CAN STATUS BE A NEW GROUND IN AUSTRALIAN DISCRIMINATION LAWS

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Introduction

2004 saw the addition of yet another ground of discrimination with the enactment of the Federal *Age Discrimination Act 2004*. This prompted me to look at the growing number of grounds upon which discrimination is prohibited and ask, 'Are we ready to embrace a principled approach to the grounds of discrimination or are we to continue *ad infinitum* adding new grounds?'

I have always been intrigued by the formulations in various international human rights instruments of the grounds of discrimination. There is usually an apparently exhaustive list including not just the primary grounds of race and sex but a number of related and apparently unrelated grounds such as religion, political opinion, social origin and even property. Dangling at the end of the list is the phrase 'or other status' indicating that the grounds enumerated are not exhaustive. What is this phrase intended to achieve? Is it just meant to be a peg upon which the international body can hang categories of persons worthy of protection at a future date or is there some greater use for the phrase? How does it fit in with the enumerated grounds?

The use of the concept is well established in the jurisprudence of the European Court of Human Rights, the Human Rights Committee and the Canadian Supreme Court. It has been adopted recently in South Africa.[1]

What I want to look at today is whether the use of a 'catch-all' provision such as 'other status' would benefit those suffering from discrimination on grounds not enumerated in Australian anti-discrimination laws or those that fall between the inevitable cracks created by a federal system. I will consider the problems experienced in Australian discrimination laws that might be ameliorated by the introduction of status as a ground. I will then look at the way in which status has operated in other jurisdictions and how Australia fits within those approaches. Finally, I propose some ways in which status might be introduced at a Federal or State and Territory level.

The Inequality of Australian Equality Laws

The maturity of anti-discrimination legislation in Australia is undermined by the federal system. Each State and Territory has its own anti-discrimination legislation. At the Federal level the *Age Discrimination Act 2004* is the fourth example of ground specific legislation

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after the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*. The approach of both levels of government has been to add new grounds incrementally. Different enforcement mechanisms exist depending on whether an applicant seeks a remedy from a State/Territory tribunal or a Federal court.

There is a considerable disparity in the grounds available. At the Federal level discrimination on the grounds of race, sex, disability and age are established. All those grounds are available under the State and Territory legislation but other grounds have been added such as nationality, sexuality, transexuality, political belief, religious belief and trade union activity. There is no reason to think that the Commonwealth is any less susceptible to the forms of discrimination prohibited in the States and Territories. Because of that difference there remains confusion as to the coverage of specific discrimination laws.

There has also been a considerable time lag between the protection of certain grounds at a State or Territory level compared to the Federal legislature. The prohibition on age discrimination found in the *Age Discrimination Act 2004* was to be found in legislation in NSW in 1994. Similarly, the prohibition of discrimination on the ground of (physical) disability in the *Anti-Discrimination Act 1977* (NSW) from 1981 was not enacted by the Commonwealth until 1992. More than twenty years after the NSW Government added homosexuality to the list of prohibited grounds in 1982 it has yet to receive similar protection at the Commonwealth level.

A third point of complexity and a source for criticism is the strict definition of the grounds. This point applies to both State/Territory and Federal anti-discrimination laws. It is nowhere more obvious than in the *Sex Discrimination Act 1984*. In order to deal with the rigidity of the definition of sex and particularly the characterics of a comparator the legislature has been forced to add additional grounds such as pregnancy, marital status and family responsibilities. In some States breast feeding has been added as a further ground. It seems extraordinary to me that a broad protection against sex discrimination has been unable, in and of itself, to incorporate pregnancy or breastfeeding as prohibited grounds. On the other hand some have sought to unduly stretch prohibitions on sex discrimination to include discrimination against homosexual spouses within its ambit.[2]

In Australia it is well understood that discrimination occurs and needs to be prohibited so that persons of all races, both sexes, irrespective of age and with a disability are able to fully participate in Australian society. From that proposition can be drawn the principle that there is wide acceptance that people should not suffer from some detriment based on a criterion which is not objectively justified. One might venture to say that this is part of the idea of ‘a fair go’. That fair go is being denied to people while they wait for the Commonwealth to enact protections available in the States and Territories or where the characteristic of a group (which may later form a prohibited ‘ground’) has yet to be recognised.

I want to explore today whether on that foundation provided by the principle of equality of treatment can be erected a general ground (called ‘status’) in anti-discrimination legislation which can be used to prohibit such discrimination. The question remains whether ‘status’ is the appropriate vehicle and particularly how one might prevent the use of the concept dissolving into a free-for-all based on any form of differentiation. In the next section I look at how various national and international jurisdictions have dealt with this exact problem.

The Experience of Status

Each of the national and international jurisdictions considered have dealt with the issue of increasing the grounds upon which discrimination is prohibited in different but related ways. The key issues to consider are (a) how they have allowed for the grounds to be expanded and (b) what checks they have placed on this expansion. What will emerge from this

discussion is that a principled approach may be used to selection of grounds and that, once selected, discrimination may still be permissible in circumstances where it is objectively and reasonably justified.

According to Sandra Fredman there appear to be three approaches.[3] The first allows for a broad statement of the principle of equality with the enumeration of the grounds and whether such differentiation is reasonable or justified left to the judiciary. The second approach is for the legislature to specify the grounds upon which discrimination is prohibited. The third approach and that adopted in various international human rights instruments is to specify primary grounds and then leave a 'catch-all' provision by using the words 'or other status'. Certainly that is the case with the *International Covenant on Civil and Political Rights* (ICCPR)[4] and the *European Convention on Human Rights* (ECHR).[5]

Australia falls into the second category because the enumerated grounds in its anti-discrimination statutes are limited. What the Australian protections *prima facie* lack is the flexibility with which the ICCPR and ECHR were drafted.

The starting point must be the 14th Amendment to the US Constitution otherwise known as the equal protection clause which provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'. The clause falls within the first category.

The equal protection clause has allowed for the development of jurisprudence providing a sliding scale of review depending on the 'category' upon which the differentiation is based. At the top of the list (those in the 'suspect category') is race and the level of scrutiny applied by the Court must be strict and the government must have a 'compelling government interest' and the measure must be narrowly tailored to achieve its purpose.[6] Sex falls into an intermediate category where an 'exceedingly persuasive' justification must be established and the measure must be substantially related to the achievement of important government objectives. At the bottom of the scale the government needs only to establish that there is a rational relationship between the measure and a legitimate state interest.[7]

By contrast the Council of Europe has chosen to enumerate specific grounds. Article 14 of the European Court of Human Rights (ECHR) states,

> The enjoyment of the rights set forth in this Convention shall be secured without discrimination *on any ground such as* sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status.* (emphasis added)

The restriction on the applicability of the non-discrimination protection only to the rights set forth in the ECHR has recently been dramatically expanded by Article 1 of Protocol No 12 to the ECHR to include a right to the enjoyment of 'any right set forth by law.'[8]

'Other status' has been interpreted to include sexual orientation, marital status, illegitimacy, trade union membership, military status, conscientious objection, professional status, imprisonment and disability.[9] The emphasis in the ECHR is on the justification for categorisation rather than the placing of strict limitations on new grounds.

The width of the grounds that may come under Article 14 of the ECHR is tempered by the availability of a substantial defence. The principle of equality of treatment is violated if the distinction has no objective and reasonable justification.[10] If an applicant is able to establish differentiation on an impugned ground then the discriminator may justify its action if there is a legitimate aim for the measure or there is a relationship of proportionality between the means employed and the aim.[11] The state is afforded a 'margin of appreciation' where it is necessary to choose between different means.[12] For certain enumerated grounds, such as sex, very weighty reasons are required before a difference in treatment on the grounds of

sex could be considered compatible with the ECHR.[13] There is an obvious similarity here to the suspect categories under the equal protection clause which necessitate strict scrutiny.

A more sophisticated approach is found in the application of the non-discrimination clause of the *Canadian Charter of Rights and Freedoms* ('the Charter'). Section 15 is in the following terms:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination *and, in particular,* without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (emphasis added)

Section 15 is binding on the legislatures of Canada and its provinces and the laws they enact as well as action taken under statutory authority.[14] Private acts are excluded from coverage of the Charter.[15]

The formulation of the grounds of discrimination is open ended but it is now well established that an 'analogous ground' may also come within the protection.[16] The criteria applied to establish whether a particular ground is an analogous ground include:

(a) the distinction is based on an immutable characteristic;

(b) the group has suffered historical disadvantage;

(c) the group constitutes a 'discrete and insular minority'; or

(d) the distinction is made on the basis of a characteristic attributed to the individual not on merit but on the basis of association with the group.[17]

There is some discussion as to weighting and influence of particular criteria but immutability appears to be at its core. Accordingly, the type of ground which comprises an analogous ground is narrower than that found under the ECHR. The ECHR has included grounds which are (arguably) changeable such as membership of a trade union or political opinion.[18] Whereas the Supreme Court has rejected a number of grounds on the basis that each was not analogous: employment status[19] and membership of a group wishing to make a claim against the Crown[20] being two examples.

The decision in *Egan v Canada* provides an example of the application of the test. In that case La Forest J held that sexual orientation was an analogous ground on the basis that sexuality was a deeply personal and immutable characteristic the changing of which would come at some considerable cost to the person.[21]

Section 1 of the Charter requires that the rights and freedoms set out in the Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a democratic society.' That check on the non-discrimination provision in s 15 is, generally speaking, the same approach taken with respect to the ECHR. That is, the principle of proportionality between means and end has a central role to play in the exercise required by s 1. *R v Oakes*[22] is the seminal case in the application of s 1, the main principles of which may be summarised as follows:

(a) the measure must have a sufficiently important objective which warrants overriding a constitutionally protected right or freedom;

(b) the means chosen must be proportionate to the detrimental effects upon the right or freedom violated which may be assessed as follows:

(i) the measure must have a rational connection to the objective in the sense that it cannot be arbitrary or unfair;

(ii) the least drastic means must be employed; and

(iii) there must be proportionality between the effects of the measure and its objective.

Finally I come to the non-discrimination protection in the ICCPR. Article 26 is in the following terms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination *on any ground such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*. (emphasis added)

The jurisprudence of the Human Rights Committee confirmed 20 years ago that the protection provided by Article 26 goes beyond the enumerated rights in the ICCPR and is a stand alone protection against discrimination.[23] That protection is balanced by a democratic check that allows for such discriminatory requirements, practices or acts if they correspond to objective criteria.[24] In its General Comment (No 18) on Article 26,[25] the Human Rights Committee confirmed that if the differentiating criteria are reasonable and objective and their aim is to achieve a purpose which is legitimate under the Covenant, then the criteria will not be discriminatory.[26] The Human Rights Committee also chose to adopt the formula for discrimination found in the *International Convention on the Elimination of all Forms of Racial Discrimination* and the *Convention on the Elimination of all Forms of Discrimination Against Women*[27] and which also appears in a modified form in the *Racial Discrimination Act 1975*.[28]

It is difficult to extract from the cases a clear line of jurisprudence upon which an *un*enumerated ground in Article 26 may be a ground upon which discrimination is prohibited. Certainly the Human Rights Committee has added grounds such as nationality, marital status, place of residence, foster versus natural children, public versus private schools, sexual orientation, age, family responsibility and disability.[29] The more likely interpretation is that the task undertaken in determining whether there is discrimination under Article 26 is one that concentrates on the reasonableness or objectiveness of a measure. The hurdle to establish a 'new' ground is low and need only be identified. However, the nature of the ground is important for the application of the reasonableness test.

The Human Rights Committee appears also to have adopted a sliding scale of review not dissimilar to that applicable to the equal protection clause of the US Constitution. Some grounds are seen to be inherently more suspect than others and deserving of greater scrutiny.[30] Those grounds will not surprise and include the enumerated grounds of sex and race as well as the grounds that fall under 'other status' such as sexual orientation and disability. Sarah Joseph in her excellent book on the ICCPR argues that the more important grounds have the attribute of either immutability or a history of unjustified discrimination or both.[31]

It is important to contrast the positions of the European Court of Human Rights and the Human Rights Committee as against that of the Canadian Supreme Court. At one time Peter Hogg argued for a position which appears analogous to that in the European Court of Human Rights. However, that position was rejected by McIntyre J in *Andrews v Law Society of British Columbia* because it gave s.15 little work to do.[32] One could legitimately conclude that the position under the ECHR and the ICCPR places greater emphasis on the analysis of reasonableness and objective justification than on whether a purported ground falls into one of the enumerated grounds or status.

Looking then at the three approaches there are some clear conclusions. The equal protection clause found in the 14th Amendment provides for perhaps an undue reliance on the judiciary to determine the grounds upon which discrimination will be unlawful and the degree of scrutiny required for particular rights. The imbalance between race and sex found in the US jurisprudence has been overtaken by international concern for specific grounds such as sex. Australia has followed the lead set by the UN standard setting conventions in that regard.

Turning to the third category there is a clear difference between the approach under the ECHR and ICCPR and that in Canada. The former grouping provides the judiciary with considerable power over determining what the relevant grounds are to be. Both the European Court of Human Rights and the Human Rights Committee have used that power to expand the grounds freely but balanced that with considerable deference to the legislature in permitting such discrimination. That balance may be because it is both unwieldy and time consuming to amend such an instrument. A question arises as to whether that is an appropriate model for domestic legislation.

The Canadian position is more attractive to Australia. It provides flexibility in the sense that the grounds upon which discrimination may be established are not arbitrarily limited and a strongly principled approach is applied to the expansion of the enumerated grounds. At the same time the review provided by the application of s 1 of the Charter is also strongly principled and is without the sometimes questionable principle of a margin of appreciation found in difficult cases heard by the European Court.

The Use of Status in Australia

The first observation that may be made in the light of the above discussion is that Australia has advanced down the path of prohibiting discrimination on grounds where the characteristic is immutable. Certainly at a Federal level the four pieces of primary legislation enacted so far fall into that category. It is useful to note that age and disability are not included in the enumerated grounds of Article 26 of the ICCPR although they have been recognised under the 'other status' category. The States and Territories have followed suit but have also gone further, prohibiting discrimination on grounds which would not strictly fall under the immutable characteristic category such as political opinion or trade union membership.[33]

Is it then possible to allow for the addition of further grounds upon which discrimination is prohibited without continual resort to more legislation? The answer to that question must be 'yes' if done carefully and with sufficient safeguards.

In many ways the easiest means to solve the restrictiveness of specific grounds is to enact the equivalent of Article 26 of the ICCPR with some teeth. That, however, is likely to be caught by the current lack of enthusiasm, perhaps even opposition, to a Bill of Rights. Certainly at a Federal level the government appears reluctant to provide the judiciary with an open ended mandate to create new grounds in the manner given to the European Court of Human Rights and the Human Rights Committee.

I use the term 'with some teeth' because the *Human Rights and Equal Opportunity Commission Act 1986* already allows for a complaint to be made to the Commission for a breach of a human right including Article 26.[34] The provision applies only to acts or practices of the Commonwealth[35] and, if there is a finding by the Commission of a breach, results in a non-binding notice issued to the respondent containing recommendations together with a report to the Minister.[36] The provisions are not well known and have only infrequently been exercised. Successive Federal governments have been reluctant to provide for enforceable rights in the nature of those found in the primary discrimination statutes.[37]

But there is another way – dare I call it a 'third way' – where the legislature retains sufficient control. The way proposed builds upon the existing legislation rather than providing a whole new model. Adding 'status' as a separate ground to existing discrimination legislation is a simple and, on the basis of international and overseas experience, well established way in which to provide for new grounds. A process with two parts is proffered. First, a set of criteria must be satisfied by an applicant in order for a new ground to be accepted by the judiciary. Secondly, a respondent should be provided with a defence where the differentiation concerned is objectively reasonable.

The first part of the process is to establish criteria (similar to that in Canada) that will provide a State, Territory or Federal legislature with sufficient comfort that the grounds upon which discrimination is prohibited are not being unduly expanded. A non-exclusive (and overlapping) list should include the following criteria:

÷ The proposed new ground is analogous to enumerated grounds (eg in the Federal sphere: race, sex, disability and age);

÷ The characteristic which forms the ground is immutable[38];

÷ The characteristic which forms the ground is shared by a group that has historically suffered disadvantage.

The use of the first criterion would allow for the different approaches of State and Federal governments. In the Federal sphere the enumerated grounds have been restricted to grounds which are immutable or 'suspect'.[39] Accordingly, the use of the first criterion would ensure that all new grounds are of a similar order. Whereas in the States and Territories a more expansive approach has meant the inclusion of grounds beyond those categories regarded as 'suspect'. The use of the first criterion would allow for those wishing to establish a new ground to benefit from the more liberal attitude of the State or Territory.

The second part of the process should be similar to the formulation of reasonableness used to provide a 'defence' to indirect discrimination in the *Sex Discrimination Act 1984*. That defence was clearly built on the jurisprudence available on the principle of proportionality from *inter alia* the European Court of Human Rights, the Human Rights Committee and the Canadian Supreme Court.[40]

Section 7B of the *Sex Discrimination Act 1984* sets out the matters that are to be taken into account when considering the reasonableness of an act that falls within the prohibition on indirect discrimination:

> (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.

The similarities with the decision of the Canadian Supreme Court in *R v Oakes* are obvious. The formulation in s 7B should be improved so that rather than a bland reference to 'disadvantage' there is specific consideration by the adjudicator of the nature of the ground upon which the discrimination has occurred. There is room here for a sliding scale of scrutiny depending on the nature of the right.

The check provided by the second part of the measure is conservative but important. It will not be as easy to prove as a claim of direct sex or race discrimination but it will satisfy the legislature that the hurdle is sufficiently high not to allow through grandiose or otherwise unwarranted claims. Once a particular ground has been established jurisprudentially it may well spur the legislature onto a full consideration of the ground including whether the safeguard should be abandoned, whether indirect discrimination should be included and whether there should be exceptions. In the meantime those discriminated against will have recourse to the courts and will not languish as they currently do waiting for the legislature to act.

The introduction of status as a basis upon which discrimination is prohibited must be accompanied by sufficient enforcement measures to be truly effective. The addition need only be inserted into the current enforcement mechanisms. The prohibition should be of direct discrimination with indirect discrimination left for further legislative consideration.[41] The areas in which discrimination on the ground of status are prohibited should include employment, education, goods and services, access to premises, accommodation, clubs and associations and the other areas which are well established as being caught by anti-discrimination legislation. There is also no need to depart from the system of conciliation and adjudication found at the State/Territory and Federal levels.

Conclusion

What emerges then is that there is a way for the grounds of discrimination to be expanded in a limited and cautious way which does not require continual resort to the legislature. At the State and Territory level this will assist with difficulties over categorisation of particular forms of discrimination. If the Commonwealth was to introduce status into its discrimination laws then at least some of the grounds available at the State level would be likely to be made available in the Commonwealth sphere.

Returning to the question posed in my introduction, there is a principled way in which to advance the grounds upon which discrimination is prohibited. However, despite the theoretical attraction of a single principle covering all grounds of discrimination there is real merit in advancing an approach which builds on current protections.

Endnotes

1 See s 1(1)(xxii)(b) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000.*

2 See for example the argument advanced in *Grant v South West Trains Ltd* [1998] ECR I-621

3 S Fredman, *Discrimination Law*, Oxford 2002, pp 67-68.

4 Article 26. The International Covenant on Civil and Political Rights is to be found at *Human Rights and Equal Opportunity Commission Act 1984*, Schedule 2.

5 Article 14.

6 S Fredman, op cit n 117, p 117

7 Ibid at p 76.

8 The Explanatory Memorandum further sets out that the right extends to obligations and discretionary rights exercised by a public authority or other such acts or omissions: [22] www.humanrights.coe.int/Prot12.

9 D Harris et al, *Law of the European Convention on Human Rights,* London, 1995, p 470.

10 *Belgian Linguistics Case* (1968) 1 EHRR 252 [10]

11 K. Starmer, *Blackstone's Human Rights Digest,* London, 2001, p 340.

12 *Rasmussen v Denmark* (1984) Series A 87 [41].

13 *Abdulaziz v UK* (1985) 7 EHRR 471 [78], Burghartz v Switzerland (1994) Series A Vol 280B [27]. Other suspect categories are race and illegitimacy: D. Harris, op cit n 123, at p 482.

14 See Hogg, *Constitutional Law of Canada,* Ontario, p 980.

15 Section 32, *Canadian Charter of Rights and Freedoms.*

16 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 181-182 per McIntyre J, Wilson and La Forest agreeing on this issue.

17 Fredman op cit at p78, *Miron v Trudel* [1995] 2 SCR 418 at 496-497 per McLachlin J for the majority.

18 Hogg argues that this is because these are constitutional protections and that other grounds lacking in immutability need to be specifically protected by the legislature: PW Hogg, op cit n 128, at p 997.

19 *Re Workers Compensation Reference 1983* [1989] 1 SCR 922.

20 *Rudolf Wolff & Co v Canada* [1990] 1SCR 695.

21 [1995] 2 SCR 513 at 528 per La Forest J (Lamer CJ, Gonthier and Major JJ agreeing).

22 [1986] 1 SCR 103 per Dickson CJ at 138-139.

23 *Broeks v Netherlands* (172/84). This expansive interpretation was confirmed in General Comment No 18 at par [7]. That is, Article 26 includes a protection from discrimination in relation to 'all rights and freedoms' not just those found in the ICCPR.

24 See, for example, *Vos v Netherlands* (218/86).

25 HRI/GEN/1/Rev.5 pp134-137.

26 At par [13].

27 ' … [T]he Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based *on any ground such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.' General Comment No 18 par [7]

28 Sections 9 and 10. See also the definition of discrimination at s 3 *Human Rights and Equal Opportunity Commission Act 1986*.

29 S Joseph et al *The International Covenant on Civil and Political Rights* Oxford 2000, p 530.

30 Ibid at p 532.

31 Ibid.

32 [1989] 1 SCR 143, 181-182; P Hogg, op cit n 128, at pp 987-988.

33 See the anti-discrimination statutes of Queensland, Tasmania, Victoria, WA, the ACT and the NT.

34 Section 20(1)(b).

35 Sections 3, 11(1)(f) and 20(1)(b).

36 Section 29(2).

37 The *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004.*

38 In the wider sense used in *Egan v Canada.*

39 Race, sex, disability and age.

40 Sections 7B-7D were introduced by the *Sex Discrimination Amendment Act 1995* sometime after the decision in *R v Oakes*.

41 One approach of the Commonwealth has been to prohibit discrimination on the ground of family responsibilities only where there has been direct discrimination: s 7A *Sex Discrimination Act 1984.*