

Thinking about access to justice

We often hear the maxim that ignorance of the law is no excuse. This maxim has been argued as being necessary for the administration of justice so that people cannot claim ignorance of the law as a defence. The flipside is that most people have very little knowledge of the broad range of statute law, case law and even international law that applies to us all. We are all deemed to know of it.

Laws are generally written with wide applicability, and do not single out individuals. In legislation you often see the phrase 'no person shall' or 'any person'. This potential equality before the law lures many into thinking that people are all equal before the law. While one can argue this position, it is clear that there is not equality of access to the law. This has become a major critique of our legal system and led to the creation of institutions to try and correct this problem.

While we may be notionally equal before the law, few Australians have any direct input into new laws that are made. In fact many distinct societal groups have encountered structural barriers in accessing legal advice and legal services. Let's have a look at two groups:

Women

Women now 'on paper' have the same rights as men. Historically laws did make women second class citizens when it came to voting, property ownership rights, in pay scales and types of work that they could undertake. With sex discrimination being unlawful, you may now wonder how women can still experience such discrimination. This is because one tends to envisage direct discrimination that is obvious to all. In reality it is far more common to experience indirect discrimination. At its simplest direct discrimination

requires a comparison to be made between the treatment of the person discriminated against and a different real or hypothetical person. Indirect discrimination involves treatment which appears to be neutral or fair but which has the effect of disadvantaging a particular group.

See Parliament of Victoria, *Discrimination in the Law* at http://www.parliament.vic.gov.au/SARC/Equal_Opportunity/Discussion/chaptertwo.htm

Have a look at the *Sex Discrimination Act 1984* (Cth) below, and also online from the AustLII website http://www.austlii.edu.au/au/legis/cth/consol_act/sda1984209/:

5 Sex discrimination

(1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(1A) To avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.

(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

6 Discrimination on the ground of marital status

(1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the marital status of the aggrieved person if, by reason of:

- (a) the marital status of the aggrieved person; or
- (b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person; the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status.

(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the marital status of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital status as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

7 Discrimination on the ground of pregnancy or potential pregnancy

(1) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:

- (a) the aggrieved woman's pregnancy or potential pregnancy; or
- (b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
- (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant; the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.

(2) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's pregnancy or potential pregnancy if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are also pregnant or potentially pregnant.

(3) This section has effect subject to sections 7B and 7D.

7A Discrimination on the ground of family responsibilities

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:

- (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
- (b) the less favourable treatment is by reason of:
 - (i) the family responsibilities of the employee; or
 - (ii) a characteristic that appertains generally to persons with family responsibilities; or
 - (iii) a characteristic that is generally imputed to persons with family responsibilities.

7B Indirect discrimination: reasonableness test

(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.

(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

7C Burden of proof

In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.

7D Special measures intended to achieve equality

- (1) A person may take special measures for the purpose of achieving substantive equality between:
- (a) men and women; or
 - (b) people of different marital status; or
 - (c) women who are pregnant and people who are not pregnant; or
 - (d) women who are potentially pregnant and people who are not potentially pregnant.
- (2) A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).
- (3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:
- (a) solely for that purpose; or
 - (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.
- (4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

8 Act done for 2 or more reasons

A reference in subsection 5(1), 6(1) or 7(1) or section 7A to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.

On the face of it, sections 5, 6 and 7 appear to apply equally to all people. Yet there are still problems, and complaints are still being made. Extensions have had to be made to the law (e.g. s 7A above that deals with discrimination based on family responsibilities). It is useful to read this account by the Federal Sex Discrimination Commissioner who travelled round Australia on a listening tour. She specifically wanted to find out whether the laws above were working, or whether they needed reforming. See

http://www.hreoc.gov.au/sex_discrimination/listeningtour/ListeningTourCommunityReport.pdf

This report showed the structural barriers facing women, and how the law did not prevent the effect of such barriers. It is important to recognise that laws can fail to recognise barriers, and so it is here. Think about the kinds of additions to or changes to the Sex Discrimination legislation that might take account of the problems outlined in this report.

Indigenous Australians

Chapters 7 and 8 of *Connecting with Law* outline the history of relations between the Indigenous inhabitants of Australia and the new settlers. The legacy of this history placed indigenous Australians at extreme levels of disadvantage. The following are key barriers to indigenous Australians accessing legal services identified in Schetzer & Henderson (2003), *Public consultations: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW, Access to justice and legal needs vol. 1*, Law and Justice Foundation of NSW, Sydney, <http://www.lawfoundation.net.au/report/consultations>:

- a reluctance of Indigenous communities to involve outsiders in matters which they consider private and which would require them to 'hang out their dirty laundry', in front of strangers
- a lack of awareness by Indigenous people of the scope and ability of the law to resolve certain types of problems

- the limited ability of the law and traditional legal approaches to resolve problems that in many cases involve not just legal, but also significant political, historical and cultural issues
- the reliance on documentary evidence to substantiate legal claims and its reluctance to accept or rely on anecdotal or oral evidence by Aboriginal people
- long-term distrust of and previous negative experiences with the legal system
- formality of the legal system and its services
- lack of cultural awareness, sensitivity and compassion among justice system staff and legal service providers
- lack of Aboriginal personnel
- lack of relationship between the local Legal Aid office and the local community
- intimidation in approaching legal services
- lack of awareness of the services of Legal Aid
- the need to book Legal Aid's services
- location of legal aid offices
- lack of public transport to Legal Aid's offices.

To illustrate the overlap between the above category and this one, read Chapter 3 'Indigenous Women and Access to Legal Services' of the Joint Committee of Public Accounts and Audit, Parliament of Australia *Report 403: Access of Indigenous Australians to Law and Justice Services*, (2005). The chapter illustrates the issues that Indigenous women face in accessing legal services, and can be accessed online <http://www.aph.gov.au/House/committee/jpaa/atsis/report.htm>.

How should the law respond to fix the issues flagged in the Schetzer and Henderson report? Is it possible that the reforms needed are not necessarily legal? Read some suggested solutions posited in chapter 2 of the report online at <http://www.lawfoundation.net.au/ljf/app/&id=5B03EB7B96C25E56CA257060007D4EA8>.

What it is clear from the above, is that while law may appear value-neutral, it does not mean that it will apply in its effect equally. It's a lesson that you need to be mindful of when studying law. Many other groups experience similar structural barriers. Some of these issues are explored in *Connecting with Law* at p320-28.