Hunter and Alice Leonard, *The outcomes of conciliation in sex discrimination cases* (1995).

[54] For example Austlii at www.austlii.edi.au provides separate databases of decisions from the state and territory tribunals and the Federal Court.

opportunity commissions committed to upholding human rights need to adopt strategies that recognise this insecurity. Until this is done we cannot know if the current legislation is money well spent, and more importantly whether it is creating racial equality.