Industrial Relations Commission
New South Wales

LAUNCH FOR *DISCRIMINATION LAW AND PRACTICE*, 6TH EDITION

SPEECH FOR 5 MARCH 2025 AT FREDERICK JORDAN CHAMBERS

JUSTICE INGMAR TAYLOR, PRESIDENT OF THE INDUSTRIAL RELATIONS OF NSW

1 I would first like to acknowledge the Gadigal People, on whose lands this book launch is taking place tonight. I pay my respect to their elders and to any First Nations people who are with us today.

2 It is such a pleasure to be invited by Chris Ronalds and Bronwyn Byrnes to launch the sixth edition of *Discrimination Law and Practice* tonight.

3 In her preface to the first edition of the book, Chris wrote, "Running discrimination cases remains an exciting challenge as this relatively new area of law unfolds."

4 Over the following 27 years, discrimination law's impact on our lives – particularly in our work lives – has increased greatly. The enactment of the Commonwealth and State Discrimination Acts at the end of the 20th century have been bolstered by subsequent amendments, including the recent amendments to the *Sex Discrimination Act* and *Fair Work Act* which are explained by this book. Workplace policies, internal grievance mechanisms, and affirmative action programs are now drafted with discrimination laws in mind. Arriving at the same time as the creation of other individual as against collective statutory employment rights, such as unfair dismissal, it has led to the overall increase in employment litigation and employment law advisers. It is in employers' interests to take measures to create safe, equal opportunity workplaces, rather than to defend claims for breaches of the law.

5 However, recent international developments, worryingly being echoed domestically, bring home that the changes that this book discusses are not an inevitable arc towards equality. Changes being introduced in the USA have rightly generated concern about the state of the rule of law.[1] One such event is President Trump's reversal of diversity, equity and inclusion programmes in the US's federal government. The rule of law, of course, includes the application of international human rights treaties, which are the source of anti-discrimination obligations in Australia and the United States. Following suit, many other large US corporates have rolled back their own DEI policies. McDonald's, Meta, Amazon, Google and Disney are among those who have scrapped diversity quotas, ceased participation in external DEI surveys, and quietly omitted references to "inclusion and diversity" in their annual reports.

6 Opponents of DEI often claim that these programs result in so-called "reverse" discrimination. Here I quote Justice Kevin Bell, former judge of the Supreme Court of Victoria, in his decision *Re Lifestyle Communities Ltd (No 3)*: "Equality does not imply absolute equality without any distinctions. … Measures taken to redress inequalities arising from past treatment or historical circumstances are not violations of the equality and non-discrimination principles."[2] He continues, speaking to the importance of discrimination law, "Discrimination is repugnant and has insidious consequences. It demeans people in the humanity and dignity which is their birthright, impairs their personal autonomy and development, damages society and violates the principle of equality on which freedom in democracy ultimately depends. The community looks to the law for equal treatment and protection against discrimination."[3]

7 The study of discrimination law and its importance has rarely been so vital.

8 This book ably equips us for that task. It is a seminal – if not the leading – text on Australian discrimination, harassment and vilification law and practice. It has been so since its first edition, which was authored solely by Chris and published

[1] The Hon A S Bell, "Present and Future Challenges to the Rule of Law and for the Legal Profession" (Law Society of NSW, Opening of Law Term Dinner Address 2025).
[2] (2009) 31 VAR 286; [2009] VCAT 1869 at [4].
[3] (2009) 31 VAR 286; [2009] VCAT 1869 at [1].

in 1998. The second edition was co-authored with Rachel Pepper, now Justice Pepper of the Land and Environment Court. The fourth and fifth editions were co-authored with Elizabeth Raper, now Justice Raper of the Federal Court. This edition is co-authored with Bronwyn Byrnes.

9 Chris and Bronwyn are the obvious choices to author a book on discrimination law and practice. Chris is the leading practitioner in the field. She was instrumental in developing the *Sex Discrimination Act* and has appeared in some of Australia's most significant discrimination law cases, including *Wotton v State of Queensland (No 5)*[4] – the largest race discrimination claim in Australia since *Mabo*. Bronwyn is one of the most promising juniors in this area. Prior to being called to the Bar, she was a lawyer with the Australian Human Rights Commission and a research and policy advisor for the International Secretariat of Amnesty International.

10 I am very grateful to Chris and Bronwyn for one feature of the book in particular. Textbooks have a tendency to balloon in size and page count with each passing edition. In this regard Chris and her co-authors are to be commended for exercising considerable restraint. The first edition of *Discrimination Law and Practice* was 245 pages long, and the sixth is 309 pages long. With each edition, Chris and her co-authors have made significant changes, but managed to remove nearly as much as they have added to retain its essential character as a concise as well as accurate description of the law, with the result that the editions' page count have only increased by about 13 pages on average.

11 The book's concision can be attributed to the fact that the authors of each edition have always had the book's audience in mind. Chapter 1 of each edition states, in identical terms, that the book "is designed to assist lawyers, equal opportunity and industrial relations practitioners, human resource managers and people involved in employment decisions as well as students and anyone with a general interest in the law and its effect."

[4] Wotton v State of Queensland (No 5) (2016) 352 ALR 146.

12 The word “Practice” in the title is apt. Each edition is highly readable, practically focused and written in plain English. They contain useful summaries of the newest cases and references for further reading.

13 But its concise and practical approach does not mean that it is any less authoritative. It has been cited on multiple occasions, in the High Court,[5] the Federal Court,[6] the Supreme Court of Tasmania,[7] and various state tribunals.

14 Readers will find particularly useful Chapter 6 on “Harassment”, which has been substantially reworked. The authors have revised the section “Defining ‘harassment’” to clearly explicate, from first principles, the statutory definition of “sexual harassment” at section 28A of the *Sex Discrimination Act*. The authors have summarised the legal principles of the three essential elements in section 28A. These are, first, whether, whether any of the forms of conduct mentioned in subsection (1) have occurred as a question of fact; second, whether such conduct was unwelcome to the person harassed; and third, whether a reasonable person would have anticipated the possibility that the complainant would be offended, humiliated, or intimidated by such conduct.

15 Chapter 6 has also been updated in light of the amendments introduced by the *Respect at Work Amendment Act*. The Amendment Act gave effect to recommendations of the Respect@Work Report from the Australian Human Rights Commission. It aimed to make it easier for workers and employers to address sexual harassment and sex discrimination, as well as to support meaningful culture change in workplaces. The amendments include new sections 28AA and 28M in the *Sex Discrimination Act*, which prohibit sex-based harassment in section 28AA, and the prohibition on conduct that results in a hostile workplace environment on the basis of sex in section 28M. The most significant amendment is the creation of a positive duty on employers and persons conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, discrimination under

[5] *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62 at [94].
[6] *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334; [2014] FCAFC 82 at [86], [89]; *Tropoulos v Journey Lawyers Pty Ltd* (2019) 287 IR 363 at [324]-[325].
[7] *Jago v Anti-Discrimination Tribunal* [2021] TASSC 10 at [157].

the *Sex Discrimination Act*, sexual harassment, sex-based harassment, and hostile workplaces on the ground of sex and victimisation. Belinda Smith, Associate Professor at the University of Sydney, argues that the introduction of this duty has a powerful symbolic effect. It reframes sexual harassment, so that "[the] problem is seen not merely as an individual or private one but as a public problem, as something we all have an interest in addressing."[8]

16 Related to this new positive duty is the new function of the Australian Human Rights Commission to inquire into issues of systemic unlawful discrimination, or suspected systemic unlawful discrimination, in workplaces, which the authors have described in Chapter 3. The creation of this inquiry function is another step in shifting the onus of dealing with sexual harassment away from an individual, complaints-based system, to an independent regulator, businesses, organisations, and employers.

17 In Chapter 15, the authors address the insertion of Part 3-5A of the *Fair Work Act*, titled "Prohibiting Sexual Harassment in Connection with Work", made by the *Secure Jobs Better Pay Act*. New sections 527D and 527E prohibit the sexual harassment of workers, prospective workers and persons conducting a business or undertaking, and allow for an employer to be found vicariously liable for sexual harassment if they cannot prove that they took all reasonable steps to prevent it. One significant amendment is the ability for aggrieved persons to make an application to the Fair Work Commission for a "stop sexual harassment order" to prevent future harassment or to obtain compensation for past harm under a new dispute resolution framework.

18 The authors have done a commendable job in summarising these, and other, important legislative amendments. I look forward to reading their analysis of the prospective case law in edition seven.

[8] Belinda Smith, "Respect@Work Amendments: A Positive Reframing of Australia's Sexual Harassment Laws" (2023) 36(2) *Australian Journal of Labour Law* 145 at 162.

19 I congratulate Chris and Bronwyn on the publication of this outstanding edition. I encourage everybody to get a copy at the end of tonight's celebrations.

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