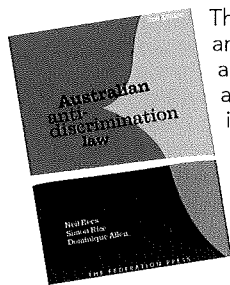


BOOK REVIEWS

Australian Anti-discrimination Law, 2nd ed
Neil Rees, Simon Rice
& Dominique Allen
The Federation Press
933 pp \$125
Reviewed by Rebecca Crawford



This text is a thoughtful and insightful analysis, and critique, of current anti-discrimination law in Australia.

In this country, with neither a bill of rights nor a bundle of enforceable common law anti-discrimination rights, freedoms, duties or obligations, the protection of human rights falls almost wholly to the various Commonwealth and State anti-discrimination statutes.

Anti-discrimination legislation is a relatively recent creature, with the first Commonwealth legislation enacted in 1975 following the commencement of the *Convention for the Elimination of all forms of Racial Discrimination*. There are now four Federal statutes, and one in each of the States and Territories. While all of the Australian statutes follow a similar pattern and operate in a similar way, there are problematic drafting inconsistencies and ambiguities.

The text opens with an absorbing examination of varying ideas about the philosophical underpinnings of anti-discrimination law. The legislature has consistently failed to identify the policy goal: is it to provide equality in terms of consistent treatment, equality of opportunity, or equality of result (which requires correction of misdistributions)?

A great deal of the book is dedicated to the concepts of direct and indirect discrimination, which are the backbone of Australian (and international) anti-discrimination law. At first glance they are simple concepts: direct discrimination occurs when a person is treated less favourably because of a protected attribute; indirect discrimination occurs when a person requires everyone to comply with the same condition or requirement, but more people with a protected attribute are unable to comply with that condition or requirement than are people without that attribute, and the condition or requirement is not reasonable in the circumstances.

However, courts and tribunals have struggled with both limbs. The drafting leaves considerable uncertainty about the elements, particularly for indirect discrimination. In the absence of clear policy statements from the legislature, courts and tribunals have tended to preserve the status quo: the frequency

with which appellate courts overturn lower court or tribunal decisions made in favour of complainants is remarkable.

The text examines in depth the problems thrown up by the direct and indirect provisions in each statute. There are extensive case extracts, accompanied by insightful analysis and efforts to identify the principles. Unfortunately, while it is noted that the Tasmanian legislation deviates from the "standard" direct discrimination provision, there is in fact no discussion of the concept of direct discrimination as it exists in the Tasmanian Act.

The huge task facing a complainant attempting to prove direct or indirect discrimination, with the requirement to prove the motivation of the respondent, is contrasted with the position in the United States and United Kingdom, where there is a shifting onus once an evidentiary threshold is met by the complainant.

There is, of course, a chapter on the protected attributes. In Tasmania, the prohibition extends to a list of 20 attributes: race, age, sexual orientation, lawful sexual activity, gender, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal record, irrelevant medical record, and association with any person who has or is believed to have any of these attributes. All of these are examined in detail.

There is a chapter which looks at each of the areas of public life in which the anti-discrimination legislation operates.

Anti-discrimination statutes also contain prohibitions on harassment (including sexual harassment), vilification (topical, of course, because of the Government's recent desire to repeal section 18C of the Commonwealth *Racial Discrimination Act*), and victimisation related to protected attributes. The authors dedicate a chapter to each. There is also a chapter dedicated to the manner in which discrimination is addressed in the *Fair Work Act 2009*.

The final chapters detail the procedures for enforcement of the law, and the remedies available. In all jurisdictions except Victoria, the process must begin by way of a complaint lodged with the relevant agency. There are investigatory, conciliation and inquiry stages to be completed before litigation proper can be commenced.

This text is a substantial work, weighty enough for an audience of specialist lawyers, tribunal members and judges.

It is also a powerful critique. The authors say that the legislation remains under-developed. A strong body of anti-discrimination jurisprudence has not emerged despite repeated judicial statements that the legislation must be interpreted liberally and beneficially. The absence of a clear articulation of the policy goals has not enabled this to occur. Further, the procedures for enforcement of the laws are too slow and cumbersome. The authors quote Kirby J: "the field of anti-discrimination law is littered with the wounded" (*X v Commonwealth* (1999) 200 CLR 177 at 213).

Understanding National E-Conveyancing
Peter Rosier
LexisNexis
178 pp \$110
Reviewed by Tim Tierney

This is a useful 178 pages of materials for practitioners who are interested to find out early some of the detail behind the National Electronic Conveyancing System:

- an overview from the author of about 50 pages,
- the National Electronic Conveyancing Law,
- the Model Participation Rules,
- the Model Operating Requirements, and
- an Index.

The author has been a member of the Law Society of New South Wales Property Law Committee and an advisory group for E-Conveyancing. He has practiced in property law since 1973 and is an accredited specialist.

His overview is comprehensive and incisive.

He begins with the useful confirmation that the National Electronic Conveyancing System is in fact not a complete conveyancing system but rather a settlement and land registration tool, planned to eventually become national, and not yet committed to by the smaller states including Tasmania.

The comprehensive nature of his overview reflects his extensive participation in the consultation. He helpfully for instance, gives us a table of acronyms instead of the more typical table of cases and statutes. The acronyms can be singularly unhelpful: for instance:

"the participation rules which we discuss in detail at (6) set out the qualification for subscribers, subscribers may access the ELN by him-, her-, or itself via a user.

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