

# **The Law Handbook**

**YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES**

**15th EDITION**



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# Discrimination

Jennifer Daphne Lim – Senior Lawyer, Australian Human Rights Commission

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# What is unlawful discrimination?

[17.10] Discrimination, in the legal sense, means treating someone unfairly because they happen to have certain personal characteristics such as their race, disability, age, sex, pregnancy, sexual orientation or gender identity. 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 (such as 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 people with a particular personal characteristic). In law, obviously unfair treatment is known as *direct discrimination* and less obvious unfair treatment is known as *indirect discrimination*.

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### **Direct discrimination example**

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

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### **Indirect discrimination example**

An employer who advertises for someone at least 190 cm tall to do a job is likely to unfairly exclude women applicants. 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 discrimination could be claimed.

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Not all forms of unfair treatment are against the law. The law prohibits certain *types* of unfair treatment when they happen in certain *areas* of public life.

In NSW, both Commonwealth and NSW anti-discrimination legislation determine what forms of discrimination are against the law. Generally, both Commonwealth laws and state/territory laws cover the same grounds and areas of discrimination. However, 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.

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## **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 2002* (Cth);
  - *Disability Standards for Education 2005* (Cth);
  - *Disability (Access to Premises – Buildings) Standards 2010* (Cth);
- *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.

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# Types of discrimination

## **[17.20] Types of discrimination**

Under state and/or federal legislation, it is typically against the law in NSW to discriminate against a person in employment, education, the provision of goods and services, 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;
- carer's and family responsibilities.

It is also unlawful to vilify someone on the basis of their race, colour, nationality, descent, ethnic, ethno-religious or national origin, homosexuality, HIV/AIDS status or being transgender.

### [17.30] Race discrimination

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

- race;
- colour;
- nationality;
- descent;
- immigrant status;
- national, ethnic or ethno-religious origin.

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#### *What does "ethno-religious origin" mean?*

*Ethno-religious origin* has been found to include backgrounds such as Jewish and Sikh. It may not include backgrounds such as Muslim or Roman Catholic – religions widespread across many different ethnic groupings.

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### [17.40] Disability discrimination

Disability discrimination happens where, for example, 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.

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

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

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### 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 hardship taking into account factors such as cost or inconvenience. This depends on all the relevant circumstances in a particular case.

Employers should also look at whether a person can get the job done, rather than how. For example, if one aspect of a 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 they can be moved by other means (that does not cause unjustifiable hardship to the employer), that person should be employed.

The "best person for the job" in any particular case should be decided on the merit of each individual applicant and the circumstances, including the inherent requirements of the job.

### Disability Standards

The Attorney-General may make Disability Standards to specify rights and responsibilities under the law to prevent discrimination on the basis of 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 access standards for people with a disability;
- 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;
- that buildings comply with access requirements for people with disabilities.

### [17.50] Sex discrimination

Sex discrimination happens when, for example, 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.

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

## Sex-based harassment

Sex-based harassment – for example, addressing a woman as “bitch” because of her sex even without sexual overtones – may also be against the law.

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### *What about pregnancy?*

Discrimination against a woman because she is pregnant or likely to become pregnant can be unlawful.

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## [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.

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

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

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

**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.

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

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## [17.90] Age discrimination

Age discrimination can happen 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, exceptions which allow people to be treated differently on the basis of their age. For example, legal age limits for things such as driving, drinking, marriage, voting, sexual activity, watching adult-rated films and being accompanied by an adult for safety are permitted by age discrimination law.

### *Juniors*

The employment of *juniors* is a major exception to discrimination on the basis of age. 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 that they will retire at a specific time). Threatening to do so, or doing anything that could result in retirement due to age, may also be unlawful.

### Exceptions

There are some exceptions to protection against compulsory retirement in NSW, including for people employed:

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

## The Age Discrimination Act

In 2004, the Commonwealth enacted the *Age Discrimination Act 2004* (Cth). This Act makes it against the law to treat people less favourably than another person because of their age in areas such as employment, education, accommodation, the provision of goods and 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, it is not unlawful to provide discounts and concessions to older Australians for use of services and/or facilities.

### Exceptions

The *Age Discrimination Act 2004* (Cth) may not apply in relation to:

- Commonwealth laws that govern taxation, social security, migration and superannuation;
- certain health programs;
- youth wages or direct compliance with industrial agreements and awards.

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

Under NSW law, this type of discrimination may happen where someone is treated unfairly or harassed because of the sex, pregnancy status, race, age, marital status, homosexuality, transgender or disability of one of their relatives, friends,

colleagues or associates. Under federal law, people are also protected against discrimination on the basis of disability in relation to being an associate, carer or assistant of a person with a disability. Similarly, in some instances, it is unlawful to discriminate against a person because of the race, colour or national or ethnic origin of a relative or associate of that person, including by refusing to allow access to a place that members of the public can enter or use.

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### For example ...

It is against the law for a hotel to refuse admission to a group of people because one of them is Aboriginal. That person could obviously claim discrimination, but so could all the other members of the group.

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## [17.110] Carer's and family responsibilities discrimination

This type of discrimination can occur 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:

- has current carer's responsibilities;
- had carer's responsibilities in the past;
- might or will have carer's responsibilities in the future; or
- is thought by the employer to have past, current or future carer's responsibilities.

Under the *Sex Discrimination Act 1984* (Cth), 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.

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### Who is an immediate family member?

For these purposes, *immediate family members* include:

- 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.

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## When is discrimination against the law?

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**[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 and housing;
- clubs.

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### *Carer's/family responsibilities discrimination*

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

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### **[17.130] Education**

#### **Government educational institutions**

Government schools, colleges and universities must comply with all relevant federal and state anti-discrimination laws.

#### **Private educational institutions**

Private educational institutions must comply with all relevant federal and state anti-discrimination laws. In NSW, the relevant state law is the *Anti-Discrimination Act 1977* (NSW) as it relates to:

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

### **[17.140] Goods and services**

Anti-discrimination laws generally cover buying or trying to buy goods and getting or trying to get services, from places such as banks, government

departments, councils, hospitals, hotels, trades people, shops and transport authorities.

### **[17.150] Employment**

Anti-discrimination laws cover many aspects of 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 in contravention of the law.

### **The Australian Human Rights Commission Regulations**

Regulations made under the federal *Australian Human Rights Commission Act 1986* (Cth) 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;
- trade union activity.

### **Industrial relations legislation**

The *Fair Work Act 2009* (Cth) applies to almost all private sector employees across Australia. Under this Act, an employer must not take any adverse action against an employee (or prospective employee) because of their 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. An employer also cannot dismiss an employee just because they are temporarily absent from work because of illness or injury.

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

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See Chapter 22, Employment, for more information.

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## [17.160] Accommodation

### Renting

Anti-discrimination laws cover the renting of:

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

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#### *For example ...*

A woman told a real estate agent that 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.

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## 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.

### Sale of land

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

Under federal and NSW laws, 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.

Anti-discrimination laws cover:

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

### Single-sex clubs

It is not unlawful for a single-sex club to discriminate against a person based on their sex, if membership of the club is available to persons of a different sex only.

Once the club admits the other sex as members, however, it must generally give both sexes the same access to membership and membership benefits.

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#### *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.

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### 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, for example, as a special measure.

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#### *For example ...*

A person who is sacked or demoted because they have complained about discrimination can lodge a complaint with the Anti-Discrimination Board or the Australian Human Rights Commission claiming victimisation.

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# Vilification

[17.190] Vilification is publicly denigrating someone or 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 a 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 online 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 or do something "reasonably and in good faith" if done 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;
- 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 actions could be against the law if their content is 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 a fair and accurate reports or a fair comment;
- symbols worn in public, such as badges or clothing with slogans;
- gestures made in public;
- publications (literature works 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. Equal employment opportunity (EEO) policies, plans and reporting are mandatory for some federal and state public sectors.

## [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* or positive discrimination. Sometimes it can be done legally without being granted a specific exemption from 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 in NSW might need to get a specific exemption from state anti-discrimination laws to do so.

Under federal anti-discrimination laws, there is no need to obtain an exemption where an employer or other organisation is satisfied that they are taking a “special measure” to assist a disadvantaged group on the basis of sex, disability, race, age or other protected grounds for the purpose of achieving substantive equality. Where an action is not a special measure and is discriminatory, an application for an exemption may need to be made to the Australian Human Rights Commission. The Commission has published guidelines that explain the difference between a special measure and actions that may require an exemption.

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

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## [17.230] Equal employment opportunity management plans

### NSW government bodies

The *Government Sector Employment Act 2013* (NSW), the *Government Sector Employment (General) Rules 2014* (NSW) and provisions of the *Local Government Act 1993* (NSW) seek to improve equal opportunity and diversity in the NSW

state and local government sector, including for Aboriginal people, women, people from culturally and linguistically diverse backgrounds and people with disability. Government departments, statutory authorities and local councils must comply with relevant workforce diversity requirements and with their obligations under the *Anti-Discrimination Act 1977* (NSW).

The NSW Public Services Commissioner must include in annual reports 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), some federal government entities like Australia Post, the Reserve Bank and the ABC must have equal employment opportunity plans and affirmative action programs to support:

- women;
- Indigenous Australians;
- people of non-English-speaking backgrounds;
- people with disabilities.

## [17.240] Equal opportunity for women and men

The Workplace Gender Equality Agency (WGEA) is a federal government agency responsible for promoting and improving gender equality in Australian workplaces. The WGEA administers the *Workplace Gender Equality Act 2012* (Cth), and its functions include to: advise and assist employers in promoting and improving gender equality in the workplace; develop benchmarks in relation to gender equality indicators; issue guidelines to assist relevant employers to achieve the purposes of the Act; review compliance with the Act by relevant employers; and review public reports lodged by relevant employers and respond to those reports.

Some private sector employers with 100 or more employees are required to report annually to the WGEA on “gender equality indicators”, including on the gender composition of their workforce, remuneration differences between men and women and practices that permit flexible work arrangements.

Relevant employers are also 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

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**[17.250]** It is often a good idea for a person who believes that 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.

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

### **[17.260] Which agency?**

Complaints about discrimination can be made 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 federal and NSW anti-discrimination 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 complainants to the other agency if necessary.

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#### ***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.

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### **[17.270] Formal complaints**

Complaints to both the Anti-Discrimination Board and the Australian Human Rights Commission

should be made in writing. Complaints may be made 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 receive complaints through mail, fax, email, hand delivery or online. It can provide assistance to a person who wishes to make a complaint.

#### **Writing a complaint letter**

A complaint letter should describe the relevant conduct, including:

- the type of discrimination;
- who was involved, if known;
- when, where and how it occurred.

The letter need not be long, but it should set out as fully as possible the detail of the alleged unlawful conduct. Further material and evidence will be collected later, if necessary.

If the matter is urgent (because, eg, the person making the complaint is about to lose their job), it is a good idea to say this in the letter.

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#### ***Who handles what?***

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

- Complaints about discrimination on the basis of sex, sexual orientation, gender identity, intersex status, race, age or disability or direct discrimination in work (for family responsibilities only) 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 organisations before deciding where to lodge the complaint.
- Transgender, homosexual (male or female) and HIV/AIDS vilification complaints can be made 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.

- Complaints about discrimination in employment because of criminal record, medical record, religion, political opinion, nationality 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 has functions in relation to complaints of human rights breaches and complaints about equal opportunity in employment (in addition to handling 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 relevant functions of the Commission, which include inquiring into:

- alleged breaches of human rights by the Commonwealth (such as by a federal government department) against accepted international standards (such as those contained in the International Covenant on Civil and Political Rights);
- discrimination in employment (public and private organisations) on a range of grounds set out in the *Act*, including age, religion, sexual orientation, political opinion, trade union activity, medical record 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 may present a report to the Attorney-General setting out its findings and recommendations.

However, the findings of the Australian Human Rights Commission in relation to human rights and to equal opportunity in employment are not legally binding and cannot be enforced in a court. In contrast, where a complaint of unlawful discrimination has been made to the Commission under Pt IIB but is not resolved, you can take the matter to court.

#### **Time limits**

Complaints to both the Anti-Discrimination Board and the Australian Human Rights Commission

should be made within six months of the alleged discrimination, harassment or vilification.

#### **Discretion as to time limits**

The presidents of both the Anti-Discrimination Board and the Australian Human Rights Commission might 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 seek to deal with complaints as quickly as possible. However, how long the agency takes to respond to, and seek to resolve, 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 must generally be made by the person who has experienced discrimination or the human rights breach, or their representative. Complaints about vilification must come from a member of the group claiming to have been vilified or their representative or a representative body.

For example, a parent or guardian could lodge a complaint on behalf a person who lacks legal capacity to do so (because of disability or age). Generally, peak organisations representing people of the particular race, sex, age or other status (depending on the type of discrimination being claimed) can lodge a complaint on behalf of its aggrieved members.

### **[17.290] Investigation and conciliation**

A complaint made to the Anti-Discrimination Board (ADB) will be investigated by an officer to check that it is covered by the anti-discrimination or other relevant laws. 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.

When a complaint is received by the Australian Human Rights Commission (AHRC), the President of the Commission will consider whether to

inquire into the complaint, having regard to certain factors. The AHRC may “terminate” a complaint (eg, because it was lodged more than six months after the discrimination happened or the alleged act is not unlawful discrimination) or will otherwise inquire into the complaint and attempt to conciliate the complaint. If the AHRC terminates the complaint, a case can be filed with the Federal Court or Federal Circuit Court within 60 days to have the decision reviewed, subject to the relevant leave requirements.

The Anti-Discrimination Board (ADB) may similarly “decline the complaint”. If the ADB declines the complaint, an 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).

## Conciliation

Conciliation involves helping the *complainant* (the person making the complaint) and the *respondent* (the person or organisation they are complaining about) to find a way to resolve a complaint. The conciliator must not take sides and must give both parties the opportunity to explain their version of events.

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), subject to leave requirements.

## 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 cannot resolve an unlawful discrimination complaint, or when it decides to terminate the complaint for another reason (eg, the conduct occurred more than six months ago or the conduct was not unlawful), it issues a Notice of Termination.

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. In some cases, the complainant must seek the leave of the court (permission from the court) to make an application.

### Formal requirements

The applicant must complete and lodge a form setting out the allegations and provide an affidavit (a statement of evidence) explaining what has happened. There is a \$55 fee (which can sometimes be waived) when a discrimination case is started in the Federal Circuit Court.

### Hearings

If a hearing is held before a judge of the Federal Court or Federal Circuit Court, the rules of

evidence normally apply, although the judge can decide that usual formalities and court rules will not apply in every case.

Procedures in the two courts can be similar, but the Federal Circuit Court tends to operate more informally and can sometimes resolve cases 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 that the discrimination or harassment does not continue.

### **Costs**

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

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### ***Examples of discrimination***

An employer refuses to hire a suitably qualified person as a shop assistant because they are Aboriginal and instead hires a less qualified person of a different racial background. This could be racial discrimination.

A company policy says that only full-time workers will be promoted. This policy could discriminate against women as they are more likely to work part-time to accommodate their family responsibilities.

A nightclub or restaurant refuses a person entry because they are blind and have a guide dog. This could be disability discrimination.

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### ***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.

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# 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.communications.gov.au](http://www.communications.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](http://www.tisnational.gov.au).

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See [www.service.nsw.gov.au](http://www.service.nsw.gov.au) for further details.

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## Anti-Discrimination Board of NSW

[www.antidiscrimination.justice.nsw.gov.au](http://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 7/10 Valentine Avenue, Parramatta NSW

Email: [complaintsadb@agd.nsw.gov.au](mailto:complaintsadb@agd.nsw.gov.au)

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

[www.disabilitylaw.org.au](http://www.disabilitylaw.org.au)

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

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## Australian Human Rights Commission

[www.humanrights.gov.au](http://www.humanrights.gov.au)

ph: 9284 9600

National Information Service: 1300 656 419 (local call) or 1800 620 241 (TTY)

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## Fair Work Commission

[www.fwc.gov.au](http://www.fwc.gov.au)

ph: 1300 799 675

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## Federal Circuit Court

[www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au)

ph: 9230 8567

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## HIV/AIDS Legal Centre

[www.halc.org.au](http://www.halc.org.au)

ph: 9206 2060

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## Inner City Legal Centre

[www.iclc.org.au](http://www.iclc.org.au)

ph: 1800 244 481 or 9332 1966

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## Intellectual Disability Rights Service

[www.idrs.org.au](http://www.idrs.org.au)

ph: 9265 6300 or 1300 665 908

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## Kingsford Legal Centre

[www.klc.unsw.edu.au](http://www.klc.unsw.edu.au)

ph: 9385 9566

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## LawAccess NSW

[www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

ph: 1300 888 529

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## Legal Aid NSW

[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

*Human Rights Committee*

ph: 9219 5790 or 1300 888 529

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## NCAT Administrative and Equal Opportunity Division

[www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au)

ph: 1300 006 228 or 1300 555 727 (TTY)

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## Youth Law Australia

[www.yla.org.au](http://www.yla.org.au)

ph: 9385 9588

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## NSW Industrial Relations Commission

[www.irc.justice.nsw.gov.au](http://www.irc.justice.nsw.gov.au)

ph: 8688 3516

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## Office of the High Commissioner for Human Rights

[www.ohchr.org](http://www.ohchr.org)

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## Public Interest Advocacy Centre

[www.piac.asn.au](http://www.piac.asn.au)

ph: 8898 6500

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## Women's Legal Services NSW

[www.wlsnsw.org.au](http://www.wlsnsw.org.au)

ph: 1800 801 501 or 8745 6988

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## Wirringa Baiya Aboriginal Women's Legal Centre

[www.wirringabaiya.org.au](http://www.wirringabaiya.org.au)

ph: 1800 686 587 or 9569 3847