UNSW Law & Justice Research Series

Commonwealth human rights and discrimination legislation

Peter Cashman

[2024] *UNSWLRS* 23

UNSW Law & Justice
UNSW Sydney NSW 2052 Australia

E: LAW-Research@unsw.edu.au
W: http://www.law.unsw.edu.au/research/faculty-publications
AustLII: http://www.austlii.edu.au/au/journals/UNSWLRS/
SSRN: http://www.ssrn.com/link/UNSW-LEG.html

Research Paper 4: Commonwealth human rights and discrimination legislation

Contents

In this paper, we provide a brief overview of Commonwealth human rights and anti-discrimination legislation.[1] As noted by Rees, Rice and Allen in their comprehensive text on the law in this area, state and Commonwealth anti-discrimination laws are characterised by disharmony, inconsistency, 'bewildering' exceptions, and a lack of clarity in policy aims.[2]

For the most part, the Commonwealth anti-discrimination legislation operates on an individual complaints-based model. Much has been written about the limitations of this model, particularly its inability to bring about systemic or structural change.[3] Yet, largely for political reasons, the flawed anti-discrimination framework has proven resistant to change.

In 2021 and 2023 the Australian Human Rights Commission published two Position Papers setting out a law reform agenda across a suite of anti-discrimination laws. [4]

Subsequently a comprehensive report was published proposing various wide-ranging reforms. [5]

---

[1] The topic of Commonwealth human rights and discrimination legislation has been covered in numerous comprehensive guides and academic literature. See, for example, Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018); Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017).

[2] Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) 2, 7, 280. The authors state the case for urgent reform of anti-discrimination laws, including new objectives, to improve consistency across jurisdictions; replace ineffective and out-dated procedures to ensure compliance; and rewrite the 'dry' language of the statute to increase the impact of the laws on the lives of individuals and bring about broader systemic change, at 31. On the lack of clarity in policy aims, and the impact that this can have on both measuring the success of the legislation and achieving effectiveness through guiding the way in which it is interpreted, see Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *UNSW Law Journal* 188.

[3] See, e.g., Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An evaluation of the new regime* (Themis Press, 2010) 243-6; Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) 20; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990); Belinda Smith and Dominique Allen, 'Whose fault is it? Asking the right question to address discrimination' (2012) 37(1) *Alternative Law Journal* 31; Dominique Allen, 'Thou shalt not discriminate: moving from a negative prohibition to a positive obligation on business to tackle discrimination' (2020) 26(1) *Australian Journal of Human Rights* 110; Dominique Allen, 'Barking and Biting: the Equal Opportunity Commission as an enforcement agency' (2016) 44 *Federal Law Review* 312; Simon Rice, 'Basic instinct, and the heroic project of anti-discrimination law' (Conference speech, Adelaide Festival of Ideas, October 2015); Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773; Ronnit Redman, 'Litigating for gender equality: the amicus curiae role of the Sex Discrimination Commissioner' (2004) 27(3) *UNSW Law Journal* 849. There has been criticism of what is said to be a tendency for the judiciary to interpret anti-discrimination laws in the same way as other legislation, ignoring their broader context and viewing the individual complainant as neutral (see Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25(3) *Alternative Law Journal* 125). This is, perhaps, compounded by an apparent unwillingness to afford to anti-discrimination legislation the beneficial interpretation the High Court has said it should be given (Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) 2, 24).

[4] *Free & Equal: a reform agenda for federal discrimination laws* (2021) and *Free & Equal: a Human Rights Act for Australia* (2023).

[5] Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free and Equal Report* 2023.

On 27 January 2023 the Australian Law Reform Commission released a Consultation Paper with proposals for changing the way Commonwealth anti-discrimination law applies to religious schools and educational institutions.[6] Thereafter Background Papers concerning international comparisons[7] and the views of stakeholders[8] were published. As noted in research paper 3, a final report by the Commission was tabled in Parliament by the Attorney-General in March 2024.

Human rights and discrimination law will no doubt continue to evolve in Australia, including through changes in legislation, jurisprudence and corporate and governmental practices.

1. The Australian Human Rights Commission

The *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') established the Australian Human Rights Commission.[9] Its functions include conducting inquiries; dealing with complaints through facilitating conciliation; examining enactments for consistency with human rights and intervening in proceedings that involve human rights issues.[10] The AHRC is limited in its jurisdiction to Commonwealth laws.

The Act provides that the Commission shall consist of f a President and a Human Rights Commissioner, as well as six Special Purpose Commissioners with offices related to particular human rights issue areas: the Aboriginal and Torres Strait Islander Social Justice Commissioner; the Age Discrimination Commissioner; Disability Discrimination Commissioner; Race Discrimination Commissioner; Sex Discrimination Commissioner and the National Children's Commissioner.[11]

---

[6] Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (2023).
[7] Australian Law Reform Commission, Background Paper ADL1 Religious Educational Institutions and Anti-Discrimination Laws, *International Comparisons*, November 2023.
[8] Australian Law Reform Commission, Background Paper ADL2 Religious Educational Institutions and Anti-Discrimination Laws, *What We Heard*, November 2023.
[9] *Australian Human Rights Commission Act 1986* (Cth) s 7. The institution was formerly named the Human Rights and Equal Opportunity Commission, established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It was renamed the Australian Human Rights Commission in 2008. The first iteration was in 1981, after Australia ratified the International Covenant on Civil and Political Rights.
[10] *Australian Human Rights Commission Act 1986* (Cth) s 11. The Commission also has statutory responsibilities under the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth), *Native Title Act 1993* (Cth) and *Fair Work Act 2009* (Cth). Hilary Charlesworth and Gillian Triggs suggest that 'its most important contribution to the implementation of international human rights standards has been the AHRC's major reports on topics from mental health, to the stolen generation of Indigenous children, to workplace equality and to the treatment of children in immigration detention': 'Australia and the International Protection of Human Rights' in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Law Book Co., 3rd ed, 2017) 117, 126.
[11] *Australian Human Rights Commission Act 1986* (Cth) s 8(1). See Australian Human Rights Commission, *President & Commissioners* <https://www.humanrights.gov.au/about/president-commissioners> . The Commission Offices can be subject to change. For example, from 2014-2016, the Disability Discrimination Commissioner role was amalgamated with the Age Discrimination Commissioner role as a result of Commonwealth Government funding cuts (see Dan Harrison, 'Age discrimination commissioner Susan Ryan takes on extra role of acting disability discrimination commissioner', *Sydney Morning Herald* (online), 1 July 2014 <http://www.smh.com.au/federal-politics/political-news/age-discrimination-commissioner-

The Commission is given functions in relation to international human rights instruments.[12] Human rights are defined under the AHRC Act according to definitions in international law, as recognised in the International Covenant on Civil and Political Rights (ICCPR) or declared under various Declarations and other relevant international instruments.[13]

However, as noted by Charlesworth and (former Human Rights Commission President) Emeritus Professor Gillian Triggs, the way in which these rights are implemented under the AHRC Act is 'tenuous'.[14] The reference to, or inclusion of, international human rights instruments does not make them justiciable in an Australian court. Their significance is mainly limited to the guidance of the policy work of the AHRC and particular instruments form the basis of administrative complaints made to the AHRC. In some circumstances they may provide guidance in the judicial resolution of human rights issues. For example, international instruments may be of relevance where there is uncertainty or ambiguity in the relevant provisions of domestic law.

1.1 **Complaints under the AHRC Act**

susan-ryan-takes-on-extra-role-of-acting-disability-discrimination-commissioner-20140701-3b63r.html>). Similarly, the office of the Privacy Commissioner, established in 1989 under the *Privacy Act 1988* (Cth) was subsequently amalgamated into the Office of the Privacy Commissioner and Office of the Australian Information Commissioner (OAIC) in 2010.

[12] The instruments are the *ICCPR* (included as schedule 2 to the AHRC Act); *ILO Convention Concerning Discrimination in Respect of Employment and Occupation* (No. 111) (sch 1 to the AHRC Act); the *CRPD* (which was declared to be a 'relevant international instrument' for the purposes of s 47(1) of the AHRC Act on 20 April 2009); the *CRC* (declared to be a 'relevant international instrument' for the purposes of s 47(1) on 22 December 1992); *Declaration of the Rights of the Child* (sch 3 to the AHRC Act); *Declaration on the Rights of Disabled Persons* (sch 4 to the AHRC Act); *Declaration on the Rights of Mentally Retarded Persons* (sch 5 to the AHRC Act); and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (declared to be a 'relevant international instrument' for the purposes of s 47(1) on 8 February 1993). In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner must have regard to the rights and freedoms recognised by the ICERD, UDHR, ICESCR, and any other instrument relating to human rights that the Commissioner considers relevant (see ss 46A and 46C(4).

[13] *Australian Human Rights Commission Act 1986* (Cth) s 3. See also s 47, under which the Minister may declare an instrument to be an international instrument relating to human rights for the purposes of the AHRC Act. The AHRC Act also contains a general definition of 'discrimination,' which is distinct from the definitions of 'discrimination in employment' and 'unlawful discrimination' which are discussed below. This definition is used in connection with the policy work of the Commission and the complaint mechanism. The general definition for discrimination is any distinction, exclusion or preference made on the basis of race, colour, sex, 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, subject to certain exceptions, distinctions and preferences in relation to a person's ability to perform the inherent requirements of a particular job and in relation to employment at religious institutions: s 3 and *Australian Human Rights Commission Regulations* 1989 (Cth) reg 4.

[14] Hilary Charlesworth and Gillian Triggs, 'Australia and the International Protection of Human Rights' in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Law Book Co., 3rd ed, 2017) 117, 126.

The current President of the AHRC has described in detail the complaints handling role of the AHRC and its historical development.[15]

The Commission has power to consider four types of complaints:[16]

i. acts or practices of the Commonwealth Government (or one of its agencies) that are *inconsistent with or contrary to any human right*.[17] Specifically, the complaint must be based on a breach of a specific international human rights instrument (including the *ICCPR, CRPD, CRC*, *Declaration of the Rights of the Child*, *Declaration on the Rights of Mentally Retarded Persons*, *Declaration on the Rights of Disabled Persons*, and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief)*.

ii. acts or practices constituting *discrimination in employment* based on the grounds of religion, criminal record, trade union activity, sexual preference, political opinion or social origin.[18] The act or practice alleged may include being refused a job; dismissed from a job; refused a promotion, transfer or other benefit associated with employment; given unfair terms or conditions of employment; refused training opportunities; refused flexible work arrangements; or harassed or bullied.[19] Complaints cover all types of workers and can be brought against all types of employers.[20] By enabling aggrieved persons to bring complaints in this area, the government is giving effect to Australia's obligations under the *ILO Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*.

iii. *unlawful discrimination* on the grounds of sex, race, disability and age.[21] Specifically, 'unlawful discrimination' is defined by the AHRC Act as any act, omission or practice

---

[15] Emeritus Professor Rosalind Croucher, 'Seeking Equal Dignity without Discrimination-The Australian Human Rights Commission and the Handling of Complaints' (2019) 93 *ALJ* 571.

[16] *Australian Human Rights Commission Act 1986* (Cth) ss 46PD, 46PF(1). 2307 complaints were considered by the AHRC in the 2019-2020 financial year. 1432 conciliation processes were conducted and 70% of these complaints were resolved successfully. See AHRC, *Annual Report 2019-2020*, 20 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2019-2020>.

[17] *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f), 20(1)(b).

[18] *Australian Human Rights Commission Act 1986* (Cth) s 3.

[19] See Australian Human Rights Commission, *Work Out Your Rights – Info for Employees* <http://www.humanrights.gov.au/complaints_information/WOYR.html> .

[20] Australian Human Rights Commission, *Work Out Your Rights – Info for Employees* <http://www.humanrights.gov.au/complaints_information/WOYR.html> .

[21] *Australian Human Rights Commission Act 1986* (Cth) s 46P(1). It is important to note that many people experience discrimination on the basis of more than one attribute or characteristic and that often these grounds cannot be neatly separated. When this occurs, it gives rise to a new *sui generis* discrimination that the existing anti-discrimination legislative framework may have difficulties in addressing. On intersectionality and anti-discrimination law, see, e.g., Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773; Beth Goldblatt, 'Intersectionality in international anti-discrimination law: Addressing poverty in its complexity' (2015) 21(1) *Australian Journal of Human Rights* 47; Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43 *University of New South Wales Law Journal* 773; Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) 326 <https://humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf>.

which is unlawful under various statutes.[22] Unlawful discrimination complaints are not limited to issues of employment. For example, they can relate to other areas of public life, including education, accommodation and the provision of goods and services.[23] They can also be brought against any individual or entity that has a legal personality.[24]

iv. allegations that a person has done a *discriminatory act under an industrial instrument or under a determination.*[25] This includes acts that would be unlawful under relevant discrimination statutes,[26] but for the fact they were done in direct compliance with a modern award, enterprise agreement, workplace determination, Fair Work Commission order, a transitional instrument, a State award or employment agreement or determination of the Remuneration Tribunal or Defence Force Remuneration Tribunal.[27] Where it appears to the President that there has been a discriminatory act, the industrial instrument in question must be referred to the Fair Work Commission, Remuneration Tribunal or Defence Force Remuneration Tribunal, as appropriate.[28]

The complaints process before the Commission is largely the same for the different forms of complaints under the AHRC Act, excluding acts or practices constituting discrimination in employment (discussed below).[29] Key elements of this process are set out below.[30]As discussed below, complaints of unlawful discrimination can proceed to court for an enforceable remedy.

In *Brandy v Human Rights and Equal Opportunity Commission*,[31] Mr Brandy challenged the validity of the Human Rights and Equal Opportunity Commission (HREOC) (now the AHRC) legislation which sought to make non-enforceable HREOC decisions enforceable if registered in the Federal Court. He argued that the scheme was tantamount to giving an administrative agency judicial power and therefore violated the separation of powers required by the Constitution. The High Court found in his favour and as such, all Commission matters that require legal determination and enforcement must be taken to the Federal Court or Federal Circuit Court.

1.1.1 Some procedural considerations

[22] Part 4 and Division 2 of Part 5 (other than s 52) of the *Age Discrimination Act 2004* (Cth); Part 2 of the *Disability Discrimination Act 1992* (Cth); Part II, Part IIA and s 27(2) of the *Racial Discrimination Act 1975* (Cth); Part II and s 94 of the *Sex Discrimination Act 1984* (Cth).
[23] See *Racial Discrimination Act 1975* (Cth) pt II; *Sex Discrimination Act 1984* (Cth) pt II; *Disability Discrimination Act 1992* (Cth) pt 2; *Age Discrimination Act 2004* (Cth) pt 4.
[24] *Grigor-Scott v Jones* [2008] FCAFC 14, [20]
[25] *Australian Human Rights Commission Act 1986* (Cth) ss 46PW–46PY.
[26] Part 4 of the *Age Discrimination Act 2004* (Cth); Part 2 of the *Disability Discrimination Act 1992*(Cth); or Part II of the *Sex Discrimination Act 1984* (Cth).
[27] See *Australian Human Rights Commission Act 1986* (Cth) ss 46PW, 46PX, 46PY; *Fair Work Act 2009* (Cth) s 12.
[28] *Australian Human Rights Commission Act 1986* (Cth) ss 46PW, 46PX, and 46PY.
[29] The AHRC publishes extensive guidance and explanatory information on its website, see <https://humanrights.gov.au/complaints/complaint-guides>.
[30] For greater detail, see Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> .
[31] (1995) 183 CLR 245.

Complaints in relation to any matter over which the Commission has jurisdiction can be made by or on behalf of a 'person aggrieved' by an act or practice,[32] or by or on behalf of one or more other persons who are aggrieved by the same act or practice.[33]

In addition, two or more aggrieved persons can bring a complaint on their own behalf, or on behalf of themselves and one or more other aggrieved persons.[34] Complaints can also be lodged by a person or trade union on behalf of one or more other aggrieved persons.[35]

However, all allegations in representative complaints must be against the same person, arise from the same or similar circumstances, and give rise to a substantial common issue of law or fact.[36] Should conciliation at the Commission fail and the complaint be terminated, any 'affected person'[37] can apply for leave to commence proceedings in the Federal Circuit Court or Federal Court, including representative proceedings pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth).[38]

Discrimination in employment complaints under the equal opportunity and human rights procedure are treated differently to complaints under the DDA,SDA, RDA, ADA. A written complaint can be made, AHRC can conduct an investigation but if conciliation is unsuccessful, the complainant cannot commence proceedings in the FCC/FCA. The President, if he/she believes discrimination has occurred can write a report on the matter to the Attorney-General, which can then be tabled in Parliament. The obvious problem with this complaints stream is the

---

[32] The AHRC Act does not define 'a person aggrieved.' However, it has been extensively considered by the courts. It is not a requirement that a 'person aggrieved' be a victim of the alleged act or practice. However, they must demonstrate a grievance beyond an ordinary member of the public (see *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 313 [52]). See also *Tooheys Ltd v Minister for Business & Consumer Affairs* (1981) 36 ALR 64; *Cameron v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 509; *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Stephenson (as executrix of estate of Dibble) v Human Rights & Equal Opportunity Commission* (1996) 68 FCR 290; *Cuna Mutual Group Ltd v Bryant* (2000) 102 FCR 270; *Munday v Commonwealth of Australia (No 2)* (2014) 226 FCR 199. See Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) at 6.3.1, 285-93 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> .

[33] *Australian Human Rights Commission Act 1986* (Cth) ss 20(1)(b), 32(1)(b), 46P(2)(a), 46PW(1)(a), 46PX(1)(a), 46PY(1)(a). In relation to unlawful discrimination, the scope for inquiry also includes omissions.

[34] *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(b) (for complaints of unlawful discrimination); ss 46PW(1)(b), 46PX(1)(b) and 46PY(1)(b) (for complaints about discriminatory acts committed under an industrial instrument or determination).

[35] *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c) (for complaints of unlawful discrimination); s 46PW(1)(d) (in relation to complaints about discriminatory acts done under industrial instruments only). Representative complaints can be made concerning discriminatory acts committed under an industrial instrument or determination per s 46PW(1)(c), 46PX(1)(c), 46PY(1)(c).

[36] *Australian Human Rights Commission Act 1986* (Cth) s 46PB(1). Other requirements are included in ss 46PB and 46PC.

[37] An 'affected person' is defined in s 3 of the *Australian Human Rights Commission Act 1986* (Cth) as a person on whose behalf the complaint was lodged.

[38] *Australian Human Rights Commission Act 1986* (Cth) s 46PO. One prominent example of a class action brought pursuant to s 46PO is *Duval-Comrie v Commonwealth* [2016] FCA 1523, alleging that the Government Business Services Wage Assessment Tool (BSWAT) discriminated against workers with intellectual disabilities in contravention of the *Disability Discrimination Act 1992* (Cth). The action was settled in 2016.

lack of access to the court.[39] From 15 December 2023 provisions in respect of work-place discrimination and protected attributes under the *Fair Work Act 2009* (Cth) have been expanded to provide strengthened protections against discrimination.[40]

Complaints under the AHRC Act can be submitted from anywhere in Australia and in any language but they must be in writing.[41] Complaints are not subject to strict time limits. However, the President has discretion to terminate a complaint of unlawful discrimination if it is lodged more than six months after the alleged violation took place,[42] or may decline to inquire into a complaint on equal opportunity and human rights made more than 12 months after the alleged conduct.[43]

For complaints under the SDA only, since Sept 2021, the time limit is 24 months.[44]

Section 46P(1B) stipulates that the complaint must set out details of the alleged acts, omissions or practices as fully as practicable. In addition, it must be 'reasonably arguable' that the alleged acts, omissions or practices constitute unlawful discrimination for the purposes of the Act.[45]

Individuals are precluded from bringing a complaint under federal discrimination law if they have made a complaint, instituted a proceeding or taken any other action under an analogous state or territory law.[46]

---

[39] See s32A *Australian Human Rights Commission Act 1986* (Cth).
[40] See the detailed explanation published by the Fair Work Ombudsman: https://www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/workplace-discrimination. See also information published by the Fair Work Commission: https://www.fwc.gov.au/issues-we-help/discrimination.
[41] *Australian Human Rights Commission Act 1986* (Cth) s 46P(1). There are no fees associated with making a complaint and there is no requirement that a complainant be legally represented. According to statistics published by the AHRC, 804 people (35% of those who made a complaint in the 2019-2020 financial year) were represented. Of those 804 people, 36% were represented by privately funded solicitors and 10% were represented by community legal centres: Australian Human Rights Commission, '2019-2020 Complaint Statistics' <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf> . The lack of representation is said to be a factor affecting outcomes including the overall outcome and the quantum of compensation obtained, both at the complaint and court stages, see Des Kennedy, 'Damages in the federal courts for sexual and racial harassment / discrimination' (2016) 135 *Precedent* 57, 60-1; Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW Law Journal* 699, 715.
[42] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b). See *Budini v Sunnyfield* [2019] FCA 2164, [58]-[59] (Charlesworth J).
[43] *Australian Human Rights Commission Act 1986* (Cth) ss 20(2)(c)(i), 32(3)(c)(i), 46PH(1)(b).
[44] See s 46PH(1)(b)(i) *Australian Human Rights Commission Act 1986* (Cth)
[45] *Australian Human Rights Commission Act 1986* (Cth) 46P(1B).
[46] See *Sex Discrimination Act 1984* (Cth) s 10(4); *Racial Discrimination Act 1975* (Cth) s 6A(2); *Disability Discrimination Act 1992* (Cth) s 13(4); *Age Discrimination Act 2004* (Cth) s 12(4). See also *Fair Work Act 2009* (Cth) ss 725, 732, the combined effect of which is to require people seeking relief for termination that is allegedly discriminatory to elect whether to proceed under the *Australian Human Rights Commission Act 1986* (Cth) or the *Fair Work Act 2009* (Cth). However, the lodging of a complaint while *Fair Work Act* proceedings were pending did not the complaint a nullity or prevent the court from considering proceedings arising out a terminated complaint to the AHRC, in at least one instance: *Eastman v Shamrock Consultancy Pty Ltd* [2018] FCCA 3436, [59]-[62].

1.1.2 Reviewability of acts or practices of an intelligence agency

The AHRC Act states that the Commission does not have jurisdiction over the acts or practices of an intelligence agency. All such complaints alleging violation of human rights and anti-discrimination laws must be referred to the Inspector-General of Intelligence and Security who can accept complaints from Australian citizens or permanent residents.[47]

The Inspector-General has discretion to dismiss complaints for a number of reasons, including that the complainant became aware of the action more than 12 months before the complaint was made or can seek reasonable remedies through a court or a tribunal.[48] Inquiries are conducted in private[49] and a report setting out the Inspector-General's conclusions and recommendations is given to the head of the relevant Commonwealth agency or responsible Minister.[50] A written response is given to the complainant, subject to considerations of security, national defence and Australia's relations with other countries.[51] The head of the agency can then decide whether to take any action and, if no adequate action is taken within a reasonable period, the Inspector-General may make a report to the Attorney-General and, in some cases, the Prime Minister.[52]

1.1.3 Investigation

The Commission has a significant amount of discretion as to whether to proceed with an inquiry and the manner in which investigation is conducted.[53] Further information may be requested from the complainants and the individual or entity subject to the complaint will generally also be contacted, provided with a copy of the complaint and given an opportunity to comment.

The anonymity of complainants can be preserved if the Commission considers that this is necessary to protect their employment, privacy or human rights.[54]

The Commission is empowered to require relevant information to be given and documents to be produced,[55] to require the attendance of people who are capable of giving relevant information,[56] and to examine witnesses under oath.[57] Respondents must be given a reasonable opportunity to appear before the Commission and/or to make written submissions on their behalf.[58] For unlawful discrimination complaints under s 46P, the Commission must refer the

---

[47] See *Australian Human Rights Commission Act 1986* (Cth) ss 11(3)–(4); *Inspector-General of Intelligence and Security Act 1986* (Cth) s 8(2)(a)(iv).
[48] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 11.
[49] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 17.
[50] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 22.
[51] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 23.
[52] *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 24.
[53] *Australian Human Rights Commission Act 1986* (Cth) ss 20(2), 14(1). The Commission is not bound by the rules of evidence in carrying out this function.
[54] *Australian Human Rights Commission Act 1986* (Cth) s 14(2).
[55] *Australian Human Rights Commission Act 1986* (Cth) s 21(1)-(2).
[56] *Australian Human Rights Commission Act 1986* (Cth) s 21(5). Failure to comply with these requirements is a civil penalty: s 23.
[57] *Australian Human Rights Commission Act 1986* (Cth) s 22.
[58] *Australian Human Rights Commission Act 1986* (Cth) s 27.

complaint to the President for his or her consideration of whether there should be an inquiry into the matter.[59]

1.1.4 Referrals

Where appropriate, complaints alleging inconsistency with, or contravention of, human rights can be referred to the Information Commissioner under the *Privacy Act 1988*.[60]

Once a complaint alleging discriminatory acts done under an industrial instrument or determination is received and it appears to the President that the act complained of is a discriminatory act and is not frivolous, vexatious, misconceived or lacking in substance, the matter must be referred to the Fair Work Commission or the relevant determination to the Remuneration or Defense Force Remuneration Tribunals.[61]

1.1.5 Conciliation

The Commission is empowered to seek the resolution of complaints by conciliation.[62] The role of the President is to facilitate a resolution of the matter among the parties through a face-to-face 'conciliation conference';[63] a telephone conference; or an exchange of letters, phone messages or emails. Complaints resolved in conciliation are on a 'without admission of liability' basis. Some information on the number of complaints resolved through conciliation is provided in tables 4.1 and 4.2 below.

The Commission maintains an online Conciliation Register providing summaries of a selection of complaints that have been resolved through the Commission's conciliation process. [64] Outcomes in complaints have no precedential value. However, the summaries prepared by the Commission may assist complainants to understand available outcomes through the conciliation process. For example, conciliation could facilitate an apology, a change of policy and/or compensation.

Charlesworth and Triggs point to the high rates of complaints resolved through the cost-free conciliation process with recourse to the courts only where conciliation is unsuccessful. This is said to be a way in which 'Australia's anti-discrimination laws have been effective in protecting human rights' arising under the four anti-discrimination statutes.[65]

Details of the conciliation and resolution of complaints are published in the Annual Reports of the AHRC.

---

[59] *Australian Human Rights Commission Act 1986* (Cth) ss 46PD, 46PF.
[60] *Australian Human Rights Commission Act 1986* (Cth) s 20(4A).
[61] *Australian Human Rights Commission Act 1986* (Cth) ss 46PW(3), 46PX(3), 46PY(3).
[62] *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f)(i). Functions of the Commission under s 11(1)(f) must be performed by the President: s 8(6).
[63] *Australian Human Rights Commission Act 1986* (Cth) s 46PK.
[64] At the time of writing, complaints were available on the Register. See Australian Human Rights Commission, *Conciliation Register.*
<http://www.humanrights.gov.au/complaints_information/register/index.html> .
[65] Hilary Charlesworth and Gillian Triggs, 'Australia and the International Protection of Human Rights' in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Law Book Co., 3rd ed, 2017) 117, 130.

High rates of matters resolving at conciliation does reduce the number of discrimination matters that are decided by the courts, reducing jurisprudence and the normative impact of judgments. As noted by Gaze and Hunter:

> 'some level of litigation is desirable in the public interest in discrimination cases, in order to establish precedents that will assist future settlement, to achieve outcomes going beyond the interests of an individual complainant, and to publicise the legislation so that it can both empower potential future complainants and deter potential future discriminators.'[66]

The AHRC protections for breaches of human rights obligations and equal opportunity in employment (which have not been implemented in Australian law) are weaker because complainants lack access to the courts to seek a binding legal judgment, should conciliation fail.[67]

However, although the conciliation processes are in theory 'cost-free', and legal representation is not required, legal advice and representation may make a difference to the eventual outcome of a complaint.

The two-stage process, whereby genuine engagement in conciliation will be required prior to access to the courts, may also result in other disadvantages, such as inefficiency in the resolution of complaints and delays.[68]

1.1.6 Termination of a complaint

The President or Commission can exercise discretion to refuse to inquire into an act or practice, or to discontinue an inquiry, on the following grounds:

- the complaint was made more than a specified period after the act was done or after the last occasion when an act was done pursuant to the practice;
- the complaint is frivolous, vexatious, misconceived or lacking in substance;
- other remedies have been sought in relation to the subject matter of the complaint and have adequately dealt with the matter;
- another more appropriate remedy is reasonably available to the aggrieved person;
- the subject matter of the complaint has already been adequately dealt with by the Commission or by another statutory authority or could be better dealt with by another statutory authority; or

---

[66] Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699, 702.

[67] Hilary Charlesworth and Gillian Triggs, 'Australia and the International Protection of Human Rights' in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Law Book Co., 3rd ed, 2017) 117, 130.

[68] See Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) 58, 65. Allen has identified various factors which might lead people to resolve complaints at the conciliation stage, including psychological reasons and the delay, publicity, costs, proof and evidence issues associated with litigation. While Allen was looking at the Victorian context, these factors are also relevant to federal discrimination complainants (Dominique Allen, 'Behind the Conciliation Doors Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778, 786-9).

- the complaint has been settled or resolved.[69]

In addition, further inquiry into complaints of unlawful sex, race, disability or age discrimination may be refused or discontinued on the basis that the President is satisfied that:

- the alleged unlawful discrimination is not unlawful discrimination;
- 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.[70]

Where a complaint is not established or upheld, the Commission will issue the parties with a report setting out the findings and reasons.[71] This does not apply to the unlawful discrimination complaints -- i.e., the ones under the four Discrimination Acts -- but only to the ILO 111 (discrimination in employment) and human rights complaints referencing the treaties.

Table 4.1 Complaints received by the AHRC

Year	No. of complaints[72]	Acts under which complaints were lodged				
		DDA	***SDA***	***RDA***	***ADA***	**AHRC Act**
2019-2020	2307	1006	479	403	168	251
2018-2019	2037	891	520	332	137	157
2017-2018	2046	869	552	290	172	163
2016-2017	1939	755	465	409	154	156
2015-2016	2013	750	409	429	152	273
2014-2015	2388	740	453	561	149	485
2013-2014	2223	830	474	380	184	355
2012-2013	2177	793	417	500	157	310
2011-2012	2610	995	505	477	196	477

Table 4.2 Complaints resolved through conciliation

Year	No. of conciliation processes conducted	No. of complaints resolved through conciliation	Conciliated complaints by act				
			DDA	***SDA***	***RDA***	***ADA***	**AHRC Act**
2019-2020	1432	1004 (70%)	438	227	254	34	51

[69] *Australian Human Rights Commission Act 1986* (Cth) ss 20(2), 32(3), 46PH(1).
[70] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1).
[71] *Australian Human Rights Commission Act 1986* (Cth) ss 29(3), 35(3), 46PH(2).
[72] Counted by complainants.

2018-2019	1396	1010 (72%)	455	259	165	71	60
2017-2018	1262	931 (74%)	418	267	137	58	51
2016-2017	1128	843 (75%)	307	184	228	47	77
2015-2016	1308	989 (76%)	364	181	268	81	95

1.1.7 Remedies – complaints about human rights or discrimination in employment

Where an inquiry has been conducted and the Commission finds that an act or practice was inconsistent with or contrary to any human right or entailed discrimination in employment, the Commission will serve notice in writing on the person with its findings and reasons.

The Commission may also include recommendations for the prevention of the act in future or its continuation, recommended compensation or other remedial action.[73]

Recommendations are not enforceable, as these grounds are not expressly covered in the Commonwealth discrimination acts and the international instruments upon which they are based have not been fully incorporated into Australian domestic law. As noted by the current President of the AHRC, 'in the absence of a pathway to judicial consideration, the complainant is left in a most unsatisfactory position.'[74] Croucher describes these grounds as 'relics'.[75]

The Commission can prepare a report of the complaint for the Minister and federal Attorney-General which may be tabled in Parliament.[76] Reports to the Attorney-General are published on the Commission's website.[77]

Recent reports pursuant to s 11(1)(f) relate to immigration detention:

- In *LF v Commonwealth (Department of Home Affairs*)[78] the Commission published a report into arbitrary detention, concluding that the decision of the Department not to invite the Minister to exercise his statutory discretion under ss 195A and s 197AB of the

[73] *Australian Human Rights Commission Act 1986* (Cth) s 29(2). On equal opportunity in employment, see s 35(2).
[74] Rosalind Croucher, 'Righting the Relic: towards effective protections for criminal record discrimination' (2018) 48 *Law Society Journal* 73, 75.
[75] Rosalind Croucher, 'Righting the Relic: towards effective protections for criminal record discrimination' (2018) 48 *Law Society Journal* 73, 75.
[76] *Australian Human Rights Commission Act 1986* (Cth) ss 20A, 29, 32A, 35. The AHRC Act was amended in 2017 to remove the requirement that the Commission report to the Attorney-General. There is now a discretion whether or not to report to the Attorney-General. While the publication of recommendations can serve as a way to increase awareness of issues of discrimination, as indicated by AHRC President Croucher, the change has meant that the privacy of the complainant can be better protected: Rosalind Croucher, 'Righting the Relic: towards effective protections for criminal record discrimination' (2018) 48 *Law Society Journal* 73, 75.
[77] See Australian Human Rights Commission, Human Rights Reports <https://www.humanrights.gov.au/publications/reports-minister-under-ahrc-act> .
[78] [2020] AusHRC 139.

Migration Act 1958 (Cth) breached article 9(1) of the *ICCPR*. The President recommended open periodic reviews of the necessity of detention for all persons in immigration detention and the published report includes the response of the Department to the allegations. The Department did not accept the conclusions of the President.

- In the complaint of *PD v Commonwealth (Department of Home Affairs*)[79], which also related to immigration detention, similar conclusions were drawn, with additional comment on the conditions of detention (namely, the prolonged use of handcuffs) being a possible breach of article 10 of the ICCPR and a recommendation for compensation. The Department did not accept the conclusions on arbitrary detention and noted that the complainant's application to the Department for compensation had not been finalised.
- In *Hamedani v Commonwealth (Department of Home Affairs*)[80], also relating to arbitrary immigration detention, the President concluded that the combination of the Department's delay in referring the complainant's case to the Minister for consideration of his discretionary intervention powers, and the Minister's subsequent delay in considering whether to exercise his discretionary power under s 197AB of the *Migration Act 1958* (Cth) were acts inconsistent with or contrary to article 9(1) of the *ICCPR*. The Department did not accept the recommendation that cases referred to the Minister for consideration under s 197AB involving people with significant health concerns be followed up on a monthly basis.
- In *Mr AC v Commonwealth (Department of Home Affairs*)[81] the Department did not accept recommendations relating to the detention of people identified as a risk to national security by ASIO.
- The AHRC has handled some group complaints post 2017 amendments, including on the use of force in immigration detention.

The engagement of the Government in this process means that the Government has to provide a response to criticism of its acts or practices which violate human rights. The report itself can also shed light on practices which may not necessarily be in public view. For example, the report on *FZ v Commonwealth (Department of Home Affairs*)[82] includes extensive descriptions of the use of force in immigration detention, including photographs.[83] Yet, as is evident from the above brief review of reports published in 2020, the Government may (and frequently does) respond to the recommendations of the Human Rights Commission by rejecting those recommendations.

In a recent report published on discrimination in employment, a company was found to have discriminated against the complainant on the basis of her criminal record.[84] The President made a number of recommendations, including compensation, revision of the company's policies to

[79] [2020] AusHRC 138.
[80] [2020] AusHRC 137.
[81] [2020] AusHRC 136.
[82] [2020] AusHRC 135.
[83] See also the *Use of Force in Immigration Detention* [2019] AusHRC 130.
[84] *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018] AusHRC 125.

ensure they are in line with Government guidelines on the question of criminal history and that the company conduct relevant training for its human resources, recruitment and management staff. The company complied with all the recommendations made and noted that the complaints and conciliation process had 'been a positive experience for the Company with important learnings not only in legal compliance but also in humanity, empathy and compassion.'[85] The President commended the company for its response and reviewed the company's new anti-discrimination policy favourably.

1.1.8 Remedies – complaints about unlawful sex, race, disability and age discrimination

If conciliation fails, the Commission does not have the power to make an enforceable determination of unlawful discrimination.[86] Accordingly, the Act provides a procedure whereby, if conciliation fails, the aggrieved persons will be issued with a termination notice.[87] The complainant then has 60 days to apply to the FCA or the FCC to hear their case.[88] Courts will not grant remedies for unlawful discrimination unless the applicant has been through the Commission regime first.[89]

However, where the alleged discrimination includes claims of the constitutional invalidity of particular laws, the courts may hear a matter despite there being no prior complaint to the Commission.[90] Both the FCA and the FCC[91] are empowered to deal with cases of discrimination, harassment, vilification or victimisation that are not resolved at the Commission.

---

[85] *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018] AusHRC 125 [116]. See also *BE v Suncorp Group Ltd* [2018] Aus HRC 121 and Rosalind Croucher, 'Righting the Relic: towards effective protections for criminal record discrimination' (2018) 48 *Law Society Journal* 73, 75.

[86] See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, in which the High Court held that HREOC did not have the constitutional power to make legally binding decisions in complaints of unlawful discrimination because it was not established as a court under Chapter III of the Australian Constitution.

[87] *Australian Human Rights Commission Act 1986* (Cth) ss 46PH(2)–(3), 46PO(1).

[88] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(2). The Commissioners with mandates for particular issue areas can act as *amicus curiae* in these court proceedings. On the courts' discretion to grant extensions of time, see *Stepien v Department of Human Services* [2018] FCA 1062 [21]-[23] (Mortimer J); *Wickham v Victoria Legal Aid* [2019] FCA 1503 [13]-[14] (Kenny J).

[89] This is on the basis that the AHRC Act provides an exclusive regime for the remedying of contraventions of federal discrimination laws. See *Carreon v the Honourable Amanda Vanstone* [2005] FCA 865 (27 June 2005) [10]–[11]; *Juries Against Illegal Laws Incorporated v the State of Tasmania* [2010] FCA 578 (8 June 2010) [41]–[42]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 (3 October 2003) [69]; *Simundic v University of Newcastle* [2007] FCAFC 144 (31 August 2007) [18]; *Re East; Ex parte Nguyen 140* (1998) 196 CLR 354.

[90] See *Bropho v Western Australia* [2004] FCA 1209 (15 September 2004) [56] (Nicholson J) applying *Gerhardy v Brown* (1985) 159 CLR 70, stating that the issue of constitutional validity precedes the application of any remedy for a contravention.

[91] Matters can be lodged in either court and are regularly transferred between them by motion of a party or on the courts' own motion. For example, a matter may be transferred to the FCC if that would be less expensive and more convenient to the parties or if it would be determined more quickly there. It is usually cheaper to run a case in the FCC than the FCA. More complex matters are generally filed in or transferred to the FCA.

As noted above, there is a requirement for leave of the court before matters of unlawful discrimination can be heard pursuant to s 46PO.[92] In addition, the AHRC Act states that only 'affected persons' are entitled to make an application to the FCC or FCA.[93] As such, claims cannot be brought on behalf of others, in contrast to complaints to the Commission.

The complainant bears the onus of proof in establishing a complaint of unlawful discrimination.[94] The definitions of direct and indirect discrimination are mutually exclusive.[95]

Once a finding of unlawful discrimination is made, the court has a discretion to make such orders as it thinks fit. A non-exhaustive list of orders is provided in s 46PO(4) of the AHRC Act:

- a declaration of right;
- a declaration that the respondent has committed unlawful discrimination and a direction to the respondent not to repeat or continue such act or practice;[96]
- an order for the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;[97]
- an order for re-employment of an applicant;[98]

---

[92] The requirement for leave was introduced in 2017. The factors which may be considered in granting leave were considered by Mortimer J in *James v WorkPower Inc* [2018] FCA 2083, which also related to allegations of discrimination in connection to a wage assessment tool. In that matter, a settlement was approved in 2019: *James v WorkPower Inc* [2019] FCA 1239. On the discretion to grant leave, see also: *Budini v Sunnyfield* [2019] FCA 2164; *Rossi v Qantas Airways Limited (No 2)* [2020] FCA 1080; *Owen v Serendipity (WA) Pty Ltd t/as Advanced Personnel Management* [2020] FCA 1826; *Jones v Westpac Banking Corporation* [2020] FCA 238. Alternatively, it may be transferred to the FCA if the proceedings involve questions of general importance. Ultimately it will depend on whether there are associated proceedings pending in either of the courts and on the interests of justice at the time. Representative proceedings are limited to the Federal Court and involve additional requirements imposed by the Part IVA regime.

[93] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1). See also s 46POA and s 46POB.

[94] See *Evidence Act 1995* (Cth) s 140 which sets out the rules governing the standard of proof in all civil matters. *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 574 [127], 575 [132].

[95] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393; *Australian Medical Association v Wilson* (1996) 68 FCR 46, 55. The 'person affected' can allege direct discrimination and, in the event that the court finds that there was no direct discrimination, plead indirect discrimination in the alternative. See, e.g., *Minns v New South Wales* [2002] FMCA 60 (28 June 2002) [245] (Raphael FM).

[96] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(a). See, e.g., *Jones v Scully* (2002) 120 FCR 243, 308–9 [247] where the respondent was found to have breached the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth) by distributing material in letterboxes and at markets. Hely J made a declaration that specified the unlawful conduct found to have been engaged in by the respondent and ordered that the respondent be restrained from repeating or continuing such conduct. His Honour also made an order that the respondent be restrained from distributing, selling or offering to sell any leaflet or other publication which is to the same effect as the material listed in the declaration.

[97] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(b). For example, in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915 (1 December 2004), Baumann FM found that the placement of wash basins on the outside of toilet blocks constituted indirect disability discrimination as some persons with disabilities reasonably required the use of wash basins out of public view as part of their toileting regime [81]. As such, he ordered that the respondent construct and install internal hand basins in those toilet blocks within nine months [94].

[98] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(c).

- compensation for any loss or damage suffered because of the conduct of the respondent;[99]
- variation of the termination of a contract or agreement to redress any loss or damage suffered by an applicant;[100] or
- a declaration that it would be inappropriate for any further action to be taken in the matter.[101]

The remedy of compensation is often of particular importance to complainants. However, compensation amounts paid in discrimination cases are not generally high.[102]

---

[99] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(d). Courts have often relied on tortious principles to inform their calculations of damages under this section, to the extent that the use of these principles is appropriate in a particular case. See, for example, the approach of Lockhart J in *Hall v Sheiban* (1989) 20 FCR 217, 239. Cf the approach of French J at 281, which emphasised that the measure of damages is found in the words of the statute. See also *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 312 ALR 285, [23]-[31], [126], and [131], where Besanko and Perram JJ note that the approach of French J is preferred by more modern authorities. See also *Commissioner of Police v Mohamed* [2009] NSWCA 432, [47]-[48] Basten JA. Courts may order, for example, damages for economic loss, past and future medical expenses, counselling and past and future loss of income. There is also scope for the courts to award damages for non-economic loss such as hurt, humiliation and distress. See *Hall v Sheiban* (1989) 20 FCR 217, 256. Courts may award aggravated damages (see, e.g., *Hughes trading as Beesley and Hughes Lawyers v Hill* (2020) 382 ALR 231). However, judges have differed in their views on whether exemplary damages can be awarded in discrimination cases. Some argue that 'punitive' damages cannot be awarded because the section is compensatory (see *Hughes v Car Buyers Pty Ltd* (2004) 210 ALR 645, 657 [68] and the obiter comment of French and Jacobson JJ in *Qantas Airways Ltd v Gama* (2008) 247 ALR 273 at [94]). Others refer to the broad discretion to make orders as the court thinks fit under s 46PO(4) to suggest that exemplary damages may be available. The question was left open in *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92, [133], cited in *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 442 [340] (Barker J). The Full Court declined to decide the question in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130; 234 FCR 207 at [166] (Flick, Reeves and Griffiths JJ). In *Wotton v State of Queensland (No 5)* [2016] FCA 1457; 157 ALD 14 at [1784]-[1797], Mortimer J concluded from a review of judicial comments and the construction of the statutory that no such power is available under s 46PO(4)(d). However, even if it is later found that such a power is available, there is a clear reluctance to exercise it. On damages generally see chapter 7 of Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> . On remedies in anti-discrimination law more generally, see Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) chapter 16. As the authors note, online information on compensation amounts obtained in the courts published by the AHRC should be consulted with caution. There is insufficient information provided to understand the acts and damage that is sought to be remedied and compensated in each case and anecdotal evidence suggests that settlements prior to hearings may be in excess of amounts obtained in court, 915-6.

[100] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(e).

[101] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(f).

[102] See Chris Ronalds, *Discrimination Law and Practice* (Federation Press, 3rd ed, 2008) 223. The conservative figures historically awarded in relation to non-economic loss in sex discrimination cases has been subject to significant academic criticism. In *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 312 ALR 285, the academic commentary on inadequate compensation amounts were noted by Kenny J, at [86]-[87], [108]-[109], [117]-[118]. In that case, an award for $18,000 was substituted with a six-figure sum. That case marked a point of departure in the awards made in sexual discrimination cases for the

In addition, courts have the power to issue interim injunctions at any time after a complaint is lodged with the Commission to maintain the *status quo* or the rights of any of the parties.[103]

An order for costs may be made at the conclusion of the court proceedings or at an interim stage. Normal costs rules apply.[104] Costs in public interest cases are discussed in detail in research paper 11.

1.2 **The Commission's power to intervene in proceedings**

The Commission also has powers to intervene in proceedings involving certain human rights and discrimination issues (or 'intervention issues').[105] The Commission may intervene where this is permitted, sought or required by the courts, when the proceeding involves a significant intervention issue which is not peripheral to the proceedings, and which will not be adequately or fully argued by the parties to the proceedings.[106]

The Commission requires leave of the relevant court or tribunal to intervene. It does not need the permission of the parties to intervene but it must notify them that it intends to seek leave to

---

benefit of complainants, and by extension, the broader public interest in stopping discrimination occurring in the community. The low level of damages awarded at first instance were viewed as erroneous and increased on appeal to the benefit of the complainant, having regard to 'the nature and extent of Ms Richardson's injuries and prevailing community standards', at [81], [91].

[103] *Australian Human Rights Commission Act 1986* (Cth) s 46PP(1).

[104] Costs follow the event, subject to the general discretion of the courts to order otherwise: *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit Court of Australia Act 1999* (Cth) s 79. Where the matter is of public interest or importance this will likely be relevant to the exercise of judicial discretion in relation to costs. However, even where a significant issue arises in an arguable case, the usual costs rule still may apply, see *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, [20]-[24] (Driver FM) cited in See Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 446 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> . For criticisms of the application of the usual costs regime in the human rights and discrimination context, see Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An evaluation of the new regime* (Themis Press, 2010) 241-3. Costliness of court proceedings is one of the main factors identified by Disability Discrimination Commissioner Alastair McEwin, '25 years of the Disability Discrimination Act: Success, stagnation and strengthening the law' (2018) 42 *Law Society Journal* 71, 72-3.

[105] Intervention issues are human rights, discrimination in employment, racial discrimination, discrimination on the ground of sex, marital status, pregnancy or family responsibilities and sexual harassment, discrimination on the basis of disability and age discrimination. See Australian Human Rights Commission, *Intervention in court proceedings – The Australian Human Rights Commission Guidelines* (18 September 2009) <https://www.humanrights.gov.au/intervention-court-proceedings-australian-human-rights-commission-guidelines> . The AHRC power to seek leave to intervene is found in *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(o), 31(j); *Racial Discrimination Act 1975* (Cth) s 20(1)(e)*; Sex Discrimination Act 1984* (Cth) s 48(1)(gb), *Disability Discrimination Act 1992* (Cth) s 67(1)(l); *Age Discrimination Act 2004* (Cth) s 53(1)(g).

[106] Australian Human Rights Commission, *Intervention in court proceedings – The Australian Human Rights Commission Guidelines* (18 September 2009) <https://www.humanrights.gov.au/intervention-court-proceedings-australian-human-rights-commission-guidelines> . If a party decides to raise the issues considered important by the Commission, then the Commission may withdraw its application to intervene.

appear and on what issues it anticipates making submissions. A list of interventions made by the Commission can be found on the Commission's website.[107]

Commission interventions have covered a wide array of subject matters, including criminal law, coronial inquests, employment law, family law, human rights, native title, racial discrimination, refugee law and sex discrimination. Recent interventions include the limitations on private speech by public servants;[108] the validity of a warrant to raid a journalist's home and press freedoms;[109] court authorisation for hormonal treatment of children with gender dysphoria;[110] and the right to take an assistance dog in the cabin of aircraft.[111] The Commission also intervened in a state matter concerning the meaning of 'habitable' in relation to housing.[112]

While the Commission is invariably granted leave to intervene, on rare occasions the courts have been critical of submissions made by the Commission.[113] Overall, the Commission has been remarkably successful as an intervenor.

1.3 **Amicus curiae submissions by the Commission**

The Special Purpose Commissioners at the Australian Human Rights Commission may seek to assist the Federal Court or the Federal Circuit Court, with leave, as *amicus curiae* where:

- the Commissioner thinks the orders may affect to a significant extent the human rights of persons who are not parties to the proceedings; or
- the proceedings, in the opinion of the Commissioner, have significant implications for the administration of the relevant Act(s); or
- the proceedings involve special circumstances such that the Commissioner is satisfied that it would be in the public interest for the Commissioner to assist the court as *amicus curiae*.[114]

---

[107] Australian Human Rights Commission, *Submission to Court as Intervener and Amicus Curiae* <https://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae> .

[108] *Comcare v Banerji* (2019) 372 ALR 42. On this case and the use of international law, see Azadeh Dastyari, 'Vitalising international human rights law as legal authority: Freedom of expression enjoyed by Australian public servants and Article 19 of the 'International Covenant on Civil and Political Rights' (2020) 43(3*) University Of New South Wales Law Journal* 827.

[109] *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

[110] *Re: Imogen (No. 6)* (2020) 61 Fam LR 344. The AHRC had also intervened on this issue in *Re Kelvin* (2017) 57 Fam LR 503*; Re Alex: Hormonal Treatment For Gender Identity Dysphoria* (2004) 180 FLR 89; *Re: Bernadette* (2010) 45 Fam LR 24; *Re Jamie* (2013) 278 FLR 155.

[111] *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207.

[112] *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1. This and other cases concerning housing and the supply of water to Indigenous tenants in the Northern Territory are discussed in research paper 11.

[113] E.g., *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157, [125]–[131] (Martin CJ), on the basis that submissions focused on compliance with international instruments without identifying any ambiguity in the relevant provisions of the municipal law.

[114] *Australian Human Rights Commission Act 1986* (Cth) s 46PV. See also Ronnit Redman, 'Litigating for gender equality: the amicus curiae role of the Sex Discrimination Commissioner' (2004) 27(3) *UNSW Law Journal* 849.

This function can only be exercised where the court is hearing an application alleging unlawful discrimination under Division 2, Part IIB of the AHRC Act.[115] In other cases, the Commission's intervention function (discussed above) still applies.

A party to proceedings can request that a Commissioner consider acting as an *amicus curiae* in the proceeding. Once a Commissioner files a Notice of Intention to seek leave to appear, other parties to the proceedings can oppose the intervention. Subsequent to a grant of leave, a party may decide to raise or adopt the Commissioner's proposed issues. If this occurs, the Commissioner may decide not to press the application or limit involvement to written submissions.

Examples of *amicus curiae* submissions by Commissioners include:

- submissions of the Aboriginal and Torres Strait Islander and Social Justice Commissioner and Acting Race Discrimination Commissioner into the underpayment of Aboriginal workers in *Giblet v Queensland*;[116]
- submissions of the Aboriginal and Torres Strait Islander and Social Justice Commissioner and Acting Race Discrimination Commissioner into racial discrimination in *John Morris Kelly Country v Louis Beers;*[117]
- a number of submissions on the *Disability Discrimination Act* by the Disability Discrimination Commissioner, such as submissions regarding access to premises in *Webb v Child Support Agency,*[118] and assistance animals in *Forest v Queensland Health*;[119] and
- submissions of the Sex Discrimination Commissioner regarding marital status discrimination in *AB v Registrar of Births, Deaths and Marriages*,[120] special measures under the *Sex Discrimination Act*, part-time work and family responsibilities in *Howe v Qantas Airways Limited,*[121] and pregnancy discrimination in *Gardner v AANA Ltd*.[122]

An explanation of *amicus curiae* interventions more generally is found in research paper 10.

1.4 **Appealing decisions of the President to the Administrative Appeals Tribunal**

[115] The Commission has published '*Guidelines for the Exercise of the Amicus Curiae Function under the AHRC Act*' which outline what the Commissioner must consider before seeking leave of the court to appear. For example, relevant cases may be those which involve a new area of the law; where a case would clarify a disputed interpretation of the law; where a case has significant ramifications beyond the parties to the proceedings; or where a case may affect the human rights of a significant number of people. Commissioners must also consider factors such as whether they will be able to raise issues not otherwise before the court or to offer a perspective not raised by the parties and whether an amicus curiae submission would detract from the efficient conduct of the litigation. Practical considerations are also important, such as resource implications and the impact upon the integrity of the Commissioner's role and that of the amicus powers in future cases. See Australian Human Rights Commission, *Amicus guidelines* (18 September 2009) <https://www.humanrights.gov.au/amicus-guidelines> .
[116] [2006] FCA 537.
[117] [2004] FMCA 336.
[118] [2007] FMCA 1678.
[119] (2007) 161 FCR 152.
[120] [2006] FCA 1071.
[121] (2004) 188 FLR 1.
[122] [2003] FMCA 81.

The AAT does not have a general power to review decisions made under Commonwealth legislation. However, it is empowered to review certain decisions of the Australian Human Rights Commission[123] relating to the granting or refusal of exemptions to prohibitions on discrimination under the Commonwealth discrimination statutes.[124]

1.5 **Judicial Review of Decisions**

Where it is contended that a decision of the Commissioner under the AHRC Act contains errors of law, an application may be made to the Federal Court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for an order of review of the decision.[125]

2. The federal anti-discrimination acts

2.1 **The *Racial Discrimination Act 1975*** (RDA)

The RDA was the first anti-discrimination law enacted by the Commonwealth, giving effect to Australia's obligations under *ICERD*. The language of the statute draws on that of the treaty and *ICERD* is attached as a schedule to the RDA.[126]

[123] See the Administrative Appeals Tribunal Jurisdiction List, *Decisions Subject To Review* (31 May 2019) <https://www.aat.gov.au/AAT/media/AAT/Files/Lists/List-of-Reviewable-Decisions.pdf> .

[124] See *Age Discrimination Act 2004* (Cth) s 45; *Disability Discrimination Act 1992* (Cth) s 56; *Sex Discrimination Act 1984* (Cth) s 45; *Disability (Access to Premises – Buildings) Standards 2010* (Cth) cl 5.4.

[125] *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5, 7. See e.g., *Qajar v Australian Human Rights Commission* [2023] FCA 314 (Meagher J) where the applicant initially sought judicial review of a decision of a delegate of the President of the Commission to not continue to inquire into his complaint against the Commonwealth of Australia for alleged breach of his human rights. See also *Przybylowski v Australian Human Rights Commission* [2023] FCA 177 (Perry J).

[126] See Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264-5. The effectiveness of the RDA has been doubted. See, for example, Beth Gaze, 'Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000-2004' (2005) 11(1) *Australian Journal of Human Rights* 6; Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2014) 17(2) *Australian Indigenous Law Review* 3. See also Alice Taylor,' Anti-Discrimination Law as the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*, (2021)', 42(2) *Adelaide Law Review*, 405.

Under the RDA, it is unlawful to racially discriminate against others.[127] This includes 'direct'[128] and 'indirect'[129] discrimination. Unresolved questions of interpretation and construction concerning these key provisions remain despite over 45 years elapsing since the RDA was enacted.[130]

There are also specific prohibitions making it unlawful to:

- refuse specific people access to places or vehicles based on their, or their relatives or associates, race, colour or national or ethnic origin (s 11);
- refuse to sell, assign, lease, let, sub-lease, sub-let, license or mortgage land, housing or other accommodation to a person or on less favourable terms than would otherwise be offered on the basis of their, or their relatives or associates, race, colour or national or ethnic origin (s 12);
- refuse to supply goods and services to another person by reason of their, or their relatives or associates, race, colour or national or ethnic origin (s 13);
- prevent a person from joining a trade union by reason of their race, colour or national or ethnic origin (s 14);
- refuse to employ someone, or to dismiss them by reason of their, or their relatives or associates, race, colour or national or ethnic origin (s 15);
- advertise in a way that indicates that one will unlawfully discriminate against another by reason of their, or their relatives or associates, race, colour or national or ethnic origin (s 16);
- incite, assist or promote any of the above acts (s 17); and

---

[127] Race, colour, and ethnic origin are not defined under the RDA or the ICERD. These words will be given their broad popular meaning, see *Eatock v Bolt* [2011] FCA 1103; 197 FCR 261, [312]-[316] (Bromberg J). However, the complexity and contest over understandings of race and its cognate terms continues to be an aspect of the legislation which could be subject to useful reform, particularly the lack of an express 'characteristics extension', see Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) chapter 5, particularly 249-51. See also Bill Swannie, 'Speech Acts: is racial vilification a form of racial discrimination?' (2020) 41(1) *Adelaide Law Review* 179.

[128] Direct discrimination is any act which distinguishes, excludes, restricts or preferences another person, based on race, colour, descent or national or ethnic origin, with the result of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life: *Racial Discrimination Act 1975* (Cth) s 9(1).

[129] Indirect discrimination is where a person requires another person to comply with a term, condition or requirement which is not reasonable, and with which they cannot comply, by reason of the other person's race, colour, descent or national or ethnic origin, resulting in nullification or impairment of their ability to enjoy or exercise of their rights on an equal basis: *Racial Discrimination Act 1975* (Cth) s 9(1A). See also *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, [45] (Kenny J, with whom Greenwood and Logan JJ agreed).

[130] For example, questions of whether a race, or other defined characteristic must be a material factor for the act to be 'based on' that characteristic, or if it merely must be done by reference to race, for the purposes of s 9, see: *Hamzy v Commissioner of Corrective Services and the State of NSW* [2020] NSWSC 414, [163]-[164], citing the approaches of Weinberg J in *Macedonian Teachers' Association of Victoria Inc. v Human Rights and Equal Opportunity* Commission (1998) 160 ALR 489, 512 and *Maiocchi v Royal Australian and New Zealand College of Psychiatrists (No. 4)* [2016] FCA 33 at [339]-[340]. See also Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 46 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> .

- offend, insult, humiliate or intimidate another person or group of people in public on the basis of their racial, colour or national or ethnic origin (s 18C, also known as the racial vilification provision).[131] However, there are exemptions, *inter alia,* for artistic works, debates held in the public interest and reporting purposes.[132]

These specific grounds do not limit the generality of the prohibition on racial discrimination under s 9.[133] Mortimer J has described s 9 as having two limbs: a 'conduct-based' and an 'outcome-based' limb.[134] Mortimer J noted the breadth of the provision, derived from the language of the text and the *ICERD,* and its focus on substantive equality.[135]

In addition, there is a general right to equality before the law under s 10, which implements article 5 of ICERD to 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'.[136] This has been one of the RDA's most

---

[131] As introduced by s 3 of the *Racial Hatred Act 1995* (Cth). The Abbott Government sought to reform the *Racial Discrimination Act 1975* (Cth) in 2014, including the repeal of s 18C. However, the draft reforms failed to draw sufficient support and amendments to the Act were not made. In 2004, Meagher argued that the harm threshold in s 18C was insufficiently clear, leading to unpredictable decision making. He indicated that this was unlikely to be solved through the development of 'interpretative clarity' over time: Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225. The language of the provision has not changed since 2004. The wording lacks clarity for the public who must abide by the law. However, contrary to Meagher's projections, some clarity has developed through jurisprudence over time to enable predictable court outcomes. The courts have given a narrow interpretation to the words with application only to 'profound and serious effects', although on their face they may still be unclear. See Australian Human Rights Commission, 'Body of case law provides clarity on 18C: Commissioner' (14 March 2014) <https://humanrights.gov.au/about/news/body-case-law-provides-clarity-18c-commissioner> ; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [16] (Kiefel J); *Jones v Scully* (2002) 120 FCR 243, 269 [102]. The provision has continued to elicit criticism from some quarters concerning its effect on freedom of speech, despite evidence of broad public support for its retention, see Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986* (28 February 2017) chapter 2; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth laws*, Report No. 129 (12 January 2016) chapter 4. See also Tim Soutphommasane, 'The AHRC and the Racial Discrimination Act: Setting the record straight' (2017) 30 *Law Society of NSW Journal* 70; Tim Soutphommasane, '40 Years of the Racial Discrimination Act' (2015) 8 *Law Society Journal* 21; Elizabeth Hicks, 'Context and the limits of legal reasoning: the "victim focus" of section 18C in comparative perspective' (2016) 44 *Federal Law Review* 257.

[132] *Racial Discrimination Act 1975* (Cth) s 18D, as introduced by s 3 of the *Racial Hatred Act 1995* (Cth).

[133] *Racial Discrimination Act 1975* (Cth) s 9(4). Gibbs CJ stated that the Part II provisions 'may be regarded as amplifying and applying to particular cases the provisions of s 9 which prohibit acts of discrimination'; *Gerhardy v Brown* (1985) 159 CLR 70, 85. According to one commentator approximately 15 claims invoking s 18C have been brought to the courts by Aboriginal and Torres Strait Islander people in the previous twenty years: Justin Mohamed, 'Racial Discrimination Act-Section 18C The facts', https://www.reconciliation.org.au/wp-content/uploads/2021/10/Racial-Discrimination-Act_18C.pdf.

[134] *Wotton v State of Queensland (No 5)* [2016] FCA 1457; 157 ALD 14 [530]-[531]. This was a representative proceeding arising from discrimination by police against Aboriginal people on Palm Island in 2004.

[135] *Wotton v State of Queensland (No 5)* [2016] FCA 1457; 157 ALD 14, [532].

[136] A complainant is not required to show that their right to equality was infringed 'based on' or 'by reason of' their race, colour, national or ethnic origin. The section may apply where there is no express

consequential provisions; for example, it played a critical role in the ultimate recognition of native title – see *Mabo v Queensland (No 1)*,[137] discussed below.

distinction on the basis of one of these categories, where the operation or effect of the law or a relevant provision of the law, they do not enjoy a right that is enjoyed by persons of another race, colour, nationality or ethnic origin, or enjoy that right to a more limited extent. See *Bropho v Western Australia* [2004] FCA 1209; *Ward v Western Australia* (2002) 213 CLR 1; *Maloney v the Queen* (2013) 252 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland* [No 1] (1988) 166 CLR 186; *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ). One aspect of the decision in *Bropho v Western Australia* (reading down the scope of s 10 to exclude laws imposing reasonable or legitimate restrictions on rights such as property rights) was subsequently overruled in *Maloney v the Queen* (2013) 252 CLR 168, see Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 31-2 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> ; Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228. The AHRC cannot investigate complaints under s 10, as it lacks jurisdiction to inquire into an allegation that a state or territory law is inoperative. Instead, proceedings must be lodged in the Supreme Court of the state or territory in which the legislation was made or in the Federal Court. For example, in *Hamzy v Commissioner of Corrective Services and the State of NSW* [2020] NSWSC 414, Bellew J considered, *inter alia,* whether s10(1) was infringed by a NSW regulation which provided that all communications during a visit to a prison inmate designated as an 'extreme high risk restricted inmate' be conducted in English. Bellew J considered that the 'right' asserted by Hamzy did not fall within s 10(1), but even if it did, there would be no breach where a person does not enjoy a right, or enjoys it to a lesser extent, because of their individual personal circumstances, namely being imprisoned and designated as an 'extreme high risk restricted inmate', at [164]-[165], citing *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514, [45] (Goldberg and Hely JJ). Rees, Rice and Allen have commented that, despite the potential of s 10 to challenge laws with a discriminatory operation or effect, it 'remains under-utilised, no doubt because of its complexity': RDA Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018) 280. See also George Williams and Daniel Reynolds, 'The Racial Discrimination Act and inconsistency under the Australian Constitution' (2015) 36 *Adelaide Law Review* 241, 254.

[137] (1988) 166 CLR 186.

Special measures securing the advancement of certain racial or ethnic groups or individuals are permitted under the Act.[138] Special measures have been described by the courts as 'integral' to the principle of non-discrimination in the RDA.[139]

The RDA also contains vicarious liability provisions, so that employers will be liable for acts of an employee or agent which are unlawful under the RDA, unless they can establish that all reasonable steps were taken to prevent the employee or agent from doing the offending act.[140]

Unlawful acts of racial discrimination do not constitute a criminal offence.[141] The RDA contains limited offence provisions relating to the administration of the Act and the disclosure of personal information: see ss 27 and 27F.

Both individuals and legal entities may have standing if relevantly affected on racial grounds.[142]

Some landmark or significant cases regarding racial discrimination include:

- *Koowarta v Bjelke-Petersen*,[143] where Mr Koowarta sued the Queensland Government for discrimination for its refusal to approve the transfer of a pastoral lease to him and other Aboriginal stockmen, known as the Winychanam Group. The transfer had been blocked on the basis of a belief that 'sufficient land in Queensland is already reserved and available for the use and benefit of Aborigines'. Koowarta successfully complained to the HREOC. The Queensland Government appealed this decision to the Queensland

[138] *Racial Discrimination Act 1975* (Cth) s 8. See Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 63 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> . The use of 'special measures' has been controversial. In 2007, the Commonwealth Parliament enacted a package of legislation including the *Northern Territory National Emergency Response Act 2007* (Cth), purportedly to address claims of violence, child sexual abuse and neglect in Northern Territory Aboriginal communities. S 132 exempted the government's 'special measures' (including changes to welfare provisions, law enforcement and land tenure) from the obligations in Part II of the RDA. While the intervention included some positive measures, including increased healthcare resources, many of the policies and laws enacted were not related to the stated goals of the policy, including the abolition of the permit system under the Northern Territory *Land Rights Act* and providing Government services in exchange for giving up rights to land. The intervention was criticised as paternalistic, discriminatory, lacking in consultation and an unacceptable infringement of human rights, such as through income management. It was widely opposed by Aboriginal communities in the Northern Territory. While the legislation relating to the intervention was repealed in 2012 and replaced with the *Stronger Futures in the Northern Territory Act 2012* (Cth), its impact and legacy are ongoing. A number of criticised measures continued under the 2012 legislation, which is still in force. See Amnesty International, 'The NT intervention and human rights' (2010) <https://www.amnesty.org/download/Documents/SEC010032010ENGLISH.PDF>; Jumbunna Indigenous House of Learning, 'Listening but not hearing' (March 2012) <https://www.uts.edu.au/sites/default/files/ListeningButNotHearing8March2012_1.pdf>; Castan Centre for Human Rights Law, 'The Northern Territory intervention: an evaluation' (2020) <https://www.monash.edu/__data/assets/pdf_file/0003/2106156/NT-Intervention-Evaluation-Report-2020.pdf>.

[139] *Maloney v the Queen* (2013) 252 CLR 168, [327] (Gageler J).

[140] *Racial Discrimination Act 1975* (Cth) ss 18A, 18E as introduced by s 3 of the *Racial Hatred Act 1995* (Cth). See, e.g. *House v Queanbeyan Community Radio Station* [2008] FMCA 897.

[141] *Racial Discrimination Act 1975* (Cth) s 26.

[142] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 236 (Mason J); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 237 FLR 369, 390 [38] (McMurdo P).

[143] (1982) 153 CLR 168.

Supreme Court and also challenged the constitutional validity of the RDA. By a 4:3 majority, the High Court confirmed the constitutional validity of the RDA. As such, the Commonwealth had the authority, not only to sign the *ICERD* and incorporate it into domestic law via the RDA, but to ensure that state governments complied with it.

- *Gerhardy v Brown*,[144] in which Mr Brown, who was charged with going on Pitjantjatjara land in South Australia without permission, argued that the *Pitjantjatjara Land Rights Act 1981* (SA) was inconsistent with the RDA and consequently invalid. The High Court held that the South Australian Act was a 'special measure' for the purposes of s 8(1) of the RDA and consequently valid. As such, non-Pitjantjatjara people could lawfully be excluded from the Pitjantjatjara lands.
- *Mabo v Queensland (No 1)*,[145] in which the validity of the *Queensland Coast Islands Declaratory Act 1985* (Qld) was challenged. The Act purported to extinguish the Meriam peoples' interests in their land. The Murray Islanders argued that the Act denied them equality before the law and the enjoyment of their right to own property, as well as arbitrarily depriving them of their property contrary to article 5 of the *ICERD.* The High Court held (4:3) that the Act was inconsistent with the RDA and therefore invalid. The case confirmed that s 10 of the RDA could render subsequent discriminatory state legislation invalid.
- *Mabo v Queensland (No 2)*,[146] which considered whether Australian law would protect the Meriam peoples' traditional rights and interests in the land of the Murray Islands. The High Court held (6:1) that the common law of Australia recognises a form of native title to land and rejected the *terra nullius* doctrine. As such, the Meriam people were entitled, as against the whole world, to the possession, use, occupation and enjoyment of (most of) the Murray Islands. The relevance of the RDA is that it requires fair and just compensation to be paid for loss of native title after 1975.
- *Western Australia v Commonwealth*,[147] in which the Western Australian Government challenged the validity of the *Native Title Act 1993* (Cth) and representatives of the Wororra and Martu Peoples challenged the validity of the *Land (Titles and Traditional Usage) Act 1993* (WA), which purported to extinguish native title in WA and replace it with 'rights of traditional usage'. This was a form of 'statutory' title. The High Court found that the *Native Title Act* was valid and that the Western Australian Act was invalidated by the RDA on the basis that s 10 ensures that native title holders have the same security of enjoyment of their land title as other land holders.
- *Jones v Toben*,[148] in which the Executive Council of Australian Jewry claimed that the Adelaide Institute's website, established by Dr Fredrick Toben, was anti-Semitic and vilified Jewish people. The Federal Court found that certain documents on the website vilified Jewish people and as such breached the RDA. The case was the first to apply the RDA's racial vilification provisions to the Internet.
- *Eatock v Bolt*,[149] in which newspaper and online blog articles targeting fair-skinned Aboriginal people were found to breach s 18C of the RDA. The successful outcome led to a media backlash against the provision based on free speech arguments.

[144](1985) 159 CLR 70.
[145] (1988) 166 CLR 186.
[146] (1992) 175 CLR 1.
[147] (1995) 183 CLR 373.
[148] [2002] FCA 1150.
[149] (2011) 197 FCR 261.

- *Clarke v Nationwide News*,[150] in which the publication of readers' comments on a news article was found to breach s 18C.
- *Maloney v the Queen,*[151] in which the criminalisation of possession of amounts of liquor within certain geographical areas which were overwhelmingly populated by Aboriginal people was challenged for inconsistency with the *ICERD* and s 10 of the RDA. The Court considered issues of inconsistency under s 109 of the *Constitution* and provided guidance on 'special measures' under the RDA.
- *Wotton v Queensland*,[152] a class action against the State of Queensland relating to discrimination by the police against Indigenous residents of Palm Island, following a death in custody and subsequent protests and fires in 2004. The class action was successful at first instance and, following the withdrawal of an appeal, resulted in a $30 million settlement.

2.2 The *Sex Discrimination Act 1984* (SDA)

The SDA gives effect to Australia's obligations under various international law instruments.[153] The SDA provides that it is unlawful for a person to discriminate against another person on the grounds of their sex, marital status, pregnancy or potential pregnancy or breastfeeding by treating them less favourably than they treat or would treat a person without those attributes. For example, by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons with those attributes.[154]

In addition, the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) inserted new protections into the SDA, including making discrimination unlawful on the basis of sexual orientation, gender identity and intersex status.[155] It also increased protection from discrimination for same-sex de facto couples.[156]

---

[150] (2012) 201 FCR 389.
[151] (2013) 252 CLR 168.
[152] [2016] FCA 1457; 157 ALD 14
[153] The CEDAW, the ICCPR, the ICESCR, the CRC and various ILO Conventions, *No 100 - Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, No 111 - Concerning Discrimination in respect of Employment and Occupation, No 156 - Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities,* and *No 158 - Concerning Termination of Employment at the Initiative of the Employer.* See *Sex Discrimination Act 1984* (Cth) ss 4 (definition of "relevant international instrument"), 9(10). However, the extent to which the SDA effectively implements the CEDAW 'has been a mixed story': Hillary Charlesworth and Sara Charlesworth, 'The *Sex Discrimination Act* and International Law' (2004) 27(3) *UNSW Law Journal* 858, 864-5.
[154] *Sex Discrimination Act 1984* (Cth) ss 5–7A.
[155] *Sex Discrimination Act 1984* (Cth) ss 5A–5C.
[156] *Sex Discrimination Act 1984* (Cth) s 4. Another statute which related to the rights of homosexual men was the *Human Rights (Sexual Conduct) Act 1994* (Cth). The *Human Rights (Sexual Conduct) Act* was enacted in response to the Tasmanian government's refusal to repeal provisions that criminalised consensual sex between adult males in private. Section 4(1) provides that 'sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the ICCPR.' Nicholas Toonen, a Tasmanian resident, had brought a complaint to the United Nations Human Rights Committee on the basis that the law violated his right to privacy under articles 17 and 26 of the ICCPR because it distinguished between people on the basis of sexual activity, sexual orientation and identity,

Under the SDA it is unlawful, *inter alia,* to discriminate against a person with regard to:

- employment or dismissal from employment (ss 14(1)–(3), 15);
- the payment of a superannuation benefit (s 14(4).);
- working conditions (s 16); partnership (s 17);
- the conferral, renewal or extension of an authorisation or qualification (s 18);
- membership of a registered organisation (s 19);
- use of employment agency services (s 20);
- admission as a student to an educational authority (s 21);
- the provision of goods and services and access to facilities (s 22);
- access to accommodation (s 23);
- the disposition of an estate or interest in land (s 24);
- membership to a club (s 25);
- functions and powers of any Commonwealth law or program (s 26); or
- the provision of information during an interview process (s 27).

The definition of discrimination includes both direct[157] and indirect discrimination.[158] Indirect discrimination is also subject to a reasonableness test. Certain impositions, conditions, requirements or practices that disadvantage someone on the defined grounds will not be unlawful if the impositions, conditions, requirements or practices are reasonable in the circumstances.[159] What is reasonable depends on the nature and extent of the disadvantage

---

meaning that gay men in Tasmania were unequal before the law. The Committee upheld his complaint and stated that sexual orientation was included in the treaty's anti-discrimination provisions as a protected status (*Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994). Despite this ruling, the Tasmanian Parliament refused to repeal the offending laws. In 1997, Mr Rodney Croome applied to the High Court for a ruling as to whether the Tasmanian laws were inconsistent with the Commonwealth Act (*Croome v Tasmania* (1997) 91 CLR 119). However, the Tasmanian Government repealed the relevant Criminal Code provisions after failing in its attempts to have the matter struck out. The Act is still in force and has been considered briefly in a few subsequent cases, the most recent of which was in 2011.

[157] That is, subjecting a person to less favourable treatment than another person, based on the presence of a defined attribute. An example would be where an employer refuses to allow an employee to attend a work-based training because she is pregnant, or where an employer forces an employee to resign because she is suffering morning sickness when pregnant: see Pru Goward, 'Obligations under the *Sex Discrimination Act 1984* (Cth)', Speech to the NSW Department of Transport (5 March 2001) <http://www.humanrights.gov.au/about/media/speeches/sex_discrim/dept_transport.html> . Discrimination on the ground of family responsibilities is limited to direct discrimination.

[158] That is, where the discriminatory action taken does not appear on its face to be discriminatory. An example would be where an employer introduces a policy that employees who have worked continuously for the company for 20 years will receive a wage increase. This may disadvantage women as they are more likely to take breaks from their working lives to have children and are therefore less likely to have worked continuously in one company for 20 years: see Pru Goward, 'Obligations under the *Sex Discrimination Act 1984* (Cth)', Speech to the NSW Department of Transport (5 March 2001) <http://www.humanrights.gov.au/about/media/speeches/sex_discrim/dept_transport.html> .

[159] *Sex Discrimination Act 1984* (Cth) s 7B(1).

imposed; the feasibility of overcoming or mitigating the disadvantage; and whether the disadvantage is proportionate to the result sought.[160]

The SDA contains certain exemptions, whereby discrimination on the ground of sex will not be unlawful, for example, where there is a genuine need for an employee to be of a certain sex[161] and in relation to sport.[162] Voluntary bodies, charities, religious bodies[163] and educational institutions are also afforded certain exemptions from the requirements of the Act.[164] The Commission is able to grant temporary exemptions under s 44 for periods of less than five years.[165]

Sexual harassment is also unlawful under the SDA, which is described as when a person makes an unwelcome sexual advance, makes an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[166]

---

[160] *Sex Discrimination Act 1984* (Cth) s 7B(2).

[161] *Sex Discrimination Act 1984* (Cth) s 30.

[162] *Sex Discrimination Act 1984* (Cth) s 42.

[163] The breadth of the exemption for religious bodies under s 37 has been criticised: Hillary Charlesworth and Sara Charlesworth, 'The *Sex Discrimination Act* and International Law' (2004) 27(3) *UNSW Law Journal* 858, 863-4. While this criticism dates from 2004, the text of the provision has not changed.

[164] *Sex Discrimination Act 1984* (Cth) ss 36–39. In addition, it should be noted that the SDA does not expressly bind the Crown in right of a state, see Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 96 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> .

[165] Australian Human Rights Commission, 'Temporary exemptions under the Sex Discrimination Act 1984 (Cth)' <https://humanrights.gov.au/our-work/legal/temporary-exemptions-under-sex-discrimination-act-1984-cth>.

[166] *Sex Discrimination Act 1984* (Cth) s 28A(1). On the relationship between sexual harassment and sex discrimination, see the caselaw outlined in Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 148 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> . In 2020, the Commissioner Kate Jenkins published a national inquiry report on sexual harassment at work, 'Respect @ Work' which concluded that sexual harassment remains pervasive in Australian workplaces and there is a need for reform. It was noted, at 14, that 'the current system for addressing workplace sexual harassment in Australia is complex and confusing for victims and employers to understand and navigate. It also places a heavy burden on individuals to make a complaint.' The Report recommendations included strengthening obligations under the SDA and the establishment of a Workplace Sexual Harassment Council. The lack of a positive duty to prevent sexual harassment in the workplace was said to result in it being treated a lower priority by employers than health and safety or other employment legislation. The lack of clarity in the objects (such as the absence of achieving substantive equality), outdated definitions (relating to the meaning of workplace given the change in work structures), the lack of liability for those who aid or permit the sexual harassment of others, the relatively short time-frame to lodge complaints of six months, the risk of adverse costs and the inquiry role of the AHRC were also noted as issues in need of reform, see 26-8. See also Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *UNSW Law Journal* 155; Jodie Davis and Ariella Markman, 'Behind closed doors: Approaches to resolving complaints of sexual harassment in employment' <https://humanrights.gov.au/our-work/complaint-information-service/publications/behind-closed-doors-approaches-resolving> . In July 2022 the Federal Attorney-General announced he would fully implement all 55 recommendations of the Respect@Work report.

This conduct may include:

- staring, leering or unwelcome touching;
- suggestive comments or jokes;
- unwanted invitations to go out on dates or requests for sex;
- intrusive questions about a person's private life or body;
- unnecessary familiarity, such as deliberately brushing up against a person;
- emailing pornography or rude jokes;
- displaying images of a sexual nature around the workplace;
- communicating content of a sexual nature through social media or text messages; and
- behaviour that may also be considered to be an offence under criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.[167]

A recent example arising under the NSW anti-discrimination legislation is illustrative.[168]

Sexual harassment is unlawful in: the workplace;[169] registered organisations;[170] employment agencies;[171] educational institutions;[172] clubs;[173] the provision of goods and services;[174] the course of disposing or acquiring land;[175] the course of conferring, renewing, extending, revoking or withdrawing an authorisation or qualification;[176] the administration of Commonwealth laws and programs;[177] and the provision of accommodation.[178]

Section 94 of the SDA prohibits 'victimisation' of people who make complaints of discrimination, with a pecuniary penalty or three-month period of imprisonment for non-compliance.[179]

---

[167] See Australian Human Rights Commission, *Sexual harassment* <https://humanrights.gov.au/quick-guide/12096> .

[168] https://www.smh.com.au/national/nsw/sydney-water-found-to-have-discriminated-in-lubricate-poster-20191002-p52wv5.html.

[169] *Sex Discrimination Act 1984* (Cth) s 28B. On the meaning of 'workplace', see *Vergara v Ewin* (2014) 223 FCR 151. MacDermott notes that, in the courts, 'very few employers succeed in establishing that they have taken all reasonable steps to prevent their employees engaging in harassing conduct, as the obligation is seen as requiring a "lively and real interest" and sustained effort to maintain a harassment-free work environment': Therese MacDermott, 'The under-reporting of sexual harassment in Australian workplaces: are organisational processes falling short?' (2020) 40 *Legal Studies* 531, 547, citing *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102, [163] and *Saldana v John Danks and Sons Pty Ltd* [2009] VCAT 448, [32].

[170] *Sex Discrimination Act 1984* (Cth) s 28D.

[171] *Sex Discrimination Act 1984* (Cth) s 28E.

[172] *Sex Discrimination Act 1984* (Cth) s 28F.

[173] *Sex Discrimination Act 1984* (Cth) s 28K.

[174] *Sex Discrimination Act 1984* (Cth) s 28G.

[175] *Sex Discrimination Act 1984* (Cth) s 28J.

[176] *Sex Discrimination Act 1984* (Cth) s 28C.

[177] *Sex Discrimination Act 1984* (Cth) s 28L.

[178] *Sex Discrimination Act 1984* (Cth) s 28H.

[179] The language of this provision is largely identical to s 42 of the DDA, so that the jurisprudence on both sections is helpful to understand victimisation on the basis of disability or sex and other defined

The SDA also contains vicarious liability provisions so that if an employee or agent commits an unlawful act under the SDA ' in connection with' their employment or duties, the employer will be liable unless they can establish that all reasonable steps were taken to prevent the employee or agent from doing the unlawful act.[180] In addition, liability attaches to those who cause, instruct, induce, aid or permit another person to do one or more of these unlawful acts[181] and to bodies corporate, who are liable for unlawful acts committed by those acting on its behalf. [182]

Written complaints alleging unlawful discrimination with regard to the above acts can be lodged with the Australian Human Rights Commission.[183] However, not every unlawful act will constitute a criminal offence.[184]

---

attributes. The courts have grappled with whether victimisation can give rise to civil and criminal proceedings. In recent years, the courts have questioned whether there is jurisdiction to hear proceedings pursuant to s 46PO of the AHRC Act which allege victimisation as the relevant unlawful discriminatory act(s). See *Penhall-Jones v New South Wales* [2007] FCA 925, [6]-[10]; *Dye v Commonwealth Securities Limited (No 2*) [2010] FCAFC 118, [43], [71]; cf obiter comments in *Chen v Monash University* (2016) 244 FCR 424, [119]-[124] (which was followed by North J in Chen v Birbilis [2016] FCA 661); and doubts expressed in *Walker v Cormack* [2011] FCA 861, [37]-[41] and *Walker v State of Victoria* [2012] FCAFC 38, [98]-[100] (Gray J); Hazledine v Arthur J Gallagher Australia & Co (Aus) Limited [2017] FCA 575, [16]; *Tropoulos v Journey Lawyers Pty Ltd* [2019] FCA 436, [313]-[319]. The Commission filed written submissions in relation to this question in *Winters v Fogarty* [2017] FCA 51. The authorities were considered in a strike out application at [25]-[34], with Bromberg J refusing to strike out the application on the grounds of want of jurisdiction. In *Wilson v Britten-Jones (No 2)* [2020] FCA 1290, [138] Abraham J described this as a 'live issue' requiring consideration by the Full Court. In that matter, the applicant had not presented any material to support the claim and so did not express a concluded view.

[180] *Sex Discrimination Act 1984* (Cth) s 106. This liability has been found to extend to harassment away from the usual site of work, including in shared accommodation of employees while they attended a work conference in *Leslie v Graham* [2002] FMCA 109 and off-duty accommodation in *South Pacific Resort Hotels Pty Ltd v Trainor* [2002] FCA 32. The scope of the section is construed broadly. It has been found to include the rape of an employee by a co-worker which was viewed as a part of a course of sexual harassment in *Lee v Smith* 2007] FMCA 59.

[181] *Sex Discrimination Act 1984* (Cth) s 105. See also Patricia Easteal and Skye Saunders, 'Interpreting vicarious liability with a broad brush In sexual harassment cases' (2008) 33(2) *Alternative Law Journal* 75. It also appears that common law vicarious liability may be available for claims of victimisation per s 94, although this is less clear: *Taylor v Morrison* [2003] FMCA 79, [22] and *Lee v Smith* [2007] FMCA 59, cited in Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 166 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> 130 .

[182] *Sex Discrimination Act 1984* (Cth) s 107.

[183] *Australian Human Rights Commission Act 1986* (Cth) s 46P.

[184] *Sex Discrimination Act 1984* (Cth) s 85. Only those acts expressly described in sections 86 - 95 of the SDA are offences. Some acts are punishable with a fine, such as advertising an intention to do an act which is unlawful under the Act (s 86); failing to provide actuarial or statistical data regarding acts of discrimination to the Commission (s 87); or communicating particulars of a complaint without authority (s 92). Should a person victimize another – that is, threaten them on the basis that they made a complaint to the Commission or are involved in a complaint –they could be liable to a fine and three months imprisonment. A more substantial fine will be imposed if the perpetrator is a body corporate (s 94). It is also an offence, subject to a fine, to insult, hinder, obstruct, molest or interfere with a person exercising a power or performing a function under the SDA (s 95). In relation to s 92, it has been suggested that criminal sanctions for breach of the provision may have a 'chilling effect' on transparency and there is 'a dramatic need to reduce the use of non-disclosure provisions in settlement agreements more generally,

There are also a number of other Commonwealth Acts and policies which may be relevant to a complaint under the SDA, such as the *Workplace Gender Equality Act 2012* (Cth)*; Family Law Act 1975* (Cth); and the *Paid Parental Leave Act 2010* (Cth).

Some significant cases concerning sex discrimination include:

- *Hill v Hughes*[185] where a solicitor seeking to woo an employee solicitor with the firm was found to have engaged in sexual harassment and ordered to pay $170,000 in compensation.
- *McBain v Victoria*,[186] where Dr McBain, a gynaecologist, challenged the Victorian law prohibiting the provision of IVF treatment to single women in the Federal Court, arguing that was discrimination in the provision of goods and services on the grounds of sex or marital status. He was successful before the Federal Court and the decision was unsuccessfully challenged in the High Court by the Australian Catholic Bishops Conference.[187]
- *Hickie v Hunt & Hunt*,[188] in which a partner of a law firm (Ms Hickie) brought a claim against her employer for refusing her request to work part-time following the birth of her child. The HREOC found that the law firm had indirectly discriminated against Hickie by requiring her to work full-time in order to maintain her practice. The firm was ordered to pay $95,000 in compensation. This case 'has proven to be one of the most significant cases dealing with discrimination on the basis of family responsibilities in the employment area'.[189] It is also useful for an understanding of reasonableness for the purposes of s 7B(2).[190]
- *Alridge v Booth*,[191] in which the concept of 'unwelcome' sexual advances was explored. Justice Spender defined the concept as an advance, request or conduct which was not solicited or invited by the employee, and which the employee regarded as undesirable or offensive. It is a subjective test, so it is irrelevant that the behaviour may not offend others or has been an accepted feature of the work environment in the past. As a 'general principle of tort law - you take your victim as you find them'.[192]

---

particularly when seeking to reveal the prevalence of discrimination as a systemic problem:' Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2020) 43(2) *Melbourne University Law Review* 384. On confidentiality and sexual harassment, see Therese MacDermott, 'The under-reporting of sexual harassment in Australian workplaces: are organisational processes falling short?' (2020) 40 *Legal Studies* 531, 542-3.

[185] [2019] FCCA 1267 (Judge Vasta) 287 IR 86. See also *Leung v Chung (Human Rights)* [2023] VCAT 1193, a decision under the Victorian legislation.

[186] (2000) 99 FCR 116.

[187] *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

[188] [1998] HREOCA 8 (extract at (1998) EOC 92-910).

[189] Pru Goward, 'Obligations under the *Sex Discrimination Act 1984* (Cth)', Speech to the NSW Department of Transport (5 March 2001).
<http://www.humanrights.gov.au/about/media/speeches/sex_discrim/dept_transport.html> .

[190] Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016)
<https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> 130.

[191] (1988) 80 ALR 1.

[192] Pru Goward, 'Obligations under the *Sex Discrimination Act 1984* (Cth)', Speech to the NSW Department of Transport (5 March 2001)
<http://www.humanrights.gov.au/about/media/speeches/sex_discrim/dept_transport.html>.

- *Ansett Transport Industries (Operations) Pty Ltd v Wardley*,[193] in which the High Court upheld the law's prohibition (in this case the SDA's equivalent provisions in the *Equal Opportunity Act 1977* (Vic)) on excluding a woman from recruitment as a trainee pilot simply because she was female. Ansett had refused to recruit Wardley as a pilot, even though her test scores on the intake testing were higher than those of some men who were recruited, asserting that passengers would not feel safe with women flying the planes. The case affirmed that the complainant bears the onus of proving that the basis of the employer's decision was the prohibited attribute.[194]
- *Amery v NSW*,[195] in which a group of female long-term casual teachers complained of indirect sex discrimination on the basis that their pay scale, as casuals, stopped short of those available to permanent teachers. Women were disproportionately affected by this difference because many had to assume casual work status once they had children. Through being employed as casual workers, they were able to avoid relocation to other parts of the state, as happened with permanent teachers. The claim was brought under the *Anti-Discrimination Act 1977* (NSW) and upheld by the NSW Court of Appeal. However, the High Court determined that permanent and casual teaching were completely different job categories to which different conditions could apply.[196]
- *Australian Iron and Steel Pty Ltd v Banovic,*[197] in which 34 women complained under the *Anti-Discrimination Act 1997* (NSW) that the Port Kembla Steelworks had failed to hire them because they were women. After a long period of conciliation, the company agreed to engage over 150 women as ironworkers. However, in 1982, many workers were retrenched using the 'last on, first off' principle so many of these women lost their jobs. They filed further complaints arguing that had they not been subject to the original discrimination, they would not have been retrenched. The women were awarded over $1 million compensation in the Equal Opportunity Tribunal, which rejected the Steelworks argument that the discrimination was not unlawful because most of the work was unsuitable for women. The company then lost its appeal to the High Court. Eventually, the Public Interest Advocacy Centre (PIAC) was able to secure a settlement for the remaining 709 women affected by the actions of the Steelworks.[198]
- *Thomson v Orica Australia Pty Ltd*,[199] in which the connection between pregnancy, maternity leave and sex discrimination was explored. Thomson had taken 12 months maternity leave, for which she was eligible under the relevant company policy, following a long period of employment. Prior to her return, she was informed that she would be undertaking a new position with new responsibilities. The new role was of much lower status and amounting to a demotion. Using a comparator approach, Allsop J found that this equated to a constructive dismissal at common law and discrimination for the purposes of the SDA.

---

[193] (1980) 142 CLR 237.

[194] Beth Gaze, 'The Sex Discrimination Act after 25 years: What is its role in eliminating gender inequality and discrimination in Australia?' (2010) 7 *Insights* 13.

[195] (2006) 230 CLR 174.

[196] Beth Gaze, 'The Sex Discrimination Act after 25 years: What is its role in eliminating gender inequality and discrimination in Australia?' (2010) 7 *Insights* 13.

[197] (1989) 168 CLR 165.

[198] See Public Interest Advocacy Centre Ltd, 'Employment of women at the Port Kembla steelworks' < https://piac.asn.au/legal-help/public-interest-cases/employment-of-women-at-the-port-kembla-steelworks/ >; Jill Anderson, 'Iron and Steel' (1994) *Alternative Law Journal* 19(3) 107.

[199] [2002] FCA 939.

- *Jacomb v Australian Municipal Administrative Clerical & Services Union,*[200] in which a union successfully defended rules which reserved certain elected roles for women on an equal quota basis according to its policy, where in some branches women numbered less than half of members. The rules were special measures for the purposes of s 7D.[201]

2.3 The *Disability Discrimination Act 1992* (DDA)

Divisions 1, 2, 2A and 3 of Part 2 (other than ss 20, 29 and 30) of the DDA give effect to the *CRPD, ICCPR, ICESCR* and the *ILO Convention No. 111 Concerning Discrimination (Employment and Occupation).*[202]

'Disability' is defined as:

- total or partial loss of the person's bodily or mental functions; or
- total or partial loss of a part of the body; or
- the presence in the body of organisms causing disease or illness; or
- the presence in the body of organisms capable of causing disease or illness; or
- the malfunction, malformation or disfigurement of a part of the person's body; or
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

The definition includes a disability that:

- presently exists; or
- previously existed but no longer exists; or
- may exist in the future (including because of a genetic predisposition to that disability); or
- is imputed to a person,

as well as behaviour that is a symptom or manifestation of the disability.[203]

---

[200] (2004) 140 FCR 149.

[201] See Julie O'Brien, 'Affirmative Action, special measures and the Sex Discrimination Act' (2004) 27 *University of New South Wales Law Journal* 840: s 7D is 'a vehicle to pursue the goal of substantive equality and to effect the structural and cultural changes necessary to correct past and current forms and effects of discrimination'.

[202] *Disability Discrimination Act 1992* (Cth) ss 12(1), (8). The DDA's major objectives are to eliminate discrimination against people with disabilities; promote community acceptance of the principle that people with disabilities have the same fundamental rights as all members of the community and ensure as far as practicable that people with disabilities have the same rights to equality before the law as other people in the community, s 3.

[203] *Disability Discrimination Act 1992* (Cth) s 4(1).

Discrimination under the DDA can be direct[204] or indirect.[205] The DDA covers people with disabilities and their associates,[206] carers, assistants, assistance animals and disability aids.[207]

Under the DDA it is unlawful, *inter alia,* to discriminate against a person with regard to:

- employment or dismissal from employment (s 15);
- agency arrangements (s 16);
- contract work (s 17);
- promotion to partnership (s 18);
- the conferral, renewal or extension of an authorization or qualification (s 19);
- membership of a registered organisation (s 20); and
- the use of employment agency services (s 21).

However, there are exceptions where a person with a disability would be unable to carry out the inherent requirements of a job, even if the employer, principal or partnership made reasonable adjustments,[208] or where avoiding the discrimination would impose an unjustifiable hardship on the discriminator.[209]

It is unlawful to discriminate against a person with disabilities with regard to:

- admission as a student to an educational authority;[210]
- access to premises;[211]
- the provision of goods, services and facilities;[212]

---

[204] *Disability Discrimination Act 1992* (Cth) s 5. Direct disability discrimination is described as treating, or proposing to treat, a person with a disability less favourably than they would treat another person who did not have the disability, in circumstances that are not materially different. It also includes a failure to make, or a proposal not to make, reasonable adjustments for the person, where the failure has or would have the effect that the aggrieved person is treated less favourably than others. To prove direct discrimination under the DDA, the comparator test is used. This is contentious, as it is said to impose a restrictive and 'artificial' barrier which undermines the availability of protection. See Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) 324-5 <https://humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf>. The comparator test is also applicable to other discrimination claims.

[205] *Disability Discrimination Act 1992* (Cth) s 6. Indirect disability discrimination is where one person requires another person to comply with a requirement or condition which the person is unable to comply with because of their disability, resulting in further disadvantage. There is a requirement for a person to comply with a requirement or condition that could only be fulfilled if the discriminator made reasonable adjustments for the person with the disability but does not do so, or proposes not to do so, resulting in further disadvantage or likely further disadvantage. The burden of proving that a requirement or condition is reasonable lies with the person who demands compliance.

[206] *Disability Discrimination Act 1992* (Cth) s 7.

[207] *Disability Discrimination Act 1992* (Cth) s 8.

[208] *Disability Discrimination Act 1992* (Cth) s 21A.

[209] *Disability Discrimination Act 1992* (Cth) s 21B.

[210] *Disability Discrimination Act 1992* (Cth) s 22.

[211] *Disability Discrimination Act 1992* (Cth) s 23.

[212] *Disability Discrimination Act 1992* (Cth) s 24. This section codified the outcome in *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

- access to accommodation;[213]
- the disposition of an estate or interest in land;[214]
- participation in sport;[215]
- membership of a club;[216] and
- functions and powers of any Commonwealth law or program,[217]

unless it would impose an unjustifiable hardship on the discriminator to avoid the discrimination.[218] There is, however, no such exception with regard to the unlawful act of requiring an interviewee to provide certain information about their disability during the interview process.[219]

It is also unlawful to contravene any disability standard that the Minister imposes,[220] and to harass employees, students or acquirers of goods or services with disabilities.[221] Furthermore, the DDA states that anyone who causes, instructs, induces, aids or permits another person to do one or more of these unlawful acts is also liable.[222]

Bodies corporate are liable for the actions of their directors, employees or agents when acting within the scope of their authority, unless it can be established that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.[223]

Written complaints alleging unlawful discrimination with regard to the above acts can be lodged with the Australian Human Rights Commission.[224] However, as with the other anti-discrimination legislation, unlawful acts are not necessarily offences.[225]

There are a number of exceptions for behaviour relating to 'special measures'. Special measures are measures which are reasonably intended to ensure that persons who have a disability have

---

[213] *Disability Discrimination Act 1992* (Cth) s 25.
[214] *Disability Discrimination Act 1992* (Cth) s 26.
[215] *Disability Discrimination Act 1992* (Cth) s 28.
[216] *Disability Discrimination Act 1992* (Cth) s 27.
[217] *Disability Discrimination Act 1992* (Cth) s 29.
[218] *Disability Discrimination Act 1992* (Cth) s 29A.
[219] *Disability Discrimination Act 1992* (Cth) s 30.
[220] *Disability Discrimination Act 1992* (Cth) ss 31, 32. See Australian Human Rights Commission, 'Disability Standards: Standards & Guidelines' <https://humanrights.gov.au/our-work/disability-rights/disability-standards>.
[221] *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39. It has been suggested that the case law on harassment is limited and the law in this regard could be strengthened to provide better protections for disabled people from violence and abuse: Diability Discrimination Commissioner Alastair McEwin, '25 years of the Disability Discrimination Act: Success, stagnation and strengthening the law' (2018) 42 *Law Society Journal* 71, 73.
[222] *Disability Discrimination Act 1992* (Cth) s 122.
[223] *Disability Discrimination Act 1992* (Cth) s 123(2).
[224] *Australian Human Rights Commission Act 1986* (Cth) s 46P.
[225] *Disability Discrimination Act 1992* (Cth) s 41. The only offences under the DDA relate to victimisation, that is, threatening someone who has made a complaint to the Commission or is involved in a complaint (which may give rise to a punishment of six months imprisonment per s 42); incitement to do an act which is unlawful under the DDA (which may give rise to a punishment of six months imprisonment per s 43); or advertising which displays an intention to commit an unlawful act (which may give rise to a fine per s 44). It is also an offence to fail to provide actuarial or statistical data on which the act of discrimination was based to the Commission (which may give rise to a fine per s 107).

equal opportunities with others; to afford them goods or access to facilities, services or opportunities to meet their special needs in relation to specified areas; or to afford persons with a disability grants, benefits and programs to meet their special needs in relation to specified areas.[226]

There are exemptions for reasonably discriminating against persons with a disability with regard to:

- superannuation and insurance policies;[227]
- acts done under statutory authority;[228]
- the curtailment of infectious diseases;[229]
- charities;[230]
- pensions and allowances;[231]
- migration;[232]
- combat duties and peacekeeping services; [233] and
- assistance animals.[234]

The Commission is able to grant further exemptions under the statute.[235]

Government policies may also be relevant to a complaint, such as the National Disability Strategy 2010-2020, aimed at ensuring the implementation of the CRPD.[236]

Landmark cases regarding disability discrimination include:

- *Citta Hobert Pty Ltd v Cawthorn*[237], where a complaint under the Tasmanian anti-discrimination legislation alleging discrimination on the ground of disability by failing to provide adequate wheel-chair access was referred to the Anti-Discrimination Tribunal[238] where the respondent contended that the state provisions were inconsistent with

[226] *Disability Discrimination Act 1992* (Cth) s 45. It should be noted, however, that unnecessary discrimination in the implementation of a special measure or in relation to the wages or salary rates of disabled people is not permitted under the section. The proviso set out in subsection 2 was inserted in 2009, see Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 272 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>.
[227] *Disability Discrimination Act 1992* (Cth) s 46.
[228] *Disability Discrimination Act 1992* (Cth) s 47.
[229] *Disability Discrimination Act 1992* (Cth) s 48.
[230] *Disability Discrimination Act 1992* (Cth) s 49.
[231] *Disability Discrimination Act 1992* (Cth) s 51.
[232] *Disability Discrimination Act 1992* (Cth) s 52.
[233] *Disability Discrimination Act 1992* (Cth) ss 53, 54.
[234] *Disability Discrimination Act 1992* (Cth) s 54A.
[235] *Disability Discrimination Act 1992* (Cth) s 55.
[236] A National Disability Research and Development Agenda was endorsed by Australian, state and territory disability ministers in November 2011, to identify research and development priorities to support the implementation of the National Disability Agreement and the National Disability Strategy. Consultation on a new National Strategy was undertaken in 2020, with the new Strategy finalised in 2021.
[237] [2022] HCA 16, (2022) 96 ALJR 476.
[238] The Anti-Discrimination Tribunal has now been replaced by the Tasmanian Civil and Administrative Tribunal.

federal anti-discrimination laws. The High Court[239] held, inter alia, that the hearing and determination of the claim and the defence was beyond the jurisdiction conferred on the Tribunal by the State legislation.[240]

- *Maguire v SOCOG,*[241] where Mr Maguire complained to the HREOC that the Sydney Olympic organisers had failed to provide its website and ticketing information in a format accessible to people with a vision impairment. Despite SOCOG arguing that correcting the site would cause unjustifiable hardship, HREOC ordered them to upgrade their website prior to the start of the Games and provide ticketing information in Braille. However, their website was found to be only partly compliant, so damages were awarded in the sum of $20,000.
- *Scott v Telstra*,[242] where Mr Scott complained to HREOC that Telstra had indirectly discriminated against him for failing to provide him with a telephone typewriter (TTY) in the same way it provided standard handsets to other customers, who were not deaf. Telstra argued that the cost of supplying TTYs would cause unjustifiable hardship. However, the complaint was upheld, and Telstra was directed to provide a TTY to Mr Scott as well as to all other Australian households that required them.
- *Graeme Innes v Rail Corporation of NSW (No 2)*,[243] in which Mr Innes, the Disability Discrimination Commissioner, made 36 complaints to the Commission in his personal capacity, regarding the quality and infrequency of announcements made on trains run by the New South Wales Rail Corporation (RailCorp). When these complaints failed to be resolved by conciliation, he brought proceedings in the Federal Magistrates Court seeking declarations and damages. He claimed under s 24 of the DDA that he suffered both direct and indirect discrimination in relation to the provision of services. The court found that direct discrimination could not be advanced because there was no evidence that the failure to make clear, audible announcements occurred because Mr Innes was blind. However, it did find that the actions of RailCorp amounted to indirect discrimination against him because he was subject to a requirement or condition that in order to know his whereabouts on the journey, he was required to read the signage, and this was not possible due to his disability. The court found that the availability of clear, audible announcements would be a reasonable adjustment, and the failure to do so had resulted in disadvantage in breach of the Disability Standards. The Court awarded Mr Innes $10,000 compensation.

---

[239] Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ. In a separate concurring judgment Edelman J agreed in the result for similar reasons.

[240] See the discussion of the decision and its implications by Stephen Mc Donald SC at: https://www.auspublaw.org/blog/2022/05/im-sorry-i-cant-hear-you-my-jurisdiction-keeps-dropping-out-citta-hobart-pty-ltd-v-cawthorn.

[241] Human Rights and Equal Opportunity Commission with William Carter QC, No H 99/115 (24 August 2000).

[242] Human Rights and Equal Opportunity Commission with Sir Ronald Wilson, Nos H95/34, H95/51 (19 July 1995).

[243] (2013) 273 FLR 66. Allen considers that this case 'illustrates the inadequacies of the current model of enforcing anti-discrimination law', as the Commissioner was obliged to lodge a complaint in a private capacity, risking adverse costs, and received only compensation and no requirement for RailCorp to stop the unlawful practice: Dominique Allen, 'Barking and Biting: the Equal Opportunity Commission as an enforcement agency' (2016) 44 *Federal Law Review* 312.

- *Purvis v State of New South Wales*,[244] in which Mr and Mrs Purvis brought discrimination complaints under the DDA against South Grafton High School for (i) their initial refusal to enrol their foster son Daniel, who had intellectual disabilities and (ii) for subsequent suspensions and an ultimate exclusion once they had enrolled him. The HREOC first heard the complaint and found that some of the disciplinary measures imposed on Daniel, and his ultimate exclusion from South Grafton High School, constituted conduct in breach of the DDA. The State applied to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for an order of review of the decision of the Commissioner. The Federal Court set the decision aside and remitted the matter to the HREOC.[245] Purvis unsuccessfully appealed to the Full Court of the Federal Court and the High Court (which dismissed the appeal 5:2).[246]
- *X v Commonwealth*,[247] where the High Court considered the meaning of inherent requirements under the DDA with respect to health and safety. X had enlisted in the army and after training had begun, discovered he was HIV positive. He was discharged in accordance with defence policy. The Commonwealth argued that he could not carry out the inherent requirements of the job because he posed a risk to other soldiers by reason of his HIV infection. The High Court found that it was permissible to have regard to the health and safety of others when considering the requirements of the employment. The degree of risk to others, the consequences of the risk being realised, the employer's legal obligations to co-employees and others, the function which the employee performed and the organisation of the work were all relevant considerations. As such, the Commission's original decision in favour of X was set aside and remitted for further consideration.[248]
- *Haraksin v Murrays Australia Limited (No 2)*,[249] in which Ms Haraksin claimed Murrays breached National Disability Standards for Accessible Public Transport when it refused her booking in 2009. She is a wheelchair user and wanted to travel on a Murrays bus from Canberra to Sydney but was told they did not have wheelchair access on any of their buses. The Disability Standards came into effect in 2002. They require all new public transport vehicles to be wheelchair accessible and required 25% of transport operator's existing fleet to be accessible by 2007. Justice Nicholas in the Federal Court

[244] (2003) 217 CLR 92.
[245] *Purvis v State of New South Wales (Department of Education & Training)* [2001] FCA 1199 (Emmet J).
[246] *Purvis v State of New South Wales (Department of Education & Training)* (2002) 117 FCR 237 (Spender, Gyles and Conti JJ); *Purvis v New South Wales* (2003) 217 CLR 92 (*Purvis*). The High Court found that the expression 'because of' required consideration of the 'true basis' or 'real reason' for the allegedly discriminatory conduct, see 101-2. The comparator approach was applied by the majority, at 100-1, 160-1 and 175. The approach and outcome in *Purvis* have been criticised by various scholars: Jacob Campbell, 'Using Anti-discrimination Law as a Tool of Exclusion: a Critical Analysis of the Disability Discrimination Act 1992 and Purvis v NSW' (2005) 5 *Macquarie Law Journal* 201; Kate Rattigan, 'The Purvis Decision: A Case for Amending the Disability Discrimination Act 1992' (2004) 28(2) *Melbourne University Law Review* 532; Belinda Smith, 'From Wardley to Purvis – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3; Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111.
[247] (1999) 200 CLR 177.
[248] (1999) 200 CLR 177, 211 (Gummow and Hayne JJ).
[249] (2013) 211 FCR 1.

declared that Murrays Australia had directly discriminated against Ms Haraksin and ordered Murrays to comply with the Standards on its Sydney - Canberra route.[250]

- *Lyons v Queensland,*[251] in which the High Court found that the exclusion of a deaf person who required Auslan interpreting from jury service did not constitute unlawful discrimination for the purposes of the Queensland anti-discrimination law. The plaintiff was ineligible for jury service under s 4(3)(1) of the *Jury Act 1995* (Qld) as the necessary disclosure of jury deliberations to the Auslan interpreter was not permitted by the Act, absent an express provision to the contrary. The decision is notable for its incompatibility with considerations of this issue by human rights committees, such as *Beasley v Australia*.[252]
- *Sklavos v Australasian College of Dermatologists,*[253] in which Sklavos had developed a 'phobia' recognised under the DDA which was related to the final examinations required for admission into the profession. The College was found not to have unlawfully discriminated against Sklavos by refusing his request for admission as a dermatologist without sitting the examinations, despite alternative assessments being possible. The examination requirement was found to be reasonable, with alternatives imposing unjustifiable hardship. The Court considered that the general duty to make reasonable adjustments under s 5(2) did not change the causation requirements of the section.

As shown in table 4.1 above, disability claims make up the largest group of complaints to the AHRC, and these complaints mainly concern employment and access to services and facilities.

Lawyer and disability rights advocate Natalie Wade suggests that existing anti-discrimination laws are adequate, but broader societal and attitudinal issues mean that people with disabilities continue to be 'shut out'.[254] Wade argues that existing legal mechanisms should be put to better use, with systemic issues identified in complaints being used to inform public education and inquiries to bring about a change in public attitudes.[255] But the statute was 'never going to be a panacea'.[256] The DDA continues to be used in public interest litigation on human rights issues, such a test case concerning the use of handcuffs on people seeking asylum in immigration detention who require access to healthcare.[257]

2.4 The *Age Discrimination Act 2004* (ADA)[258]

[250] *Haraksin v Murrays Australia Limited (No 2)* (2013) 211 FCR 1, 25 [106].
[251] (2016) 259 CLR 518. See Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *UNSW Law Journal* 188, 195-6.
[252] CRPD/C/15/D/11/2013 (2016).
[253] (2017) 256 FCR 247. Special leave was refused by the High Court.
[254] Natalie Wade, 'The culture of disability discrimination: the law doesn't need to change – we do' (February 2019) *The Bulletin* 8, 9.
[255] Natalie Wade, 'The culture of disability discrimination: the law doesn't need to change – we do' (February 2019) *The Bulletin* 8, 9.
[256] Alastair McEwin, '25 years of the Disability Discrimination Act: Success, stagnation and strengthening the law' (2018) 42 *Law Society Journal* 71.
[257] Public Interest Advocacy Centre, 'Test case challenges the misuse of handcuffs against asylum seekers' (24 November 2020) <https://piac.asn.au/2020/11/24/excessive-force-test-case-challenges-the-misuse-of-handcuffs-against-detained-asylum-seekers/>.
[258] Prior to the ADA, discrimination in employment on the basis of age was covered in the ILO 111 aspect of the AHRC Act. Some complaints under this limb were reported: e.g. the *Report of Inquiry into Complaints of Discrimination in Employment and Occupation*, HREOC Report No 1 (August 1996).

The Australian Government introduced the ADA in order to implement its obligations under international law to avoid and eliminate age discrimination.[259] Whilst there is no specific UN convention on age discrimination, article 1(1)(b) of the ILO *Discrimination (Employment and Occupation) Convention* (No. 111), articles 2 and 26 of the ICCPR, and article 2(2) of the ICESCR allow parties scope to extend the list of protected grounds for the right to non-discrimination.

'Age' is one of the grounds recognised in regulation 4(a)(i) of the *Australian Human Rights Commission Regulations 1989* (Cth). The UN Human Rights Committee has also held that the term 'other status' in article 26 of the ICCPR includes age.[260] Relevantly, the CRC contains many social, economic and cultural rights for the benefit of people under 18. In addition, Australia has made non-binding commitments to protect against age discrimination under the *Political Declaration and Madrid International Plan of Action 2002* adopted at the Second World Assembly on Ageing 2002.[261]

'Age' is defined as including 'age group.'[262] It does not extend to cover the age which might be imputed to a person, although the definition of direct age discrimination includes less favourable treatment because of 'a characteristic that is generally imputed to persons of the age of the aggrieved person.'[263]

Discrimination for the purposes of the ADA can be either direct or indirect.[264]

Prior to its amendment in 2009, the ADA required that, where an act is done for more than two reasons, the complainant demonstrate that age was the 'dominant reason' for the discriminatory action.[265] The removal of this requirement substantially reduced the burden on people who sought to prove discrimination under the ADA.

Under the ADA it is unlawful to discriminate against someone on the ground of age in respect of:

- employment and related matters;[266]
- education;[267]

---

[259] The objects of the ADA are to eliminate discrimination against persons on the ground of age in a variety of areas; ensure equality before the law, regardless of age; allow appropriate benefits and other assistance to be given to people of a certain age; promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights; and respond to demographic change by removing barriers to older people participating in society, particularly in the workforce; and changing negative stereotypes about older people (*Age Discrimination Act 2004* (Cth) s 3).
[260] *Love v Australia*, Communication No 983/2001, UN Doc CCPR/C/72/D/885/1999; *Schmitz-de-Jong v Netherlands*, Communication No 885/1999, UN Doc CCPR/C/72/D/855/1999.
[261] The Declaration is referenced in s 3 of the *Age Discrimination Act 2004* (Cth).
[262] *Age Discrimination Act 2004* (Cth) s 5.
[263] *Age Discrimination Act 2004* (Cth) s 14.
[264] Direct discrimination on the ground of age occurs when a person treats another less favourably than they would treat a person of a different age, in circumstances that are the same or not materially different and they do so because of the age of the other person, s 14. Indirect discrimination occurs when a person imposes an unreasonable condition, requirement or practice which disadvantages persons of the same age as the aggrieved person. The burden of proving what is reasonable lies with the discriminator, s 15.
[265] *Age Discrimination Act 2004* (Cth) s 16.
[266] *Age Discrimination Act 2004* (Cth) ss 18–25.
[267] *Age Discrimination Act 2004* (Cth) s 26.

- access to premises;[268]
- provision of goods, services and facilities;[269]
- provision of accommodation;[270]
- disposal of land;[271]
- administration of Commonwealth laws and programs;[272] and
- requests for information on which age discrimination might be based.[273]

Positive discrimination is not considered unlawful if the act provides a *bona fide* benefit to persons of a particular age, it is intended to meet a need that concerns people of a particular age, or it is intended to reduce a disadvantage experienced by people of a particular age.[274]

There is also a defence to age discrimination in employment where a person is unable to carry out the inherent requirements of the role because of their age.[275]

The ADA also permits exemptions for, *inter alia*:

- charities[276];
- religious bodies[277];
- voluntary bodies;[278]
- terms and conditions of membership of a superannuation scheme, insurance policies and credit;[279]
- superannuation legislation;[280]
- direct compliance with laws and orders;[281]
- taxation laws;[282]
- pensions, allowances and benefits;[283];
- Commonwealth employment programs;[284]
- health programs;[285]
- migration and citizenship;[286]

---

[268] *Age Discrimination Act 2004* (Cth) s 27.
[269] *Age Discrimination Act 2004* (Cth) s 28.
[270] *Age Discrimination Act 2004* (Cth) s 29.
[271] *Age Discrimination Act 2004* (Cth) s 30.
[272] *Age Discrimination Act 2004* (Cth) s 31.
[273] *Age Discrimination Act 2004* (Cth) s 32.
[274] *Age Discrimination Act 2004* (Cth) s 33.
[275] *Age Discrimination Act 2004* (Cth) ss 18(4), 24(2), 22(2), 19(3), 21(4).
[276] *Age Discrimination Act 2004* (Cth) s 34.
[277] *Age Discrimination Act 2004* (Cth) s 35.
[278] *Age Discrimination Act 2004* (Cth) s 36.
[279] *Age Discrimination Act 2004* (Cth) s 37.
[280] *Age Discrimination Act 2004* (Cth) s 38.
[281] *Age Discrimination Act 2004* (Cth) s 39.
[282] *Age Discrimination Act 2004* (Cth) s 40.
[283] *Age Discrimination Act 2004* (Cth) s 41.
[284] *Age Discrimination Act 2004* (Cth) s 41A.
[285] *Age Discrimination Act 2004* (Cth) s 42.
[286] *Age Discrimination Act 2004* (Cth) s 43.

- youth wages;[287] and
- any other exemptions the Commission may grant.[288]

Blackham argues that the wide range of exceptions under the ADA suggests that age equality is a lesser priority and this 'seriously undermines the symbolic and progressive potential of age discrimination law'.[289]

The ADA provides that anyone who causes, instructs, induces, aids or permits another person to do one or more of these unlawful acts is also liable.[290]

Bodies corporate are also liable for the actions of their directors, employees or agents when acting within the scope of their authority, unless it can establish that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.[291]

As with the other anti-discrimination legislation, unlawful acts are not necessarily offences under the ADA.[292] Advertising an intention to commit an unlawful act is an offence (attracting a potential fine),[293] as is victimising or threatening someone who makes, or is involved with, a complaint to the Commission (leading to up to six months imprisonment),[294] and failing to disclose sources of actuarial or statistical data (attracting a potential fine).[295]

Various other federal laws and policies may be relevant to an age discrimination complaint. For example, the Commonwealth Government's 'Living Longer Living Better' aged care reforms aimed at increasing the capacity of the National Aged Care Advocacy Program, with a focus on rural and regional Australia. Other relevant Acts of Parliament may include the *Aged Care Act 1997* (Cth) and the *Carers Recognition Act 2010* (Cth). There is also a National Carer Strategy.

It is notable that there has been little success in cases of discrimination brought under the ADA.[296] In her study of employment age discrimination in Australia, Blackham identified various

---

[287] *Age Discrimination Act 2004* (Cth) s 25.
[288] *Age Discrimination Act 2004* (Cth) s 44.
[289] Alysia Blackham, 'A compromised balance? A comparative examination of exceptions to age discrimination law in Australia and the UK' (2018) 41 *Melbourne University Law Review* 1085, 1119. See also: Alysia Blackham, Reforming Age Discrimination Law: Beyond Individual Enforcement, (Oxford University Press, 2022); *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice*, (Hart Publishing, 2016).
[290] *Age Discrimination Act 2004* (Cth) s 56.
[291] *Age Discrimination Act 2004* (Cth) s 57.
[292] *Age Discrimination Act 2004* (Cth) s 49.
[293] *Age Discrimination Act 2004* (Cth) s 50.
[294] *Age Discrimination Act 2004* (Cth) s 51.
[295] *Age Discrimination Act 2004* (Cth) s 52.
[296] See Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 10 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>; Therese MacDermott, 'Giving a Voice to Age Discrimination Complainants in Federal Proceedings' (2017) 19 *Flinders Law Journal* 233; Therese MacDermott, 'Resolving federal age discrimination complaints : where have all the complainants gone?' (2013) 24(2) *Australasian Dispute Resolution Journal* 102; Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1. This was observed most recently in 2020. As at the time of writing, this appears to still be the case (excluding FWA adverse action cases). Blackham suggests that the strongest cases are likely resolved at the conciliation stages, about which little information is publicly available. Yet, as MacDermott notes, the lack of case law means that complainants cannot draw on decisions on the

factors which contributed to the string of 'notoriously unsuccessful' court cases, including (but not limited to) the wide range of exceptions available; unduly narrow interpretation by the courts; causation difficulties; the lack of evidence in many cases;[297] costs; legal uncertainty because of the underdeveloped case law; and the comparator requirement.[298] As a result of these factors, as well as the delays involved with the AHRC regime, age discrimination cases are often litigated under the *Fair Work Act* (2009) Cth,[299] discussed in greater detail below.

The AHRC suggested various reforms to the framework in its 2016 report *Willing to Work*, including the removal of the comparator test; changes to the usual costs rules in anti-discrimination cases; changes to standing rules to allow for actions by representative organisations; and the introduction of positive duties.[300]

Landmark cases in the field of age discrimination include:

- *Qantas Airways Ltd v Christie*,[301] in which John Christie sued Qantas in the Industrial Relations Court on the basis of his compulsory retirement from service as a pilot at age 60. This case was decided under the *Industrial Relations Act 1988* (Cth), prior to the entry into force of the ADA. Qantas argued that its policy to require pilots to retire at the age of 60 was a genuine and reasonable inherent requirement of being a pilot because of safety concerns associated with allowing pilots to continue to work after turning 60 and the Convention on International Civil Aviation, which barred captains aged 60 or over from flying many of the routes which they might be asked to fly. The High Court upheld Qantas' appeal on the second basis, establishing the principle that

---

interpretation of various provisions and outcomes approved by the court for proven cases of age discrimination in the conciliation to pressure respondents to resolve complaints favourably: Therese MacDermott, 'Giving a Voice to Age Discrimination Complainants in Federal Proceedings' (2017) 19 *Flinders Law Journal* 233, 238.

[297] The evidentiary burden in age discrimination cases may be even higher than in relation to other forms of discrimination, see Margaret Thornton and Trish Luker, 'Age Discrimination in Turbulent Times' (2010) 19 *Griffith Law Review* 141, 151 cited in Alysia Blackham, 'Defining "Discrimination" in UK and Australian Age Discrimination Law' (2017) 43(3) *Monash University Law Review* 760, 771. On the standard of proof in anti-discrimination cases more generally, see Loretta De Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law : "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 308; Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579; Australian Human Rights Commission, *Federal Discrimination Law* (30 June 2016) 346-9 <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>.

[298] Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1. See also Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34(1) *UNSW Law Journal* 182.

[299] Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34(1) *UNSW Law Journal* 182. See, for example, the recent finding of age discrimination in *Australian Building and Construction Commissioner v CoreStaff WA Pty Ltd* [2020] FCA 893.

[300] Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) <https://humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf>. Prior to that the ALRC also published a report about age barriers to work in Cth laws: *Grey Areas-Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78, 2 October 2012.

[301] (1998) 193 CLR 280.

the ability to perform the inherent requirements of a job goes beyond being able to physically perform the duties. The Court found that employees are required to do the job within the particular operational setting of the employer.

- *Blatchford v Qantas Airways Limited*,[302] in which the NSW Equal Opportunity Tribunal found that the airlines' selection criterion for new pilots amounted to unlawful age discrimination. Qantas was awarding younger applicants more points than older applicants, based on the premise that Qantas would have a greater chance of recouping its training costs with younger employees as they would be employed for longer. The Tribunal concluded that anti-discrimination law did not make any exceptions for economic rationalism.
- *Virgin Blue Airlines Pty Ltd v Stewart*[303] in which the Queensland Anti-Discrimination Tribunal upheld the claim that those older applicants for flight attendant positions had been discriminated against on the basis of age. Statistical evidence of Virgin's selection results showed that only one employee over 35 had ever been hired.
- *Dewan v Main Roads WA*,[304] where the Western Australian Equal Opportunity Tribunal held that a job advertisement that sought to recruit 'recent graduates' did not amount to indirect age discrimination against graduates over 25, even though a majority of recent graduates would be younger than 25.
- *Thompson v Big Bert Pty Ltd t/as Charles Hotel*,[305] in which the applicant alleged that she had been directly and indirectly discriminated against on the basis of her age and sex in her employment as a bar attendant at the respondent's hotel. However, Buchanan J dismissed the applicant's claim, being satisfied that the changes in the applicant's working arrangements were prompted by management's need to reduce the wages bill and a breakdown in the working relationship between the new manager and the applicant which led to the manager putting her on separate shifts.
  Recent cases include claims against a diverse range of organisations including Services Australia,[306]Mc Donalds,[307] health care providers,[308]a tennis club,[309]a religious institution,[310]a shipping company.[311]
- There have also been numerous clams and proceedings arising out of alleged age discrimination amongst the leading Australian accounting firms.

3. Other Commonwealth legislation with human rights implications

[302] (1997) EOC 92-888.
[303] (2007) EOC 93-457.
[304] (2005) EOC 93-362.
[305] [2007] FCA 1978.
[306] *McElligott v Commonwealth of Australia represented by Services Australia [2023*] FCA 1638.
[307] *Robertson v McDonald's Australia Limited (No 2)* [2023] ICQ 28.
[308] *Albert v Global Healthcare Pty Ltd* [2023] QCAT 428; *Pathmanathan v St John of God Healthcare Inc (No 3)* [2023] FCA 628.
[309] *Grass v Voyager Tennis Pty Ltd* [2023] NSWCATAP 168.
[310] *Kelly v Corporation of the Synod of the Diocese of Brisbane* [2023] FCA 829.
[311] *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399.

3.1 *Fair Work Act 2009* (FWA)[312]

Certain provisions of this Act give effect to the following ILO Conventions or Recommendations:

- *No 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (1981);*
- *No 111 concerning Discrimination in respect of Employment and Occupation (1958);*
- *No 158 concerning Termination of Employment at the Initiative of the Employer (1982);*
- *No R166 on Termination of Employment (1982);* and
- *No R165 on Workers with Family Responsibilities*.[313]

The FWA covers many aspects of the right to just and favourable conditions of work, including the right to minimum standards of work; minimum awards for particular industries or occupations; and the making of enterprise agreements. For example, the FWA protects collective bargaining, good-faith bargaining, equality bargaining and low-paid bargaining.

The FWA also contains the National Employment Standards which outline minimum standards in relation to hours of work; flexible working arrangements; parental leave and entitlements; annual leave; personal or carer's leave and compassionate leave; long service leave; community service leave; public holidays; notice of termination and redundancy pay; and access to fair work information statements.[314]

Part 3-3 of the FWA also offers certain limited protections for those exercising their right to strike, which is protected in Article 8(1)(d) of the ICESCR.

Section 351(1) of the FWA provides that an employer must not take adverse action against a prospective or current employee 'because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

S 351(1) does not apply to actions that are not unlawful under any anti-discrimination law in force in the place where the action is taken; actions taken because of the inherent requirements of the job; or action against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, where that action is taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.[315]

In 2022 the Federal Government announced a commitment to implement reforms proposed in the 2020 AHRC Report: Respect@Work. [316] This encompasses 55 recommendations.

---

[312] Detailed consideration of the FWA is beyond the scope of this paper. The human rights and anti-discrimination provisions of the *Fair Work Act* are examined in detail in chapter 17 of Neil Rees, Simon Rice, and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018). However, as noted below, there have been major recent legislative changes, including amendments to the *Fair Work Act 2009* (Cth).

[313] *Fair Work Act 2009* (Cth) ss 722, 743, 758, 771, 784.

[314] *Fair Work Act 2009* (Cth) Ch 2, Part 2.2.

[315] *Fair Work Act 2009* (Cth) s 351(2).

[316] Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces,* (Canberra: AHRC, 2020). See the explanation and history of the reforms: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2324a/24bd33.

Of these recommendations, 13 required Commonwealth legislative reform. All but one of these 13 recommendations have now been implemented with the commencement of the following legislation:

- *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*
- *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Respect at Work Act 2022) and
- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.[317]

The provisions in the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* were formulated in light of the outstanding recommendation which requires legislative reform (recommendation 25), which proposed the amendment of the *Australian Human Rights Commission Act* to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth). However, a modified 'equal access' costs protection provision is incorporated in the Bill which will apply to all unlawful discrimination proceedings commenced in federal courts. [318]

The *Respect at Work Act 2022* amended the *Australian Human Rights Commission Act* to allow a representative body (such as a trade union, advocacy group or human rights organisation) to initiate proceedings in the federal courts if it has lodged a complaint with the AHRC on behalf of one or more 'persons aggrieved' and the representative complaint is not able to be conciliated at the AHRC and is terminated.

3.1.1 Administrative remedies

The Act also provides for administrative remedies through the Commonwealth Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC).[319]

The FWO can accept complaints from certain employees[320] regarding pay, leave, ending employment, discrimination and sham contracting, union membership and right of entry, and anything else covered by an award, enterprise agreement or other registered agreement. While courts can hear evidence on complaints relating to acts or conduct which occurred up to six years ago, the FWO advises that it is unlikely to involve itself in issues which occurred over two

[317] See Shannon Torrens, 'Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022', Bills Digest, 27, 2022–23, (Canberra: Parliamentary Library, 2022); Jaan Murphy and Howard Maclean, 'Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021', Bills Digest, 11, 2021–22, (Canberra: Parliamentary Library, 2021); Elliott King, Jaan Murphy and Scanlon Williams, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Bills Digest, 34, 2022–23, (Canberra: Parliamentary Library, 2022).

318 This is discussed in further detail in research paper 11.

[319] Formerly named Fair Work Australia, the predecessor of which was the Australian Industrial Relations Commission. The FWO and FWC can investigate and resolve disputes involving certain employers, employees and unions and employer associations who are covered by the national workplace relations system. For disputes involving bullying and harassment at work, complainants can also contact the relevant work health and safety body in their state or territory.

[320] See Fair Work Ombudsman, *Help resolving workplace issues* <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues>.

years ago.[321] The FWO tries to resolve complaints through mediation and can investigate some complaints. If it finds that a Commonwealth workplace law has been contravened, the FWO can send a 'contravention letter' to the person or business that has contravened the Commonwealth workplace law, outlining its findings and explaining what needs to be done to fix the contravention.

If nothing is done to fix the contravention, the FWO has enforcement measures at its disposal, such as compliance notices, infringement notices, enforceable undertakings, and standing to litigate matters to obtain court orders.[322]

Certain workplace issues fall under the purview of the national workplace relations tribunal, the FWC. It is an independent body offering dispute resolution services such as conciliation, mediation and arbitration, as well as the resolution of disputes on a final basis pursuant to its statutory powers.[323] Relevantly, the FWC can resolve disputes concerning unfair dismissal[324] and disputes arising under the general protections provisions of the FWA, which aim to protect workplace rights and freedom of association, and to provide protection from workplace discrimination.[325]

---

[321] See Fair Work Ombudsman, *Step 1: Find out what we can help with* <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/step-1-find-out-what-we-can-help-with>.

[322] For example, the FWO successfully brought proceedings concerning a contravention of s 351 related to age discrimination in *Fair Work Ombudsman v Theravanish Investments Pty Ltd & Ors* [2014] FCCA 1170. As noted by Allen, this example is one of 'blatant discriminatory conduct where the employer communicated in writing that it did not employ any staff once they reached 65 years of age': Therese MacDermott, 'Giving a Voice to Age Discrimination Complainants in Federal Proceedings' (2017) 19 *Flinders Law Journal* 233, 250. See Dominique Allen, 'Wielding the Big Stick: Lessons for Enforcing Anti-Discrimination Law from the Fair Work Ombudsman' (2015) 21(1) *Australian Journal of Human Rights* 119; Dominique Allen, 'Adverse effects: Can the Fair Work Act address workplace discrimination for employees with a disability?' (2018) 41(3) *UNSW Law Journal* 846. Allen suggests that the enforcement mechanisms under the FWA offer a more effective avenue for redress than anti-discrimination laws but are limited by the narrow definition of discrimination in the case law.

[323] *Fair Work Act 2009* (Cth) s 595. FWC determinations can be appealed to the Federal Court.

[324] The time limits on applications to the FWC are very strict. For unfair dismissal, if the applicant was dismissed on or before 31 December 2012, the application must be lodged within 60 days after the dismissal took effect. If the applicant was dismissed on or after 1 January 2013, the application must be lodged within 21 days after the dismissal took effect, s 394(2). If the FWC is satisfied that an employee was unfairly dismissed then it may order reinstatement of the employee, together with continuity of service and lost remuneration, or payment of compensation for lost wages to the employee (if satisfied that reinstatement is inappropriate), ss 390-393.

[325] *Fair Work Act 2009* (Cth) s 595. Employees who bring an unfair dismissal action cannot, in general, pursue a concurrent application for dismissal where there has been a breach of the general protections under s 545(2). The general protections application must be made to the court within 14 days from the issuance of a certificate under s 368(3)(a), per s 370. While the adverse action can be taken for a number of reasons, of which the protected characteristic is one reason, and the decision maker has the onus of showing that the prohibited reason was not one of those reasons on the balance of probabilities, per ss 360-1, it is significant that the enquiry focuses on the actual state of mind of the decision maker, and their testimony, if accepted as reliable, is capable of discharging that burden, per *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, at [45]. The FWA considerations contrast with the outcome-based inquiry under, for example, the DDA. For a recent application to adverse

3.1.2 Judicial remedies

Judicial remedies are available for the contravention of the civil remedy provisions and safety net contractual entitlements of the FWA in accordance with Chapter 4, Part 4-1.[326] There is a dedicated Fair Work Division of the Federal Court, to which applications can be made.[327] The statutory time limit for applications for orders is six years after the day on which the contravention occurred.[328]

Applicants with a general protections complaint (for example under s 351 FWA) may make an application to the FCC/FCA.

For complaints involving a dismissal, an applicant must first go through the FWC complaints process and may only proceed to the FCC if the complaint does not settle at conciliation conference and the FWC issues a certificate. There is a 14 day time limit.[329] For general protections complaints not involving a dismissal, complaints may file directly in the FCC, a 6 year time limit applies.

As noted above, from 15 December 2023 provisions in respect of work-place discrimination and protected attributes under the *Fair Work Act 2009* (Cth) have been expanded to provide strengthened protections against discrimination.[330]

3.2 ***Native Title Act 1993*** **(NT Act)**

The Preamble of the *NT Act* acknowledges that the Australian Government, in order to protect the rights of its indigenous peoples, has ratified ICERD, ICCPR, ICESCR and accepted the UDHR. However, very few of the rights contained within these instruments are incorporated into the *NT Act*, RDA or AHRC Act and, as such, remain non-justiciable.

Nonetheless, the Preamble does note certain common law protections stemming from the High Court's rejection of the doctrine of *terra nullius*. It acknowledges that the common law of Australia recognises a form of native title which is only extinguishable by valid government acts that are inconsistent with the continued existence of native title rights and interests.[331] In addition, the constitutional right to acquisition of property on just terms is referred to, as is the

---

action allegedly taken because of a disability, see *Western Union Business Solutions (Australia) Pty Ltd v Robinson* (2019) 272 FCR 547.

[326] The persons eligible to apply for orders, the appropriate courts and maximum penalties for contravention of civil remedy provisions are all set out in a chart in s 539. In general, the FCA or FCC has the power to grant pecuniary penalty orders; costs orders; injunctions; protected action ballot orders; orders awarding compensation, or reinstatement of a person to employment.

[327] See *Fair Work Act 2009* (Cth) s 563. See also s 567 for the FCC equivalent.

[328] *Fair Work Act 2009* (Cth) s 544. Employees (or former employees) can also choose to commence small claims proceedings under s 548 of the Act in their state or territory magistrate's court or the FCC. The limit on recovery for entitlements is $20,000 or an amount prescribed by regulation.

[329] see s370 *Fair Work Act 2009* (Cth).

[330] See the detailed explanation published by the Fair Work Ombudsman: https://www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/workplace-discrimination. See also information published by the Fair Work Commission: https://www.fwc.gov.au/issues-we-help/discrimination.

[331] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

existence of other common law rights and interests (although they are not specified). The Preamble also states that the government can introduce special measures, in accordance with article 1(4) of the ICERD and the RDA, in order to advance and protect Aboriginal peoples and Torres Strait Islanders.[332]

The *NT Act*, together with the AHRC Act, confer a number of functions upon the Australian Human Rights Commission in relation to native title. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner may:

- prepare reports to the Attorney-General on the operation of the *NT Act* and its effect on the exercise and enjoyment of human rights of Aboriginal persons and Torres Strait Islanders; and
- report, when given a written direction by the Commonwealth Minister, on the operation of the *NT Act* or its effect on the exercise and enjoyment of human rights of Aboriginal persons and Torres Strait Islanders.[333]

The 2011 report of the Commissioner called on the Government to inter alia implement its obligations under the United Nations Declaration on the Rights of Indigenous Peoples which Australia gave its support to in April 2009. However, until such time, the rights and protections contained therein remain non-justiciable. The United Nations Committee on the Elimination of Racial Discrimination (CERD) has been critical of the NTA noting that 'the high standard of proof required has the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands.'[334]

Native title determinations, as to whether native title does or does not exist in relation to a particular area of land or waters, are made by the Federal Court, the High Court of Australia or another recognised body. The Federal Court can also consider applications for compensation to determine whether native title holders have the right to be compensated for the acquisition of their land or waters in the past or for contemplated future acquisition.[335]

As noted by Justice Barker, the native title determination and compensation system 'is often characterised by formulaic approaches to dispute resolution, slowness and expense in arriving

---

[332] On the relationship between the RDA and *NT Act,* see s 7 of the *Native Title Act 1993* (Cth) and Margaret Donaldson and Yvette Park, 'The Racial Discrimination Act: Does it have a Role in Native Title?' (2003) 5(24) *Indigenous Law Bulletin* 8.

[333] *Australian Human Rights Act 1986 (Cth)* s 46C; *Native Title Act 1993* (Cth) s 209.

[334] Commonwealth, Explanatory Memorandum to the *Native Title Amendment (Reform) Bill (No 1) 2012* (Cth).

[335] In 2019, the High Court handed down the first decision on compensation in *Northern Territory of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Commonwealth of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Mr A Griffiths (deceased) and Lorrain Jones on behalf of the Ngaliwurru and Nungalie Peoples v Northern Territory of Australia & Anor* [2019] HCA 7; 364 ALR 208 ('*Timber Creek*'). The decision upheld the Federal Court award for cultural loss but reduced the economic loss award to 50% of the freehold value of the land applying simple interest, with regard to the extent of the title and interests extinguished. See Holly Nicholls and Eleanor Nolan, 'Calculating cultural loss and compensation in native title: *Northern Territory v Griffiths* (2019) 364 ALR 208' (2019) 40 *Adelaide Law Review* 879. Nicholls and Nolan argue that the approach of the High Court applies 'ill-fitting and culturally inappropriate methods of ascertaining economic loss' derived from western notions of property ownership and the assessment of intangible cultural loss which may not be properly compensated by the payment of money, at 889.

at outcomes; outcomes which sometimes are considered of limited or no utility by some indigenous groups and frustrate other parties.'[336]

Various attempts have been made to reform the NTA since 1993. In 2015, an ALRC report on the NT Act was tabled in Parliament which proposed a number of recommendations for reform.[337]

The *Native Title Legislation Amendment Act 2021* (Cth) was passed on 3 February 2021 and came into force on 25 March 2021. The amendments are largely directed at improving the efficiency of the native title system. A useful summary and overview has been published by Ashurst.[338]

3.3 ***Privacy Act 1988***

The Preamble to the *Privacy Act* acknowledges that Australia is a party to the ICCPR[339] and that it intends to implement article 17 in order to protect the human right to privacy. The *Privacy Act* is concerned with information privacy only.[340] As such, the Australian Law Reform Commission has noted that it is not a full implementation in domestic law of the meaning of article 17.[341]

However, those elements of the human right to privacy that the *Privacy Act* does protect are justiciable. For example, individual or representative complaints can be made to the Privacy Commissioner (now within the Office of the Australian Information Commissioner) if persons believe their privacy has been interfered with by an Australian Government agency or private sector organisation covered by the Act.[342]

The Commissioner is empowered to investigate and conciliate complaints and can require the production of information or documents, or the attendance of a person at a conference.[343] Conciliation may lead to outcomes such as an apology, a change in practices or procedures, or compensation for loss resulting from the infringement of the person's privacy.[344] The Commissioner can make determinations about complaints which can be enforced in court proceedings commenced by the Commissioner or the complainant.[345] Decisions of the OAIC not

---

[336] Justice Michael Barker, 'Alternative pathways to outcomes in Native Title anthropology' (FCA) [2015] FedJSchol 2 (Speech, ANU's Centre for Native Title Anthropology, 12 February 2015) <http://www.austlii.edu.au/au/journals/FedJSchol/2015/2.html>.

[337] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No. 126, April 2015).

[338] https://www.ashurst.com/en/news-and-insights/legal-updates/native-title-act-reforms-finally-enacted/.

[339] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The Australian Government ratified the ICCPR on 13 August 1980.

[340] See, for example, the National Privacy Principles in sch 3 of the *Fair Work Act 2009* (Cth).

[341] See Australian Law Reform Commission*, For Your Information: Australian Privacy Law and Practice*, (Report No. 108, 2008) vol 3, ch 74.15.

[342] *Privacy Act 1988* (Cth) ss 36(1), 38.

[343] *Privacy Act 1988* (Cth) Part V.

[344] See Office of the Australian Information Commissioner, *How we investigate and resolve your complaint* <https://www.oaic.gov.au/privacy/privacy-complaints/how-we-investigate-and-resolve-your-complaint>.

[345] *Privacy Act 1988* (Cth) s 55A.

to investigate a complaint or determinations of the OAIC can be subject to judicial review by the Federal Court or Federal Circuit Court.[346]

One significant determination related to a representative complaint made on behalf of people seeking asylum in Australia who were held in immigration detention on 31 January 2014 and whose personal information was published, in error, on the website of the Commonwealth Department of Immigration and Border Protection. 9258 people were affected by the breach. A representative complaint was made in 2014. Notice was given to class members to provide information about their loss or damage in 2018.[347] A determination was made by the Commissioner pursuant to s 52 of the *Privacy Act* on 11 January 2021, finding that the conduct did constitute a breach and compensation was to be payable to group members.[348]

3.4 ***Freedom of Information Act 1982*** **(FOI Act)**

The FOI Act states that there is a legally enforceable right to obtain access to certain agency documents and certain official documents of a Minister.[349] The Act also empowers the Information Commissioner to investigate complaints about how an agency exercised its powers or performed its functions under the FOI Act.[350]

While the statute provides for deadlines by which FOI requests must be acknowledged and processed (30 days)[351], various agencies have failed to meet those deadlines and FOI users regularly experience substantial delays in processing FOI requests.

Also, in many instances government agencies seek to rely upon narrow exemptions to refuse to release information. Timely compliance with requests under the FOI Act can have vital

[346] Complainants can also request a review of the merits of the decision by the OAIC or complain about unfair treatment to the Commonwealth Ombudsman.

[347] The online publication of identifying information about people who have sought asylum in another country could place those people at risk of harm, in the event that they are forcibly returned to the country from which they sought safety and their status as a failed asylum seeker is known. This risk undoubtedly caused affected individuals significant anxiety, stress, and fear. The delay from the date of the original breach to the date at which affected class members were asked to provide information to claim compensation, and to the date of the final determination, has meant that at least some of those affected have likely been removed from Australia, without an opportunity to obtain compensation. This is in addition to those who, it is likely, were deterred from raising their claims for compensation with the Department out of fears over the impact that a complaint or compensation claim might have on their pending protection visa applications. It is not suggested that the complaint procedure would have had any actual impact on their applications, but such a fear would be reasonable among any group of people, let alone those may have experienced persecution or serious harm from governments in their countries of origin.

[348] Office of the Australian Information Commissioner, 'Immigration Data Breach Privacy Complaint Determination' <https://www.oaic.gov.au/privacy/privacy-complaints/immigration-data-breach-privacy-complaint/immigration-data-breach-privacy-complaint-determination/>.

[349] *Freedom of Information Act 1982* (Cth) s 11(1).

[350] *Freedom of Information Act 1982* (Cth) ss 69, 70.

[351] Section 15(5) *Freedom of Information Act 1982* (Cth).

importance for the protection of human rights in Australia, for example, in relation to refugee law[352]and for holding the Government accountable.[353]

[352] The OAIC recently found, in a Commissioner-initiated investigation report, that the compliance of the Department of Home Affairs was particularly affected by delays, brought about by inadequate processes and training: Angelene Falk, 'Department of Home Affairs' compliance with the statutory processing requirements under the Freedom of Information Act 1982 in relation to requests for non-personal information' (11 December 2020) <https://www.oaic.gov.au/assets/freedom-of-information/reports/Department-of-Home-Affairs-CII-Report-including-Secretary-Comments.pdf>.
[353] For further info on issues with the FOI system, see the report by Grata: https://assets.nationbuilder.com/gratafund/pages/664/attachments/original/1629265812/Grata_Fund_-_FOI_Hit_List_report_-_FINAL.pdf?1629265812.