

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

14th EDITION



THOMSON REUTERS

REDFERN LEGAL CENTRE PUBLISHING

Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

19 Harris Street, Pyrmont NSW 2009
First edition published by Redfern Legal Centre as *The Legal Resources Book (NSW)* in 1978.
First published as *The Law Handbook* in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014
Fourteenth edition 2016

Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

National Library of Australia
Cataloguing-in-Publication entry

The Law Handbook : Your practical guide to the law in NSW / Redfern Legal Centre.
14th edition.

Includes index

ISBN: 9780455238180

Law – New South Wales – Handbooks, manuals, etc

Legislation – New South Wales

Jurisprudence – New South Wales – Handbooks, manuals, etc

Civil rights – New South Wales – Handbooks, manuals, etc

© 2017 Thomson Reuters (Professional) Australia Limited

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the *Copyright Act 1968*, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

This edition is up to date as of 1 October 2016.

The Law Handbook is part of a family of legal resource books published in other states:

Vic: *The Law Handbook* by Fitzroy Legal Service, ph: (03) 9419 3744

SA: *The Law Handbook* by the Legal Services Commission of SA, ph: (08) 8111 5555

Qld: *The Law Handbook* by Caxton Legal Centre, ph: (07) 3214 6333

Tas: *The Tasmanian Law Handbook* by Hobart Community Legal Service, ph: (03) 6223 2500

NT: *The Law Handbook* by Northern Territory Legal Aid Commission and Darwin Community Legal Services, ph: (08) 8982 1111

Editor: Ben Brocherie

Product Developer: Karen Knowles

Publisher: Robert Wilson

Indexed by: Puddingburn Publishing Services

Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

Discrimination

Bronwyn Byrnes Australian Human Rights Commission

Contents

- | | | | |
|----------|---|----------|---------------------------------|
| [17.10] | What is unlawful discrimination? | [17.190] | Vilification |
| [17.20] | Types of discrimination | [17.210] | Equal employment opportunity |
| [17.120] | When is discrimination against the law? | [17.250] | Complaints about discrimination |
| [17.180] | Victimisation | | |

What is unlawful discrimination?

[17.10] Discrimination, in the legal sense, means treating someone unfairly because they happen to belong to a particular group – because, for example, the person is female or comes from a particular ethnic group or has a disability. Discrimination is often the result of prejudice or negative stereotyping based on ignorance, fear or simple naivety.

Unfair treatment can be obvious (like when you are treated unfairly because you belong to a particular group compared to someone else from a different group), or it can be less obvious, (like when a rule or policy seems to apply equally to everybody but when it is examined more closely, it actually has an unfair impact on a particular group of people). In law, obviously unfair treatment is known as *direct discrimination* and less obvious unfair treatment is known as *indirect discrimination*.

Direct discrimination example

If an employer won't hire someone just because he is a man, this is likely to be direct sex discrimination.

Indirect discrimination example

An employer who advertises for someone 190 cm tall to do a job is likely to end up discriminating against women and against men from some ethnic groups. If it can be shown that a shorter person could do the job, or that it could easily be adapted to suit shorter people, indirect sex or race discrimination could be claimed.

Not all forms of unfair treatment are against the law. To be unlawful, both the *type* of unfair treatment and the *area* of public life that it happens in must be covered by a law.

In NSW, both the Commonwealth and NSW anti-discrimination legislation determine what forms of discrimination are against the law. Although both Commonwealth laws and the state/territory laws generally cover the same grounds and areas of discrimination, there are some differences in the protection that is offered and there are also circumstances where only the Commonwealth law applies or where only the state law applies.

Legislation

Federal laws

Federal laws dealing with discrimination are the:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)

Disability Standards for Accessible Public Transport
Disability Standards for Education

Disability (Access to Premises - Buildings) Standards

- *Australian Human Rights Commission Act 1986* (Cth)
- *Age Discrimination Act 2004* (Cth).

NSW laws

The *Anti-Discrimination Act 1977* (NSW) is the most important NSW anti-discrimination law.

Types of discrimination

[17.20] Types of discrimination

Under state and/or federal legislation, it is against the law in NSW to discriminate against a person in employment, education,

the provision of goods, services and accommodation and in relation to registered clubs, on the grounds of:

- race
- disability
- sex
- sexual orientation
- gender identity

- intersex status
- marital or relationship status
- pregnancy
- age
- who they are related to or associate with
- carer's and family responsibilities.

Vilification on the basis of race, colour, nationality, descent, homosexuality, HIV/AIDS or transgender status and ethnic, ethno-religious or national origin, is also unlawful.

[17.30] Race discrimination

Race discrimination happens when someone is treated unfairly or harassed because of their:

- race
- colour
- nationality
- descent
- immigrant status
- ethnic or ethno-religious background.

What does "ethno-religious background" mean?

Ethno-religious background includes backgrounds such as Jewish, Sikh and Buddhist. It does not include backgrounds such as Muslim or Roman Catholic – religions widespread across many different ethnic groupings.

[17.40] Disability discrimination

Disability discrimination happens where someone is treated unfairly or harassed because:

- they have a disability or an illness
- they have had a disability or illness in the past
- they will, or might, become disabled or ill in the future.

What kind of disability or illness is covered?

The law covers any kind of disability or illness – physical, intellectual, psychiatric, sensory or categorised in some other way.

It is against the law, for example, to discriminate against someone because they have HIV or AIDS.

The law relating to mental illness is discussed in Chapter 16, Disability Law.

The law relating to HIV/AIDS is discussed in Chapter 26, Health Law.

Obligations of employers and service providers

In most cases, if people with disabilities need special services or facilities (to enable them to work, have access to accommodation, and so on), employers and service providers must make these services and facilities available – unless it would cause unjustifiable cost or inconvenience.

Employers should also look at whether a person can get the job done, rather than how. For example, if the job involves moving boxes from one room to another, and the best person for the job cannot move them by hand because of a disability, but can get them moved by another means that does not cause unjustifiable hardship to the employer, that person should be employed.

Who is the "best person for the job" in any particular case should be decided on merit – by judging which of the individual applicants best meets the essential requirements of the job.

Disability standards

The Attorney-General may make Disability Standards to specify rights and responsibilities about equal access and opportunity for people with a disability. To date, Disability Standards have been enacted in relation to public transport, education and access to premises. These standards require:

- providers and operators of public transport to comply with standards that set out the minimum requirements for access by people with disability, their families and carers
- schools to comply with standards to ensure that students with disabilities are able to access and participate in education and training free from discrimination, and on the same basis as other students

- people with disabilities to be able to access public buildings.

[17.50] Sex discrimination

Sex discrimination happens when a person is treated unfairly or harassed because they are female and not male, or male and not female.

Sexual harassment

Sexual harassment is unlawful. Unwanted or unwelcome behaviour that may constitute sexual harassment includes:

- suggestive behaviour
- staring or leering
- wolf whistling
- making sexual jokes
- making sexual propositions
- sexual or physical contact
- making sexually offensive gestures
- displaying sexually offensive objects
- displaying sexually explicit material in a public place or in people's work areas.

The sexual harassment can occur in person or via the internet, social networking sites or mobile phones.

Sex-based harassment

Sex-based harassment that is not sexual – for example, addressing a woman as “bitch” – may also be against the law.

What about pregnancy?

Discrimination against a woman because she is pregnant can be sex discrimination.

[17.60] Breastfeeding

It is unlawful to discriminate against a woman because she is breastfeeding (this includes expressing milk).

[17.70] Marital or relationship status discrimination

Marital or relationship status discrimination happens when someone is treated unfairly or harassed:

- because of their marital or relationship status; for example, because they are:

- single
- married
- divorced
- living in a de facto relationship with a member of the opposite or same sex, or
- because of the particular person they are married to or in a de facto relationship with.

[17.80] Sexual orientation, gender identity and intersex status discrimination

Discrimination occurs when someone is treated unfairly or harassed because of their sexual orientation, gender identity or intersex status or because someone thinks they have a particular orientation, identity or status.

Sexual orientation includes a person's sexual orientation towards persons of the same sex, persons of a different sex or persons of the same sex and persons of a different sex.

Gender identity encompasses the way people express or present their gender and may include an identity other than male or female.

Intersex status means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, or a combination of female and male, or neither female nor male.

The law relating to lesbian and gay couples and their families is discussed in Chapter 34, Same-sex Couples and their Families.

[17.90] Age discrimination

Age discrimination happens where someone is treated unfairly because of their age. For example, generally it is against the law for an employer to advertise for someone of a particular age or age group or to compulsorily retire workers because they have reached a certain age.

Exceptions

There are, of course, many common sense exceptions. For example, the legal age limits

for such things as driving, drinking, marriage, voting, sexual activity, watching adult-rated films, being accompanied by an adult for safety and so on, override the age discrimination law.

Juniors

The employment of *juniors* is a major exception. Employers can advertise for and employ people under 21 and pay them at junior rates.

Compulsory retirement

In most cases, it is against the law to require an employee to retire at a certain age (including by hiring only older workers on fixed term contracts as a way of ensuring they will retire at a specific time). Threatening to do so, or doing anything that could result in their retiring due to their age, is also unlawful.

Exceptions

People are not covered by the law against compulsory retirement in NSW if they are employed:

- as judges and magistrates
- as an officer not appointed for a fixed term, who can only be removed from office by parliament.

The Age Discrimination Act

The Commonwealth enacted the *Age Discrimination Act* in 2004. This Act makes it against the law to treat people less favourably because of their age in areas such as employment, education, accommodation, use of services, and the administration of Commonwealth laws and programs.

The Act does not make it unlawful to provide a benefit to a particular age group to meet a need that arises from being a member of that age group (for example, discounts and concessions provided to older Australians for services and/or facilities).

Exceptions

The *Age Discrimination Act* may not apply in relation to:

- Commonwealth laws that govern taxation, social security, migration and superannuation

- state laws
- certain health programs
- youth wages or direct compliance with industrial agreements and awards.

[17.100] Discrimination because of a person's relatives or associates

This type of discrimination happens where someone is treated unfairly or harassed because of the sex, pregnancy, race, age, marital status, homosexuality, transgender or disability of one of their relatives, friends or colleagues.

For example ...

It is against the law for a real estate agent to refuse to let a house to a couple just because they have children.

This would also apply if a hotel refused admission to a group of people because one of them was Aboriginal. That person could obviously claim discrimination, but so could all the other members of the group.

[17.110] Carer's and family responsibilities discrimination

This type of discrimination occurs when a job applicant or employee is treated unfairly because they need to care for or support a child or other immediate family member.

Under NSW law, past, future and *presumed* carer's responsibilities are covered – that is, the discrimination may occur because someone:

- had or might have had a carer's responsibility in the past
- might or will have it in the future, or
- is thought by the employer to have it now or in the future.

Under the *Sex Discrimination Act 1984*, both men and women are protected from direct sex discrimination on the basis of family responsibilities in all areas of their work. Women may make complaints of indirect sex discrimination where they are disadvantaged because of their family responsibilities.

Under NSW law, both men and women are protected from both direct and indirect

discrimination on the ground of carer's responsibilities in all areas of their work.

Who is an immediate family member?

For these purposes, *immediate family members* are:

- married or de facto with a partner of the same-sex or different sex
- ex-partner
- parent or partner's parent
- brother or sister, or partner's brother or sister

- grandchild or partner's grandchild
- grandparent or partner's grandparent.

This includes adoptive, foster and step relationships.

In most cases, employers must provide whatever flexible working arrangements are necessary to enable the job applicant or employee to meet their family responsibilities alongside their work – as long as they can still get the work done.

When is discrimination against the law?

[17.120] In general, the forms of discrimination discussed in this chapter (except carer's/family responsibilities) are against the law if they happen in the following areas:

- education
- access to goods or services
- employment
- accommodation
- registered clubs.

Carer's/family responsibilities discrimination

Carer's/family responsibilities discrimination is only against the law if it occurs in relation to employment.

[17.130] Education

Government educational institutions

Government schools, colleges, and universities must comply with the anti-discrimination laws.

Private educational institutions

Private educational institutions need only satisfy the provisions of the NSW *Anti-Discrimination Act 1977* relating to:

- age discrimination in employment
- race discrimination
- sexual harassment.

Private educational institutions must also comply with the relevant provisions of federal discrimination laws.

[17.140] Goods and services

The anti-discrimination laws cover buying or trying to buy goods, and getting or trying to get services, from such sources as banks, government departments, councils, hospitals, hotels, trades people, shops and transport authorities.

[17.150] Employment

The anti-discrimination laws cover everything to do with work – applying for a job, what happens at work and leaving the job. They also cover independent contractors, commission agents, partnerships and qualifying bodies.

Many employers call themselves *equal employment opportunity* (EEO) employers, some have EEO officers and some run various types of *affirmative action* programs.

Whether they do these things or not, all employers must try to ensure that people in their workplace do not discriminate against or harass anyone for any of the reasons discussed above.

The Human Rights and Equal Opportunity Commission Regulations

Regulations under the federal *Australian Human Rights Commission Act 1986* cover, in relation to employment, discrimination on some of the grounds discussed in this chapter, as well as other grounds including:

- criminal record
- medical record
- religion or political opinion
- trade union activity.

Industrial relations legislation

The *Fair Work Act 2009* (Cth) applies to almost all private sector employees across Australia. Under the *Fair Work Act 2009* an employer must not take any adverse action against an employee (or prospective employee) because of their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Neither can an employer dismiss an employee because they are temporarily absent from work because of illness or injury.

If a person has either been dismissed or feels there has been some other breach of the Act, they may make an application to the Fair Work Commission (FWC) to deal with the dispute. If the dispute remains unresolved, the person can make an application to a court to deal with the matter.

State public sector and local government employees may be able to complain about unfair dismissal to the NSW Industrial Relations Commission.

See Chapter 22, Employment, for more information.

[17.160] Accommodation

Renting

The anti-discrimination laws cover the renting of:

- flats
- houses
- hotel and motel rooms
- commercial premises, and
- caravans.

For example ...

A woman told a real estate agent she wanted to rent a particular house but the owners refused to let it to her

because she was Aboriginal. Conciliation by the Anti-Discrimination Board resulted in an apology and a monetary settlement.

Sale of land

Under federal law, sex, age, race and disability discrimination are against the law in relation to the sale of land.

Under NSW law, it is unlawful to sexually harass another person in the course of the sale of land.

[17.170] Registered clubs

Registered clubs sell alcohol or have gambling machines.

The anti-discrimination laws cover:

- becoming a member of a club
- entry into the club
- services provided by the club.

Single-sex clubs

Clubs set up as single-sex clubs can continue as single-sex clubs.

Once the club admits the other sex as members, however, it must give both sexes the same access to all classes of membership.

For example ...

A woman complained that a particular club still had a "men only" bar. After discussions with the Anti-Discrimination Board, the club opened the bar to both men and women.

Clubs for racial or ethnic groups

Clubs specifically set up to provide benefits to people of a particular racial or ethnic group may operate as single racial or ethnic group clubs.

Victimisation

[17.180] Once a person has complained to the Australian Human Rights Commission or the Anti-Discrimination Board, or

claimed that they have been discriminated

against, it is an offence for someone to punish (victimise) them because of their complaint.

For example ...

A person who is sacked or demoted because they have complained about discrimination can lodge a complaint with the board or Commission claiming victimisation.

Vilification

[17.190] Vilification is publicly saying or doing something that could make others hate or ridicule a particular group of people.

[17.200] The law about vilification

Racial, homosexual, transgender and HIV/AIDS vilification are against NSW law. Racial vilification is also against federal law.

What do the laws cover?

NSW vilification laws cover any *public act* that could encourage hatred, serious contempt or severe ridicule because of a person's or group's:

- race, colour, nationality, descent, ethnic, ethno-religious or national origin (racial vilification)
- homosexuality, whether male or female, actual or presumed (homosexual vilification)
- HIV or AIDS status, whether actual or presumed (HIV/AIDS vilification)
- transgender identity, whether actual or presumed (transgender vilification).

Commonwealth racial vilification laws make it against the law to do something in public based on the race, colour, national or ethnic origin of a person or group of people which is likely to offend, insult, humiliate or intimidate them.

An example of racial hatred may include putting racially offensive material on

e-forums, blogs, social networking sites or video sharing sites on the internet.

The law aims to strike a balance between the right to freedom of speech and the right to live free from racial hatred. Under federal law it is not unlawful to say something "done reasonably and in good faith" in:

- an artistic work or performance
- a statement, publication, discussion or debate made for genuine academic or scientific, or other public interest purposes
- a fair and accurate report on a matter of public interest, or
- a fair comment on any matter of public interest which is an expression of a person's genuine belief.

What is a "public act"?

To be against the law, vilification must be a *public act*. Generally speaking, this means that it must have been possible for someone other than those directly involved to have seen, heard or read it. The following could be against the law if their content was racist, homophobic, anti-HIV/AIDS or anti-transgender:

- speeches or statements made in public – except those made "reasonably and in good faith" for academic, artistic, scientific or research purposes
 - statements in a newspaper or journal, or on radio or TV – except for "fair reports" of an act of vilification
 - symbols worn in public, such as badges or clothing with slogans
 - gestures made in public
 - publications (works of literature and scientific and academic works would generally be exempt)
 - graffiti, posters or stickers in a public place.
-

Equal employment opportunity

[17.210] Equal opportunity in a workplace context means that all employees have equal access to the opportunities that are available at work. In Australia, equal employment opportunity (EEO) policies are mandatory across federal and state public sectors and public organisations are required to have EEO plans and to monitor EEO progress.

[17.220] Affirmative action

In certain circumstances employers can discriminate in *favour* of some groups – for example, people of one sex rather than the other, or people of particular races or ethnic groups, or people in particular age groups can be sought for particular types of jobs.

This situation, where the aim is to redress past disadvantage or discrimination, is often called *affirmative action*. Sometimes it can be done legally without seeking a specific exemption from the anti-discrimination laws.

For example ...

It is acceptable to advertise for and employ someone of a particular racial background where:

- the job is to provide welfare services to people of that racial background, and
- the best way of providing these services is through someone of the same background.

However, an employer who wanted to set up a female-only apprenticeship scheme to encourage more women to take up a particular trade would almost certainly need to get a specific exemption to do so.

For information on exemptions, contact the Anti-Discrimination Board or the Australian Human Rights Commission.

[17.230] Equal employment opportunity management plans

NSW government bodies

Previously all NSW government departments, statutory authorities and local councils were required to prepare and implement *equal employment opportunity management plans* – plans to remove discrimination and harassment from their work practices and procedures. However, the requirement for such plans was repealed by the *Government Sector Employment Act 2013* (NSW) (the GSE Act) which commenced on 24 February 2014. The Act preserves the focus on existing diversity groups (Aboriginal people, women, people from culturally and linguistically diverse backgrounds, and people with disability) while also encompassing mature workers, young people and carers. Government departments, statutory authorities and local councils must comply with all workforce diversity requirements that are specific to the government sector as set out in the GSE Act and with their obligations under the *Anti-Discrimination Act 1977* (NSW). The responsibility for workforce diversity within the agency vests with the head of that government sector agency.

The NSW Public Services Commissioner is to include in annual reports to the NSW Premier or other reports, periodic reports on workforce diversity across government sector agencies.

Federal government bodies

Under the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth), federal authorities like Australia Post, the Reserve Bank and the ABC must have equal employment opportunity plans and affirmative action programs for:

- women
- Aboriginal people
- people of non-English speaking backgrounds

- people with disabilities.

[17.240] Equal opportunity for women and men

The Workplace Gender Equality Agency (WGEA) (formerly known as the Equal Opportunity for Women in the Workplace Agency) is the Australian Government statutory agency charged with promoting and improving gender equality in Australian workplaces. The WGEA administers the *Workplace Gender Equality Act 2012* (Cth) and its functions include: advising and assisting employers in promoting and improving gender equality in the workplace; developing, in consultation with relevant employers and employee organisations, benchmarks in relation to gender equality indicators; issuing guidelines to assist relevant employers to achieve the purposes of the Act; reviewing compliance with the Act

by relevant employers; reviewing public reports lodged by relevant employers and responding to those reports in accordance with the Act.

Relevant private sector employers with 100 or more employees are required to report against standardised “gender equality indicators” including matters like gender composition of the workforce, remuneration differences between men and women, and practices that permit flexible work arrangements.

Also from 2015-2016, relevant employers will be required to report on the:

- number of appointments made
- number of promotions awarded
- number of resignations
- number of employees who ceased employment during or at the end of a period of parental leave.

Complaints about discrimination

[17.250] It is often a good idea for a person who believes they have been discriminated against to try talking to the person or organisation doing the discriminating. A community worker or welfare worker may be able to do this on their behalf, or there may be other sources of help. For example, if it is a work problem, their union (if the person is in one) may be able to help.

Often, people who have a good understanding of their rights are able to sort out the problem themselves.

If this doesn't work, or it isn't appropriate, the person can make a formal complaint.

[17.260] Which agency?

Complaints about discrimination go to the:

- Australian Human Rights Commission (for discrimination under federal law)
- NSW Anti-Discrimination Board (for discrimination under NSW law)
- NSW Industrial Relations Commission or the Fair Work Commission for

employment-related complaints.

If a complaint is covered by both laws a choice must be made about which law you want to lodge your complaint under – you cannot lodge a complaint under both. Both the Anti-Discrimination Board and the Australian Human Rights Commission can advise whether they can handle a particular complaint, and refer complaints to the other agency if necessary.

How to make enquiries

Both the Anti-Discrimination Board and the Australian Human Rights Commission operate phone and drop-in enquiry services during business hours to give advice about the law and how to lodge a complaint.

[17.270] Formal complaints

Complaints to both the Anti-Discrimination Board and the Australian Human Rights Commission should be in writing.

Complaints may be in any language, or in braille. They can be mailed, hand delivered, faxed or emailed to the Anti-Discrimination Board.

The Australian Human Rights Commission can assist in the making of a complaint, and can also receive complaints online or via email.

What should be in the letter

The letter should:

- explain what type of discrimination the person has suffered

- state who caused it
- state when it occurred, and
- ask the president of the board or Commission to investigate.

The letter need not be long, and there is no need for supporting documents. Further material and evidence will be collected later, if necessary.

If the matter is urgent (because, for example, the person making the complaint is about to lose their job) this should be stated in the letter.

Who handles what?

The general guidelines for where to take complaints are discussed below:

- complaints about sex, sexual orientation, gender identity, intersex status, race, age or disability discrimination, direct discrimination in work only for carer's/family responsibilities and racial vilification complaints can go to either the Anti-Discrimination Board or the Australian Human Rights Commission. There are subtle differences between federal and state unlawful discrimination, so it is a good idea to phone both before deciding where to lodge the complaint
- transgender, homosexual (male or female) and HIV/AIDs vilification complaints go to the Anti-

Discrimination Board. Complaints of indirect discrimination in work for carer's/family responsibilities can be brought by both men and women to the Anti-Discrimination Board

- other types of employment-related complaints (such as discrimination because of criminal record, religion, medical record or trade union activity) can go to the Australian Human Rights Commission.

Unlawful and unfair dismissal complaints

- Some unlawful and unfair dismissal or adverse action complaints should go to the Fair Work Commission.
- People covered by a state award can take some types of unfair dismissal complaints to the NSW Industrial Relations Commission.

Complaints of discrimination in relation to equal opportunity in employment and human rights breaches under the Australian Human Rights Commission Act

The Australian Human Rights Commission also has functions in relation to complaints of human rights breaches and complaints about equal opportunity in employment (as distinct from complaints of unlawful discrimination) under the *Australian Human Rights Commission Act 1986* (Cth). Divisions 3 and 4 of Pt II of the Act specify the functions of the Commission, which include inquiring into:

- alleged breaches of human rights by the Commonwealth (such as a federal government department) against accepted international standards (such as those contained in the International Covenant on Civil and Political Rights)
- any act or practice, including any systemic practice, that may constitute discrimination in employment (public and private organisations) on a range of

grounds set out in the Act, including age, religion, sexual preference, political opinion, trade union activity and criminal record.

Complaints received can be resolved by conciliation between the parties. If the matter cannot be conciliated, and is not discontinued for other reasons provided for in the Act, the commission will (in contrast to the treatment of complaints of unlawful discrimination under Pt IIB) present a report to federal parliament outlining the key issues and recommendations to resolve the complaint.

However, the findings of the Australian Human Rights Commission are not legally binding and cannot be enforced in a court.

Time limits

Complaints to both the Anti-Discrimination Board and the Australian Human Rights Commission must be made within 12 months of the last occasion of discrimination, harassment or vilification.

Extensions of time

The presidents of both the Anti-Discrimination Board and the Australian Human Rights Commission can only accept complaints outside these time limits if there is a very good reason why they should do so.

How long will it take?

Both agencies deal with complaints as quickly as possible. However, how long the agency takes to respond to, and ultimately settle, a complaint will depend on a number of factors – for example, how urgent the complaint is in comparison with other complaints at the agency, how quickly those involved respond, and so on.

[17.280] Who can lodge a complaint?

Complaints about vilification must come from a representative body or member of the group claiming to have been vilified.

Generally, the letter or complaint form must be signed by the person making the complaint. NSW law allows organisations representing people of the particular race, sex, age, or other status (depending on the type of discrimination being claimed) to lodge a complaint on a person's behalf.

NSW law also provides for a parent or guardian to be able to lodge a complaint for a person who lacks legal capacity to do so (because of disability or age).

[17.290] Investigation and conciliation

An officer from the agency first investigates the complaint to check that it is covered by the anti-discrimination laws. This person must not take sides, and must give both parties the opportunity to explain their version of events.

If the officer decides that the complaint is covered by the anti-discrimination laws (and if it has not been settled during investigation), an attempt is made to conciliate the matter.

The Anti-Discrimination Board (ADB) may “decline the complaint”, and the Australian Human Rights Commission (AHRC) may ‘terminate the complaint’ at this stage (for example, because it was lodged more than 12 months after the discrimination happened or doesn’t show a breach of discrimination law). If the ADB declines the complaint, application can be made to have the decision reviewed by the Supreme Court of New South Wales within 28 days or leave can be sought for the ADB to refer the matter to the NSW Civil and Administrative Tribunal for hearing within 21 days (depending on the reasons for declining the complaint). If the AHRC terminates the complaint, the complaint can be lodged with the Federal Court or Federal Circuit Court within 60 days.

Conciliation

Conciliation involves helping the *complainant* (the person making the complaint) and the *respondent* (the person or organisation they are complaining about) to reach a private settlement that they both agree on.

The type of settlement will depend on the facts of the case. It could be, for example:

- an apology
- financial compensation
- an offer to give someone back their job
- setting up an education program in the workplace to try to ensure that the discrimination does not recur.

Most complaints are settled by conciliation.

[17.300] If conciliation is not successful

If the complaint is not settled:

- it will be referred to the NSW Civil and Administrative Tribunal (NCAT) (for complaints made to the Anti-Discrimination Board), or
- the complainant may commence proceedings in the Federal Court or the Federal

Circuit Court (for complaints made to the Australian Human Rights Commission).

The Equal Opportunity Division of the NSW Civil and Administrative Tribunal

The Equal Opportunity Division of NCAT deals with discrimination, harassment, vilification or victimisation cases that have been referred to NCAT by the President of the NSW Anti-Discrimination Board.

Hearings

The tribunal hears from the complainant, the respondent and any witnesses. Hearings are designed to be informal and accessible. The formal rules of evidence do not apply, and generally each side pays their own costs of having the complaint heard.

What the tribunal may do

After hearing all the evidence the tribunal determines whether discrimination, harassment or vilification has occurred, and makes a legally binding decision. It can order a respondent to pay compensation to the victim of discrimination up to \$100,000. It can also make orders to ensure that the discrimination does not occur again.

Hearings in the Federal Court or the Federal Circuit Court

Time limits

When the Australian Human Rights Commission can take no further action in relation to a complaint about sex, sexual orientation, gender identity, intersex status, family responsibilities, race, age or disability discrimination, it terminates the matter.

The complainant then has 60 days to decide whether to take the matter further by applying to the Federal Court or the Federal Circuit Court for a decision.

Formal requirements

The complainant must complete and lodge a form setting out the allegations, and an affidavit (a statement of evidence) from the

alleged victim explaining what has happened. There is a \$55 fee (which can sometimes be waived) when a discrimination case is started in the courts.

Hearings

A hearing is held before a judge of the Federal Court or judge of the Federal Circuit Court. Cases are conducted formally, and the rules of evidence normally apply, although the judge can decide that the formalities and the strict rules of evidence will not apply in every case.

Procedures in the two courts are very similar, but cases in the Federal Circuit Court are generally resolved more quickly than in the Federal Court.

What the courts may do

Either court may award compensation and, in contrast to the situation under NSW law, there is no limit on the amount of compensation that may be awarded. The courts may also order a respondent to do certain things to ensure the discrimination or harassment does not continue.

Costs

The side that loses the case generally has to pay the other party's legal costs.

A discriminatory examination

Mr Bishop suffered from dyslexia. He complained to the Human Rights and Equal Opportunity Commission (as it was then called) when a college he attended to learn sports massage required him to take a written exam, making no allowance for his dyslexia (it was difficult for him to complete the exam in the same two-hour period as the other students) and failing to offer him the alternative of an oral exam. Because of this, Mr Bishop failed the exam and had to enrol in another college, delaying his training and work opportunities.

The college's failure to give Mr Bishop an extra half-hour to complete the exam, or the option of an oral exam, was found to be disability discrimination, and he was awarded \$3,000 to redress the loss and damage he suffered (*Bishop v Sports Massage Training School Pty Ltd*, decided December 2000).

Where to get more information

Both the Anti-Discrimination Board and the Australian Human Rights Commission have produced several fact sheets and guidelines for people wanting to know about their rights or responsibilities under anti-discrimination law. These are available free of charge from the agencies. Their annual reports contain other useful information, including case examples.

The Anti-Discrimination Board also produces a quarterly newsletter, *Equal Time*, which anyone can subscribe to.

Each agency also has an extensive internet website for information.

Contact points

[17.310] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.tisnational.gov.au.

Anti-Discrimination Board of NSW

www.antidiscrimination.justice.nsw.gov.au

ph: 1800 670 812

Sydney Office

ph: 9268 5555 or

9268 5544 (general enquiries) or

9268 5522 (TTY)

To make a complaint:

Post: PO Box A2122, Sydney South NSW 1235

Street address: Level 4, 175 Castlereagh Street, Sydney NSW 2000

Email:

complaintsadb@agd.nsw.gov.au

Australian Centre for Disability Law (formerly Disability Discrimination Legal Centre)

www.disabilitylaw.org.au

ph: 1800 800 708 or 1800 644 419 (free TTY)

Australian Human Rights Commission

www.humanrights.gov.au

ph: 9284 9600

Info line: 1300 656 419 (local call) or 1800 620 241(TTY)

Fair Work Commission

www.fwc.gov.au

ph: 1300 799 675

Federal Circuit Court

www.federalcircuitcourt.gov.au

ph: 9230 8567

HIV/AIDS Legal Centre

www.halc.org.au

ph: 9206 2060

Inner City Legal Centre

www.iclc.org.au

ph: 1800 244 481 or 9332 1966

Intellectual Disability Rights Service

www.idrs.org.au

ph: 9318 0144 or 1800 666 611

Complaints infoline

ph: 1300 656 419

Kingsford Legal Centre

www.klc.unsw.edu.au

ph: 9385 9566

LawAccess NSW

www.lawaccess.nsw.gov.au

ph: 1300 888 529

Legal Aid NSW

www.legalaid.nsw.gov.au

Human Rights Committee

ph: 9219 5790 or 1300 888 529

NCAT Administrative and Equal Opportunity Division

www.ncat.nsw.gov.au

ph: 1300 006 228 or 13 36 77 (TTY)

National Children's and Youth Law Centre

www.ncylc.org.au

ph: 9385 9588

NSW Industrial Relations Commission

www.irc.justice.nsw.gov.au

ph: 9258 0866

Office of the High Commissioner for Human Rights

www.ohchr.org

Public Interest Advocacy Centre

www.piac.asn.au

ph: 8898 6500

Women's Legal Services NSW

www.wlsnsw.org.au

ph: 1800 801 501 or 8745 6988

Wirringa Baiya Aboriginal Women's Legal Centre

www.wirringabaiya.org.au

ph: 1800 686 587 or 9569 3847