

ANTI- DISCRIMINATION LAW & PRACTICE

A LEGAL GUIDE TO LGBTI WORKPLACE INCLUSION

A Pride in Diversity Publication 2016

Content developed by Corrs Chambers Westgarth

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About this publication

This handbook is intended to provide Australian employers with a brief overview of their legal rights and obligations under Australian Anti-Discrimination Law. It aims to identify anti-discrimination best practice in the workplace and to assist employers to develop clear policies in order to avoid any instances of LGBTI discrimination occurring in the workplace.

The content of the handbook was created in 2016 and is provided for general information purposes only. It does not constitute legal advice, and should not be used as such. Formal legal advice should be sought in any particular matter. Whilst the information contained in this handbook has been formulated with all due care, Pride in Diversity, IBM and Corrs Chambers Westgarth do not accept any liability to any person for the information which is provided in this handbook.

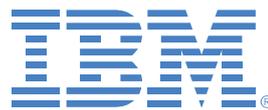
A note on Pride in Diversity and our terminology

Pride in Diversity, Australia's national not-for-profit employer support program for all aspects of LGBTI workplace inclusion, is a social inclusion initiative of ACON. ACON is Australia's largest LGBTI health organisation. Pride in Diversity was established by ACON to assist in the reduction of stigma, social isolation, homophobia and discrimination in the workplace thereby improving the mental health and wellbeing of LGBTI employees.

This publication utilises the acronym LGBTI (Lesbian, Gay, Bisexual, Transgender, Intersex). We acknowledge the limitations of this acronym and that not all people will identify with the labels within. We understand that terminology can be contentious but we also understand the importance of a consistent language for employers. We use the acronym LGBTI as a representative term for our community.

We acknowledge that there is a diversity of identities within our community and that no one term or acronym is capable of encompassing them all. We do not in practice, education, service delivery or intention exclude any one identity or person from within our community.

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Acknowledgements

This publication was written by the Summer Clerks and Lawyers of Corrs Chambers Westgarth 2016. We thank Corrs Chambers Westgarth for developing this publication as a pro bono project to support Pride in Diversity and our member organisations.

We also acknowledge and thank IBM the sponsor of our annual publication for the last six years, without their support this publication would not be possible.

We thank Ishwar Singh, Tess Ziems, Adrian Eisler, Amie Wee, Sarah McCarthy, Ross Wetherbee and Steph Mellor for proof reading the document and Finlay Long for the design of the publication. An additional thank you to Ishwar Singh for managing this project from the Pride the Diversity end.

Pride in Diversity acknowledges the traditional owners of country throughout Australia and their diversity, histories, knowledge and continuing connection to land and community. We pay our respects to all Australian Indigenous peoples and their cultures, and to elders of past, present and future generations.

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Suggested citation

Pride in Diversity & Corrs Chambers Westgarth (2016), Anti-Discrimination Law and Practice, A legal guide to LGBTI workplace inclusion, www.prideindiversity.com.au

ISBN: 978-0-646-96496-6

A WORD FROM PRIDE IN DIVERSITY

WELCOME TO THE 2016 PRIDE IN DIVERSITY ANNUAL PUBLICATION.

Every year, we endeavour to compile a publication that is topical, educational but most of all really useful to our member organisations.

This year, we were very fortunate to have Corrs Chambers Westgarth approach us about providing some pro bono support to Pride in Diversity. We were delighted that we were able to jointly establish a project that would not only benefit Pride in Diversity but provide significant value to our members. We are very grateful to Corrs Chambers Westgarth for instigating this project and for their ongoing and generous support in seeing the publication through to completion.

Throughout the year, Corrs' Summer Clerks have worked tirelessly on researching and compiling this publication. I would like to thank, on behalf of all of our members, all of the Summer Clerks involved in this project and Ruth Nocka and the other lawyers at Corrs who made this publication possible.

This publication on Anti-Discrimination Law and Practice, with a specific focus on LGBTI workplace inclusion, will be an excellent guide for HR Practitioners, Diversity Leaders and Executives alike. We trust that you will find it to be a useful, valuable and highly informative resource.

I would like to thank Ishwar Singh for sharing his legal expertise and working with Corrs on this publication, the contributions of the Pride in Diversity team including Finlay Long for his design acumen, and ACON staff for assistance in proofing and editing the document.

I would also like to thank IBM for their ongoing support of our annual publication. This is the sixth consecutive year that IBM has sponsored this project. Without the support of IBM, the design, print and distribution of this resource would not be possible. Thank you.

Dawn Hough

Director,

ACON's Pride Inclusion Programs

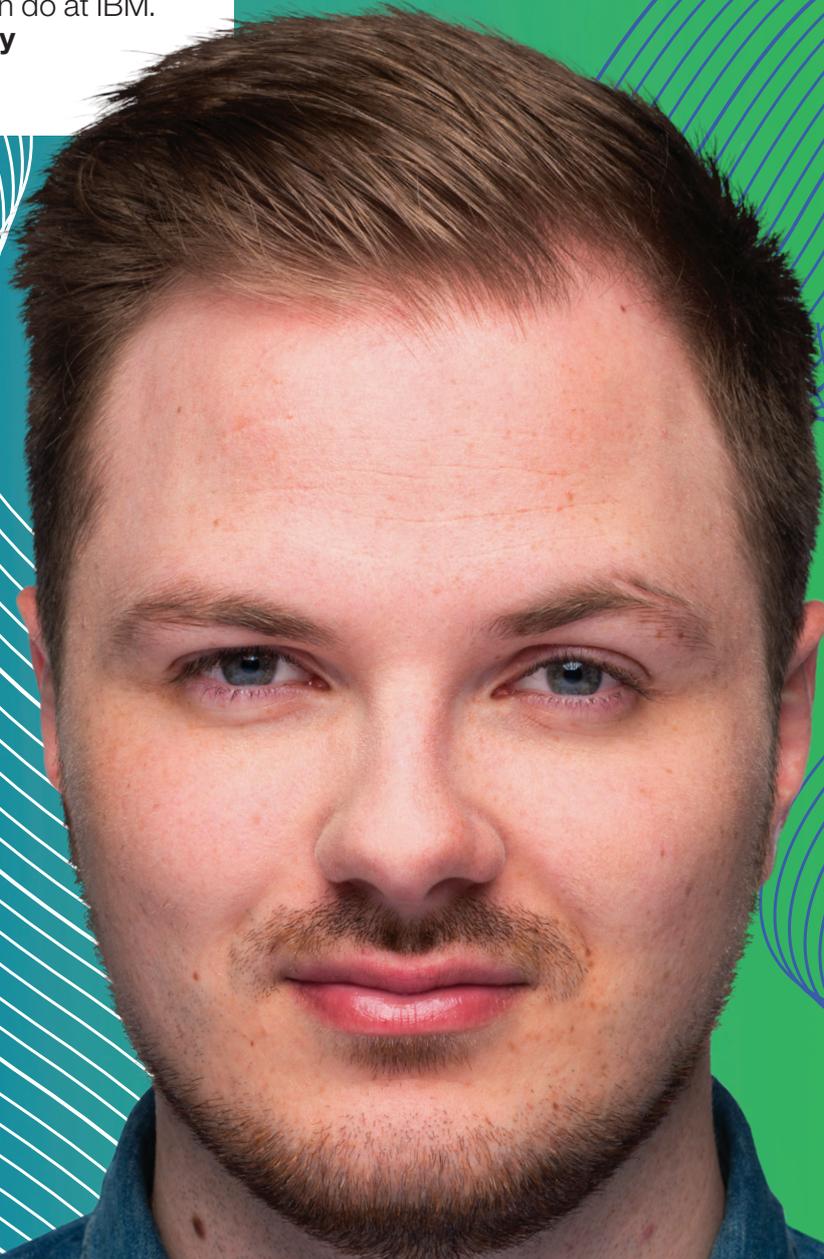
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A WORD FROM IBM, OUR PUBLICATION SPONSOR

THIS IS AN IMPORTANT PUBLICATION PROVIDING GUIDANCE TO EMPLOYERS AND EMPLOYER-SUPPORTED LGBTI NETWORKS IN RELATION TO WORKPLACE DISCRIMINATION.

IBM is once again proud to sponsor this year's Pride in Diversity publication 'Anti-Discrimination Law and Practice: A legal guide to LGBTI workplace inclusion'.

For more than a century, we have viewed the diversity of cultures, people, thoughts and ideas as an imperative to successfully delivering innovative, superior technologies that truly help solve our nation's greatest challenges. IBM is built on creating a safe and inclusive environment for all, where independence of thought is celebrated and all employees, including our LGBTI employees, can bring their whole selves to work.

Diversity and inclusion is embedded in all that we do. This includes business activities such as hiring, training, compensation, promotions, transfers, terminations, as well as IBM-sponsored social and recreational activities which are conducted without discrimination or harassment based on race, religion, sex, gender, gender identity or expression, sexual orientation, national origin, genetics, disability and age.

We know that the best teams with the most impact are diverse and promote an environment where everyone has no barrier to their career potential. Effective management of our workforce diversity policy is an important strategic objective to achieve this.

We continually strive to build and maintain an inclusive workplace that supports and engages our LGBTI employees through mentorship, support communities and education. Seeking to support, educate and maximise the career potential of all employees, we also continue to build a culture that leverages and celebrates the achievements and contributions of all our LGBTI employees.

Kerry Purcell

Chief Executive Officer

IBM

A WORD FROM CORRS CHAMBERS WESTGARTH

EVERYONE SHOULD WORK IN AN ENVIRONMENT WHERE THEY FEEL FREE TO BRING THEIR FULL IDENTITY TO THE WORKPLACE.

It is a simple statement, and something which truly resonates with us at Corrs. And yet, we know that it is still not the case in all workplaces in Australia.

Although legislation has been introduced at both Federal and State levels with the aim of protecting people from discrimination, ultimately it is the responsibility of every organisation to ensure that it has created a welcoming and respectful workplace where everyone is accepted and treated equally.

This handbook is about helping to educate employers and employer-supported LGBTI networks about how best to achieve this.

As Australia's leading independent law firm, this is an issue which is incredibly important to us. We want to lead on this issue in the same way as we lead on many other important issues. Corrs is committed to addressing this issue and improving diversity, equality and inclusion in the legal profession. We are a signatory to the Law Council of Australia's Diversity and Equality Charter, and our LGBTI@Corrs Network aims to support the inclusion of our own LGBTI people, and also to better engage with the LGBTI community more broadly.

We are a very proud member of Pride in Diversity, and it is through this relationship that the idea of developing this publication was born. We are delighted to be partnering with Pride in Diversity to help educate employers about their obligations and best practices in regards to workplace inclusion. Pride in Diversity has developed a solid volume of resources for its members and we are pleased to contribute to this with the publication of Anti-Discrimination Law and Practice: A legal guide to LGBTI workplace inclusion. We would also like to thank IBM for their sponsorship of this publication and their help in spreading this important message.

From our experience at Corrs, we know that diversity and inclusion are important to both our people and our firm. We hope that this publication helps other employers to create an inclusive workplace, something which is vital for the wellbeing of employees and the success of the organisation.

John WH Denton AO

Partner and Chief Executive Officer

Corrs Chambers Westgarth

TABLE OF CONTENTS

| | | |
|----|---|----|
| 1 | INTRODUCTION | 8 |
| 2 | AN OVERVIEW OF THE LAW | 9 |
| 3 | PROTECTED ATTRIBUTES | 10 |
| 4 | DIRECT AND INDIRECT DISCRIMINATION | 15 |
| 5 | EMPLOYMENT DECISIONS AND POLICIES | 20 |
| 6 | EXTERNAL COMPLAINTS PROCEDURE | 27 |
| 7 | ANTI-DISCRIMINATION LAW AND PRACTICE | 29 |
| 8 | REMEDIES | 36 |
| 9 | GENERAL PROTECTIONS | 40 |
| 10 | ALTERNATIVE DISPUTE RESOLUTION | 46 |
| 11 | PUBLIC SECTOR CONSIDERATIONS | 52 |
| 12 | RELIGIOUS SECTOR CONSIDERATIONS | 62 |
| 13 | EXEMPTIONS TO ANTI-DISCRIMINATION LAWS | 66 |
| 14 | CASE STUDIES | 72 |
| 15 | GLOSSARY | 77 |

INTRODUCTION

The purpose of this guide is to assist you with advising employers and employer-supported lesbian, gay, bisexual, transgender and intersex (LGBTI) networks in relation to workplace discrimination. The guide is aimed at providing practical advice and best practice guidelines for employers to adopt during all stages of employment to ensure an LGBTI inclusive workplace.

This guide provides general information to help you identify:

- what the terms discrimination, harassment and bullying mean under Australian law;
- how the protected LGBTI attributes (sexual orientation, gender identity and intersex status) are defined in Australian law;
- the types of LGBTI discrimination that can occur – direct or indirect;
- what kind of employment decisions are legally reviewable in the context of LGBTI workplace inclusion;
- the discrimination laws that apply in a workplace and the remedies available;
- the alternative dispute resolution processes available and how employers can prepare for these;
- what are the general protection provisions, public sector and religious sector considerations; and
- where to get further help.

Purpose of anti-discrimination law

Anti-discrimination laws aim to promote equality of opportunity for everyone by protecting people from unfair discrimination in certain areas, including work, education and accommodation. This is achieved by prohibiting discrimination on grounds such as race, sex, religious belief, and sexual orientation.

In terms of LGBTI workplace inclusion, the legislative object of the *Sex Discrimination Act 1984* (SDA) is to eliminate, as far as possible, discrimination against people on the grounds of sexual orientation, gender identity and intersex status.

All employers have a responsibility to make sure that employees, contractors and applicants for employment are treated fairly.

History of LGBTI protections

Over the last 30 years, the Commonwealth and State/Territory governments have passed legislation designed to protect people from discrimination.

State and Commonwealth anti-discrimination laws often overlap. Both Commonwealth and State laws must be complied with.

Initially, Australian anti-discrimination laws protected only a limited number of attributes, however the laws have become progressively more comprehensive. In 2009, a series of laws were amended to remove discrimination against same-sex couples and their children in areas such as taxation, immigration, family law and superannuation, ensuring they were treated the same as different-sex de facto relationships. In 2011, reforms were passed to assist sex and gender diverse persons obtain a passport in their affirmed gender, and in 2012 a Certificate of No Impediment to Marriage was created for Australians seeking to enter into a same-sex marriage overseas.

Continuing this increasing recognition of the need for further LGBTI protections, the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 was passed into law, extending protections under the Sex Discrimination Act 1984 to include sexual orientation, gender identity and intersex status.

The existing ground of 'marital status' was also changed to 'marital or relationship status' to extend protection to same-sex de facto couples.

Anti-discrimination laws in Australia protect individuals against discrimination in different areas of life on the basis of particular attributes known as “protected attributes”. There are Federal and State or Territory anti-discrimination laws which may apply to any single occurrence of discrimination.

THE LAWS

In Australia, anti-discrimination legislation exists in two parallel sets of laws: one at the State or Territory level, and one at the Federal level (known as the “**Commonwealth**” level). Commonwealth legislation applies to the whole of Australia, whereas the State and Territory laws only apply to their respective State or Territory.

Generally a person who believes they have been discriminated against may have the option of bringing a discrimination complaint under either the relevant State or Territory or Commonwealth anti-discrimination law. In some cases only one set of laws will apply.

The State or Territory and Commonwealth anti-discrimination laws prevent and protect individuals against particular types of discrimination. Discrimination is only protected in certain areas (for example in employment or education) and on particular grounds.

What does the term “protected attributes” mean?

Only discrimination which occurs on the basis of certain **specific personal attributes** of a person is unlawful. Attributes are inherent features, characteristics or qualities that exist in people, such as a person's age or religion. These specific personal attributes are known as “**protected attributes**”.

Only discrimination that is said to occur because of a protected attribute is unlawful.

It is important to note that the attributes listed and explained within this section are not exhaustive – they have been identified as those which are of **particular** relevance to LGBTI persons. There are a number of protected attributes which are **not** discussed here, for example, age, race, religion or political beliefs, which may be relevant to LGBTI persons as well.

The next section explains which protected attributes are covered by the legislation and are of particular relevance to LGBTI people.

There are two parts:

- 1 An overview table that gives a brief snapshot of the attributes which are protected in different parts of Australia. This table can be used to determine which protected attributes are covered under which piece of legislation; and
- 2 A more detailed explanation of each protected attribute, where in Australia the protection applies and under which piece of legislation the protection exists.

3 PROTECTED ATTRIBUTES

PART 1: WHAT ATTRIBUTES ARE PROTECTED IN AUSTRALIA?

This table is a summary table of the protected attributes most relevant to LGBTI people and where they are protected under Australian law.

| Protected Attribute | Cth ¹ | FWA ² | NSW | Vic | Qld | WA | SA | Tas | ACT | NT ³ |
|-------------------------------|------------------|------------------|-----|-----|-----|----|----|-----|-----|-----------------|
| Sex | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Intersex | ✓ | | | | | | | ✓ | | |
| Sexual orientation | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Pregnancy | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Marital/relationship status | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Family/carer responsibilities | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Transgender/gender identity | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Physical features | | | | ✓ | | | | | | |
| Age | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Disability | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

¹ Cth refers to the Sex Discrimination Act 1984 except age which is protected by the Age Discrimination Act 2004 and disability which is protected by the Disability Discrimination Act 1992.

² FWA refers to the Fair Work Act 2009.

³ In the NT, parenthood is a protected attribute. However, family or carer responsibilities are not protected attributes.

3 PROTECTED ATTRIBUTES

PART 2: DEFINITIONS OF SOME POTENTIALLY RELEVANT PROTECTED ATTRIBUTES

This table contains the definition of relevant protected attributes, information on where each attribute is protected in Australia and the relevant laws which apply.

It is important that you understand how each attribute is defined, as only those characteristics which fall within the definition will be protected. Remember to let the person know they may need to check the specific law which applies to the facts in question.

| Protected Attribute | Definition of the protected attribute | Where is the attribute protected? |
|------------------------|--|---|
| Sex | Sex includes a person's physical, hormonal or genetic features, including their sex organs. This is different from gender, which refers to a person's role in society. For example, if a person is described as 'feminine', that relates to their gender. | This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level. |
| Intersex status | Intersex status is where a person has physical, hormonal or genetic features that are: a) neither completely female nor completely male; b) a combination of female and male; or c) neither female nor male. | Since 2013, this attribute has been protected at a Commonwealth level. However, the only State or Territory that specifically protects this attribute is Tasmania. |

3 PROTECTED ATTRIBUTES

| Protected Attribute | Definition of the protected attribute | Where is the attribute protected? |
|--|--|---|
| <p>Sexual orientation</p> | <p>Sexual orientation refers to the sexual feelings and attraction that a person may feel for someone else. Sexual orientation includes, but is not limited to:</p> <ul style="list-style-type: none"> a) heterosexuality (persons of a different sex); b) homosexuality (persons of the same sex); or c) bisexuality (persons of both the same sex and a different sex). <p>This also covers instances where a person is suggested to have a particular sexual orientation by others.</p> <p>In the NT, sexuality is defined to also include transsexuality.</p> <p>Note: the NSW law only protects homosexuality. It does not protect heterosexuality or bisexuality.</p> | <p>This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level.</p> |
| <p>Transgender/ gender identity</p> | <p>Gender identity means any aspects of identity related to gender, such as appearance or mannerisms, regardless of the person's sex at birth.</p> <p>This attribute is known as 'transgender' in NSW, 'gender history' in WA and 'chosen gender' in SA.</p> <p>Note: outside the law, transgender and gender identity may not refer to the same thing.</p> | <p>Since 2013, this attribute has been protected at a Commonwealth level.</p> <p>This attribute is also specifically protected under the law of each State and Territory, except for the NT which instead includes 'transsexuality' within the definition of sexuality. 'Transsexuality' itself though is not defined under that law.</p> |

3 PROTECTED ATTRIBUTES

| Protected Attribute | Definition of the protected attribute | Where is the attribute protected? |
|--|---|--|
| <p>Marital status</p> | <p>Marital status refers to a person's relationship status and includes a person's status as:</p> <ul style="list-style-type: none"> a) single; b) married; c) divorced, or d) de facto, <p>whether in the past or present, regardless of living circumstances.</p> <p>Note: a de facto relationship can be of any gender combination. It may refer to all relationships where two adults are living together as a couple on a genuine domestic basis, regardless of whether they have a sexual relationship.</p> <p>The SA equivalent of de facto relationships is called 'domestic partnerships'.</p> | <p>This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level.</p> |
| <p>Family/carer responsibilities & parenthood</p> | <p>Family/carer responsibilities means a person's responsibilities for:</p> <ul style="list-style-type: none"> a) a dependent child; or b) other immediate family members, including a de facto partner. <p>In Tasmania, as well as family/carer responsibilities, parental status is a protected attribute. This covers both people who are parents and people who are childless.</p> <p>The NT law covers only parenthood, with no protection for family/carers (for example, carers of sick family members). However, parents are broadly defined to include:</p> <ul style="list-style-type: none"> a) step-parents; b) adoptive parents; c) foster parents; d) guardians; and e) people who provide care, nurturing and support to a child. | <p>This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level.</p> |

3 PROTECTED ATTRIBUTES

| Protected Attribute | Definition of the protected attribute | Where is the attribute protected? |
|--|---|--|
| Pregnancy & potential pregnancy | <p>Pregnancy is defined broadly in Australian anti-discrimination laws. Anyone who is currently pregnant is protected. The characteristics that pregnant people generally show are also protected.</p> <p>In addition, under SA, WA, ACT and Commonwealth laws, potential pregnancy for a 'woman' is specifically protected. Potential pregnancy refers to the views people have on a person being likely to become pregnant in the future.</p> | <p>This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level.</p> |
| Physical features | <p>Physical features are defined as a person's:</p> <ul style="list-style-type: none"> a) height; b) weight; c) size; or d) other body characteristics. | <p>This attribute is only protected in Victoria.</p> |
| Age | <p>Age refers to how long a person has lived, and also to the process of growing older.</p> <p>However, 'age' is not actually defined in Australian anti-discrimination laws.</p> | <p>This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level.</p> <p>States like NSW and WA also prohibit discrimination based on the age of a person's relatives or associates. An 'associate' can be a friend, team mate in a sport, or someone who does business with that person.</p> |
| Disability | <p>Disability means:</p> <ul style="list-style-type: none"> a) any loss of the person's functions; or b) any loss of any body part; or c) disease or illness; or d) any deformity of any body part; or e) any learning disorder; or f) any behavioural disorder | <p>This attribute is protected separately under the law of each State and Territory. It is also protected at the Commonwealth level.</p> <p>States such as SA also prohibit discrimination based on the disability of a person's relatives or associates. An 'associate' can be a friend, team mate in a sport, or someone who does business with that person.</p> |

4 DIRECT AND INDIRECT DISCRIMINATION

DIRECT AND INDIRECT DISCRIMINATION

There are two main types of discrimination: **direct** and **indirect**. While the names of the two different types may sound straightforward, identifying direct and indirect discrimination when it is actually occurring can be much more difficult. Not all conduct which negatively affects a person will be discrimination, even where a person has a protected attribute. It is therefore important to carefully assess any conduct that is said to amount to discrimination.

Direct and indirect discrimination have specific legal meanings which can be difficult at first to understand. However, it is very important to understand the differences between them, and how the different types can arise, when trying to prevent or identify discrimination in your workplace. To help understand those differences, we set out hypothetical scenarios in the definitions below.

This section breaks down the legal definitions of direct and indirect discrimination. It sets out the criteria which need to be fulfilled in order for a person to establish that they have been directly or indirectly discriminated against (these are referred to as the “legal elements” of direct or indirect discrimination).

1. WHAT IS DIRECT DISCRIMINATION?

Direct discrimination occurs if a person treats another person who has a protected attribute less favourably than someone without that attribute, in the same or similar circumstances. The person who does the discriminating is called the “**discriminator**”, and the person suffering the discrimination and who makes a complaint is called the “**complainant**”.

Most States and Territories require a comparison between the treatment of a complainant, who has a protected attribute, with the treatment of a person without that relevant attribute, in the same or similar circumstances.

However, Victoria and the ACT view direct discrimination merely in terms of ‘unfavourable treatment’ (which is known as the “**detriment model**”). This is based on the disadvantage suffered by a person **because** they have a protected attribute, without a comparison being made.

What are the legal elements of direct discrimination?

1. An act or omission of the discriminator

Direct discrimination can be in the form of either:

- a) a positive act; or
- b) an omission (a failure to do something).

The act or omission must result in the complainant being

treated unfavourably or less favourably than someone without the same protected attribute. In all the anti-discrimination laws except for those in Victoria and the ACT, the **difference** in treatment is the focus and a comparison must be made. The complainant is compared with a person who does not share the same protected attribute (which is known as the “**comparator**”).

Consider the following scenario:

Susan (previously Stephen) was responsible for a very important contract at work. She took time off to undergo sex reassignment surgery to become a female. While recovering, Susan tells her employer that she can still work from home, but her employer doesn't keep Susan updated about the contract she was working on. Susan's client seeks the services of another company. On the day of her return to work, Susan is told that she will be laid off as there isn't enough work for her to do.

In this scenario, the employer has not overtly treated Susan unfavourably or less favourably, but they have failed to keep her updated on any issues with her work, which is an omission resulting in unfavourable or less favourable treatment. The question then is whether a person who needed to work from home but not for the same purposes would be treated the same way.

4 DIRECT AND INDIRECT DISCRIMINATION

2. What would happen to a person without the attribute?

It is important for the 'comparator' to be someone placed in the same or similar circumstances, but who does not have the relevant attribute.

Consider the following scenario:

David is in a de facto same-sex relationship and, along with his partner, has recently adopted a child. David will be the primary carer. David applies for extended parental leave to care for his new child, but is informed that his employer policy does not allow for men to take extended parental leave.

In the above circumstances, David is receiving less favourable treatment than another employee who is:

- a) a woman and a primary carer for a new child, which amounts to direct discrimination on the basis of David's sex; and
- b) in a heterosexual relationship and the woman in the relationship is able to be the primary carer for a new child, which amounts to direct discrimination on the basis of David's sexual orientation, as he is in a same-sex relationship.

3. The discriminatory treatment must have occurred because of the protected attribute

The protected attribute must be the **real** reason for the discriminatory act or omission.

Consider the following scenario:

Sally applies for a position as a childcare worker, and in the interview she is asked her sexual orientation. Sally goes to the gym a lot and is quite muscular, prefers to wear gender neutral clothing, and identifies as bisexual. Sally declines to answer the question regarding her sexual orientation, as well as comply with a criminal history check.

CONT'D

The interviewer informs Sally that they cannot progress any further if she is unwilling to answer all interview questions and comply with the criminal history check.

Sally: "I was not progressed through this stage of the recruitment process because I did not want to answer the question regarding my sexual orientation. I think I have been discriminated against."

Employer: "The **real** reason Sally was not progressed was her refusal to comply with a criminal history check which is essential for a person who will be working with children. We did not discriminate against Sally."

In this scenario, there are multiple reasons for the discriminatory act or omission. In these types of situations, the test for whether discrimination has occurred varies according to the jurisdiction. For example:

- a) in NSW,
 - so long as the protected attribute is at least one reason for the discriminatory act, the act will be taken as occurring because of the protected attribute; and
- b) in Victoria and SA,
 - the protected attribute must form a **substantial** (as opposed to dominant) reason for the act.

Against this background, consider Sally's circumstances again. It is possible that Sally's refusal to answer the question regarding her sexual orientation was **at least one reason** or a **substantial** reason for her not progressing through the recruitment process, since it is an unusual question to ask in a job interview.

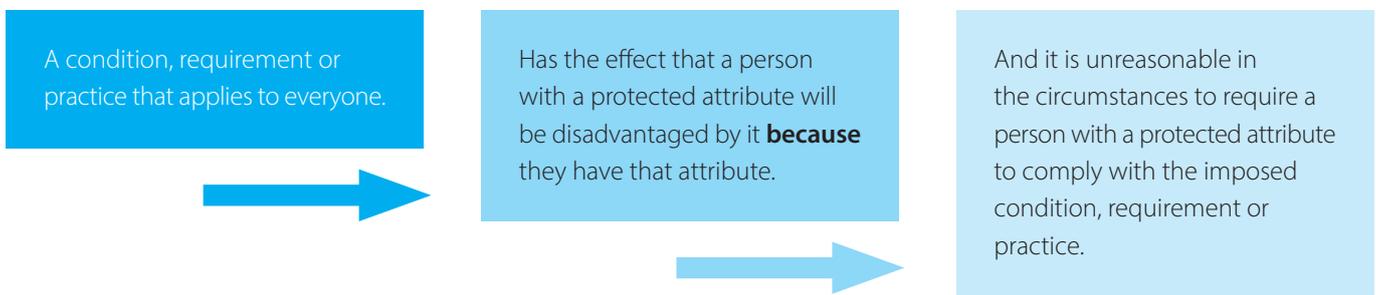
Generally, the discriminator's motive for discriminating against the complainant is irrelevant. It is also not necessary that the discriminator knows that the treatment of the complainant is less favourable than the treatment of others.

2. WHAT IS INDIRECT DISCRIMINATION?

Indirect discrimination is very different to direct discrimination. It can be extremely subtle, which sometimes makes it difficult to spot before it actually occurs.

Indirect discrimination occurs if the way a condition, requirement or practice operates results in discrimination against a person who has a protected attribute.

Indirect discrimination occurs when there is:



What are the legal elements of indirect discrimination?

1. A requirement, condition or practice

There must be a condition, requirement or practice that is being imposed now, or in the future.

What constitutes a 'requirement, condition or practice' has been broadly interpreted by courts. A requirement, condition or practice may include:

- a) workplace policies which are clearly established and published; or
- b) implied practices or preferences, such as a general trend in recruitment to hire people with particular traits or characteristics.

Consider the following scenario:

A company policy offers special benefits, such as discounted goods or services, and access to the company gym, to the spouses of married employees.

As this policy does not extend to de facto partners, it has the effect that the partners of employees in same-sex relationships are not able to access the policy's benefits. Therefore, this policy indirectly discriminates against employees in same-sex relationships.

2. The requirement, condition or practice may have the effect of disadvantaging those people with the same protected attribute as the complainant, or a higher proportion of people without the attribute can comply with the requirement, condition or practice

At the Commonwealth level (under the Sex Discrimination Act 1984 (Cth), as opposed to a State or Territory law), the requirement, condition or practice must **at least** be **likely** to disadvantage persons who have the same protected attribute as the complainant.

Under State or Territory laws, there must be a **higher proportion** of people without the attribute who can comply with the requirement than people who share the same attribute as the complainant and cannot comply.

4 DIRECT AND INDIRECT DISCRIMINATION

This 'higher proportion' is counted from a **relevant** base group of persons. This base group will vary depending upon the circumstances in which the discrimination is complained of. Often, it will be the members of the employer's workforce who do not have the same protected attribute as the complainant.

In NSW, SA and WA, the threshold is modified to a **'substantially' higher proportion** of persons.

3. Inability of the complainant to comply with the requirement, condition or practice

If the complainant is unable to comply with the requirement imposed, regardless of the cause, this is enough to establish that the complainant has sustained some disadvantage because of the requirement.

However even though a complainant can comply with a condition or requirement it does not mean that the condition or requirement does not have the effect of disadvantaging a complainant or members of the group with the same gender identity.

Please see point 4 below for further illustration of this legal element.

4. The requirement, condition or practice is not reasonable

In determining whether an imposed or proposed requirement, condition or practice is reasonable, all the circumstances of the alleged discrimination must be considered.

Depending on which law a complaint is made under, the following factors may be relevant:

- the consequences of a failure to comply with the condition, requirement or practice for the complainant;
- the reasons in favour of the condition, requirement or practice put forward by the discriminator;
- whether the disadvantage suffered by the complainant or other persons with the same protected attribute is proportionate to the reasons in favour of the condition, requirement or practice;

- the cost of any alternatives to the condition, requirement or practice for the discriminator; and
- the ability of the discriminator to mitigate the disadvantage experienced by the complainant.

Consider the following scenario:

Tim is transgender. Upon starting his new job, he is given a female uniform and told to use the female bathrooms. He explains that he identifies as male, that he would like a male uniform and to use the male bathrooms. Tim is denied these requests on the basis that his sex is female.

In this situation, a court would weigh the factors outlined above to determine if a requirement is reasonable.

For example, if the policy at Tim's workplace is that any failure to comply with the requirement will lead to disciplinary consequences, that will be a factor.

The fact that no reasons have been given as to why the requirement has been made in the first place could also be another factor.

As discussed at point 3 above, it is important to remember that just because a person *can* comply, does not mean there is no disadvantage or that the requirement is reasonable. Tim may be *able* to wear a female uniform and use the female bathrooms, but he is still disadvantaged and that disadvantage is likely to render the requirement unreasonable.

QUIZ – CHECK YOUR UNDERSTANDING OF DIRECT AND INDIRECT DISCRIMINATION

Consider the following scenario, and see if you can spot where direct and indirect discrimination may be occurring. Remember: this will always be harder in practice than in theory.

Bill is an engineer and has worked with the same company for almost the entirety of his career. Bill is now in his mid fifties, and has been in a de facto relationship with his partner Andrew for most of his adult life. No one from work has ever met Andrew, but Bill knows most of his colleagues' wives because employees' spouses are allowed to use the company gym.

Bill has found it difficult at times to fit in at his company. It can be a bit of a "boys club"; there are only one or two women, and Bill is the only openly gay man in his office. Bill does not talk about Andrew much because invariably someone will make a derogatory comment or a crude joke about his relationship. A few years ago Bill was very upset by one of these jokes and he made a formal complaint to the head of HR, but nothing ever came of it.

Over the years, Bill has felt the need to keep to himself and does not share many details of his personal life at work (in particular, information about his relationship with his partner Andrew). He has never really participated in events or activities outside of work, such as the company golf club, because he knows he is not really welcome because of his sexual orientation. Unfortunately for Bill, by not being part of the golf club, he does not have the strong working relationships that his colleagues have with the senior managers and Bill has been overlooked for promotions numerous times for positions he believes he is very qualified for.

Most recently, Bill heard a younger employee, who has just been promoted to the same position as Bill, bragging about his salary. Bill is alarmed to learn that the younger employee is earning considerably more than him for the same position. Bill is very upset and feels fed up with how he is treated at work.

There are numerous cases of possible discrimination in this scenario. Consider the following key instances, and whether you think they are **direct** or **indirect** discrimination.

1. The wives of other employees being permitted to use the gym.

This is **indirect** discrimination. The company's policy of allowing the spouses of colleagues to use the company gym is a workplace policy or practice which has the effect of discriminating against employees who are not married.

2. Derogatory comments and crude jokes by fellow colleagues.

This will be **direct** discrimination. Bill is being treated unfavourably because he is gay.

3. Bill's complaint to HR going unaddressed.

This could be **direct** discrimination. HR may not have addressed the complaint because Bill is gay.

4. Bill being overlooked for promotions.

This will likely be **direct** discrimination. Bill is being treated less favourably because he is made to feel unwelcome at the golf club, and therefore does not have the working relationships with senior colleagues. While one reason may be that he just does not play golf, at least **a reason** or the **substantial** reason for this may be because he is gay and is excluded by his colleagues as a result.

5. Bill receiving a lower salary than another employee who does the same job.

This could be **direct** discrimination. The company paying different salaries to employees performing the same role is a clear example of unequal treatment. If no genuine reasons are given for why Bill has a lower salary and it is a result of management's attitude towards Bill's sexual orientation, Bill is being discriminated against directly.

EMPLOYMENT RELATED DECISIONS AND POLICIES

This section covers:

- the policies an employer should implement to prevent discrimination
- other steps an employer can take at certain stages of employment to prevent discrimination – at the recruitment stage, during employment and at the end of employment
- examples of conduct in the workplace that can constitute unlawful discrimination.

The protection for workplace participants who identify as LGBTI is found in the *Sex Discrimination Act 1984 (Cth) (SDA)*. The SDA makes it unlawful to discriminate against a person because of their sexual orientation, gender identity or intersex status at a Federal level.

This means it is unlawful for an employer to discriminate on these grounds at any stage of employment, such as determining who will be employed and on what terms and conditions, treatment during the course of employment and conduct relating to an employee's dismissal or end of employment. It is also unlawful for employees to engage in discriminatory, harassing or bullying behaviour towards other employees. An employer is responsible for preventing this from occurring, and is vicariously liable for the unlawful conduct of its employees in this regard.

Anti-discrimination policies

To ensure LGBTI inclusion in a workplace, organisations should have in place a broad anti-discrimination policy that addresses the various types of LGBTI discrimination and provides remedies to prevent it from occurring.

Such a policy statement should include:

- A definition of key terms including discrimination, bullying, harassment and victimisation
- A statement of the organisation's commitment to providing an environment free from discrimination
- A statement confirming that the policy applies during recruitment and selection processes, and that commitment to equal employment opportunity continues throughout the employment relationship

- The specific responsibilities of managers and supervisors
- A statement confirming that discrimination, bullying, harassment and victimisation will not be tolerated
- Options available for informal (non-disciplinary) resolution of complaints
- Internal procedures for employees who may want to discuss and resolve any issues relating to unlawful discrimination, bullying, harassment or victimisation
- A statement confirming that all formal complaints will be investigated confidentially, promptly and impartially, and that all complainants and witnesses will not be victimised in any way
- Contact details of external agencies that can assist in raising people's awareness as to their rights and responsibilities

However, developing a policy alone is insufficient. Organisations need to implement and enforce such policies, including by providing appropriate training to all employees. Organisations should also periodically review policies to ensure effective operation and currency of information. By supporting workplace diversity, employers will see an improvement in productivity and morale.

A workplace discrimination and harassment policy template drafted by the Australian Human Rights Commission can be found here: www.humanrights.gov.au/employers/good-practice-good-business-factsheets/workplace-discrimination-and-harassment-policy

5 EMPLOYMENT DECISIONS AND POLICIES

Pride in Diversity also assist member organisations in conducting an LGBTI inclusive policy review, which includes bullying, harassment and grievance procedures and policies, and conducting LGBTI workplace inclusion training.

WHAT ELSE SHOULD AN EMPLOYER DO?

Discrimination can occur at any stage of employment, from the time a position is advertised to the moment an employee leaves their position.

Recruitment process

The entire recruitment process for a job must be free from any discrimination. Each applicant must be judged on their merits as an individual and not on the basis of stereotypes or assumptions about their capacity or experience.

| | |
|--------------------------------------|--|
| Advertisements for a position | <p>Job advertisements should not refer to personal characteristics such as age, race, sex, sexual orientation or relationship status unless they are a genuine requirement of the job and should instead focus on the skills and abilities required to perform the job.</p> <p>Employers should ensure that they do not target an unnecessarily narrow audience and should publish advertisements in a wide range of places such as community groups, diverse cultural media publications, disability groups etc. where appropriate, based on the nature of the organisation and/or the job being advertised.</p> |
| Application process | <p>The application process should not request or require unnecessary information. Any requests must relate to the particular job and an applicant should be allowed to withhold such information if they wish to do so.</p> |
| Short-listing applicants | <p>Recruiters cannot allow personal bias or stereotypes to influence any decisions made when short-listing applicants. They must be objective when applying the selection criteria, consistent between applicants and clearly document reasons for making decisions to be able to provide feedback to applicants and justify their decisions, should any allegations of discrimination be made.</p> |
| Interview | <p>A common set of interview questions should be asked of all candidates, focusing on skills and abilities needed for the position. Recruiters can ask additional questions to certain candidates, but only to assess their capacity to perform the job's requirements, or to assess any health and safety risks so as to identify any adjustments that would need to be made in the workplace. Recruiters cannot make assumptions about the candidate based on their physical attributes.</p> |
| Pre-employment testing | <p>Pre-employment testing, such as aptitude/psychological testing or medical testing should be used with caution and only in relation to performance of inherent requirements of a job.</p> <p>An employer cannot refuse to employ a person on the basis of a medical examination that discloses any disability or medical condition that is unrelated to their ability to adequately perform the job.</p> <p>Aptitude/psychological testing cannot be used to determine the outcome of a recruitment process by itself, but rather should be used in conjunction with all other parts of the process to form an overall impression and assessment of a candidate.</p> |

| | |
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| <p>Checking references</p> | <p>Recruiters cannot discriminate against candidates for a position using information collected from referees unless the information directly relates to their capacity to perform the requirements of the position.</p> |
| <p>Terms and conditions on which employment is offered</p> | <p>Employment must be offered to successful candidates on terms and conditions that are in no way affected by the person's sexual orientation, gender identity or intersex status.</p> <p>A successful applicant must be offered a salary (as well as components of a salary package including a car or medical benefits) equivalent to employees in the same position. While there may be reasonable explanations for treating employees differently, such as paying one employee a higher salary to reflect further qualifications and training, in the absence of such an explanation this conduct is unlawful.</p> <p>Furthermore, unsuccessful candidates should be given clear reasons as to why they were not selected for the job. Constructive feedback on how the unsuccessful candidates fared against the selection criteria, or how they performed at the interview, should be offered.</p> |

IN ORDER TO MAINTAIN A RECRUITMENT PROCESS THAT IS FREE FROM DISCRIMINATION, IT IS BEST TO DEVELOP DETAILED RECRUITMENT PROCEDURES.

Discrimination complaints are not decided on the basis of whether a complainant should have been appointed, but whether the process was affected by a discriminatory approach. Clear, written procedures can be useful to illustrate a fair and equitable recruitment process.

If a recruitment agency is engaged to oversee the process of recruiting new employees, an organisation should ensure that the agency clearly understands the requirements of the position, the organisation's equal opportunity policy and anti-discrimination laws. Employers can be vicariously liable for discriminatory practices conducted by recruitment agents they engage and, as such, they should play an active role in ensuring that agents used are familiar with the organisation's equal employment policies.

The following scenarios are examples of unlawful conduct during the recruitment process:

- A employer requires that applicants for a job disclose their sex/gender, and only offers two possible answers – "Male" and "Female" on the application form. Requiring the disclosure of sex/gender may be discriminatory in

itself, as this rarely has any impact on an individual's capacity to perform a role. Furthermore, applicants should be given the opportunity to answer the question as whatever sex/gender they identify with, rather than being limited to two options.

- A person applies for a new job and in the interview is asked about their sexual orientation. The person declines to answer the question and is then informed that they cannot progress any further if they do not answer the question. This is discrimination, as the person's sexual orientation does not relate to their capacity to perform the job.

Employers who wish to capture the diversity of their candidates may do so with appropriate messaging and by including a "prefer not to respond" option. This will not constitute unlawful conduct, provided it is made very clear to candidates that the answers to those questions or a decision not to respond will not impact any decisions in the recruitment process.

During employment

Throughout the course of employment, an employer must not deny or limit an employee's access to opportunities for promotion, transfer, training, or other benefits associated with employment, on discriminatory grounds.

Being overlooked for promotion, or being required to transfer roles are often unavoidable elements of a job and LGBTI employees are not necessarily protected from such occurrences. However, to overlook an employee for a promotion or to require them to transfer solely because of their sexual orientation, gender identity or intersex status constitutes unlawful discrimination.

In order for an employer's decision to be unlawful, all that is required is for discrimination to have been a factor in the decision-making process. There is no requirement that discrimination be the main reason for which an employer has made a decision in order for the decision to be considered unlawful. The SDA specifically prohibits discrimination during the course of employment in relation to:

- Promotions
- Transfers
- Benefits associated with employment (such as legal entitlements, opportunities to attend events, or preferred treatment regarding work allocation and rosters)

Other examples where discrimination may manifest during the course of employment include:

- Imposition of strictly gendered dress codes/uniforms
- Bathroom allocation (it is illegal to maintain a third bathroom dedicated to intersex/transgender employees) – gender neutral/all gender bathrooms are fine
- Considering requests for flexible working arrangements

In order to most effectively address the issue of workplace discrimination, employers should not merely impose reactive policies to incidents of discrimination, but rather take positive steps to address the issue head on. In some jurisdictions (such as Victoria), anti-discrimination legislation imposes a positive duty on employers to take reasonable and proportionate measures to eliminate discrimination as far as possible.

An essential component of positive action to eliminate discrimination is regular LGBTI awareness training.

Training ensures that employees are aware of their rights and obligations at work.

Often employees engaging in inappropriate and discriminatory behaviour at work may be unaware that their conduct is unlawful and awareness training can help to address this. Depending on the size and resources of an organisation, such training can be conducted by appropriately trained internal employees, or can be run by external providers, such as Pride in Diversity.

The following scenarios are examples of unlawful conduct during employment:

- A workplace policy offers special benefits, such as discounted goods or services or travel concessions, to husbands or wives of employees. This is discriminatory because it disadvantages LGBTI couples who cannot legally marry in Australia.
- A person transitioning in the workplace is given a uniform for the gender with which they no longer identify. They request the uniform for the gender with which they do identify, but their request is denied. To deny an employee the right to dress in the uniform consistent with their affirmed gender is discrimination.
- A workplace policy which does not allow changes to an employee's personal information may disadvantage trans and gender diverse employees. To refuse to allow an employee to change this information is considered discrimination.
- A male employee in a same-sex relationship applies for parental leave to care for a new child, but is informed that the company policy does not allow for men to take extended paternity leave. Parental leave constitutes a benefit associated with employment. Denying an employee this benefit because of his sex and/or sexual orientation constitutes discrimination.
- An employee openly speaks to other employees about her brother who is gay and later learns that she had been overlooked for a promotion because of this. Treating her differently because she is associated with someone who is gay is discrimination.

Bullying and harassment

Under discrimination law, it is unlawful to treat a person less favourably on the basis of their sexual orientation, gender identity or intersex status.

Bullying and harassment also constitutes unlawful behaviour, and employers are required to take reasonable precautions to prevent discrimination, bullying and harassment in the workplace. Failure to take such steps could see an employer held vicariously liable for the unlawful actions of an employee.

Furthermore, all conduct occurring within the normal or usual course of employment must be free from discrimination, bullying and harassment and this extends to out of office events such as Christmas functions, team lunches and other social events. Employers should ensure that they take all reasonable precautions in any context where employee interaction is foreseeable.

Harassment in the workplace can include:

- Telling insulting jokes about particular groups
- Displaying offensive material in offices and on desktops
- Asking intrusive questions about someone's personal life

Bullying in the workplace can include:

- Physical or verbal abuse
- Excluding or isolating employees on account of a protected attribute
- Assigning meaningless tasks to an employee that are unrelated to the job
- Undermining work performance by deliberately withholding information vital for effective performance

All incidents of harassment or bullying require employers to respond quickly and appropriately.

Complaints procedures

An effective complaints handling procedure should be in place to ensure that an employer has satisfied the requirement to take reasonable precautions and exercise due diligence to prevent discrimination or harassment, and thus minimise the risk of being vicariously liable for discrimination or harassment by an employee.

There are four stages in an effective complaint process:

1 Initial contact point

The organisation's discrimination policy should explain **how** to make a complaint and identify a Contact Officer, an employee who serves as a 'first point of contact' for people with enquiries related to discrimination, harassment and bullying. The Contact Officer can assist employees to work towards a solution of an issue before the situation escalates. It is important that all employees know who the Contact Officers are and employers should regularly update the details of the Contact Officer list, sending updated copies to all staff. Contact Officers should receive regular training in order to deal with enquiries and complaints in the best way possible. In accordance with best practice and, as reflected in the Australian Workplace Equality Index produced by Pride in Diversity, leading employers will often clearly identify LGBTI friendly Contact Officers who have undergone LGBTI Awareness Training, by placing a rainbow flag or other icon against their name in the relevant policy.

2 Early resolution

In some situations it may be appropriate to consider early resolution of a complaint without undertaking an assessment of its merit. This approach may be useful where:

- The complainant indicates a desire to sit down and discuss the matter with the respondent in an informal setting.
- The information on hand supports the view that the complaint arose from a miscommunication / misunderstanding.
- The behaviour being complained about does not appear to be discrimination or harassment as defined by the organisation's policy.

3 Formal resolution

The following steps are recommended for a formal complaint:

- Obtain information from the complainant.
- Advise the respondent about the complaint.
- Provide the respondent with an opportunity to respond.
- Assess the information.

Investigating Officers should receive regular training in order to ensure that formal complaints are handled as effectively as possible. LGBTI Awareness Training, such as the training facilitated by Pride in Diversity, is invaluable in this regard as it empowers Investigating Officers to have a better understanding of the common challenges encountered by LGBTI identifying staff.

4 Outcomes from the process

Where the allegations are substantiated, outcomes for the respondent may include:

- disciplinary counselling;
- an official warning;
- a requirement to attend discrimination and harassment awareness training;
- a requirement to provide a formal apology; and/or
- disciplinary action (suspension, dismissal, transfer etc).

Outcomes for the complainant may include:

- re-crediting any leave taken as a result of the complaint;
- supportive counselling; and/or
- a change in work environment.

Where allegations are **not** substantiated, it may still be appropriate for the employer to take some action as a result of the complaint, such as providing training on appropriate workplace behaviour, or re-issuing the organisation's policies on discrimination to employees. Care should be taken not to pursue such action in a way that singles out the respondent if the complaint was in fact unsubstantiated.

End of employment

The policies of an organisation and the decisions by an employer concerning an employee being dismissed or leaving their position are reviewable.

| | |
|------------------|--|
| Dismissal | <p>Employers should ensure that they do not dismiss an employee without a valid reason for the termination and employees should be notified of that reason.</p> <p>Employees should be given the opportunity to respond to the employer's reasons for termination.</p> <p>Employers should allow an employee to have a support person to assist at any discussions relating to termination.</p> <p>An employer must not terminate someone's employment unless they have given the employee written notice of the day of termination, or payment in lieu of that notice.</p> <p>Employers cannot terminate an employee where they have complained about discrimination, harassment or bullying by co-workers, thereby treating them as the problem.</p> <p>Employers should document an employee's performance to avoid unlawful termination.</p> |
|------------------|--|

Continued overleaf

| | |
|-------------------------------|---|
| Constructive dismissal | <p>An employer cannot, through their conduct, behaviour or actions, compel an employee to resign. An employee who resigns for this reason is considered to have been constructively dismissed.</p> <p>Employers cannot make an unauthorised variation to employment conditions, such as a pay-cut, demotion, change of working hours or forced relocation on the basis of an employee’s sexual orientation, gender identity or intersex, which causes an employee to resign.</p> <p>An employer cannot make it impossible for an employee to perform their job requirements and then terminate them on that basis.</p> <p>Employers cannot demote an employee (e.g. reducing their pay or duties) without a valid reason.</p> |
|-------------------------------|---|

In order to avoid wrongful dismissal of an employee, it is best practice for the employer to adopt an employee handbook or company policy which outlines a procedure that must be followed before an employee is terminated.

If the employer terminates someone's employment without following this procedure, the employee may have a claim arising from the termination. Employers should also ensure that they continuously document an employee’s performance to avoid unlawful termination.

The following scenarios are examples of unlawful conduct at the end of employment.

- An employee is performing well in her role but is dismissed the day after the office Christmas party, an event at which her same-sex partner was present. She was told that they

didn’t want a lesbian working in the team as it might upset some of the other work colleagues. Dismissal on this ground would constitute discrimination.

- A person is responsible for an important contract at work but takes leave to undergo sex reassignment surgery. During her recovery, she informs her employer that she can still work from home, but the employer relieves her of all responsibility for the contract. When she returns to work, she is informed that her employment has been terminated as her manager is no longer comfortable working in close proximity with her. A decision to dismiss her for this reason is unlawful.
- An employee transitions to affirm his gender. Throughout the process, he is harassed, bullied and referred to by his former (female) name. When he makes a complaint about this behaviour to his manager, his employment is terminated. His termination is unlawful in these circumstances

Further resources:

| Organisation | Address |
|--------------------------------|--|
| Fairwork.gov | www.fairwork.gov.au/employee-entitlements/bullying-and-harassment |
| Safework Australia | www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/828/Workers-Guide-workplace-bullying.pdf |
| Humanrights.gov | www.humanrights.gov.au/sites/default/files/content/info_for_employers/pdf/19_writing_adh_policy.pdf |
| Human Rights Commission | www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/eoa-practice-guidelines/item/632-guideline-transgender-people-at-work-complying-with-the-equal-opportunity-act-2010 |

EXTERNAL COMPLAINTS PROCEDURE

The information in this section can be used to understand:

- Australia's anti-discrimination legal framework;
- types of prohibited conduct; and
- when discrimination is prohibited in employment and the workplace more generally.

Choice of Jurisdiction

Federal laws and State/Territory laws generally overlap and prohibit the same type of discrimination.

An organisation must comply with both:

- the law in the State/Territory in which it operates; and
- the federal law.

As discussed in section 2 of this handbook, there are some differences in the attributes that are 'protected' between the various jurisdictions.

A person may choose to make a complaint in a particular jurisdiction by taking into account any or all of the following:

- time limits in which to lodge a complaint;
- the remedies or compensation available;
- if they are protected/covered by the law (e.g. if they are a contractor rather than an employee or if the attribute is 'protected' by the relevant law);
- the organisation against whom the complaint is being lodged (e.g. if the complaint is against a federal government department or about the administration of a Commonwealth law or program, complaints must be made to the Australian Human Rights Commission);
- costs; and
- entitlement to representation.

A person will usually lodge their complaint with the overseeing body (see the table on the next page) in the jurisdiction where the unlawful conduct occurred.

What legal fees will need to be paid?

The legal fees that have to be paid by each party may depend on who is successful in the action and where the complaint is heard.

For example, in the **NSW Civil and Administrative Tribunal**, the general rule is that you will not have to pay the opposing party's legal fees if you lose and the opposing party won't have to pay your legal fees if you win. In other words, you usually have to pay the costs of running your own case, whether you are successful or not. However, the party that is not successful in a court hearing (in the Federal Court, for example) usually has to pay the successful party's reasonable legal fees.

If the case is settled by mediation, make sure that the written settlement agreement clearly states which party has to pay costs. You may elect to ask the opposing party to pay your costs. If they don't agree to this, include something in the settlement agreement that says each party will pay their own costs.

There are some important rules guiding a person's choice of jurisdiction:

- If a person makes a complaint to a State or Territory overseeing body, they cannot bring a complaint for the same conduct to the Australian Human Rights Commission (which is the federal overseeing body).
- However, in NSW, a person can lodge a complaint with the NSW Anti-Discrimination Board, even if they have already lodged a complaint with an overseeing body in another State or Territory.

EXTERNAL COMPLAINTS PROCEDURE

The table below outlines the relevant legislation, overseeing body, appeal and review bodies for the Commonwealth and each State and Territory:

| Jurisdiction | Legislation | Overseeing body | Appeal and review |
|---------------------|------------------------------|---|--|
| Commonwealth | Sex Discrimination Act 1984 | Australian Human Rights Commission | Federal Court of Australia or Federal Circuit Court |
| NSW | Anti-Discrimination Act 1977 | Anti-Discrimination Board | NSW Civil and Administrative Tribunal |
| Victoria | Equal Opportunity Act 2010 | Equal Opportunity and Human Rights Commission | Victoria Civil and Administrative Tribunal |
| Queensland | Anti-Discrimination Act 1991 | Anti-Discrimination Commission | Queensland Civil and Administrative Tribunal |
| WA | Equal Opportunity Act 1984 | Commission for Equal Opportunity | WA Equal Opportunity Tribunal and WA Supreme Court |
| SA | Equal Opportunity Act 1984 | Commission for Equal Opportunity | SA Equal Opportunity Tribunal and South Australia Supreme Court |
| Tasmania | Anti-Discrimination Act 1998 | Anti-Discrimination Commission | Tasmania Anti-Discrimination Tribunal and Tasmania Supreme Court |
| ACT | Discrimination Act 1991 | Human Rights Commission | ACT Civil and Administrative Tribunal |
| NT | Anti-Discrimination Act 1996 | Anti-Discrimination Commission | NT Civil and Administrative Tribunal and NT Supreme Court |

TYPES OF PROHIBITED CONDUCT

As discussed in section 4 of this handbook, 'direct' and 'indirect' discrimination is prohibited in both federal and each State or Territory's laws. In addition, there are prohibitions on sexual harassment and victimisation in all jurisdictions.

Sexual Harassment

The definition of 'sexual harassment' is slightly different across Australian jurisdictions. However, it generally encompasses any conduct which includes any of the following:

- an unwelcome sexual advance;
- a request for sexual favours;
- an unsolicited act of physical intimacy;
- contact of a sexual nature; or
- a remark with sexual connotations relating to the other person.

A person may be liable for sexual harassment where the conduct referred to above is intended or reasonably anticipated to offend, humiliate or intimidate the other person.

NOTE: The prohibition in Western Australia is slightly broader in scope, compared to other jurisdictions. A person may be liable for sexual harassment where their conduct would have the other person believe on reasonable grounds that a refusal of the request or favour would disadvantage their employment or work.

Who may be liable for this conduct?

It is common for an individual who has been subject to sexual harassment to bring a complaint against both the employer and the offending employee.

For example, under federal anti-discrimination law, an employer may be legally responsible for harassment which occurs in the workplace or in connection with a person's employment unless it can be shown that '**all reasonable steps**' have been taken to reduce this liability.

Therefore, it may be that both the employer, who has been found to have not taken all reasonable steps to prevent the harassment from occurring and the individual, who is the alleged harasser, will be held jointly liable for the behaviour.

A practical perspective

Sexual harassment can occur in LGBTI specific contexts. For example, John identifies as a gay man, and has just started working in a large accounting firm. He gets along well with most of the people on his floor, except two men on the table opposite him. John has not told his workplace about his sexual orientation.

One day, the men on the opposite table are well within earshot and John overhears them talking about him while they think he is not at his desk. He hears:

"Mate, I just can't believe that some people can even consider being homo. That new guy John is so bloody flamboyant, I wouldn't be surprised if was he was a bit of a queer, eh?"

John feels particularly uncomfortable after hearing these remarks. The comments constitute sexual harassment in Australian jurisdictions. In particular, this type of sexual harassment is a remark with sexual connotations relating to the person who is the subject of the comments.

Victimisation

Whilst 'victimisation' is defined slightly differently between the various jurisdictions, it broadly refers to conduct which involves subjecting another person to a 'detriment' (meaning disadvantage or harm) because that person has:

- brought a dispute or made a complaint under the relevant anti-discrimination law;
- given information in relation to a complaint (including someone else's complaint); or
- asserted their rights or the right of another person to lodge a complaint or commence proceedings under the anti-discrimination law.

A practical perspective

Much like sexual harassment, victimisation can easily happen to people who identify as LGBTI.

For example, after experiencing sexual harassment at his firm from his colleagues, John has made a complaint to the Human Resources (HR) department of his firm. After HR has spoken with the people who made those comments, they leave a note on John's desk, which reads:

"Look mate, we don't know what we did to set you off, but don't get your panties in a bunch alright? We have nothing to do with you, but you keep up these complaints and trust us, your life at work is gonna be a whole lot worse. We got friends in high places, and we're not afraid to use them."

John feels threatened by this statement. It is an example of victimisation in the workplace. It is important to note that the type of complaint necessary to invoke victimisation can be to an employer or an external body, as long as it falls under anti-discrimination law.

WHEN IS DISCRIMINATION IN THE WORKPLACE PROHIBITED?

The table below outlines the employment and workplace-related situations in which discrimination is prohibited in each jurisdiction.

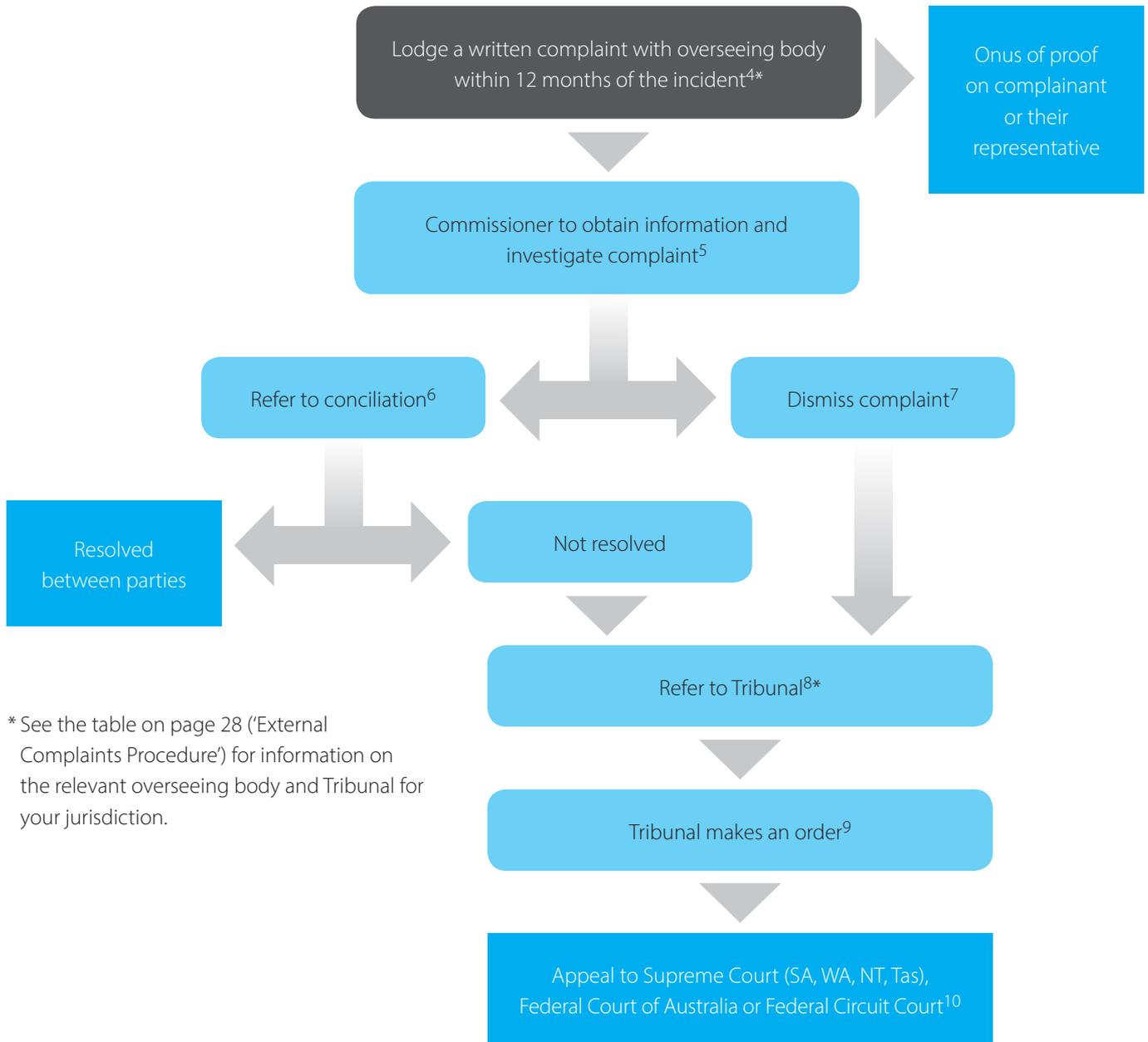
| | Cth | NSW | Vic | Qld | WA | SA | ACT | NT |
|---|-----|-----|-----|-----|----|----|-----|----|
| Against job applicants | | | | | | | | |
| Terms or conditions of employment | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Who should be offered employment | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| In developing the scope/ range of a training program | | | | ✓ | | | | ✓ |
| Denying access to a guidance apprenticeship or other training program | | | ✓ | ✓ | | ✓ | | ✓ |
| Against employees | | | | | | | | |
| Terms or conditions of employment | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ |
| Denying access to promotion, transfer, training (or in developing scope or range of program) or any other benefit | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Dismissing an employee | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Treating a person unfavourably/subjecting to a detriment | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

7 ANTI-DISCRIMINATION LAW AND PRACTICE

| | Cth | NSW | Vic | Qld | WA | SA | ACT | NT |
|---|-----|-----|-----|-----|----|----|-----|----|
| Against contractors or commission agents | | | | | | | | |
| Terms or conditions of work | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ |
| Who should be engaged as contractor/ commission agent | ✓ | ✓ | | | ✓ | ✓ | ✓ | ✓ |
| Denying or limiting access to a transfer/ training program or other benefit | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ |
| Denying access to promotion | ✓ | ✓ | | | ✓ | ✓ | ✓ | ✓ |
| Terminating engagement | ✓ | | ✓ | | ✓ | ✓ | ✓ | ✓ |
| Treating contractor/agent unfavourably subjecting to a detriment | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ |
| Partnership | | | | | | | | |
| Who should be invited to partnership | ✓ | ✓ | | | ✓ | | ✓ | |
| Terms or conditions on which invited to a partnership | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | |
| Denying access to a benefit arising from membership | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | |
| Expelling a partner or subjecting them to a detriment | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | |

In Tasmania, there is a more general prohibition on any discrimination *"in connection with employment or education or training."*

THE DISPUTE RESOLUTION PROCESS



⁴ 1. Cth s 92, NSW s 89A, Vic s 113, QLD ss 134-6, WA s 83, SA s 93, Tas s 62, ACT s 68, 109, NT ss 60-65.

⁵ Cth s 92, NSW s 90, Vic ss 127-130, QLD ss 154A-157, WA s 84, SA s 94, Tas ss 69-71, NT s 66A.

Note the Commissioner/President can choose to conciliate at any time after the acceptance of the complaint.

⁶ Cth s 48(1), NSW s 91A, Vic s 112, QLD s 158, WA s 91, SA s 95, Tas ss 74-75A, NT ss 78-79.

⁷ Cth s 48(1), NSW ss 89B, 92, 102, Vic s 116, QLD, 165, WA s 89, SA s 95A, Tas ss 64-65, 139, NT s 66, 87.

⁸ Cth s 45, NSW ss 93A-94A, 95, Vic s 122-124, QLD ss 139-140, 166-167, WA ss 90, 93, 127, SA ss 95B, 95D, 96, Tas ss 65, 78, ACT s 110, NT s 86.

⁹ Cth s 48, NSW s 108, QLD ss 209-210, WA s 127, SA s 96, Tas s 89, ACT s 110, NT s 88.

¹⁰ Cth s 45, QLD ss 113A, 233, WA s 134, SA s 98, Tas s 100, NT s 106.

The example below shows what happens when an employee decides to deal with their complaint through an external process.

This example uses the provisions of the Federal laws (*Sex Discrimination Act 1984*), however the process is very similar across all jurisdictions.

1. The workplace participant/s enquires or makes a complaint to the Australian Human Rights Commission (**AHRC**) National Information Service
2. The workplace participant/s (**complainant**) makes a formal written complaint with the AHRC within 12 months after the alleged conduct took place. A lawyer is not needed to make a complaint.
3. The AHRC will contact the complainant and the person or organisation that is being complained about to discuss the complaint and provide further information within a reasonable period. Parties will be given a copy of the complaint.
4. The President of the AHRC may:
 - a) decide not to continue with the complaint, however this is rare; or
 - b) suggest that the complaint should be resolved by conciliation

(N.B. The time between filing a complaint and conciliation is usually 2-3 months. This is the most common way that the AHRC deals with complaints.)

5. Conciliation can take place in a face-to-face meeting called a conciliation conference, or through a telephone conference. Some complaints may be resolved through an exchange of letters, phone messages or email through the appointed conciliator.
6. The conciliator does not impose a resolution on the parties. The conciliator encourages the parties to reach an agreement as to how the complaint can be resolved. Complaints can be resolved in different ways, including apologies or compensation.
7. If the complaint is not resolved, either party has 60 days to appeal the decision to the Federal Court of Australia or the Federal Circuit Court of Australia. The court will decide if unlawful discrimination has occurred. The Commission cannot take the matter to court or help present the case. At this stage, a lawyer is advised.
8. The matter will proceed by way of pleadings and affidavits being filed. Simple claims may be dealt with by the court in 12-18 months but more complex claims may take longer.
9. The unsuccessful party at the conclusion of proceedings may be liable to pay the other party's costs and comply with any other orders made by the court.

Further reading

The following websites may assist in understanding the specific time limits and processes for dispute resolution in each jurisdiction:

| Jurisdiction | Complaints process |
|---------------------|--|
| Commonwealth | www.humanrights.gov.au/complaints/complaint-guides/making-complaint/complaints-under-sex-discrimination-act |
| NSW | www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_makingacomplaint/adb1_makingacomplaint.aspx |
| Victoria | www.humanrightscommission.vic.gov.au/index.php/making-a-complaint |
| Queensland | www.adcq.qld.gov.au/complaints/making-a-complaint |
| WA | www.eoc.wa.gov.au/complaints-inquiries/making-a-complaint |
| SA | www.eoc.sa.gov.au/eo-you/making-complaint |
| Tasmania | equalopportunity.tas.gov.au/complaints |
| ACT | hrc.act.gov.au/discrimination/make-discrimination-complaint/ |
| NT | www.adc.nt.gov.au/complaints/complaints.html |

THE PARTICULAR REMEDY AVAILABLE TO A COMPLAINANT IS LARGELY DEPENDENT ON THE OVERSEEING BODY WHICH HEARS THE COMPLAINT.

Conciliation

Following conciliation conducted by an overseeing body, parties may prepare a written record of any agreement reached between them with respect to the subject-matter of the complaint.

An agreement can record remedial action of any kind, including any of the following:

- the payment of compensation;
- an apology; or
- a change in policy.

It is important to note that:

- in Queensland and Tasmania, these agreements are **automatically legally enforceable**;
- in other jurisdictions, these agreements are **binding in honour only** although the parties can agree to enter into a contract giving effect to the agreement; and
- in NSW and Victoria, a party may apply to the relevant Tribunal to have an **agreement registered** within 6 months of conciliation concluding – **this makes it enforceable**.

Tribunal orders/Federal Court/Federal Circuit Court

The remedies available from a Tribunal for a complaint made under the relevant State or federal anti-discrimination legislation are also known as 'orders.'

Orders are legally enforceable, meaning that there may be penalties for non-compliance.

Depending on the jurisdiction in which the complaint is heard, a Tribunal may make an order requiring:

- the payment of damages (compensation) for loss or injury;
- that the application be dismissed in whole or in part;
- that a person stop the unlawful conduct;

- that a person publish an apology or retraction (public or private);
- that a contract or agreement be declared void;
- that a person or organisation must develop or implement a policy aimed at eliminating unlawful discrimination; or
- that a person or organisation must re-employ the person who has been discriminated against.

In considering which jurisdiction to bring a complaint, it is important to note that:

- there are limits on the amount of damages available in some States:
 - a) New South Wales – \$100,000
 - b) Western Australia – \$40,000
- In South Australia, the Equal Opportunity Tribunal is permitted to consider the extent to which there has been injury to feelings in its damages assessment, potentially increasing the amount of damages available to a complainant.

If a complainant brings a claim with the Federal Circuit Court or Federal Court and is successful, the Court may make the following orders:

- an order that the respondent has committed unlawful discrimination and directing the respondent not to repeat such action;
- an order that the respondent pay to the complainant damages by way of compensation;
- if the complainant had their employment terminated – an order that the respondent re-employ the complainant;
- an order requiring the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;

The most common order made when a complainant is successful is that the unsuccessful party make a payment to the complainant. This payment may include two components:

- economic loss; and
- non-economic loss.

Damages for economic loss are generally assessed on the basis of compensation that reflects the economic loss of the complainant – for example, unpaid time off work, medical expenses and time not working. The Court will look at the amount the complainant would have had the benefit of/ earned if the discrimination had not happened.

Damages for non-economic loss are damages for hurt and humiliation. In discrimination matters such damages have rarely been awarded in large amounts. However, based on a recent court decision¹¹, there is reason to consider this may be changing.

¹¹ [2014] FCAFC 82

Offences

Anti-discrimination legislation also deems certain types of serious conduct to be ‘offences,’ which may carry a criminal penalty, such as a fine.

Offences are prosecuted by the State and are heard in the court system.

| Jurisdiction | Types of offences | Maximum penalty (as at 1 February 2016) |
|--------------|---|---|
| Commonwealth | Victimisation <ul style="list-style-type: none"> See explanation in section 7 | Individual – \$4,500 or 3 months imprisonment or both Corporation – \$18,000 |
| | Obstruction <ul style="list-style-type: none"> Hindering, obstructing, molesting or interfering with a person exercising a power or performing a function under the Act | \$1,800 |
| NSW | Serious transgender or homosexual vilification <ul style="list-style-type: none"> Inciting hatred, serious contempt for or severe ridicule of a person because they are trans, gay or lesbian Includes threatening or inciting others to threaten physical harm towards property or person | Individual – \$1,100 or 6 months imprisonment or both Corporation – \$11,000 |

| Jurisdiction | Types of offences | Maximum penalty (as at 1 February 2016) |
|--------------|--|---|
| Victoria | Obstruction of the Commission <ul style="list-style-type: none"> Hindering or obstructing a person (being a member of the Equal Opportunity and Human Rights Commission, the Commissioner or a staff member of the Commission) from performing their functions under the Act | Individual – \$9,100.20 Corporation – \$45,501 |
| | False or misleading information <ul style="list-style-type: none"> Giving information or making a Statement that is misleading to the Commission or Commissioner in the exercise of powers or functions under the Act | |
| QLD | Serious sexuality or gender identity vilification <ul style="list-style-type: none"> Threatening physical harm, or inciting others to threaten physical harm towards property or person because of a person’s sexual orientation or gender identity | Individual – \$8,246 or 6 months imprisonment Corporation – \$41,230 |
| WA | No provisions relating to offences | |
| SA | Obstructing the Commissioner or an officer assisting Commissioner in the exercise of duties (for example, in the conduct of an investigation into LGBTI discrimination, bullying or harassment) | \$5,000 |
| Tasmania | Making a Statement known to be false or misleading under the Act | Fine not exceeding \$1,540 |
| | Hindering proceedings under the Act | |
| | Using insulting language towards a person exercising any power or performing any function under the Act | |
| | Creating or taking part in a disturbance in or near a place where proceedings under the Act are being conducted | |

| Jurisdiction | Types of offences | Maximum penalty (as at 1 February 2016) |
|--------------|---|---|
| ACT | <p>Serious vilification because of sexual orientation or gender identity</p> <ul style="list-style-type: none"> Intentionally carrying out a public act which is reckless and threatening; and The person is reckless about whether it incites hatred, serious contempt for or severe ridicule of a person or group because of their sexual orientation or gender identity | <p>Individual – \$7,500</p> <p>Corporation – \$37,500</p> |
| NT | <p>Obstruction</p> <ul style="list-style-type: none"> Knowingly obstructing a person who is acting in an official capacity (i.e. performing or carrying out functions under the Act) | \$30,600 or 12 months imprisonment |
| | <p>Confidentiality of information</p> <ul style="list-style-type: none"> Obtaining information in the course of performing functions in connection with the Act and improperly disclosing that information | \$30,600 or 2 years imprisonment |
| | <p>Discriminatory advertisement</p> <ul style="list-style-type: none"> Publishing an advertisement containing prohibited conduct | \$30,600 or 2 years imprisonment |
| | <p>False or misleading information</p> <ul style="list-style-type: none"> Giving information to another person acting in an official capacity, knowing it is misleading | \$15,300 or 6 months imprisonment |

GENERAL PROTECTIONS PROVISIONS

Overview of General protections

The General protections laws are found in the Fair Work Act 2009 and aim to:

- Protect **workplace rights**
- Protect the right to engage in **industrial activities** (such as unions)
- Provide protection from workplace discrimination
- Provide effective relief for persons who have been discriminated against, victimised or otherwise unlawfully treated in the workplace

What do General protections protect?

General protection laws protect against a variety of actions:

- Adverse action
- Coercion
- Misrepresentations
- Undue influence and pressure
- Dismissal for temporary absence due to illness or injury
- Sham contracting arrangements

DO THE GENERAL PROTECTIONS LAWS APPLY TO ME OR MY BUSINESS?

The General protections laws apply to your **business** if you are:

- a corporation formed in Australia
- a foreign corporation
- the Commonwealth (the federal government and its departments)
- a Commonwealth authority (such as the Fair Work Commission)
- a body corporate incorporated in a Territory
- an organisation

General protections laws can protect you **personally** if you are an:

- Employee or prospective employee
- Employer or prospective employer
- Independent contractor or prospective independent contractor
- Industrial association
- General protections laws **do not** apply to volunteers

RIGHTS PROTECTED UNDER GENERAL PROTECTIONS

Workplace Rights

A person has a workplace right if the person:

- Is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order by an industrial body.
- Is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument.
- Is able to make a complaint or inquiry about their employment.

Example

Samantha complains to the Fair Work Ombudsman about being treated differently from her co-worker because of her sexual orientation.

Samantha's complaint does not result in any action by the Ombudsman but her employer soon decides to dismiss her for being a 'troublemaker'.

Samantha's employer cannot dismiss her for making this complaint, even though it failed, because she has a workplace right to make a complaint about her employment.

Discrimination

A person has a right to be free from discrimination against them because of certain protected attributes. An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of certain protected attributes, which include:

- Race
- Colour
- Sex
- Sexual orientation
- Age

- Physical or mental disability
- Marital status
- Family or carer's responsibilities
- Pregnancy
- Religion
- Political opinion
- National extraction
- Social origin

Actions prevented under the General protection laws

Adverse Action

Adverse Action is action taken **because** of a proscribed reason.

Adverse action includes a variety of actions such as an employer dismissing an employee, an employer altering an employee's job to the employee's disadvantage, or an employer discriminating between one employee and other employees.

Example one

Michael is an employee at a large company. Samuel is his manager. Samuel has discovered Michael is in a same-sex relationship. Samuel feels uncomfortable about Michael's sexual orientation. Samuel starts to treat Michael differently to other employees and excludes Michael from meetings (adverse action). Over the next month, Samuel gives Michael tasks with deadlines that Samuel knows cannot be met by anyone in the company (adverse action). Samuel's aim is to get Michael to leave the company and Samuel has brought this up in meetings where Michael has not been present. At the end of the month, Michael is dismissed (adverse action) by Samuel. Samuel tells Michael that his dismissal is due to poor performance.

"You clearly can't keep up with the work," Samuel told Michael. "It's nothing personal."

Example one continued

However, one week later Michael runs into one of his old co-workers who would often attend the meetings Michael did not take part in. The co-worker tells Michael that Samuel did not want to work with Michael. Michael realises that his dismissal (adverse action) was taken because of his sexual orientation (the reason).

In this example, Michael has had adverse action taken against him because of his sexual orientation, which is a protected attribute. Michael can make a claim under General protections provisions.

Example two

Mary is an employee at a medical centre where she works as a casual receptionist. Sarah is Mary's manager. During the first week at her job, Mary arrived 45 minutes late each day. Sarah knows that Mary is in a same-sex relationship. At the end of the week, Sarah gives Mary a warning that she cannot arrive late. Next week Mary makes more of an effort, but begins to show up late again. As a result, patients have not been able to make appointments in the morning and the medical centre becomes chaotic. Sarah gives Mary another warning for arriving late, and also tells Mary that it will be the last warning before Sarah chooses to dismiss her. Mary continues to be late and so Sarah dismisses her. Mary is dismissed (adverse action) by her employer Sarah because she constantly arrives late (the reason).

In this example, we learn that Mary is in a same-sex relationship. Like example one, her sexual orientation is a protected attribute. However, unlike example one, Mary has been dismissed for a reason unrelated to that protected attribute. Mary was not subjected to adverse action because of her sexual orientation, but because of her performance at work. Since the protected attribute was not relevant to the reason for her dismissal, Mary cannot make a claim under the General protections provisions.

Coercion

A person must not take action, or threaten to take action, against another person in order to coerce that person to exercise or not exercise a workplace right.

Example

Elise has made a discrimination claim against her employer. Elise's supervisor has threatened Elise with demotion unless Elise drops the discrimination claim. This is likely to amount to coercion under the *Fair Work Act*.

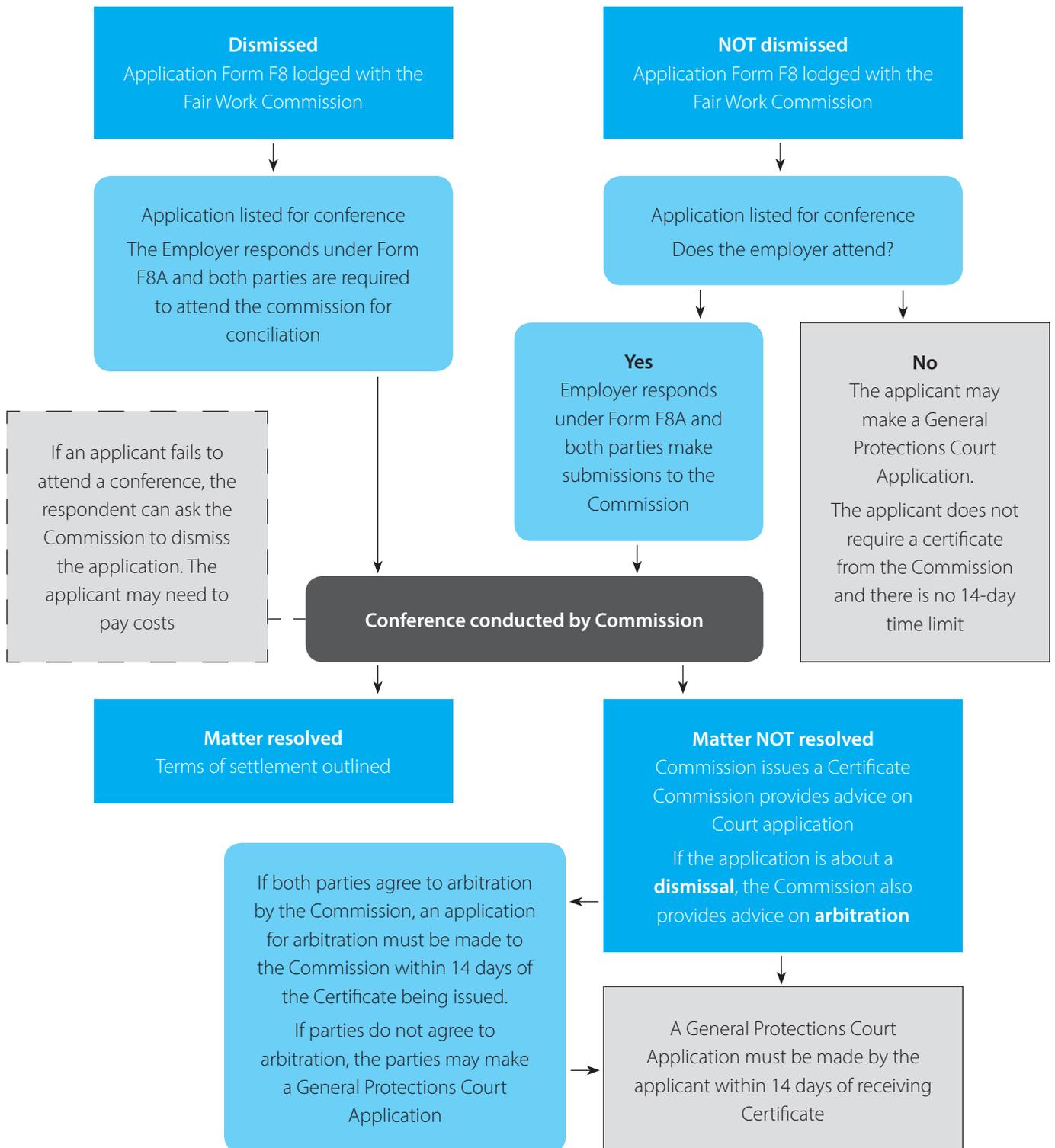
Misrepresentations

A person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person, or the exercise and effect of a workplace right by another person.

Example

Simone has been hired by a company as a researcher. Simone's boss explains, incorrectly, that General protections laws do not protect casual workers. Simone's boss has knowingly or recklessly made a false or misleading representation about Simone's workplace rights, because casual workers are in fact protected under the *Fair Work Act*.

HOW DOES A COMPLAINANT MAKE A CLAIM UNDER THE GENERAL PROTECTION PROVISIONS?



Does an employee have a valid claim?

- ✓ Are they covered by General protections?
- ✓ Do they have a workplace right?
- ✓ Has any adverse action been taken against them because of their workplace right?

If the criteria above are satisfied, an employee will have a valid General protections claim.

Practical information

How to make a General protections application

If a person wants to make a General protections application to the Fair Work Commission they must complete and lodge either:

- Form F8 – General protections dismissal application; or
- Form F8C – General protections (not involving dismissal application)

These forms are available at:

www.fwc.gov.au/about-us/resources/forms

After the Commission receives an application, it will organise a private conference to try and settle the dispute without a hearing. This private conference may be in mediation or conciliation. In either case, the Commission member will attempt to help the persons involved come to an agreement.

Does the Commission provide legal advice?

IMPORTANT: Dismissal applications must be made within 21 days after the date of dismissal

If a person wishes to make an application under General protections, and they have been dismissed, they must lodge the application within 21 days after being dismissed.

The Commission cannot provide legal advice.

How long can a complainant wait before making an application?

If the application does not involve a dismissal, it does not need to be made within 21 days. It can be made up to six years from the date of the contravention.

What happens if the complainant is outside the time limit to make an application?

Sometimes the Commission will allow for an extension of time, but only in exceptional circumstances. They will consider:

- The reason for the delay
- Other action taken by the applicant to dispute the dismissal
- Prejudice to the employer
- The merits of the application
- Fairness

Is there an application fee?

Yes, there is an application fee. Contact your local Commission to find out the application fee. The fee can be waived if its payment would cause serious hardship.

Can a complainant discontinue an application if they no longer want to proceed?

Yes, an applicant can discontinue an application at any time. An applicant can do this by taking the following actions:

- Lodging a notice of discontinuance under Form F50, available online at:
www.fwc.gov.au/about-us/resources/forms
or alternatively at any Fair Work Commission public counter, which can be found at:
www.fwc.gov.au/at-the-commission/coming-the-commission/commission-offices
- Contacting the Commission by telephone or in writing that you wish you discontinue the matter
- Telling the Commission during a conference that you wish to discontinue your application

Can a person lodge an unfair dismissal application and a General protections application at the same time?

No, it is not possible to make both a General protections application and an unfair dismissal application.

Who pays for a General protections application?

Normally the employee and employer involved in the application will pay their own costs.

The Commission may order the employee or employer to pay for some or all of the costs of the other party. This will depend on whether the General protections application was frivolous and vexatious, or had no reasonable chance of success.

Is the conference private?

Conferences are generally private and confidential. Information regarding the conference will normally only be disclosed to those involved. However, sometimes it is

necessary for the Commission to issue a written decision, such as when an extension of time is sought.

What happens when a person makes a General protections court application?

A general protections court application that relates to dismissal must be filed with either the Federal Court or Federal Circuit Court within 14 days of the Commission signing the certificate stating that conciliation has occurred.

There will be a hearing of the claim and the Court will make a finding as to whether there has been adverse action. If there has been adverse action, the Court can make various orders including orders for payment of compensation.

Courts do not generally make orders relating to costs in adverse action cases, which means that each party will ordinarily pay for its own costs in the proceedings.

Further reading

The following websites may assist in understanding the specific time limits and processes for dispute resolution in each jurisdiction:

| Jurisdiction | Complaints process |
|--|--|
| The National Association of Community Legal Centres Inc (NACLC) | www.nacalc.org.au |
| Community Legal Centres NSW | www.clcnsw.org.au |
| Fair Work Ombudsman | www.fairwork.gov.au |
| Industrial Relations Commission of New South Wales | www.irc.justice.nsw.gov.au |
| Queensland Industrial Relations Commission | www.qirc.qld.gov.au |
| South Australian Industrial Relations Tribunals | www.industrialcourt.sa.gov.au |
| Western Australian Industrial Relations Commission | www.wairc.wa.gov.au |
| Tasmanian Industrial Commission | www.tic.tas.gov.au |
| Northern Territories Workplace Advocate | www.workplaceadvocate.nt.gov.au |

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution has become an important part of dispute resolution irrespective of whether resolution is sought privately or through formal legal processes. For example, both the Human Rights Commission (Federal, State and Territory) and the Fair Work Commission use ADR as the first step in resolving discrimination and workplace complaints. It is therefore important to understand when, why and how ADR may be utilised.

What this section will cover

At the end of this section you will understand:

- What Alternative Dispute Resolution is
- The disadvantages and advantages of Alternative Dispute Resolution
- When and how Alternative Dispute Resolution may be utilised during the dispute resolution process
- How you can prepare for an Alternative Dispute Resolution event
- Why understanding Alternative Dispute Resolution is important

What is Alternative Dispute Resolution?

Alternative Dispute Resolution, sometimes known as 'ADR', is a broad concept that typically refers to methods of dispute resolution that are adopted instead of traditional litigation.

There are four main types of recognised ADR that can be utilised when a specific issue has arisen:

- Negotiation – where the parties directly engage with each other in a joint effort to resolve the dispute.
- Mediation – where the parties engage with each other with the assistance of a neutral third-party (the mediator) to resolve the dispute. The mediator assists the parties to develop possible solutions and reach settlement. The mediator's role is facilitative in nature and is sometimes viewed as a form of assisted negotiation.

- Conciliation – this process is similar to mediation but the neutral third party (the conciliator) plays a more direct role in the resolution of the dispute and may even advise the parties on possible terms of settlement.
- Arbitration – more closely aligned with traditional adversarial litigation, however, arbitration is conducted in private and the decision maker (the arbitrator) is nominated by the parties.

The type of ADR which will work best will depend ultimately on the circumstances of the case and the nature of the complaint.

LGBTI focus

Given the nature of LGBTI issues which may arise in the workplace, the less combative and adversarial approach of ADR may be an attractive alternative for both employers and workplace participants when compared with the more commonly recognised formal litigation process.

Advantages of ADR

- Confidential – the confidential nature of ADR ensures that the interests of the employer and privacy of the workplace participant are adequately protected.
- Control – participants have a relatively high degree of control over the process which facilitates solutions that meet the participant's needs. This increases the chance of an effective and long-lasting agreement.
- Protects existing relationships – ADR's conciliatory focus is appropriate for situations where the parties will need to, or want to, continue their engagement with each other.
- Time and money – ADR is more cost-effective and time-effective than court-based legal proceedings.
- Legal rights preserved – engaging in ADR does not affect the parties rights to commence legal proceedings and most ADR processes (the exception is arbitration) are not legally prejudicial nor legally binding unless or until an agreement is reached.

How might ADR be utilised?

In most cases, employers will endeavour to resolve the issue internally in adherence to any implemented best practice workplace policies.

This internal process may involve various levels of management and human resources staff.

ADR training services are offered through various independent organisations. In Sydney, The Australian Disputes Centre (disputescentre.com.au) offers courses for businesses, professional development seminars and venue hires for dispute resolution meetings. The Chartered Institute of Arbitrators Australia (www.ciarb.net.au) similarly offers training and accreditation in ADR for practitioners and business people. State-based Law Societies often offer online ADR resources for the community and are well placed to guide companies and workplace participants alike to the appropriate ADR service provider. In New South Wales, for example, visit the Law Society of New South Wales Disputes and Mediation page on their website at www.lawsociety.com.au.

While an ADR solution may be offered by the employer internally, in some circumstances a workplace participant may wish to go outside of the workplace to resolve the dispute.

If the workplace participant would prefer that their issue be resolved externally, there are several options available for pursuing a resolution. The most logical first port of call would be for the workplace participant to contact the Fair Work Commission, as outlined in the previous section, because it was designed specifically to deal with workplace complaints and is well positioned to mediate between employers and workplace participants in dispute scenarios.

The other options available are set out in the following pages.

It should be highlighted, however, that the protected attributes under the Fair Work Act do not include gender, and therefore trans and other gender diverse people will not be able to rely on the provisions in the Fair Work Act where the complaint relates to adverse action taken because of their gender identity.

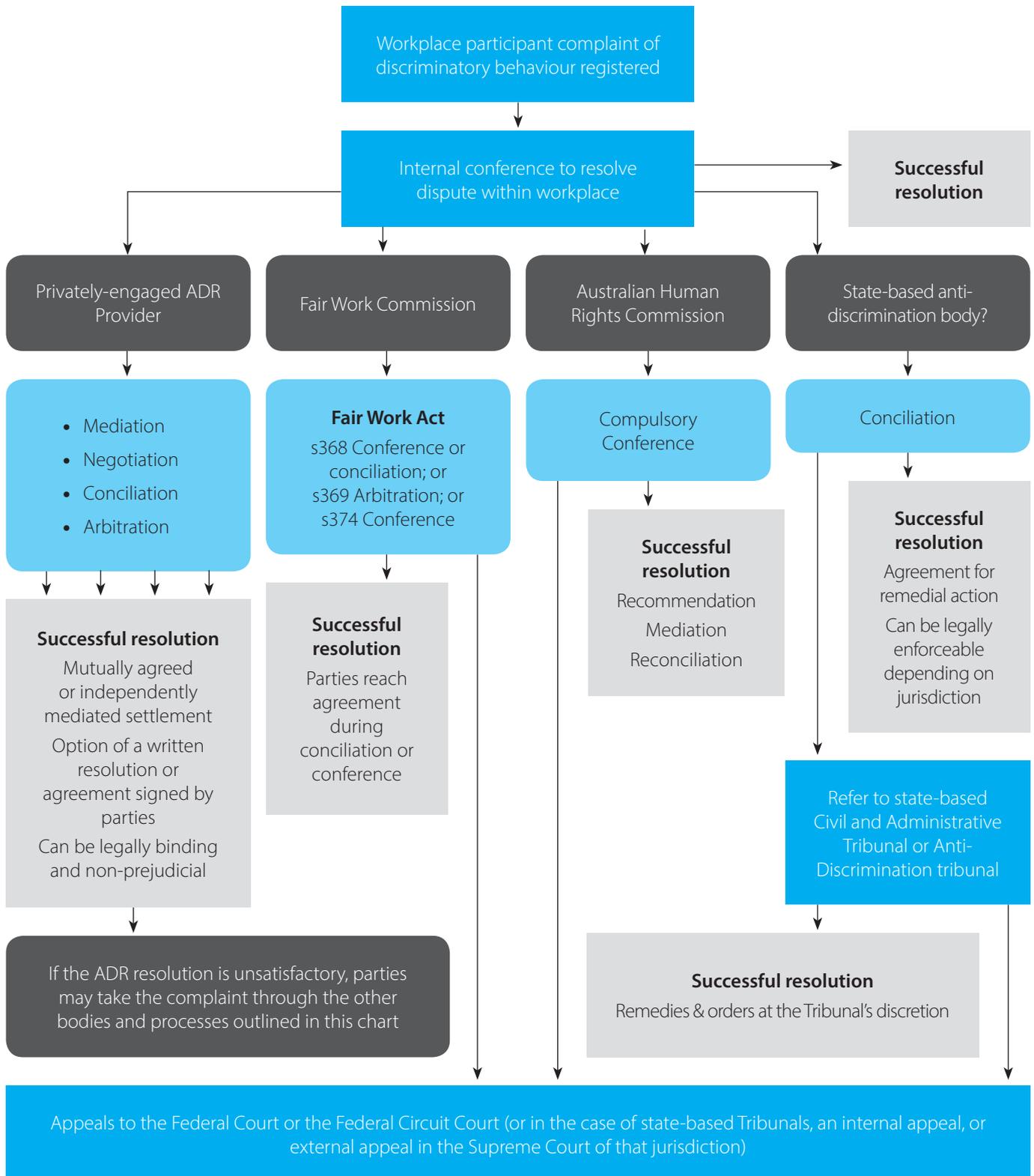
Example

Jemima is a sales rep who regularly meets with clients. Jemima's manager demotes Jemima, who is transgender, to an administrative role, because he doesn't want Jemima to meet any clients.

Jemima has heard her work colleagues, including the HR department, making transphobic comments. Jemima does not feel comfortable talking to her manager or relying on the HR department to manage a negotiation between herself and her manager regarding her demotion.

Jemima may contact the Human Rights Commission to assist. Note that Jemima would not contact the Fair Work Commission because gender identity is not included in the General protections.

GENERAL OUTLINE OF ADR PROCESSES AVAILABLE



Option 1 – Privately engaged ADR Provider

An employer may wish to offer mediation or conciliation as part of their internal dispute resolution process.

There are a number of independent conciliator and mediator providers, including in NSW:

- The Law Society of NSW: (02) 9926 0333
- Australian Disputes Centre: (02) 9239 0700
- Community Justice Centres of NSW: 1800 990 777
- For government employers, contact the Attorney-General's Department: (02) 6141 3222

For more ADR providers, contact the Law Society of the relevant State.

Option 2 – Fair Work Commission

The Fair Work Commission offers a range of ADR processes, including a telephone conciliation, a mediation and/or conciliation conference, a determinative conference and/or an arbitration hearing.

The particular process taken will depend on the circumstances. For example, if the complaint is in relation to a dismissal the Commission must hold a conference (mediation, conciliation or determinative) before any other action can be taken.

There are more options available if the complaint is in relation to non-dismissal – for example the complainant may choose not to engage in a conference and take the dispute directly to the Courts.

The workplace participant will need to pay an application fee (currently \$65.50 at the time of printing). However the fee may be waived on the grounds that its payment would cause serious hardship. The fee may also be refunded if the application is withdrawn before any formal conference or hearing.

Options 3/4 – Federal or State-level Human Rights Commission

Similarly to the Fair Work Commission, the Federal Human Rights Commission will endeavour to resolve the dispute through private settlement. This may include holding one or more private conciliation conferences.

At the State level, each jurisdiction has a version of a State Human Rights Commission. In NSW, for example, it is the Anti-Discrimination Board of NSW, and appeals from the decision of the Board go to the NSW Civil and Administrative Tribunal. Other States have similar processes.¹²

Settlement

If Settlement is reached at initial ADR (i.e. Mediation/Conciliation/Negotiation)

The agreement should be put in writing (where practical) and signed by the relevant parties.

The content of the agreement will depend on the terms of settlement. The document should contain details of the compensation or steps to be taken, as well as any contextual issues, such as privacy.

If Settlement cannot be reached and the employee wishes to continue with the dispute resolution process

In terms of privately engaged ADR, the workplace participant may wish to lodge a formal complaint with the relevant Commission.

For the Fair Work Commission, if the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been or are likely to be unsuccessful, then the Commission will endeavour to resolve the dispute by arbitration. The Commission may make orders, including:

- an order for the reinstatement of the person;
- an order for the payment of compensation; or
- an order to maintain the continuity of the person's employment.

¹² See also: Equal Opportunity and Human Rights Commission (VIC); Anti-Discrimination Commission (QLD, NT and TAS); Commission for Equal Opportunity (SA and WA); Human Rights Commission (ACT).

The orders may be enforced through the Courts if they are not complied with, and further penalties may be added.

For State-based Anti-Discrimination Commissions, the next step is to appeal the decision to the relevant state's Civil and Administrative, or Anti-Discrimination Tribunal. The Tribunal remedies are legally enforceable and penalties may apply for non-compliance. Typical remedies depend on the jurisdiction, and include:

- damages (compensation) for loss or injury;
- dismissing the application in whole or in part;
- an order to stop unlawful conduct;
- an order to publish a public or private apology or retraction;
- an order for reinstatement of employment; or
- an order to develop or implement a policy aimed at eliminating unlawful discrimination.

If the orders of the Tribunal are unsatisfactory, appeals can be made to the Federal Court or the Federal Circuit Court of Australia.

For the Human Rights Commission the next step is to commence legal proceedings in the Federal Court or the Federal Circuit Court of Australia.

How employers can prepare

Private ADR Provider

- Each ADR provider may have different preparation policies and recommendations.
- Parties should contact the particular ADR provider.

Fair Work Commission

- If the employer is a respondent to the complaint, they should seek the advice of the Commission officer when preparing for a conference or hearing.
- The employer should advise the workplace participant to seek the advice of the Commission officer.
- Both the applicant and the respondent will need to prepare:
 - a) An outline of argument;
 - b) Statement of evidence;
 - c) A document list; and
 - d) If you have an objection, an outline of argument objections.
- These documents can be prepared by using forms provided by the Fair Work Commission.

To obtain these forms or to seek further information, contact the Fair Work Commission on **1300 799 675** or visit their website at **www.fwc.gov.au**

Human Rights Commission

- The Commission directs parties to contact the officer who is handling the complaint for information about how to prepare for a conference.

For more general information, contact the Human Rights Commission (or the relevant State-based division) or visit the Human Rights Commission website, particularly: **www.humanrights.gov.au/understanding-and-preparing-conciliation-unlawful-discrimination**

LEGAL REPRESENTATION – WHEN IS IT ALLOWED?

- In regards to privately engaged ADR, such as resolving disputes through human resources divisions following existing workplace policy, the parties should agree on whether representation is allowed.
- At the Fair Work Commission:
 - a) Permission from the Commission must be sought.
 - b) However there are several exceptions to this general rule, dependent on the nature of the party's relationship with the legal representative. The requesting party should seek determination from the Commission.

The Commission may only give permission for a person to be represented by a lawyer or paid agent in a matter before the Commission if:

- a) the matter would be dealt with more efficiently;
- b) it would be unfair on the person seeking representation because the person is unable to represent themselves; or
- c) it would be unfair on the person seeking representation taking into account the other party.

In practice, the Commission is likely to grant permission for formal proceedings.

For further guidance, contact the Fair Work Commission on 1300 799 675 or visit their website at www.fwc.gov.au.

- At the Human Rights Commission:

Though legal representatives are allowed to accompany parties, the Commission decide on a case-by-case basis whether a party is allowed to be represented by another person. For more information, visit the Human Rights Commission website at www.humanrights.gov.au/complaints.

PUBLIC SECTOR CONSIDERATIONS

Discrimination in the Commonwealth, State and Territory public sectors is regulated under legislation specific to the public sector as well as the general anti-discrimination legislation applicable in each jurisdiction.

This section sets out an overview of the legislation and codes of conduct specific to the public sector and the obligations of employers and employees in each jurisdiction, together with some best practice examples.

For further information on the broader obligations under the general anti-discrimination legislation (which has not been addressed in this section), see Section 7: Anti-Discrimination Law and Practice.

Commonwealth

What is the legal framework?

Commonwealth public sector workplaces are regulated by the *Public Service Act 1999* (Cth) which includes a Code of Conduct and the 'APS Values'.

Who does it apply to?

The *Public Service Act 1999* (Cth) applies to all persons engaged on behalf of the Commonwealth as employees in a Department or Executive Agency, including Agency Heads. Additionally, the *Sex Discrimination Act 1984* (Cth) applies to the Commonwealth as an employer, Commonwealth employees in connection with their employment and persons seeking to become Commonwealth employees. The discrimination and sexual harassment provisions of the Act do not apply to State government employees who must rely on local anti-discrimination legislation.

What is a 'best practice' example?

Following the APS Employment Principles, the Australian Federal Police (AFP) prioritises diversity and recognises the importance of ensuring that its workforce reflects the community it serves. The AFP undertake a number of annual LGBTI inclusion activities and ranked among the Top 10 employers for LGBTI inclusion in 2016 under the Australian Workplace Equality Index conducted by Pride in Diversity (making them the highest ranking public sector employer for 2016). They are also a foundation member of Pride in Diversity.

What are the rights and obligations of employers?

Under the *Sex Discrimination Act 1984*, the Commonwealth as an employer, has a legal obligation to ensure that a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program does not discriminate against another person, on the ground of the other person's:

- a) sexual orientation;
- b) gender identity;
- c) intersex status; or
- d) marital or relationship status.

The *Public Service Act 1999* (Cth) establishes the Australian Public Service (APS) as a career-based public service that:

- i) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued;
- ii) provides workplaces that are free from discrimination, patronage and favouritism; and
- iii) recognises the diversity of the Australian community and fosters diversity in the workplace.

An Agency Head must establish a workplace diversity program to assist in giving effect to the APS Employment Principles. An Agency Head must uphold and promote the APS Values and APS Employment Principles

What are the rights and obligations of employees?

Under the *Public Service Act 1999* (Cth), an APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment. An APS employee must at all times behave in a way that upholds the APS Values and APS Employment Principles.

What are the consequences of failing to comply with the law?

The procedures for lodging, investigating and resolving complaints under the *Sex Discrimination Act 1984* are the same when either or both the complainant and

respondent are connected with the public sector as they would be if they were involved in the private sector. Those found to have breached the Code of Conduct under the *Public Service Act 1999* (Cth) may be subject to the following sanctions:

- termination of employment;
- reduction in classification;
- re-assignment of duties;
- reduction in salary;
- deductions from salary, by way of fine; or
- a reprimand.

New South Wales

What is the legal framework?

The NSW public sector is governed by the *Government Sector Employment Act 2013* (NSW) and the Code of Ethics and Conduct for the NSW government sector – Behaving Ethically, which identifies mandatory requirements and best practice conduct for all government sector employees and heads of government sector agencies which is consistent with the Act.

Who does it apply to?

The Act applies to most NSW Government employees, including the Public Service, the NSW Police Force, the Teaching Service, the Health Service, the Transport Service and other services of the Crown. It does not apply to judicial officers, officers or employees of Houses of Parliament, parliamentary employees, staff of ICAC, staff of the Audit Office and staff of the Judicial Commission.

What is a 'best practice' example?

The NSW Police Force (**NSWPF**) actively recruits a diverse workforce embracing the principle that a large and diverse community is best served by similar diversity, skills and experiences in the people recruited. The NSWPF is committed to implementing a number of workplace diversity strategies including Equal Employment Opportunities.

The NSWPF first implemented a Gay and Lesbian Liaison Officer (GLLO) program in 1990 for the benefit of LGBTI officers and members of the community. Since then it has grown from four inner city GLLOs to 200 LGBTI Liaison Officers (GLLOs) across NSW. NSW Police ranked in 11th place on the 2016 Australian Workplace Equality Index conducted by Pride in Diversity, making them the highest ranking state government employer for 2016 on the index. Superintendent Tony Crandell was also acknowledged as the recipient of the Executive Leadership Award by Pride in Diversity in 2016.

What are the rights and obligations of employers?

Secretaries and heads of agencies are responsible for the general conduct and management of the functions and activities of the Department in accordance with the government sector core values.

Some of the government sector core values include:

- a) consideration of people equally without prejudice or favour;
- b) appreciation of difference and welcome learning from others;
- c) building relationships based on mutual respect.

The Public Service Commissioner is charged with promoting and maintaining the government sector core values.

The head of a government sector agency is responsible for workforce diversity within the agency and for ensuring that workforce diversity is integrated into workforce planning in the agency.

Diversity is defined to include (but is not limited to) diversity of the workforce in respect of gender, cultural and linguistic background, Aboriginal people and people with a disability. The legislation also provides the flexibility to encompass additional diversity groups (such as LGBTI diversity) if required.

What are the rights and obligations of employees?

NSW Government employees are expected to treat people equally, whether they are members of the public, customers or colleagues, and not to discriminate against people because of their sex, race or ethnicity, disability, age, marital status or sexual orientation, or because they are a carer or a transgender person.

What are the consequences of failing to comply with the law?

If there is a finding of misconduct by an employee by reason of contravention of the Act or Code of Conduct, they may be subject to the following actions:

- termination of employment;
- fine;
- reduction of pay;
- demotion;
- reassignment; and
- reprimand.

Victoria

What is the legal framework?

The *Public Administration Act 2004* is the over-arching legislation that regulates public sector governance in Victoria. The Code of Conduct for Victorian public sector employees and the Code of Conduct for Victorian public sector employees of special bodies are also applicable. The *Charter of Humans Rights and Responsibilities Act 2006* (Charter) also sets out the basic rights, freedoms and responsibilities of all people in Victoria. It is about the relationship between government and the people it serves.

Who does it apply to?

The *Public Administration Act 2004* applies to 'public service bodies' (departments and administrative offices), 'special bodies that have a special relationship with Government (eg Victoria Police, the Auditor-General, Ombudsman) and 'public entities' (eg public hospitals, TAFE institutes and catchment management authorities). It does not apply to judicial officers, coroners or the Solicitor-General. The Charter applies to the Victorian Government, public servants, local councils, Victoria Police and other public authorities. So no matter which state or local government agency the community is dealing with, the same human rights apply.

What are the rights and obligations of employees?

Public sector employees must follow the spirit as well as the letter of the law relating to discrimination, harassment, bullying and victimisation. Public sector employees must also create an environment that is free of discrimination, harassment and bullying. Valuing and promoting diversity is an important element of demonstrating respect.

Public sector employees report to an appropriate authority on workplace behaviour that violates the law. Public sector employees seek to protect the human rights of colleagues, other public officials and members of the Victorian community by raising concerns regarding circumstances that could breach those rights, and reporting any suspected breaches in accordance with procedures established by their public sector employer.

What are the consequences of failing to comply with the law?

The Victorian Ombudsman can receive and investigate complaints about whether administrative actions taken by the government, local councils and public authorities are in breach of, or have not properly considered, human rights. A contravention of the Codes can constitute misconduct. Misconduct may result in the imposition of penalties including:

- reduction in salary;
- demotion;
- suspension; or
- dismissal.

What are the rights and obligations of employers?

The *Public Administration Act 2004* prescribes a set of principles to underpin public sector employment, which require heads of public sector bodies to establish employment processes that ensure:

- a) employment decisions are based on merit;
- b) public sector employees are treated fairly and reasonably;
- c) equal employment opportunity and human rights are provided;
- d) respect for colleagues and freedom from discrimination, harassment and bullying; and
- e) public sector employees have a reasonable avenue of redress against unfair and unreasonable treatment and the development of a career in public service is fostered (in the case of public service bodies).

The Charter imposes an obligation on all public authorities to act in a way that is compatible with human rights and to consider human rights when developing policies, making laws, delivering services and making decisions. Under the Charter, public officials should demonstrate respect for colleagues, other public officials and members of the Victorian community by ensuring freedom from discrimination, harassment and bullying. Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.

Queensland

What is the legal framework?

The Queensland public sector is regulated by the *Public Service Act 2008*, the *Public Sector Ethics Act 1994* and the *Code of Conduct for the Queensland Public Service*. The *Anti-Discrimination Act 1991* also specifically promotes equality of opportunity for everyone through protection from unfair discrimination in certain areas of activity, including work, which encompasses work for public or local government and work under a statutory appointment.

Who does it apply to?

The *Public Service Act 2008* and the *Public Sector Ethics Act 1994* mainly apply to public service officers.

What are the rights and obligations of employers?

A member of a local authority must not discriminate against another member in the performance of official functions.

Employment in the Queensland Public Service is to be directed towards promoting:

- a) a diverse and highly skilled workforce drawing from Government and non-government sectors;
- b) interacting with staff members respectfully, collaboratively and with integrity; and
- c) complying with an approved code of conduct and any approved standard of practice as required under the *Public Sector Ethics Act 1994*.

What are the rights and obligations of employees?

Employees of the Queensland Public Service have a responsibility to always conduct and present themselves in a professional manner, and demonstrate respect for all persons, whether fellow employees, clients or members of the public.

Employees will:

- a) treat co-workers, clients and members of the public with courtesy and respect, be appropriate in relationships with them and recognise that others have the right to hold views which may differ from their own; and
- b) ensure their conduct reflects their commitment to a workplace that is inclusive and free from harassment.

What are the consequences of failing to comply with the law?

A public service employee commits misconduct if their actions are inappropriate or improper in an official capacity.

A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has been guilty of misconduct or has contravened a standard of conduct under the *Public Sector Ethics Act 1994*. The following disciplinary action may be taken:

- termination;
- reduction of classification level;
- transfer or redeployment;
- forfeiture or deferment of a remuneration increase;
- reduction of remuneration;
- imposition of monetary penalty; or
- reprimand.

South Australia

What is the legal framework?

In South Australia, the *Public Sector Act 2009* regulates public sector employment together with the *Code of Ethics for the South Australian Public Sector*. Additionally, the *Equal Opportunity Act 1984* applies to employees of the South Australian Government as holders of a public or statutory office and to the South Australian Government as 'the Crown'.

What is a 'best practice' example?

The Department for Communities and Social Inclusion's South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014 – 2016 aims to enable full and safe participation in culturally inclusive services and programs. It aims to increase the awareness and education in the broader community about the issues they face.

What are the rights and obligations of employers?

Public sector agencies are required to treat public sector employees fairly, justly and reasonably and prevent unlawful discrimination against public sector employees or persons seeking employment in the public sector.

Strong and visible leadership is a critical factor in achieving support for, and adherence to, the values and professional conduct embodied by the Code of Ethics. Chief executives and other organisational leaders have a special responsibility to demonstrate publicly their support for both the spirit and letter of the Code of Ethics through their actions.

Who does it apply to?

In South Australia, the *Public Sector Act 2009* and the *Public Sector Regulations 2010* regulate public sector employment together with the *Code of Ethics for the South Australian Public Sector*.

Additionally, the *Equal Opportunity Act 1984* applies to employees of the South Australian Government as holders of a public or statutory office and to the South Australian Government as 'the Crown'.

What are the rights and obligations of employees?

Employees must exhibit the highest standards of professional conduct in order to maintain the integrity of the South Australian public sector. The South Australian public sector should be as diverse as the community it serves. The views and experiences of all people should be respected, regardless of gender or sexuality.

Employees must exhibit the highest standards of professional conduct in order to maintain the integrity of the South Australian public sector. Public sector employees will report workplace behaviour that violates any law or amounts to misconduct.

Every public sector employee must familiarise themselves with the content of the Code of Ethics and conduct themselves in a manner consistent with the values and standards of professional conduct that are set out therein. Some public sector employees, such as health professionals and lawyers, are bound by codes of conduct specific to their profession. In such cases, employees must have regard to the Code of Ethics as well as their professional codes.

What are the consequences of failing to comply with the law?

A public sector employee is guilty of misconduct where they breach the disciplinary provision of the Code of Ethics.

Disciplinary action may include a reprimand, suspension, reduction of remuneration or termination.

Western Australia

What is the legal framework?

The Western Australian public sector is regulated by the *Public Sector Management Act 1994* and the *Code of Ethics*. The *Code of Ethics* sets out the minimum standards of conduct and integrity to be complied with by all public sector bodies and employees.

Additionally, the *Equal Opportunity Act 1984* specifically applies to employees of the Western Australian State Government including the Western Australian Public Service.

Who does it apply to?

In Western Australia, the *Public Sector Management Act 1994*, the *Public Sector Management (General) Regulations 1994* and the *Code of Ethics* regulate public sector employment.

Additionally, the *Equal Opportunity Act 1984* applies to employees of the South Australian Government as holders of a public or statutory office and to the South Australian Government as 'the Crown'.

What are the rights and obligations of employers?

Under the *Public Sector Management Act 1994*, there is to be no unlawful discrimination against employees or persons seeking employment in the public sector on a ground referred to in the *Equal Opportunity Act 1984* or any other ground.

The *Equal Opportunity Act 1984* requires Western Australian government departments and authorities to prepare and implement Equal Employment Opportunity Management Plans. The template plan published by the Western Australian government includes outcomes such as equal employment opportunity and diversity values are incorporated into corporate values, business planning processes and human resource workforce plans and a positive, inclusive and harassment-free workplace culture is communicated and promoted within the organisation.

What are the rights and obligations of employees?

The *Code of Ethics* sets out the minimum standards of conduct and integrity to be complied with by all public sector bodies and employees. Public sector employees are to treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.

What are the consequences of failing to comply with the law?

A public sector employee who contravenes any provision of the *Public Sector Management Act 1994* or any public sector standard or code of ethics commits an act of misconduct and may be subject to disciplinary action. Disciplinary action includes a reprimand, fine, transfer, reduction in remuneration and dismissal.

Tasmania

What is the legal framework?

Employment in the Tasmanian public sector is regulated by the *State Service Act 2000* which incorporates the *State Service Principles* and a *Code of Conduct*. The Principles provide a statement as to both the way that employment is to be managed in the State Service, and the standards expected of those who work within it and the *Code of Conduct* establishes standards of behaviour and conduct that apply to all employees, including Officers and Heads of Agencies.

Who does it apply to?

The *State Service Act 2000* applies to heads of agencies, holders of prescribed offices, senior executives and employees.

What are the rights and obligations of employers?

Under the *State Service Act 2000*, a Head of Agency must uphold, promote and comply with the *State Service Principles* and develop and implement a workplace diversity program in that Agency to assist in giving effect to the *State Service Principles*.

The *State Service Principles* include the following:

- a) the State Service provides a workplace that is free from discrimination and recognises and utilises the diversity of the community it serves;
- b) the State Service provides a fair, flexible, safe and rewarding workplace; and
- c) the State Service promotes equity in employment.

The Employer is required to establish procedures for the investigation and determination of whether an employee has breached the *Code of Conduct*.

In addition, under the *Anti-Discrimination Act 1998*, a Government department is to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct. A Government department that does not comply with this section is liable for any contravention of the *Anti-Discrimination Act 1998* committed by any of its members, officers, employees and agents.

What are the rights and obligations of employees?

An employee, when acting in the course of State Service employment, must abide by the *Code of Conduct* which includes the following:

- treating everyone with respect and without harassment, victimisation or discrimination; and
- when acting in the course of State Service employment, behaving in a way that upholds the State Service Principles.

What are the consequences of failing to comply with the law?

The Minister (or their delegate) may impose one or more of a number of sanctions on an employee who is found to have breached the *Code of Conduct* including:

- counselling;
- reprimand;
- deductions from salary;
- reduction in salary within the range of salary applicable to the employee;
- reassignment of duties;
- reduction in classification; or
- termination of employment.

Australian Capital Territory

What is the legal framework?

The public sector of the ACT is regulated by the *Public Sector Management Act 1994*, the *Public Sector Management Standards 2006*, the ACT Public Service Code of Conduct and the ACT Public Service Code of Ethics. Additionally, the *Discrimination Act 1991* specifically includes “work as a Territory employee”, so employees of the ACT public service are covered by this Act. Also, a member of the Legislative Assembly (in his or her capacity as an office-holder or otherwise) is taken to be an employer.

Who does it apply to?

ACT public service employment is regulated by the *Public Sector Management Act 1994*. This Act provides for public sector departments and agencies to prepare both equal employment opportunity and access and equity programs.

What are the rights and obligations of employers?

The *Public Sector Management Act 1994* sets out some general principles of public administration, including:

- a) the public sector shall be managed in accordance with principles of access and equity;
- b) the public sector shall be administered to minimise the possibility of unlawful discrimination.
- c) Appointments must be exercised without discrimination that is unlawful under the *Discrimination Act 1991*.

What are the rights and obligations of employees?

The Code of Ethics sets out the minimum standards of conduct and integrity to be complied with by all public sector bodies and employees. Public sector employees are to treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.

What are the consequences of failing to comply with the law?

A public sector employee who contravenes any provision of the *Public Sector Management Act 1994* or any public sector standard or code of ethics commits an act of misconduct and may be subject to disciplinary action. Disciplinary action includes a reprimand, fine, transfer, reduction in remuneration and dismissal.

Northern Territory

What is the legal framework?

The definition of “work” in the *Anti-Discrimination Act 1992* includes work “in a relationship of employment”, “under a contract for services” and “under a statutory appointment”, which means that public service employees are covered by the provisions of this Act. The *Public Sector Employment and Management Act 2012* regulates the public sector of the Northern Territory and applies to all public sector officers.

What are the rights and obligations of employers?

The General Principles in the *Public Sector Employment and Management Act 2012* state that human resource management in the Public Sector must be directed towards:

- a) employment based on merit;
- b) ensuring all persons have equal opportunity to compete for employment, promotion and transfer, and to pursue careers, within the Public Sector;
- c) eliminating unlawful discrimination from human resource management in the Public Sector; and
- d) promoting diversity among employees reflective of the diversity of persons in the community; and
- e) working environments in which employees:
 - i) are treated fairly, reasonably and in a non-discriminatory way;
 - ii) are remunerated at rates appropriate to their responsibilities;
 - iii) have reasonable access to training and development; and
 - iv) have reasonable access to redress when adversely affected by improper or unreasonable decisions.

Who does it apply to?

The *Public Sector Employment and Management Act 2012* and the *Code of Conduct* apply to Public Sector Officers (the Commissioner, Agencies, Chief Executive Officers and employees).

What are the rights and obligations of employees?

The General Principles state that Public Sector Officers must treat other Public Sector Officers, other persons in the workplace and members of the public fairly, equitably and with proper courtesy and consideration.

Under the *Code of Conduct*, a Public Sector Officer in his or her dealings with other Public Sector Officers and members of the public is required to comply with the provisions of the *Anti-Discrimination Act 1992* which prohibits discrimination on the grounds of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record, irrelevant criminal record or association with a person who has, or is believed to have, one of the above attributes.

What are the consequences of failing to comply with the law?

Breaching the *Public Sector Employment and Management Act 2012* or the *Code of Conduct* is a breach of discipline and the following disciplinary action may be taken:

- formal caution;
- order the employee to undertake training, counselling or other remedial activities;
- a requirement that the employee forego a benefit or entitlement arising from the employee’s employment;
- an order that the employee pay a fine;
- a reduction in the employee’s salary;
- a transfer of the employee; or
- a termination of employment.

12 RELIGIOUS SECTOR CONSIDERATIONS

RELIGIOUS SECTOR CONSIDERATIONS

In each jurisdiction, various exemptions are given to religious bodies to discriminate on some or all of the prohibited grounds.

Table 1 sets out the categories of exemptions and which jurisdictions they apply to. Table 2 sets out each of these areas in more detail, with any relevant case law and commentary.

Table 1: Where is the exemption offered that affects LGBTI people?

| Exemptions | Cth | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
|---|-----|-----|-----|-----|----|----|-----|-----|----|
| Religious bodies | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Educational institutions | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Accommodation | ✓ | | | ✓ | ✓ | | | ✓ | ✓ |
| Sites of cultural or religious significance | | | | ✓ | | | ✓ | | ✓ |
| Religious beliefs or principles | | | ✓ | | | | | | |
| Employment based on religion | | | | | | | ✓ | | |
| Discrimination by associations | | | | | | ✓ | | | |
| Religious dress and/or identification | | | | | | ✓ | | | |

Table 2: Areas of exemption

| Exemption | Overview |
|--------------------------------|--|
| <p>Religious bodies</p> | <p>What is the exemption?</p> <p>It is not unlawful to discriminate in connection with employment, or certain other areas if the action is an act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.</p> <p>Fair Work Act 2009</p> <p>Also note that the <i>Fair Work Act 2009</i> contains a very similar religious exemption to discrimination (including discrimination on the basis of sexual orientation), if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.</p> <p>Examples</p> <ul style="list-style-type: none"> Matthew is employed by a church as a receptionist. A term of Matthew’s employment is that he acts in a manner consistent with the teachings of the church. The teachings forbid same-sex relationships. It comes to the attention of a church leader that Matthew has recently had a same-sex relationship. Matthew’s employment is terminated for breaching a condition of his employment. To satisfy the conditions of the exemption, the church need only show that its decision to terminate Matthew’s employment was consistent with the doctrines of the church. Siobhan is a transgender woman. She is employed by a progressive religious organisation which formally recognises transgender people in its teachings and almost all of its members accept this teaching. Siobhan’s manager is a member of the religious organisation but he does not share the organisation’s formal teachings on transgender people. He decides to terminate Siobhan’s employment and tries to rely on the religious exemption, claiming that the fact Siobhan is transgender offends his religious values. Because it is necessary that a significant proportion of the religious organisation be offended by Siobhan’s gender identity, and very few members of this religious organisation are offended, the religious exemption could not be relied on in this case. <p>Limits to the ‘catch all’ exemption in some states</p> <ul style="list-style-type: none"> Under the Commonwealth legislation, a religious body that provides Commonwealth-funded aged care, may only rely on the exemption in respect of the employment of persons, but not to discriminate in who it provides services to. Under the Queensland legislation, the catch all exemption does not apply in the education area or the work, or work-related area. |

| Exemption | Overview |
|--|---|
| <p>Religious bodies continued</p> | <ul style="list-style-type: none"> • Under the New South Wales legislation, the catch all exemption is in respect of an act or practice of a body established “to propagate religion” rather than “for religious reasons”. • Under the Victorian legislation, it is not unlawful for a religious body to discriminate on the basis of a person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity under the catch-all provision. This only applies in relation to employment if conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the position. There is also a broad exemption for discrimination which is reasonably necessary to enable a person to comply with the doctrines or tenets of a religion. <p>Who can rely on the exemptions?</p> <ul style="list-style-type: none"> • The exemption applies to bodies and not individuals of a religion (although in Victoria there is a separate exemption that would apply to individuals). The New South Wales Equal Opportunity Tribunal held that joint Christian owners were unable to rely on this exemption in refusing to rent their premises to an unmarried couple, as it was against their Christian values finding that the provision does not operate to allow members of any religion to impose their beliefs on a secular society. • Victoria is the only jurisdiction that defines a religious body. Under s 81, a religious body means a body established for a religious purpose or an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is conducted in accordance with the religious doctrines, beliefs or principles. <p>The effect of these provisions means that it is not unlawful for a religious body to appoint male-only priests or to train or educate only men seeking ordinations as Catholic priests. It may also permit the religious body to discriminate in the selection of altar servers or lay members of a Catholic congregation to assist the presiding priest in the conduct of a mass in a Catholic Church.</p> |

| Exemption | Overview |
|---------------------------------|--|
| Educational institutions | <p>What is the exemption?</p> <p>It is not unlawful for a person to discriminate against another person in connection with:</p> <ul style="list-style-type: none"> • employment as a member of staff of; • a position as a contract worker with a position as a contract worker that involves the doing of work in; or • the provision of education or training by, <p>an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, provided it is done in good faith and in order to avoid injury to the religious sensitivities of adherents of that religion.</p> <p>Limits to the exemption relevant to LGBTI discrimination</p> <ul style="list-style-type: none"> • Commonwealth – exemption only applies to discrimination on the basis of sex, intersex status, sexual orientation, gender identity, marital or relationship status, or pregnancy. • Tasmania – exemption only applies on the basis of religious belief, affiliation or activity. For students, the exemption only applies to the admission of a person as student and not to a person who is enrolled as a student at the educational institution. • Northern Territory – exemption only applies in the area of work on the basis of religious belief or activity and sexuality and is in good faith to avoid offending the religious sensitivities of people of the religion. • There is no exemption for educational institutions in New South Wales or South Australia but the exemption for religious bodies would apply. |

EXEMPTIONS TO ANTI-DISCRIMINATION LAWS

In each jurisdiction, various exemptions are given to employers to discriminate on some or all of the prohibited grounds. The exemptions operate as a defence to the legislative prohibitions and so an employer bears the onus of proving that they fall within the exception.

Table 1 sets out an overview of the relevant exemptions across the various jurisdictions. Table 2 explains what the exemptions allow for, and any differences between jurisdictions.

Jurisdictional overlap: what it means

- Commonwealth and State/Territory laws largely overlap, but because they both apply, you have to comply with both. That is, if you are in New South Wales, you must make sure that you are complying with the *Anti-Discrimination Act 1977* (NSW) as well as the *Sex Discrimination Act 1984* (Cth).
- In the context of exemptions, the Commonwealth/State concurrent jurisdiction becomes quite important – as an exemption under one jurisdiction is not necessarily an exemption under the other.
- On a practical level, this means that an employer looking to come within an exemption will need to ensure that they are exempt under both applicable statutes.
- For example, if an exemption is available in South Australia, but is not an exemption under the Commonwealth legislation, an employer who seeks to rely on that exemption should be aware that they may still be liable under the Commonwealth legislation.
- See Section 7: Anti-Discrimination Law and Practice for more information on how the statutes operate at the State and Commonwealth levels.

13 EXEMPTIONS TO ANTI-DISCRIMINATION LAWS

Table 1 – Overview of exemptions across jurisdictions

| Exemptions | Cth | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
|---|-----|-----|-----|-----|----|----|-----|-----|----|
| Genuine occupational requirement | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Residential domestic/care work | ✓ | | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ |
| Acts under statutory authority | ✓ | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ |
| Sport | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Equal opportunity measures | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Can apply for exemption | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Religious bodies & educational institutions | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Working with children | | | ✓ | ✓ | | | | | |
| Employer-supplied accommodation | | | | ✓ | | | | ✓ | |
| Discrimination by firms | | | ✓ | | | | | | |
| Standards of appearance/dress | | | | | | ✓ | | | |
| Provision of single-gender facilities | | | | | | | ✓ | | |
| Accommodating special needs unreasonable | | | | | | | | | ✓ |
| Combat duties | ✓ | | | | | | | | |
| Requests for info & record keeping | ✓ | | | | | | | | |

Table 2: Exemptions

| Exemption | Overview |
|---|---|
| <p>Genuine occupational qualifications</p> | <p>What is the exemption?</p> <p>It is not unlawful to discriminate in connection with employment if it is a genuine occupational qualification that a person be of a particular sex.</p> <p>This exemption might include scenarios such as:</p> <ul style="list-style-type: none"> • Where the duties of a position can only be performed by a person having particular physical attributes (other than strength or stamina). • Where the duties of the position involve performing in entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex. • Where the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve, for example, fitting clothes for persons of that sex. • Where the occupant of the position is required to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex. • Where the occupant of the position is required to live on premises provided by the employer or principal of the occupant of the position and: <ul style="list-style-type: none"> – The premises are not equipped with separate sleeping accommodation and facilities for persons of each sex; – The premises are already occupied by a person or persons of the relevant sex and are not occupied by any person of a different sex from the relevant sex; – It is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex; and – Where the occupant of the position is required to enter areas ordinarily used only by persons of the relevant sex while those persons are in a state of undress. <p>Jurisdictional differences to note:</p> <ul style="list-style-type: none"> • In Queensland & the Northern Territory, this exception is much broader – in that it is not limited only to sex. Rather, it simply provides that a person may impose genuine occupational requirements for a position. While the attribute must still be a genuine occupational requirement (and so cannot be arbitrary discrimination), it means that other attributes (such as sexual orientation or gender identity) could fall within the exception. • Similarly, in South Australia, the exemption extends to genuine occupational requirements that a person be of a particular sex, gender or sexuality. |

13 EXEMPTIONS TO ANTI-DISCRIMINATION LAWS

| Exemption | Overview |
|--|---|
| Acts under statutory or other authority | <p>Discrimination is not unlawful where it is necessary under (or specifically authorised by) a requirement of another act, regulation, order of a court or Tribunal, or relevant Commission.</p> <p>Jurisdictional differences to note:</p> <ul style="list-style-type: none"> • This exemption is not applicable in South Australia. • In Tasmania, discrimination is permissible where “reasonably necessary” to be compliant. |
| Residential workers and/or carers | <p>It is not unlawful to discriminate against somebody where the duties of the position involve residential care of children at their residence, or the performance of domestic services at the person’s home.</p> <p>Jurisdictional differences to note:</p> <ul style="list-style-type: none"> • Neither of these exemptions apply in South Australia or NSW. • The Commonwealth & Tasmanian acts only cover residential care of children – ie, the exemption does not extend to other domestic services. • In Tasmania, this exception is confined to gender only. • At the Commonwealth level, it is only lawful to discriminate on the basis of sex in respect of residential care of children (ie, other LGBTI attributes remain protected). |
| Sport | <p>It is not unlawful to discriminate by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.</p> <p>Jurisdictional differences to note:</p> <ul style="list-style-type: none"> • This exception does not extend to coaching, umpiring, refereeing or administration of any sporting activity (ie, it applies only to those competing). • In NSW, Victoria and Queensland, both sex and gender are covered by this exception. • In ACT, Northern Territory, South Australia and Western Australia, only discrimination on the basis of sex is permitted under this exception. • In Tasmania, this exception applies to discrimination on the basis of gender only, which means that it may not apply to people who are intersex (although this has not been tested by the courts). • In Queensland and Northern Territory, there is an additional requirement that the discrimination be reasonable. |

13 EXEMPTIONS TO ANTI-DISCRIMINATION LAWS

| Exemption | Overview |
|--|--|
| Equal Opportunity Measures | <p>It is not unlawful to do an act if the purpose is to promote equality, and/or ensure that members of a relevant class of people have equal opportunities to other people.</p> <p>This exemption might envisage, for example, an employer establishing an LGBTI mentoring program with a view to increasing networking opportunities for LGBTI persons.</p> <p>Jurisdictional differences to note:</p> <ul style="list-style-type: none"> • In the ACT, any discrimination of this type must be reasonable. • This exemption does not apply at the Commonwealth level, nor does it apply in NSW. |
| Exemptions may be granted | <p>On application, the relevant Commission or Tribunal in each jurisdiction may grant specific exemptions in relation to a particular person or a class of people or a particular activity. If granted, this would permit a person to do an act which would otherwise be in contravention of the legislation.</p> |
| Religious bodies | <p>The various anti-discrimination frameworks do not apply in relation to the appointment of priests, ministers or other individuals to positions in connection with any religious observance or practice, nor do they govern any other act or practice of a body established for religious purposes, where those acts or practices conform to the doctrines and beliefs of that religion.</p> <p>For more information, see the Section 12: Religious Sector Considerations.</p> |
| Working with children | <p>In Queensland and Victoria it is not unlawful to discriminate on the basis of lawful sexual activity or gender identity, if the work involves the care or instruction of minors; and the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to the all the relevant circumstances of the case, including the person's actions.</p> |
| Employer-supplied accommodation | <p>In Queensland it is not unlawful to discriminate on the basis of sex if the person is required to live in accommodation supplied by an employer and the accommodation is not equipped with separate sleeping accommodation for people of each sex, and supplying separate sleeping accommodation would impose unjustifiable hardship on the employer.</p> <p>In the ACT it is not unlawful for an employer to provide different standards of accommodation to different employees based on the number of people in the employee's family or household.</p> |
| Combat duties | <p>At the Commonwealth level, it is not unlawful for a person to discriminate against a woman on the ground of her sex in connection with employment, engagement or appointment in the Defence Force in a position involving the performance of combat duties.</p> |

13 EXEMPTIONS TO ANTI-DISCRIMINATION LAWS

| Exemption | Overview |
|---|---|
| Information requests and record-keeping | At the Commonwealth level it is not unlawful to require a person to identify as male or female in an information request or in the making or keeping of records. |
| Discrimination by firms | In Victoria, a person who intends to establish a firm comprising less than 5 partners may discriminate on reasonable terms, in determining who should be invited to become a partner and on what terms. A firm of less than 5 partners may, where reasonable, discriminate by denying or limiting access to benefits; expelling a partner; or by subjecting them to any other detriment. |
| Standards of appearance or dress | In South Australia it is not unlawful for an employer to discriminate on the ground of chosen gender if the discrimination is for the purposes of enforcing standards of appearance and dress reasonably required for the employment or engagement. |
| Accommodating special needs unreasonable | In the Northern Territory it is not unlawful to discriminate against someone with a special need because of a protected attribute, if the person would require special services or facilities and it is unreasonable to require that those special services/facilities are provided. |
| Single-gender facilities | In Tasmania it is not unlawful to discriminate on the ground of gender in providing facilities, if those facilities are reasonably required for use by persons of one gender only. |

In this section we explain three examples of cases where people have challenged a decision that the person felt was discriminatory and based on the person identifying as LGBTI.

There are very limited cases that have been reported on these issues, so not all of these examples occur in a work context. However, they are all nevertheless instructive in relation to particular confined issues which may arise in the workplace.

IS A NON-DISCLOSURE POLICY DISCRIMINATORY?

Facts

- Bock was dismissed from her employment at the Launceston Women's Shelter (Shelter) after she consistently refused to comply with a self-disclosure policy (policy). The recently introduced policy prohibited the disclosure of personal information, such as sexual orientation, in circumstances where it would remove "the focus from client needs to the worker".
- The events leading up to the introduction of the policy were as follows:
 - In the course of counselling a client, Bock had informed the client that she was a lesbian and a former sex worker. Bock suggested to the client that she consider sex work as a means to earn a good income. The client complained to the Shelter committee that Bock's behaviour was inappropriate. An investigation was completed and a recommendation adopted that Bock be counselled externally and be subject to ongoing evaluation process.
 - Bock subsequently told the committee that she would inform all clients at the initial intake stage of her identity as a lesbian and a former sex worker. Bock explained that she thought the disclosure was necessary to avoid future complaints and, in particular, homophobic and sex work-stigmatising responses of some clients.
- The policy prohibited self-disclosure at the point of intake where clients were assessed for their eligibility for crisis accommodation and other services provided by the Shelter. The policy also deemed self-disclosure inappropriate in other circumstances where it might make a client feel "unsafe, threatened or judged". Self-disclosure was not inappropriate under the policy in all circumstances.
- After the policy had been introduced, Bock maintained that she would continue to disclose her identity as a lesbian and former sex-worker to clients at the initial intake stage and did so. After her employment was terminated, Bock complained to the Anti-Discrimination Commissioner that she had been indirectly discriminated against on the basis of her sexual orientation. The matter was then referred to the Anti-Discrimination Tribunal and an appeal was subsequently made to the Supreme Court of Tasmania.

Issues

- Bock complained to the Anti-Discrimination Commission.
- Was the implementation of the policy a case of indirect discrimination? Under s 15 of the *Anti-Discrimination Act 1998* (Tas) indirect discrimination does not occur unless the imposition of the requirement (i.e. to adhere to the policy) was unreasonable in the circumstances.

Decision

- The Tribunal was satisfied that Bock was disadvantaged more than a person who was not a lesbian social worker. The blanket prohibition against self-disclosure at the initial intake stage silenced a fundamental aspect of identity and, the Tribunal noted, “because of their life experiences, lesbians would be sensitive to a policy that silenced them in that way, particularly in circumstances where it applied without allowing them the opportunity of exercising their professional judgment”.
- Although Bock established that the Shelter had introduced a requirement that disadvantaged her as a lesbian, the Tribunal found that Bock could not establish that the policy was unreasonable in the circumstances. Therefore the dismissal was not discriminatory.
- The issue of whether the policy was unreasonable in the circumstances was the subject of appeal to the Supreme Court. The Supreme Court affirmed the Tribunal’s decision that this was not a case of indirect discrimination as the requirement to abide by the policy was not unreasonable in the circumstances. The nature of the Shelter’s work, providing vulnerable women with essential support services, required employees to behave in a professional manner. This was particularly important at the intake stage where any distress caused to clients by employees acting in an inappropriate way may undermine the client’s trust and confidence in the Shelter. Bock’s proposed action to declare her sexual orientation and previous work experience at the initial intake stage was contrary to what was expected of a professional.

Lessons for employers

- Indirect discrimination occurs when there is a rule or policy that is the same for everyone but has an unfair effect on people who have a protected attribute. However a policy or requirement will only be unlawful where it is unreasonable. Employers should look to the impact of their policies on LGBTI employees and determine whether the policy is necessary or reasonable in the context of the employer’s business.
- The test for reasonableness is an objective one and all of the circumstances of the case will be evaluated. In particular, consideration will be given to the nature and extent of the discriminatory effect and the reasons advanced in favour of the requirement to have the policy.

Bock v Launceston Women’s Shelter Inc and Anti-Discrimination Tribunal [2005] TASSC 23.

IS IT REASONABLE TO DISCUSS SEXUAL ORIENTATION AT WORK?

Facts

- Susan Bunning was employed by Centacare as a co-ordinator providing family support.
- Complaints were made about Ms Bunning resulting in the termination of her employment for gross misconduct for bringing Centacare into disrepute. It had come to the attention of Centacare that Ms Bunning's details had been published on a website for the Brisbane Poly Group, a group interested in the polyamorous lifestyle, as a "poly-friendly" counsellor.
- Ms Bunning's contact details at Centacare were used on the website. Ms Bunning alleged that she had been asked by her managers whether she was a member of the Brisbane Poly Group and asked why she was a member.
- Ms Bunning also alleged she was told that such a lifestyle would be in conflict with the teachings of the Catholic Church, prior to her employment being terminated.
- Ms Bunning made a complaint to the Human Rights Commission on the basis that she had been discriminated against because of her sexual orientation. The Commission dismissed the complaint. Ms Bunning subsequently brought a claim with the Federal Circuit Court.

Issues

- Is polyamory a "sexual orientation" for the purposes of the *Sex Discrimination Act*?

Decision

- Sexual orientation has been defined in the *Sex Discrimination Act* as a state of being. Sexual orientation is "how one is, rather than how one manifests that state of being". The manifestation of a state of being can take many forms and is referred to as sexual behaviour. Sexual orientation is something far more than how one behaves sexually. The Court gave the example of a religious person who takes a vow of chastity – that person still has a sexual orientation as defined in the Act even though they engage in no sexual activity.
- There is a distinction between sexual behaviour and sexual activity as opposed to sexual orientation. The law only protects against discrimination on the basis of sexual orientation.
- Polyamory is a manifestation of the state of being that is a person's particular sexual orientation. It is behaviour rather than a state of being. A person cannot be polyamorous unless they engage in the activity of polyamory; in other words, it is the behaviour that makes the state of being.
- Polyamory is not a "sexual orientation" for the purposes of the *Sex Discrimination Act* and therefore Ms Bunning could not be discriminated against on the grounds of sexual orientation. The Application was dismissed.

Lessons for employers

- There are limits to the definition of sexual orientation. Sexual behaviour is not the same as sexual orientation.

Bunning v CentaCare [2015] FCCA 280.

IS A RELIGIOUS BODY EXEMPT FROM DISCRIMINATION LAWS?

Facts

- The respondent (Cobaw) is an organisation concerned with the prevention of youth suicide.
- The appellant (CYC) had a camp facility established by the Christian Brethren Trust. The Christian Brethren are opposed to same sex activity as being against biblical teaching.
- Cobaw wished to hire a camp facility from CYC for the use of same sex attracted young people. Mr Rowe, camp manager for CYC, refused Cobaw's request.
- Cobaw complained to the Victorian Civil & Administrative Tribunal (VCAT) about the CYC's refusal. VCAT held that the refusal amounted to unlawful discrimination on the basis of sexual orientation and rejected CYC's contention that the religious exemption provisions in the *Equal Opportunity Act 1995 (Vic)* (the EO Act) applied.
- CYC appealed the decision to the Victorian Supreme Court.

Issues

- The Court considered the following issues:
 - Were the individuals who would attend the camp discriminated against on the basis of their sexual orientation;
 - Did Mr Rowe, CYC or both parties discriminate against the individuals; and
 - Did the religious exemptions in the EO Act apply.

Decision

On appeal, the Court held:

- that the individuals had been discriminated against on the basis of their sexual orientation;
- that the act of discrimination was committed by Mr Rowe and that both Mr Rowe and CYC had contravened the EO Act; and
- that neither of the religious exemptions applied in the circumstances of the case.

The Discrimination Complaint

- The EO Act provides that a person must not discriminate against another person, in the provision of goods and services on the basis of their sexual orientation.
- CYC argued that they did not have a problem with a person being attracted to others of the same sex, but were opposed to the idea that this was normal and natural. The Court rejected this distinction, saying that CYC had refused to allow the individuals to stay at the campsite because of their sexual orientation.
- The Court upheld the Tribunal's finding of discrimination on the basis that CYC and Mr Rowe had treated Cobaw's group of young people less favourably than they would have treated heterosexual applicants proposing to hold a similar camp.

The Religious Freedom Exemptions

- CYC then relied upon the religious exemptions contained in the EO Act. Firstly, CYC argued they were exempt because they were a body established for religious purposes and that they refused Cobaw's request because of their religious beliefs. This was rejected by the Court because CYC was established to provide campsite accommodation to the public generally and, therefore, the purpose of CYC was not a religious one.
- Secondly, CYC and Mr Rowe argued that the discrimination was "necessary" for them to comply with their religious beliefs. CYC's argument was rejected as the exemption it relied upon applied only to individuals. Mr Rowe's argument was also rejected as it was not 'necessary' for him to require other persons to comply with his own religious beliefs.
- As a result, both CYC and Mr Rowe were found to have breached the EO Act.

Lessons for employers

- An employer is unable to argue that there is a distinction between a person's identity and activity associated with that identity in order to avoid breaching discrimination laws.
- Employers can be held directly liable for the discriminatory actions of their employees. Employers should assist their employees to understand their obligations not to discriminate and can do so by developing appropriate workplace policies and holding relevant training sessions.
- The religious exemptions in the EO Act can only be relied upon by bodies established for religious purposes and for actions that are consistent with the beliefs of the religion.

Christian Youth Camps Limited & ors v Cobaw Community Health Services Limited & ors [2004] VSCA 75

Bullying occurs when there is repeated and unreasonable behaviour by an employer or staff in a workplace towards a worker or group of workers which causes a risk to health and safety. Unreasonable behaviour includes victimising, humiliating, intimidating or threatening.

Commission Agent means a type of employment where an individual performs work on behalf of their principal and is remunerated by a commission fee.

Conciliation is an informal process that allows parties to discuss issues and negotiate to attempt to resolve complaints.

Contractor means a person who performs services for a principal under a contract between the person's employer and the principal.

Discrimination occurs when a person is treated less favourably than another person because of a protected attribute.

Harassment occurs when a person is subject to behaviour that they do not want, which offends, humiliates or intimidates the person or creates a hostile environment. A person must not be harassed because of their sexual orientation, gender identity or intersex status.

Tribunal means a body that deals with resolving disputes and has the power to make legally binding decisions.

Victimisation occurs when a person punishes or treats another person(s) unfairly because that other person has complained about discrimination or harassment (or is going to do so) or has helped or is going to help someone with a discrimination or harassment complaint.



pride in diversity

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ACON AND PRIDE IN DIVERSITY

Pride in Diversity is a social inclusion initiative of ACON, a leading health promotion organisation in NSW specialising in HIV and lesbian, gay, bisexual, transgender and intersex (LGBTI) health. ACON's mission is to enhance the health and wellbeing of LGBTI communities by ending HIV transmission and promoting the lifelong health of LGBTI people and people with HIV.

ISBN 978-0-646-96496-6



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