



Discrimination and Human Rights

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Introduction

The Australian Human Rights Commission describes human rights as:

- the recognition and respect of people's dignity
- a set of moral and legal guidelines that promote and protect a recognition of our values, our identity and ability to ensure an adequate standard of living
- the basic standards by which we can identify and measure inequality and fairness
- those rights associated with the Universal Declaration of Human Rights.

The *Australian Human Rights Commission Act 1986* (Cth) contains a limited definition of human rights used for the purposes of that Act. Human rights are defined as those rights and freedoms contained in specific international instruments that are scheduled to, or declared under, the Act. These instruments include:

- Convention Concerning Discrimination in Respect of Employment and Occupation (sch 1)
- International Covenant on Civil and Political Rights (sch 2)
- Declaration of the Rights of the Child (sch 3)
- Declaration on the Rights of Mentally Retarded Persons (sch 4)
- Declaration on the Rights of Disabled Persons (sch 5).

Discrimination and Human Rights Legislation

In Queensland, the law relating to discrimination and human rights is contained in six pieces of state and federal legislation:

- *Anti-discrimination Act 1991* (Qld) (Anti-discrimination Act)
- *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act)
- *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act)
- *Age Discrimination Act 2004* (Cth) (Age Discrimination Act).

The Australian Human Rights Commission administers the Commonwealth laws listed, and the Anti-discrimination Commission Queensland administers the Anti-discrimination Act.

There is a significant overlap in the jurisdiction of both state and Commonwealth laws, and complainants will be faced with a choice of whether to proceed under the state or the Commonwealth laws.

In most cases, the greater flexibility of the state laws and the wider range of grounds (known under the Anti-discrimination Act as attributes), together with the enforceability of conciliation agreements and decisions of the Queensland Civil and Administrative Tribunal (QCAT) means that it will be

better to proceed under the Anti-discrimination Act, however, legal advice is recommended. There are some areas where the Anti-discrimination Act has exclusive application, for example it prohibits discrimination and vilification against persons on the basis of religious belief and religious activity.

People who are not covered by the Anti-discrimination Act, for example Commonwealth Government employees or people who are complaining about the actions of a Commonwealth Government agency, must proceed under Commonwealth laws. This can lead to gaps in protection afforded to people such as a complaint of discrimination by a Commonwealth authority on the basis of religious belief.

Purpose and structure

As outlined in s 6 of the Anti-discrimination Act, the purpose and structure of the Act promote equal opportunity by protecting people from unfair discrimination. The Act also prohibits direct and indirect discrimination on various grounds in certain areas of activity (ss 12–116).

Complaints must be made and dealt with in the ways set out in the Anti-discrimination Act (ss 134–210), which contains a number of offence provisions (ss 219–226A).

Discrimination Explained

Direct discrimination

Direct discrimination is discrimination that occurs when a person with an attribute such as race, religion or age is treated, or proposed to be treated, less favourably than a person without that attribute in the same or not materially different circumstances (s 10(1) Anti-discrimination Act).

Other Queensland legislation support this objective such as the *Guide, Hearing and Assistance Dogs Act 2009* (Qld), which ensures that every person who relies on a guide, hearing or assistance dog has the same access rights as others to public places and public passenger vehicles. This includes cafes, restaurants, pubs, clubs, sports venues, taxis and buses.

Indirect discrimination

The Anti-discrimination Act defines indirect discrimination as imposing a term with which a person with an attribute cannot comply, with which a higher proportion of people without the attribute comply or are able to comply and which is not reasonable (s 11(1) Anti-discrimination Act).

The concept of indirect discrimination has caused significant difficulties in anti-discrimination legislation around Australia. Even the judges of the High Court have found it difficult to agree exactly how indirect discrimination is to be identified. An example would be: an employer decides to only employ people who are over 190 cm tall, although height is not pertinent to effective performance of the work. This disadvantages women and people of genetically shorter stature. The discrimination is indirect and unlawful because the height requirement is unreasonable.

Substantial reason test

When a person is discriminated against for two or more reasons, the Anti-discrimination Act requires that the discriminatory reason must be a ‘substantial reason’ for the treatment before action can be

taken. So long as a discriminatory reason was a substantial reason for an act, it is not necessary to establish that the discriminatory reason was the only reason for the act.

In contrast, the Commonwealth Acts all require that the discriminatory reason need only be one of the reasons for less favourable treatment, whether or not it is a substantial or dominant reason for the less favourable treatment. In practice, many people accused of discrimination claim that the alleged discriminatory reason for the unfavourable treatment is not substantial. They may claim instead that they acted for non-discriminatory reasons such as in employment situations where employers allege poor work standards or the worker's inability to get along with fellow workers. It is critical to obtain either direct evidence of the reason for the discrimination, or evidence that is so strong that an inference can be drawn that the discriminatory reason was the actual reason that the unfavourable treatment occurred.

Prohibited Grounds of Discrimination

Section 7 of the Anti-discrimination Act prohibits discrimination on the following attributes:

- sex
- relationship status
- pregnancy
- parental status
- breastfeeding
- age
- race
- impairment
- religious belief or activity
- political belief or activity
- trade union activity
- lawful sexual activity
- gender identity
- sexuality
- family responsibilities
- association with, or relation to, a person identified on the basis of any of those attributes.

Discrimination on the grounds of any of these attributes is broadly defined to include discrimination on the grounds of any characteristics the person with that attribute generally has, is often imputed to have or imputed to have even if the person did not have it at the time of discrimination (s 8 Anti-discrimination Act).

Prohibited Areas of Activity for Discrimination

The Anti-discrimination Act contains 10 specific areas of activity in which discrimination is prohibited:

- work and work-related areas (ss 13–23)
- education (ss 37–39)
- goods and services (ss 45–46)
- superannuation (ss 52–57)
- insurance (ss 66–71)
- disposition of land (ss 76–77)
- accommodation (ss 81–85)
- club membership and affairs (ss 93–95)
- administration of state laws and programs (s 101)
- local government (s 102).

General Exemptions for Discrimination

The following general exemptions, where discrimination is not unlawful, are set out in the Anti-discrimination Act:

- welfare measures (s 104)
- equal opportunity measures (s 105)
- acts done in compliance with legislation (s 106)
- compulsory retirement age (s 106A)
- citizenship or visa requirements imposed under state government policies (s 106B)
- accommodation for use in connection with work as sex worker (s 106C)
- public health (s 107)
- workplace health and safety (s 108)
- religious bodies such as the ordination and training of priests (s 109)
- charities (s 110)
- sport (s 111)
- legal incapacity (s 112).

Applications for exemptions

In addition, s 113 of the Anti-discrimination Act allows applications to be made to QCAT for an exemption that, if granted, is for a specified period of up to, but not more than, five years.

For example, an exemption was granted that allowed certain real estate agents in certain geographical localities to charge bonds on holiday accommodation at certain times of the year, so long as the bonds were charged to all people who rented accommodation at the premises where the bonds were being charged. An exemption is renewable on application for further periods of up to, but not more than, five years.

When an application for an exemption is made, QCAT must notify the Anti-discrimination Commission. The tribunal must have regard to any submission made by the commission. The commissioner can make submissions about the application process and about:

- whether a public hearing should occur
- identification of persons who might be affected by the application
- whether the public should be consulted
- how consultation should be conducted.

The tribunal can request that the commission inquire into the application and report back to QCAT.

Sexual Harassment

The sexual harassment provisions of the Anti-discrimination Act (ss 117–120) prohibit sexual harassment, and allow complaints of sexual harassment to be made and dealt with under the same procedures for dealing with other complaints of unlawful discrimination under the Act. Sexual harassment complaints are the largest single area of complaint to the Queensland Anti-discrimination Commission.

Sexual harassment is not restricted to specific areas of activity (e.g. occurring in employment or education) that apply to all the other attributes of discrimination. The prohibition against sexual harassment applies in all spheres of life, both public and private.

Sexual harassment is not restricted to the harassment of women by men or men by women; it can be between persons of the same sex.

Definition of sexual harassment

The definition of sexual harassment (s 119 Anti-discrimination Act) is extremely wide and lists some examples of sexual harassment. Sexual harassment includes, but is not limited to, the following conduct:

- unsolicited acts of physical intimacy (e.g. touching, hugging, kissing, unzipping of uniforms, fondling and pinching of breasts and genitals, rubbing against a person in a sexual way and acts of sexual intercourse)
- unsolicited demands or requests for sexual favours or the offer of money for sex

- remarks with sexual connotations addressed to a person (e.g. offers of marriage, comments about the size of a person's breasts and questions about a person's sex life)
- other unwelcome conduct of a sexual nature, such as showing pornographic videos, websites or photographs and the exposure of a person's sexual organs.

Intention to harass

Behaviour can only be classified as sexual harassment if one of two criteria is satisfied:

- the person performing it has an intention to offend, humiliate or intimidate the person subject to the alleged sexual harassment
- a reasonable person would have anticipated the possibility that the person who was subjected to the conduct would be offended, humiliated or intimidated by the conduct (ss 119(e)–(f) Anti-discrimination Act).

Circumstances to be taken into account

Section 120 of the Anti-discrimination Act lists circumstances that can be taken into account when looking at whether a person should have anticipated that another person would be offended, humiliated or intimidated by their conduct. These circumstances include the age, sex, race of the person, any impairment the person has, and the relationship between the people involved and any other circumstances of that person.

Associated objectionable conduct

If a person displays objectionable conduct by requesting or encouraging another person to contravene the Anti-discrimination Act, such persons, if joined, become jointly and severally (individually) liable under the Anti-discrimination Act for any discriminatory conduct, and a proceeding may be taken against both or either of them (ss 121–123 Anti-discrimination Act).

Vilification

Under s 124A of the Anti-discrimination Act, vilification is unlawful. Vilification is, by a public act, the incitement of hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of race, religion, sexuality (defined as heterosexuality, homosexuality, bisexuality (s 4 Anti-discrimination Act) or gender identity (defined as a person who identifies or has identified as a member of the opposite sex by living or seeking to live as a member of that sex, or is of indeterminate sex and seeks to live as a member of a particular sex)) of a person or members of a group. A public act is broadly defined and includes communications to the public by (s 4A Anti-discrimination Act):

- speaking
- writing
- printing
- displaying notices

- broadcasting
- telecasting
- screening or playing of tapes or other recorded material
- electronic means.

A public act also includes any conduct that is observable by the public, including:

- actions
- gestures
- the wearing or displaying of clothing, signs, flags, emblems or insignia.

There are three exceptions (s 124A(2) Anti-discrimination Act) to the vilification provision:

- the publication of a fair report of a public act
- the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation
- a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about and expositions of any act or matter.

Discriminatory advertising

The Anti-discrimination Act makes it unlawful to publish or display an advertisement that indicates that a person intends to contravene the Act (s 127 Anti-discrimination Act). Exemptions from this provision are heard by QCAT and have included cases of recruitment for gender-based services (see *YFS Ltd* [2015] QCAT 295; *Pink Army Handywomen* [2011] QCAT 395; *Women's Legal Service Inc.* [2014] QCAT 315).

Victimisation in Discrimination Matters

Victimisation includes where a person does or threatens to do an act because another person (s 129 Anti-discrimination Act):

- refuses to do something that would be unlawful
- has alleged or intends to allege that an act would be unlawful
- is involved or intends to be involved in proceedings under the Act.

For example, victimisation may include where a person who has made a complaint of discrimination is further subjected to unfavourable treatment after, and because of, having made a complaint.

Discrimination Complaints – Employer’s Liability for the Acts of Workers

The basic scheme of the Anti-discrimination Act is to make discrimination unlawful and to allow people to lodge complaints and, where the complaint cannot be resolved, to also proceed with a civil action against the other person concerned.

Vicarious liability

The Anti-discrimination Act contains stringent provisions with respect to vicarious liability (s 133) (i.e. a person or company’s responsibility for the acts of employees or agents).

A person is vicariously liable for the acts of their workers or agents unless they can prove, on the balance of probabilities, that they took reasonable steps to prevent contraventions (s 133(2) Anti-discrimination Act).

In order to show that reasonable steps had been taken, an employer would have to show that:

- the recruitment and selection of staff was non-discriminatory
- educational programs about discrimination and sexual harassment were operating for staff
- the employer had a specific well-publicised policy on discrimination and sexual harassment
- the employer had an effective complaints mechanism to deal with complaints of discrimination and sexual harassment
- employees had equitable access to benefits, promotion and training, and well-informed and responsible supervisors.

The reverse onus provisions governing vicarious liability place a burden on employers (for a detailed example see the case *Boyle v Ozden & Ors* (1986) EOC 92–165).

Making a Discrimination Complaint

Any person who wishes to take action under the Anti-discrimination Act can do it themselves, through an agent or, if they lack capacity to act, through a person appointed on their behalf by the Anti-discrimination Commissioner.

Additionally, complaints of vilification can be made by a relevant entity (s 134 Anti-discrimination Act) if the following conditions are satisfied:

- The complaint is made in good faith.
- The complaint is about relevant persons for the relevant entity (e.g. a complaint of vilification on the basis of a particular sexuality lodged by an association that promotes the interests or welfare of people of the same particular sexuality).
- It is in the interests of justice to accept the complaint.

The Anti-discrimination Act defines ‘complainant’ to include (s 4):

- the person subject of the alleged contravention of the Act

- a relevant entity who has made a complaint as a relevant entity
- a person, in relation to a representative complaint, named in the complaint or otherwise identified in the complaint as a person on whose behalf the complaint is being made.

Complaints must be in writing, state the complainant's address for service and contain sufficient details to identify a contravention of the Anti-discrimination Act (s 136). Complaints must be made within one year of the action complained of. However, the Anti-discrimination Commissioner has the discretion to extend that time period, but there must be a good explanation for the delay (s 138 Anti-discrimination Act). When considering the explanation, the commission will take into consideration the relevant circumstances of the particular case:

- the length of the delay
- whether the delay is attributable to the acts or omissions of the act of the complainant or their legal representatives, the respondent, or both
- the circumstances of the complainant
- whether there has been a satisfactory explanation for the delay
- whether or not the delay will cause prejudice to the respondent (see the case *Buderim Ginger Ltd v Booth* [2002] QCA 177).

Once a complaint has been lodged, the commissioner has 28 days to accept or reject the complaint. Once accepted, the commission must notify the respondent to the complaint and include a range of information in that notification (s 143 Anti-discrimination Act). The commissioner then investigates and conciliates the complaint.

Respondents to complaints must give the commission an address where documents can be sent to, and if they file a written response to a complaint, a copy must be provided to the complainant and any other respondents.

Prisoner complaints

The State of Queensland and anyone contracted by the state are now classified as protected defendants for the purposes of the Anti-discrimination Act in relation to complaints by offenders (s 319A *Corrective Services Act 2006* (Qld) (Corrective Services Act)). This means that any complaints of discrimination, sexual harassment or vilification that occur in prison or while under supervision (e.g. probation or community service order) must first be addressed in writing to the chief executive who then has a maximum of four months to resolve the complaint (s 319E Corrective Services Act). If still unsatisfied, a written complaint can then be made to the official visitor who has a further month to attempt resolution (s 319F Corrective Services Act). Only after this process has been exhausted can a complaint be made to the Anti-discrimination Commission Queensland. This delay does not extend the limitation periods for lodging a complaint with the commission, which remains 12 months from the date of the discrimination, sexual harassment or vilification. It may be arguable that any delay caused by this prescribed process would be a consideration under s 138 of the Anti-Discrimination Act if a complaint were lodged out of time.

A test of reasonableness has also been specifically defined and applied to instances of both direct and indirect discrimination. Monetary compensation for discrimination, sexual harassment and vilification will only occur when bad faith can be proven, and such compensation will be frozen (see the chapter on Prisons and Prisoners).

Retrospective complaints

The Anti-discrimination Act is not retrospective, so complaints can only be lodged with respect to events that occurred after 30 June 1992. However, events that occurred before that date can be relevant as background to discrimination that occurred after that date. Other legislation may have been in existence at the relevant time, and a complaint may be made to the Australian Human Rights Commission (AHRC) in such matters. Any application lodged in these circumstances would need to include an explanation of why the complaint has been made outside the relevant time limitations.

Investigations

Once a complaint is received, the commission will normally investigate the complaint. The Anti-Discrimination Act gives the commission broad powers to obtain information and documents (ss 155–157).

Representative complaints

In certain circumstances, the commissioner can decide to deal with a complaint as a representative complaint (i.e. a class action) (ss 146–152 Anti-discrimination Act). This would be possible when many people are affected by a particular aspect of discrimination.

Such representative complaints have not been widely used in Australia so far, but the Queensland provisions allow considerable scope for representative complaints to be conducted. It should be noted that a representative complaint differs from a complaint made by a relevant entity.

Rejection of a Discrimination Complaint

According to the Anti-discrimination Act, the commissioner can reject a complaint if:

- it is outside the 12-month time limit (s 138)
- it is frivolous, trivial or vexatious, misconceived or lacking in substance (s 139)
- there are concurrent proceedings in a court or tribunal in relation to the act or omission that is the subject of the complaint (s 140).

It is possible to ask for reasons for a rejection, but this must be done within 28 days (s 142 Anti-discrimination Act). There is no provision for an appeal from a decision of the commission to reject a complaint within the Anti-discrimination Act.

The only avenue open to a complainant whose complaint has been rejected by the commissioner is to apply to the Supreme Court under the *Judicial Review Act 1991* (Qld) for a review of the commissioner's decision (see the chapter on *Complaints about Government*).

Any application would need to be based on one of the grounds of review that are available under that Judicial Review Act, such as that the Anti-discrimination Commission failed to take into account a relevant consideration or took into account an irrelevant consideration.

Conciliation Regarding Discrimination Complaints

The Anti-discrimination Commissioner is obliged to attempt to resolve a complaint by conciliation if the commissioner thinks it can be resolved in that way (ss 158–164AA Anti-discrimination Act).

The commissioner can direct a person to attend a conciliation conference and, if necessary, enforce that direction as a court order (s 159 Anti-discrimination Act). The commissioner can order costs against a person who fails to attend at a conciliation conference (s 160 Anti-discrimination Act). Additionally, a respondent can request that the commission conduct an early conciliation conference without providing a written response.

What is conciliation?

Conciliation is not defined by the Anti-discrimination Act. In general terms, conciliation is an alternative dispute resolution process by which the parties to the complaint come together with the assistance of a third party (the conciliator). It is the conciliator's role to assist the settlement of the dispute without telling the parties involved what they must do. However, a conciliator may suggest possible settlement terms to either or both parties.

The conciliation conference is held in private (s 161 Anti-discrimination Act). Interpreters may be present (s 162 Anti-discrimination Act), but representation (legal or otherwise) is allowed only with the commissioner's permission (s 163 Anti-discrimination Act) or the permission of the conciliator conducting the conciliation on the day. As a general rule, representation (legal or otherwise) will be allowed unless the representative is so disruptive that their continued presence is not assisting with the process of conciliation.

Procedure for conciliation

The usual procedure for conciliation is that both parties meet in a conference room at the Anti-discrimination Commission's office. However, it does not have to be a face-to-face meeting and could be conducted by phone or in separate rooms.

One or two conciliators from the commission conduct the conference. To begin with, one of the conciliators will welcome the parties to the conference, introduce all persons present to each other and then set down the basic ground rules for the conciliation. The usual ground rules will be that the conciliation conference procedure is entirely confidential, that each of the persons concerned should listen to and not interrupt the other party when they are speaking, that the whole purpose of conciliation is to attempt to find a settlement, and that the conciliator's job is to take a neutral position and assist the parties in resolving their dispute. The conciliator then normally provides an oral summary of the complaint and a summary of the investigations of the commission as well as any response by the respondent.

Once this introduction has been given, the conciliator will then call on the complainant to talk about the complaint and in due course ask the respondent to respond. The matter then proceeds with

discussion from both sides, assisted by the conciliators. Each side can at any time speak privately with their legal representative, with the conciliator or both. Sometimes, the conciliation proceeds with the parties in separate rooms and the conciliator acting as a go-between until the matter has been settled.

Conciliated agreements

If the conference does resolve the complaint with an agreement, the terms of the agreement must be recorded, signed by both the complainant and the respondent, and then filed with the relevant tribunal (s 164 Anti-discrimination Act). Once this occurs, the conciliation agreement is then enforceable as if it were an order of the tribunal. The order can be filed in a court of competent jurisdiction and enforced as an order of that court.

If the order covers monetary matters only, it can be enforced in the Magistrates Court up to a \$150 000 limit, in the District Court from \$150 000 to \$750 000 and in the Supreme Court for any amount above \$750 000.

Criminal Offences under the Anti-discrimination Act

The Anti-discrimination Act provides that certain acts are criminal offences. These can be prosecuted in the Magistrates Court and include:

- publishing or displaying a discriminatory advertisement (s 127)
- victimisation of another who is proceeding or who intends to proceed under the Anti-discrimination Act (s 129)
- serious racial, religious, sexuality or gender identity vilification (s 131A).

The Anti-discrimination Act also makes it an offence to ignore or interfere with the various directions and orders that the Queensland Anti-discrimination Commissioner or QCAT may make, and to prevent the commissioner from carrying out the functions of the commission. The Act also contains provisions that prevent the misuse of information by staff of the commission and QCAT.

Tribunal Hearings of Discrimination Complaints

A complainant can make a request that the Anti-discrimination commissioner refer the matter to the Queensland Industrial Relations Commission (QIRC) if the complaint is or includes a work-related matter or to QCAT for all other types of complaint (ss 164A, 166 Anti-discrimination Act). This request must be made in writing and can be made where a complaint:

- is not resolved by conciliation
- was not subject to the conciliation process
- is unresolved for six months or more.

Nothing said or done in conciliation proceedings can be submitted in evidence before the relevant tribunal (s 164AA Anti-discrimination Act), although it is usual for the commissioner to provide a report to QCAT or the QIRC. The report does not detail the events that took place in the conciliation hearing, but only that the complaint could not be resolved by conciliation. Investigation reports can be provided by the Anti-discrimination Commission but will not contain any oral record of evidence.

The tribunal is not bound by the rules of evidence or any practices or procedures applying to courts of record, other than to the extent the tribunal adopts the rules, practices or procedures. Despite this, QCAT and the QIRC will often apply many of the fundamental rules of evidence (e.g. the rule relating to hearsay evidence), which prevent a person from giving evidence about what someone else told them, unless they intend to call that person to give evidence as well.

The Anti-Discrimination Act provides some guidelines about how hearings before QCAT and the QIRC are to be conducted. These guidelines include that QCAT and the QIRC (s 208):

- must have regard to the reasons for the enactment of this Act as stated in the preamble
- may draw conclusions of fact from any proceeding before a court or tribunal
- may adopt any findings or decisions of a court or tribunal that may be relevant to the hearing
- may receive in evidence a report of the commissioner, but only if each party to the hearing has a copy of the report
- may permit any person with an interest in the proceeding to give evidence
- may permit the commissioner to give evidence on any issue arising in the course of a proceeding that relates to the administration of the Anti-discrimination Act.

Once a matter is before QCAT or the QIRC, other parties can be joined to the action (ss 42, 117 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) and s 539 *Industrial Relations Act 2016*) and complaints can be amended (s 178 Anti-discrimination Act).

The hearings of QCAT are held in public unless QCAT otherwise directs (s 90 QCAT Act).

The complainant must prove their case on the balance of probabilities. Any exemption claimed by the respondent must be proved by the respondent on the balance of probabilities (ss 204–205 Anti-discrimination Act). The balance of probabilities means a fact is proved to be true if its existence is more probable than not.

Representation of parties and support persons

Representation of parties before QCAT and the QIRC is allowed only with the leave of the tribunal (ss 6, 43 QCAT Act and s 530(1)(c) if the *Industrial Relations Act 2016*). QCAT will consider the following as circumstances supporting the giving of the leave for representation:

- the party is a state agency
- the proceeding is likely to involve complex questions of fact or law
- another party to the proceeding is represented in the proceeding
- all of the parties have agreed to the party being represented in the proceeding.

Additionally, in private hearings, a support person may be allowed to assist. The QIRC may give leave for representation only if:

- it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter, or

- it would be unfair not to allow the party or person to be represented because the party or person is unable to represent themselves, or
- it would be unfair not to allow the party or person to be represented having regard to fairness between the party or person, and other parties or persons in the proceedings.

Tribunal procedure

The tribunal usually holds a compulsory conference where a member of QCAT or the QIRC gives directions about how the complaint is to proceed to hearing. Such directions usually require the complainant to file contentions followed by a requirement that the respondent file contentions. In addition, orders or directions may be made for both sides to produce a list of documents (known in the regular courts as disclosure), and how and where each side gets to see all the relevant documents that the other side has or had in their possession. It may also make orders or directions about when and how both sides are to file evidence-in-chief by way of affidavits. A timetable will be set for the parties to comply with each step of the directions.

It should be noted that any failure to comply with orders made by QCAT or the QIRC may be subject of an application to enforce compliance, and an order for costs may be made against the party that failed to comply with the order.

Tribunal Powers in Discrimination Matters

The Queensland Civil and Administrative Tribunal (QCAT) and the QIRC both have the power to order further conferences or mediations and will also encourage parties to consider potential avenues of settlement or compromise, should it become obvious that there is room for negotiation between the parties.

The tribunals have a range of other powers including to (ss 57–65 QCAT Act and s 536-540):

- take evidence on oath
- act in the absence of a party who has had reasonable notice of a proceeding
- adjourn a proceeding
- make interim orders
- grant injunctions
- require a person appearing before the tribunal to give evidence on oath
- make declarations
- make directions
- obtain documents or things from third parties
- amend documents
- deal with documents.

Orders

Once QCAT or QIRC have conducted their hearing, the Anti-Discrimination Act provides broad powers to make orders. If the complaint is proven, orders that can be made include:

- requiring the respondent not to commit a further contravention of the Anti-discrimination Act against the complainant or another person
- requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention
- requiring the respondent to do specified things to redress loss or damage suffered by the complainant and another person because of the contravention
- requiring the respondent to make a private apology or retraction
- requiring the respondent to make a public apology or retraction by publishing the apology or retraction in the way and in the form stated in the order
- requiring the respondent to implement programs to eliminate unlawful discrimination
- requiring a party to pay interest on an amount of compensation
- declaring void all or part of an agreement made in connection with a contravention of the Anti-discrimination Act (s 209).

The tribunal can dismiss a complaint (s 210 Anti-discrimination Act) and provide written reasons for its decision.

Orders of QCAT can be enforced in a court of competent jurisdiction.

Interim orders

Once a complaint has been referred to QCAT or the QIRC, the tribunal has power to make interim orders.

Protecting a complainant's interest

It is possible to apply to QCAT or the QIRC for an interim order to protect a complainant's interest before a complaint has been referred to QCAT or the QIRC (ss 144, Anti-Discrimination Act). The tribunal will consider making such orders where it considers appropriate in the interests of justice, for example:

- to protect a party's position for the duration of the proceeding
- to require or permit something to be done to secure the effectiveness of the exercise of the tribunal's jurisdiction for the proceeding.

Any such order (if obtained) can be filed and enforced in a court of competent jurisdiction. For example, a person who was about to be dismissed could apply to the QIRC immediately after lodging a complaint seeking an order that they remain employed until such time as the complaint was either conciliated or proceeded to a hearing before the QIRC.

In order to obtain an interim order, QCAT or the QIRC has to decide whether:

- there is a serious issue to be tried
- the balance of convenience favours granting the interim order.

In making an interim order, QCAT may:

- require an undertaking as to costs or damages it considers appropriate
- may provide for the lifting of the order if stated conditions are met.

The tribunal can also order an injunction on an interim or temporary basis (s 59 QCAT Act).

Orders for non-publication and to preserve anonymity

The Anti-discrimination Commissioner can make an order to preserve the anonymity of the complainant (s 145 Anti-discrimination Act). This can be done if necessary to protect the work security, privacy or any human right of the person. This will apply to proceedings before the commission. Likewise, QCAT can make non-publication orders (s 66 QCAT Act), which cover a range of things including:

- the contents of a document or other thing produced to the tribunal
- evidence given before the tribunal
- information that may enable a person who has appeared before the tribunal or is affected by a proceeding to be identified.

In making these orders, QCAT must decide they are necessary:

- to avoid interfering with the proper administration of justice
- to avoid endangering the physical or mental health or safety of a person
- to avoid offending public decency or morality
- to avoid the publication of confidential information or information whose publication would be contrary to the public interest
- for any other reason in the interests of justice.

Orders for costs

In addition, QCAT and the QIRC have the power to award costs even though the general rule is that each party bears its own costs (ch2 pt 6 div 6 QCAT Act, Schedule 2 *Industrial Relations Act*). In deciding whether to award the costs, QCAT will consider a number of matters including:

- the general rule that parties bear their own costs
- costs will not be ordered against children
- costs against a party must be in the interests of justice.

Factors taken into account include:

- the relative strengths of the claims made by each of the parties to the proceeding
- whether the applicant was afforded natural justice by the decision maker for the decision for a proceeding for the review of a reviewable decision
- whether the applicant genuinely attempted to enable and help the decision maker to make the decision on the merits
- the financial circumstances of the parties to the proceeding
- anything else the tribunal considers relevant.

Certain costs rules apply to formal offers to settle, and advice should be taken before any offer to settle is rejected.

Appeals in Discrimination Matters

An appeal is available within the QCAT structure to the Appeal Tribunal. If the decision was made by a judicial member, an appeal lies to the Court of Appeal (a division of the Supreme Court). Appeals must be lodged within 28 days of the written reasons for a decision being provided, and in some cases leave is required before an appeal can be lodged.

An appeal is available within the QIRC structure to the Industrial Court of Queensland. Appeals must be lodged within 21 days of the date of the decision.

Appeals involve complicated procedures and legal advice should always be taken about the grounds of any appeal, its likely success and the consequences if it fails.

Opinions

The Anti-discrimination Commissioner can also request an opinion from QCAT or the QIRC as to how the Anti-discrimination Act applies in a specific situation (s 228 Anti-discrimination Act). The tribunal will be constituted by a judicial member in these cases (s 228A Anti-discrimination Act), and the tribunal does not have to give an opinion (s 229 Anti-discrimination Act) but can choose to. Once an opinion has been obtained from the relevant tribunal, a complaint cannot be made to the commissioner against a person acting in accordance with such an opinion (s 231 Anti-discrimination Act). The opinion of the tribunal can be revoked (s 232 Anti-discrimination Act) and it can be appealed (s 233 Anti-discrimination Act).

Racial Discrimination

The *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act) implements Australia's obligations under the United Nations International Convention on the Elimination of all Forms of Racial Discrimination (contained in the schedule of the Act).

The Racial Discrimination Act makes it unlawful throughout Australia to discriminate against any person on the grounds of race, particularly in employment, accommodation, access to public places and the provision of goods and services, and it establishes a Race Discrimination Commissioner who

is a part of the Australian Human Rights Commission (AHRC) (s 19 *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act)).

The AHRC is given the following functions by s 20 of the Racial Discrimination Act:

- to promote an understanding and acceptance of the Act
- to develop and conduct research and educational programs to combat racial discrimination
- to prepare and publish guidelines on avoiding discrimination
- to intervene in court proceedings that involve racial discrimination issues
- to inquire into and make determinations on matters referred by the minister or commissioner.

What is racial discrimination?

The Racial Discrimination Act defines racial discrimination as any act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin (s 9 Racial Discrimination Act). This definition is based on Article I of the International Convention on the Elimination of all Forms of Racial Discrimination.

It is unlawful to discriminate on the basis of any of these matters. It is also unlawful to discriminate on the grounds of a characteristic assumed to belong to a particular race or to treat a person less favourably on the basis of the race of a person with whom they live or mix.

Section 9 of the Racial Discrimination Act makes direct and indirect discrimination unlawful. When a person discriminates on the grounds of race, but that is only part of the reason for the action, it is nevertheless unlawful, even if the discriminator's reason was not the dominant or substantial reason (s 18 Racial Discrimination Act). There must be a connection between the discrimination and the race, colour, descent, or national or ethnic origin of the complainant (s 18C Racial Discrimination Act).

Areas of racial discrimination

The Racial Discrimination Act makes it unlawful to practice racial discrimination regarding:

- the right of equality before the law (s 10)
- the access to, or use of, public places and facilities (s 11)
- land, housing or other accommodation (s 12)
- the provision of goods and services (s 13)
- the right to join trade unions (s 14)
- employment (s 15)
- advertising (s 16).

Exceptions

The exceptions to the prohibition of racial discrimination are expressly set out in s 8 of the Racial Discrimination Act. The exceptions include cases when charitable benefits are conferred on persons

of a particular race or ethnic group by will or deeds, or where affirmative action measures are taken to secure the necessary and adequate advancement of a racial or ethnic group by will or deeds.

‘Charitable’ is interpreted according to the law in the relevant state or territory. A registered charity means an entity that is registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

Racial discrimination by governments

Governments themselves sometimes practise racial discrimination. Complaints of discrimination may be made against both the Commonwealth and the Queensland governments (s 6 Racial Discrimination Act).

Racial discrimination by media

News media frequently act in a discriminatory manner against people or groups on the grounds of their race.

However, the way in which news reports are written or spoken makes it difficult to take action under the Racial Discrimination Act, because media reports are usually couched in general terms and refer to ethnic groups not to individuals. However, action may sometimes be possible against the media because the Racial Discrimination Act makes it unlawful to incite, assist or promote the doing of an act that is unlawful (s 17 Racial Discrimination Act).

Other unlawful acts

Under the Racial Discrimination Act, it is also an offence for a person or company to:

- hinder, obstruct, molest or interfere with a person exercising or performing any of the powers or functions (s 27(1))
- victimise any person who has tried to exercise their rights under the Racial Discrimination Act or has helped others to do so (s 27(2)).

A penalty of up to \$18 000 may be imposed for contravention of the Racial Discrimination Act by a body corporate, or \$4500 or three months imprisonment for a natural person.

It is unlawful to encourage, assist or support a person in committing an act that is unlawful, including provision of financial assistance to a person (s 17(b) Racial Discrimination Act).

Affirmative action

Affirmative action taken to advance the position of disadvantaged groups is not prohibited. Article 2 of the International Convention on the Elimination of all Forms of Racial Discrimination provides that such affirmative action is not to be defined as discrimination for the purpose of this area of law.

Sex Discrimination

The *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) implements Australia’s international obligations under the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (contained in the schedule of the Sex Discrimination Act) and certain aspects of the International Labour Organisation (ILO) Convention 156.

The Sex Discrimination Act outlaws sex discrimination on the basis of:

- sex
- sexual orientation
- gender identity
- intersex status
- marital or relationship status
- family responsibilities
- pregnancy or potential pregnancy
- breastfeeding

in important areas of everyday life such as:

- employment
- education
- accommodation
- provision of goods, services and facilities
- transfer of land
- licensed clubs
- administration of Commonwealth laws and programs.

What is sex discrimination?

Sex discrimination is defined as the less favourable treatment of a person because of their sex. Discriminatory treatment is treatment that is less favourable than the treatment accorded to people of the opposite sex in the same or similar circumstances (s 5 Sex Discrimination Act). Sex discrimination also includes less favourable treatment because of characteristics that generally appertain to a sex (e.g. women are generally smaller than men) or because of characteristics merely imputed to a sex (e.g. women are afraid of mice).

Sexual orientation (s 5A Sex Discrimination Act) means a person's sexual orientation towards persons of the same sex, persons of a different sex or persons of the same sex and persons of a different sex. Some terms used to describe a person's sexual orientation include gay, lesbian, homosexual, bisexual, straight or heterosexual. The definition does not use labels, as these may be offensive or inaccurate; however, it is intended to cover these orientations.

Gender identity (s 5B Sex Discrimination Act) means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person. The Act provides protection from discrimination for people who identify as men, women and neither male nor female. It does not matter what sex the person was assigned at birth or whether the person has undergone any medical intervention.

Intersex status (s 5C Sex Discrimination Act) means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male or a combination of female and male or neither female nor male. Being intersex is about biological variations, not about a person's gender identity. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or other sex. Intersex people typically also have a gender identity and sexual orientation.

Marital or relationship status includes a person's status of being any of the following:

- single
- married
- married, but living separately and apart from their spouse
- divorced
- the de facto partner of another person
- the de facto partner of another person, but living separately and apart from that other person
- the former de facto partner of another person
- the surviving spouse or de facto partner of a person who has died.

Similarly, discrimination on the ground of marital status occurs when a person is treated less favourably because of their marital status (or its characteristics) than people of different marital status would be treated in the same or similar circumstances (s 6 Sex Discrimination Act).

Discrimination on the grounds of pregnancy (or its characteristics) or potential pregnancy occurs if a person who is or may be pregnant (or who has expressed a desire to be pregnant, or is perceived to be likely to become pregnant) is treated less favourably than someone who is not pregnant or potentially pregnant would be treated in the same or similar circumstances. The Sex Discrimination Act has the additional requirement that the treatment of the pregnant person must be unreasonable in the circumstances (s 7B).

Treating a person who is pregnant more favourably than another person who is not pregnant is not discrimination under the Sex Discrimination Act.

Discrimination on the basis of family responsibilities occurs when an employer treats an employee with family responsibilities less favourably than one without such responsibilities in the same or similar circumstances. Family responsibilities include responsibilities of the person to care for or support a dependent child of the person or any other immediate family member who is in need of care and support (s 4A Sex Discrimination Act).

Discrimination on the basis of breastfeeding occurs when a person discriminates against a woman on the ground of her breastfeeding (s 7AA Sex Discrimination Act). It also includes the act of expressing milk and the process of breastfeeding over a period of time.

Reasons for sex discrimination

If someone performs an act for more than one reason, and one of those reasons is sex discrimination against a person, then that act is unlawful (s 8 Sex Discrimination Act). It does not matter if the reason that involves discrimination is not the main or substantial reason for the action. It is enough if discrimination is only a minor reason for doing the act. However, some connection between the discrimination and the complainant's sex, sexual orientation, gender identity, intersex status, marital or relationship status, family responsibilities, pregnancy, potential pregnancy or breastfeeding status must be evident.

Sex discrimination in employment

The Sex Discrimination Act applies to all aspects of employment (e.g. full-time, part-time, temporary or casual) including:

- advertising requirements for a job. Employment agencies, qualifying bodies and some trade unions are also forbidden to discriminate on the basis of sex, marital status or pregnancy (ss 14–19)
- training and promotion applying to partnerships of six people or more in relation to dealings between partners and invitations to become partners
- terms and conditions of employment; this applies to commission workers (e.g. real estate agents and contract workers).

Sexual harassment at work

The Sex Discrimination Act also deals with sexual harassment in the workforce. Sexual harassment is broadly defined to include an unwelcome sexual advance, an unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, which can include statements (oral or written) of a sexual nature. It occurs when a reasonable person would have anticipated in the circumstances that the person harassed would be offended, humiliated or intimidated (s 28A Sex Discrimination Act).

A person can complain about sexual harassment if they have good reason to believe that if they refuse a sexual advance or object to a person's conduct, they will be disadvantaged in their job or they are actually disadvantaged in their job as a result of the refusal or objection.

If male co-workers make continual comments about a woman's sex life, and she is told not to be a stirrer when she complains to her employer, she can lodge a complaint if she is offended, humiliated or intimidated. The courts have found that 'work' is to be given a broad interpretation and can include situations such as staff accommodation quarters and work-related conferences.

Affirmative action in employment

The Sex Discrimination Act allows for affirmative action in employment policies (i.e. policies aimed at ensuring that people of each sex may enjoy equal employment opportunities). The philosophy behind affirmative action is that all potential employees should be judged on the basis of merit not on a prejudgment about what persons of one sex are able to achieve in employment.

The *Workplace Gender Equality Act 2012* (Cth) requires businesses employing over 100 people and higher education institutions to lodge annual reports containing information about gender equality indicators. Subject to some exceptions, these reports are made available to the public.

Sex discrimination in education

Section 21 of the Sex Discrimination Act prohibits discrimination in the following areas of education:

- admission to an educational institution
- the terms and conditions of admission
- access to benefits provided by the institution
- expulsion of students or subjecting them to any other detriment.

The Sex Discrimination Act applies to all levels of education.

Section 28F of the Sex Discrimination Act protects students from sexual harassment by staff of schools and tertiary institutions (universities and colleges of advanced education), and it protects staff and adult students from harassment by adult students.

Sex discrimination in the provision of goods, services and facilities

Section 22 of the Sex Discrimination Act seeks to ensure that no-one can be stopped from getting goods, services and facilities because of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy or breastfeeding status.

Sex discrimination in accommodation

A person cannot be refused accommodation, offered different conditions, evicted or put lower on a waiting list because of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy or breastfeeding status (s 23 Sex Discrimination Act). There is an exemption for accommodation provided by a religious body in connection with the provision, by the body, of Commonwealth-funded aged care.

Sex discrimination in clubs and sport

Licensed clubs cannot discriminate against people because of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy or breastfeeding status (s 25 Sex Discrimination Act).

This means a club cannot discriminate in deciding who will be allowed to be a member, the terms and conditions of a person's membership and their access to club facilities.

Women and girls of 12 years of age or older can be excluded from team sports in which the strength, stamina or physique of competitors is relevant.

Exemptions

The Sex Discrimination Act provides for a number of exemptions in all areas outlined above.

Some jobs genuinely require a person of a particular sex. When a preference for an employee of a particular sex reflects a genuine occupational qualification, the Sex Discrimination Act provides that it is not unlawful to employ a person of that particular sex (s 30(1) Sex Discrimination Act). Section 30(2) lists circumstances in which a person's sex will be a genuine occupational qualification. Such circumstances arise when:

- the duties of the position can be performed only by a person having particular physical attributes (other than attributes of strength or stamina) that are not possessed by persons of the opposite sex
- the duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex
- the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex
- the duties of the position include the conduct of searches of the clothing or bodies or persons of the relevant sex
- the occupant of the position is required to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex
- the occupant of the position is required to live on premises provided by the employer or principal of the occupant of the position, and the premises are not equipped with separate sleeping accommodation and sanitary facilities for persons of each sex
- the premises are already occupied by a person or persons of the relevant sex and are not occupied by any person of the opposite sex, and it is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex
- the occupant of the position is required to enter areas ordinarily used only by persons of the relevant sex while those persons are in a state of undress
- the position is declared by regulations made for the purposes of the Sex Discrimination Act to be a position in relation to which it is a genuine occupational qualification to be a person of a particular sex.

This list provided in the Sex Discrimination Act is not exhaustive, and a genuine occupational qualification may be claimed in other appropriate situations.

Other exemptions

Church schools can discriminate in choosing employees if it is necessary to prevent breaching any religious rules (s 38 Sex Discrimination Act).

Religious bodies can also discriminate when choosing people to perform religious duties or functions (s 37 Sex Discrimination Act).

Some services, particularly medical services such as abortion and vasectomy, can only be provided to one sex. The Sex Discrimination Act does not make the provision of those services unlawful (s 32 Sex Discrimination Act), although such acts might be unlawful on other grounds.

Employers are not required to provide the same standard of accommodation for employees of different marital status, sex or who are pregnant, when it is unreasonable to expect them to do so (s 34 Sex Discrimination Act).

Discrimination on the ground of sex or marital or relationship status is allowed in certain circumstances related to jobs involving the residential care of children (s 35 Sex Discrimination Act).

Gifts to charities that involve discrimination against a particular sex, marital or relationship status or pregnant women are lawful (s 36 Sex Discrimination Act).

Voluntary bodies, such as service organisations like Rotary, are exempt from the Sex Discrimination Act as far as membership is concerned (s 39 Sex Discrimination Act).

Superannuation schemes in existence as at 1 July 1994 can discriminate against people on the grounds of sex or marital or relationship status (s 41B Sex Discrimination Act), but funds in existence after that date can only discriminate on actuarial or statistical grounds (s 41A Sex Discrimination Act).

Insurance companies can also discriminate if they can produce statistics to justify their discrimination (s 41 Sex Discrimination Act).

The Sex Discrimination Act specifically provides that women can be discriminated against in relation to performing combat duties (s 43 Sex Discrimination Act).

The Australian Human Rights Commission (AHRC) has the power to grant an exemption to any person from the operation of any part of the Sex Discrimination Act. These exemptions may be granted for up to five years (s 44 Sex Discrimination Act).

Governments' obligations

State governments and authorities are not prevented by the Sex Discrimination Act from discriminating in employment. However, the Queensland Government and its authorities are covered by the Anti-discrimination Act. Commonwealth employees are covered by s 9 of the Sex Discrimination Act.

Other offences

Apart from this ultimate power of reference to a court, the Sex Discrimination Act creates a number of offences that seek to ensure compliance with the legislation. The following are the more significant offences under the Sex Discrimination Act:

- publication of advertisements or notices indicating an intention to do something that is unlawful (e.g. an advertisement for a position limited to one sex only (s 86))
- failure to provide actuarial or statistical data (s 87)
- divulging confidential information about a complaint prior to enquiry, withdrawal or termination of the complaint (s 92)

- victimising a person making a complaint of sexual harassment (s 94)
- obstructing or hindering an investigation (s 95).

Disability Discrimination

The object of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) is to ensure that, as far as practicable, persons with disabilities have the same rights to equality before the law as the rest of the community. It seeks to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community by authorising the formulation of disability standards in relation to employment, education, accommodation and public transportation for persons with disabilities (s 31 Disability Discrimination Act).

Section 113 of the Disability Discrimination Act establishes a Disability Discrimination Commissioner who is a part of the Australian Human Rights Commission (AHRC).

What is disability discrimination?

Disability discrimination occurs when, because of the disability, the discriminator treats or proposes to treat the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different. It also occurs where a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person and:

- the discriminator does not make, or proposes not to make, reasonable adjustments for the person
- the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different (s 5 Disability Discrimination Act).

Section 6 of the Disability Discrimination Act also makes indirect discrimination on the basis of disability unlawful. Indirect discrimination occurs when a person discriminates against another person on the ground of a disability of the aggrieved person if:

- the discriminator requires or proposes to require the aggrieved person to comply with a requirement or condition
- because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply with the requirement or condition with or without reasonable adjustments
- the requirement or condition has or is likely to have the effect of disadvantaging persons with the disability.

Discrimination can also occur when a person is treated less favourably because the person is associated with a person with disability, or because the person with the disability has a carer, assistant, assistance animal and disability aid (ss 7–8 Disability Discrimination Act).

Reasons for disability discrimination

Section 10 of the Disability Discrimination Act provides that, when an act is done for two or more reasons, and one of the reasons is a person's disability, then it is not necessary to show that discriminatory reason is the dominant or substantial reason for the act of discrimination.

Areas of disability discrimination

The Disability Discrimination Act makes it unlawful to discriminate on the basis of disability in the following areas:

- employment (s 15)
- commission agents (s 16)
- contract workers (s 17)
- partnerships (s 18)
- qualifying bodies (s 19)
- registered organisations under s 20 of the Fair Work Act (Registered Organisations) 2009 (Cth)
- employment agencies (s 21)
- education (s 22)
- access to premises (s 23)
- goods, services and facilities (s 24)
- accommodation (s 25)
- land (s 26)
- clubs and incorporated associations (s 27)
- sport (s 28)
- administration of Commonwealth laws and programs (s 29)
- requests for information (s 30).

It is unlawful to harass a person on the basis of their disability in the areas of employment, education and the provision of goods and services (ss 35–39 Disability Discrimination Act).

Exemptions

The Disability Discrimination Act allows numerous exemptions, including special measures designed to ensure that persons with a disability have access to equal opportunities, have special needs met in relation to employment, education, accommodation, clubs or sport, provision of goods, services, facilities or land, the availability of facilities, the administration of Commonwealth laws and programs or the capacity to live independently (s 45 Disability Discrimination Act). Exemptions are also available for discrimination in the areas of superannuation and insurance.

The exemptions for superannuation and insurance mean that discrimination on the basis of disability is allowed in certain areas, but only if the discrimination is based on reasonable, actuarial or statistical data. When there is no such data, the discrimination must be reasonable in regard to other relevant factors (s 46 Disability Discrimination Act).

There are further exemptions for acts done under statutory authority. These exemptions include acts done to control infectious diseases, migration, combat duties and peacekeeping duties by the Defence Force and the Australian Federal Police, and acts done in the provision of telecommunications, in the payment of certain pensions and allowances, as well as acts done by charities (ss 48–54 Disability Discrimination Act).

In addition, pursuant to s 55 of the Disability Discrimination Act, the AHRC can grant applications for an exemption subject to terms and conditions specified by the commission for a specified period not in excess of five years.

Offences

It is an offence to victimise someone who has made or is making a complaint, or who has in some way been involved in proceedings or given information, or otherwise been involved in discrimination matters referred to in the legislation (s 42 Disability Discrimination Act). It is also an offence to incite another person to commit acts or offences that are unlawful under the legislation (s 43 Disability Discrimination Act). Both offences are punishable by a term of imprisonment of six months.

Pursuant to s 44 of the Disability Discrimination Act, it is an offence to publish or display advertisements indicating an intention by a person to do an act that is unlawful under the Act, and it is punishable by a fine.

Age Discrimination

The objects of the Age Discrimination Act 2004 (Cth) (Age Discrimination Act) are:

- to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information
- to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community
- to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances
- to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights
- to respond to demographic change by removing barriers to older people participating in society, particularly in the workforce and changing negative stereotypes about older people (s 3 Age Discrimination Act).

Discrimination on the ground of age can be direct or indirect, but it is not unlawful to discriminate on the ground of age if a particular exemption is applicable.

Complaints can be made to the Australian Human Rights Commission (AHRC) about unlawful discrimination.

Section 5 of the Age Discrimination Act makes it clear that the concept of age includes an age group. Age discrimination does not include disability discrimination, so there is no overlap between the Age Discrimination Act and the *Disability Discrimination Act 1992* (Cth). It is feasible, however, that a person may have complaints under both pieces of legislation arising out of an incident or a series of incidents. For instance, if a person was told they could not be employed because they were too old and too sick, this might give rise to separate complaints of discrimination.

Section 10 of the Age Discrimination Act sets out a number of limitations that arise because of the operation of the *Commonwealth of Australia Constitution Act 1900* (Imp).

What is age discrimination?

Age discrimination occurs when the discriminator treats or proposes to treat the aggrieved person because of age 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 age (s 14 Age Discrimination Act).

The Age Discrimination Act also makes indirect discrimination on the basis of disability unlawful. Indirect discrimination occurs when (s 15):

- a requirement, condition or practice is imposed or proposed
- the condition, requirement or practice is not reasonable in the circumstances
- the condition, requirement or practice will have or is likely to have the effect of disadvantaging persons of the same age as the aggrieved person.

Areas of age discrimination

The Age Discrimination Act makes it unlawful to discriminate on the basis of age in the areas of:

- employment and related matters (ss 18–25)
- education (s 26)
- access to premises (s 27)
- provision of goods, services and facilities (s 28)
- provision of accommodation (s 29)
- disposal of land (s 30)
- administration of Commonwealth laws and programs (s 31)
- requests for information on which age discrimination might be based (s 32).

Exemptions

The Age Discrimination Act contains a number of general exemptions, including:

- positive discrimination (s 33)
- charities (s 34)
- religious bodies (s 35)
- voluntary bodies (s 36)
- superannuation, insurance and credit (s 37)
- superannuation legislation (s 38)
- direct compliance with laws and orders (s 39)
- taxation laws (s 40)
- pensions, benefits and allowances (s 41)
- health (s 42)
- migration and citizenship (s 43).

Additionally, an exemption may be granted by the commission. The decision of the commission can be reviewed by the Administrative Appeals Tribunal. Any exemptions granted by the commission must be published in the Government Gazette (ss 44–47 Age Discrimination Act).

Offences

The Age Discrimination Act contains a number of offences, including:

- advertisements that breach the Age Discrimination Act (s 50)
- victimisation (s 51)
- failure to disclose sources of actuarial or statistical data (s 52).

Human Rights and Equal Opportunity Commission

The Australian Human Rights Commission (AHRC) comprises a president and six commissioners:

- Human Rights Commissioner
- National Children's Commissioner
- Disability Discrimination Commissioner
- Sex Discrimination Commissioner
- Age Discrimination Commissioner
- Aboriginal and Torres Strait Islander Social Justice Commissioner (*Australian Human Rights Commission Act 1986* (Cth) (AHRC Act)).

The commission's functions include the administration of the AHRC Act, the Racial Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act.

The AHRC has a range of duties, functions and powers. The commission's duties include ensuring that the functions under each of the Commonwealth human rights and anti-discrimination laws are carried out with regard for the universality of human rights and the principle that every person is free and equal in dignity and rights. Additionally, the AHRC is to ensure that the functions are carried out with the greatest possible benefit to the people of Australia.

The AHRC's functions include those conferred on it by the above mentioned Acts and to:

- inquire into and conciliate complaints of unlawful discrimination
- carry out those functions that arise under the AHRC Act
- examine legislation for inconsistency with human rights
- inquire into employment-based discrimination
- promote and undertake research and educational programs into human rights
- advise the Commonwealth government on human rights matters
- intervene in court proceedings involving human rights issues.

The powers of the AHRC include all things necessary or convenient for performance of its functions.

Jurisdiction of the Australian Human Rights Commission

The AHRC has specific functions in relation to equal opportunity. The commission can inquire into any act or practice that may amount to discrimination in employment or occupation on the basis of race, sex, colour, religion, political opinion, national extraction, social origin, age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference or trade union activity where such treatment nullifies or impairs equality of opportunity or treatment (s 31 AHRC Act).

Complaints from individuals can be made under the AHRC Act to the commission. Complaints can be against the Commonwealth Government, the Queensland Government or a private employer.

The AHRC Act does not outlaw distinctions based on the inherent requirements of a job or the employment by a religious institution when the distinction has been made to avoid injury to the religious susceptibilities of that religion (s 3 AHRC Act). For example, the non-employment of women is not unlawful if the tenets of a religion dictate that only men can be monks.

Human rights declarations

The AHRC can also receive complaints about and inquire into any act or practice of the Commonwealth Government and any act done under Commonwealth legislation, which are contrary to any human right recognised by the AHRC Act (s 11 AHRC Act). For detailed information about the United Nations statements on human rights visit the five schedules contained in the AHRC Act.

Complaints under the Commonwealth Human Rights and Anti-discrimination Scheme

The president of the Australian Human Rights Commission (AHRC) has responsibility for managing the administrative affairs of the commission and is the most senior member. The hearing function rests with the Federal Court and the Federal Magistrates Court.

Complaint resolution scheme

Under the complaint resolution scheme, each of the Commonwealth human rights and anti-discrimination Acts provides for the commission to accept and conciliate complaints. This means that the AHRC Act contains a uniform scheme for complaint handling.

A complaint of discrimination under these Acts must be made to the AHRC under the provisions of the AHRC Act (s 46P AHRC Act). This section provides that a complaint can be lodged in respect of individual matters or on behalf of a class as a representative complaint.

A complaint must be made in writing, but the commission should take reasonable steps to ensure that a person has assistance to formulate a written complaint if necessary (s 46P AHRC Act).

Additionally, it should be noted that a complaint can be amended at any time with leave of the president (s 46PA AHRC Act).

Complaint resolution

Once the complaint has been made to the AHRC, it will be referred to the president (s 46PD AHRC Act). This means that the president will be responsible for all complaints under each of the Acts. This responsibility for complaint handling cannot be delegated to other members of the commission.

The president will inquire into the complaint and attempt to conciliate the complaint between the parties (s 46PF AHRC Act).

The president may terminate a complaint, pursuant to the AHRC Act (s 46PH(1)(a)–(h)) if:

- the act complained of is not unlawful under the legislation
- the complainant decides not to pursue or discontinues the complaint
- the complaint is more than 6 months old
- the complaint has been adequately dealt with by another remedy
- there is another more appropriate remedy available
- the commission or another statutory body has already dealt with the complaint
- the complaint could be more effectively or conveniently dealt with by another statutory authority
- the complaint is of such public importance that it should be considered by the Federal Court or the Federal Circuit Court.

The president must terminate a complaint if the President is satisfied that (s 46PH(1B)-(1C) AHRC Act):

- the complaint is trivial, vexatious, misconceived or lacking in substance, or
- there is no reasonable prospect of the matter being settled by conciliation, or
- there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.

It should be noted that the president has the power to revoke a termination up until the time where an application is made to the Federal Court or the Federal Magistrates Court.

The president can obtain information by serving a notice on a person requiring them to produce documents or a statement within a specified period of time (s 46PI AHRC Act). Additionally, the president may require that parties attend at a compulsory conference where the president will conduct a conciliation conference between the parties (s 46PJ and 46PK AHRC Act). The proceedings at the conference are private and must be conducted in an independent and objective manner. Leave must be obtained to have representation, unless the person has a disability where they can nominate a representative to attend on their behalf. Any person who fails to attend without reasonable excuse may be penalised. Likewise, a person who fails to provide information may be penalised. It is an offence to give false or misleading information to the president in the course of the conciliation process (s 46PN AHRC Act).

Discrimination Complaints in the Federal Court and the Federal Circuit Court

If the president of the Australian Human Rights Commission (AHRC) terminates a complaint, any person affected can make an application to the Federal Court or the Federal Circuit Court alleging unlawful discrimination (s 46PO AHRC Act). The application must be made within 60 days of the president issuing a written notice of termination (s 46PO(2) AHRC Act). The court has the power to extend the time for making an application. The application to the court must not be made unless the court concerned grants leave to make the application or the complaint was terminated by the president because (s 46PO(3A)):

- the president is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court; or
- there is no reasonable prospect of the matter being settled by conciliation.

The application is limited to the same unlawful discrimination as was alleged in the terminated complaint, or it must arise out of the same acts, omissions or practices as the subject of the terminated complaint (s 46PO(3) AHRC Act). Additionally, the commission may assist a person to prepare the forms for making an application to the court (s 46PT AHRC Act). Applications are to be made by a particular form that is available from a registry of the court. Similarly, a form exists for defending an application. In both cases of application and defence, an accompanying affidavit is required. An application fee will apply, but parties can apply for a waiver or deferral of the fee.

Which court to choose

The jurisdictions of the Federal Court and the Federal Circuit Court are identical in relation to human rights matters. There are no monetary jurisdictional limits in either court.

Transfer between the courts

The Federal Court rules specifically deal with whether a matter should be transferred between the Federal Court and the Federal Circuit Court (order 27.12 Federal Court Rules). A party to a proceeding can apply to have a matter transferred from the Federal Circuit Court to the Federal Court and vice versa.

The factors that will be considered include:

- whether the proceeding is likely to involve questions of general importance so it would be desirable that it be considered by the Federal Court
- whether it is likely to be less expensive and more convenient for the parties if transferred
- whether the proceeding is likely to be heard and determined earlier in the Federal Circuit Court
- the wishes of the parties.

Case of Unlawful Discrimination

Where the Federal Court or the Federal Circuit Court finds unlawful discrimination, a number of orders can be made under the AHRC Act (s 46PO(4)(a)–(f)):

- a declaration of unlawful discrimination with a direction to not repeat or continue such discrimination
- an order requiring performance of a reasonable act or course of conduct to redress any loss or damage
- an order for damages by way of compensation for loss or damage
- an order requiring variation or termination of a contract to redress any loss or damage
- a declaration that it would be inappropriate for further action to be taken in the matter.

Injunctions

The Federal Court or the Federal Circuit Court has the power to grant interim injunctions pending determination by the court (s 46PO(6) AHRC Act). It should be noted that any injunction granted cannot include an undertaking as to damages as a condition (s 46PO(8) AHRC Act).

The AHRC Act also provides that the court can grant an injunction at any time after a complaint has been lodged with the Australian Human Rights Commission. The function of this is to allow the preservation of the status quo as it existed before the complaint was made whilst the inquiry and conciliation process is underway (s 46PP AHRC Act). The commission, a complainant, respondent or affected person can apply for an injunction. This injunction, however, cannot be granted after a complaint is withdrawn or terminated.

Court Processes in Discrimination Matters

Representation

There is a right of representation before the Federal Court or the Federal Circuit Court. A person can appear in person or be represented by a solicitor, barrister or another person (s 46PQ AHRC Act). It should be noted that only solicitors and barristers can recover professional fees for representation in such an application.

Hearing procedures

The Federal Court and the Federal Circuit Court will not be bound by technicalities or legal forms. The president of the Australian Human Rights Commission (AHRC) may provide the court with a written report on the complaint, although such a report cannot include matters said or done within the private conciliation stage of the complaint inquiry process.

Financial assistance

Financial assistance may be given by the Commonwealth Attorney-General for proceedings before the Federal Court or the Federal Circuit Court (s 46PU AHRC Act). This is available for applicants and respondents where refusal to assist would lead to hardship, and in all the circumstances it is reasonable to provide assistance to the person.

The amicus curiae and intervention functions of the Australian Human Rights Commission

The AHRC and its commissioners have the statutory power to become involved in court proceedings in two ways:

- The AHRC can intervene in court proceedings that involve human rights issues.
- Any of the special-purpose commissioners can appear as amicus curiae (a friend of the court) in proceedings in the Federal Court and the Federal Circuit Court (s 46PV AHRC Act).

Intervention in matters involving human rights

The AHRC (as a whole entity) can intervene and seek to become a party to court proceedings that involve:

- human rights issues (s 11(1)(o) AHRC Act)
- discrimination in employment or occupation (s 31(j) AHRC Act)
- racial discrimination issues (s 20(1)(e) Racial Discrimination Act)
- discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment (s 48(1)(g)(b) Sex Discrimination Act)
- discrimination on the ground of disability (s 67(1)(l) Disability Discrimination Act).

The intervention is not limited to matters before the Federal Court and the Federal Circuit Court and can be in a criminal, civil or other jurisdiction. Some examples of cases where commission intervention has occurred include:

- family law matters involving consent to medical treatment by children
- child abduction cases
- immigration cases, including detention of asylum seekers
- freedom of political speech
- native title.

The AHRC has a set of guidelines that describe the types of proceedings that the commission might intervene in, and an application can be made requesting that the commission exercise its intervention function.

The amicus curiae function of the special purpose commissioners

Where the president has terminated a complaint and the Federal Court or the Federal Circuit Court is hearing an application, a special-purpose commissioner can appear before the court as amicus curiae. This will only occur where:

- the orders sought may significantly affect the human rights of people who are not parties to the proceedings
- the proceedings have significant implications for the administration of the relevant Act
- the proceedings involve special circumstances that mean it would be in the public interest for the commissioner to assist the court.

The commissioner can only appear with the leave of the court. The commission has guidelines for the exercise of the amicus curiae function, and applications can be made requesting that the commission appear.

Legal Notices

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