

Human rights in Australia and the Australian Human Rights Commission



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Louise McDermott, Solicitor, Women's Legal Services NSW on 26 May 2016. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

- A basic introduction to Human Rights Law in Australia and why bodies like the Australian Human Rights Commission, exist.
- An overview of how you or your clients can use the Australian Human Rights Commission (AHRC) and the NSW Anti-Discrimination Board (ADB)
- When you can use these bodies, which one to use and what you can expect...

Acknowledgement: the "Discrimination Toolkit- Your Guide to Making a Discrimination Complaint," Edition 3, published by Elizabeth Evatt Community Legal Centre, Kingsford Legal Centre and Legal Aid NSW, assisted in the preparation of this webinar. You can view it here: <http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/246.pdf>

Common terms

- **AHRC** = Australian Human Rights Commission
- **ADB** = NSW Anti-Discrimination Board
- **FWC** = Fair Work Commission
- **SDA** = Sex Discrimination Act
- **NCAT** = NSW Civil And Administrative Tribunal
- **FCC** = Federal Circuit Court

Human Rights Law in Australia

- There is a large amount of international law covering human rights including the nine "**core human rights instruments**" (plus optional protocols)
 - Find the list here:
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>
- Although these are considered "binding" international law, in practice these conventions are not enforceable at a domestic level unless certain steps are taken by national governments
- Countries may sign treaties and conventions but they must be implemented to be effective within those countries
- How each country goes about the task of implementing treaties is done in ways that are the most appropriate to their legal, economic, cultural, political and social circumstances.
- Australia is a party to seven of the nine core HR instruments
- Despite this, in reality Australia doesn't have very strong human rights protections
- There is an '**implementation gap**' - between the commitments made by Australia at the international level and the actions we take here in Australia
- The main ways Australia has implemented the HR instruments is by:
 - Passing laws that outlaw discrimination eg.
 - The Sex Discrimination Act (CEDAW)
 - The Racial Discrimination Act (CERD)
 - The Disability Discrimination Act (CRPD)
 - Creating a national human rights institution to hold the government to account (AHRC)

Australian Human Rights Commission

- The AHRC administers these anti-discrimination laws, along with the *Age Discrimination Act* and the *Australian Human Rights Commission Act*.
- The AHRC is essentially the Human Rights Watchdog in Australia



The NSW Anti-Discrimination Board

- The Anti-Discrimination Board (ADB) is a part of the NSW Department of Justice
- It administers the NSW anti-discrimination laws and handles complaints under the *Anti-Discrimination Act 1977* (NSW)

The basics

- You can't go straight to a court with a discrimination complaint – you must go to either the AHRC or the ADB **first**
- You can't go to both bodies about the same problem
- *So which one should you go to?*

AHRC v ADB

- The AHRC administers **federal legislation** ie. the *Sex, Age, Racial, Disability Discrimination Acts* and the *Australian Human Rights Commission Act*
- The ADB is a state body that deals with **state legislation** ie. The *NSW Anti-Discrimination Act*
- The court will conduct a hearing to determine whether the variation should be granted.
- What is the legal test for variation of an AVO?
- A court may vary an AVO if it is satisfied it is proper to do so in all the circumstances
- A court can refuse to hear an application to vary an AVO if there hasn't been any change in the circumstances on which the making of the AVO was based
- If your complaint is about conduct that is unlawful under **both** NSW and Commonwealth anti-discrimination laws, you can complain to **either** body
- If the conduct is unlawful only under NSW **or** Commonwealth law, complain to the body that administers that law
 - Eg. Some discrimination on the basis of sexual orientation is only unlawful under the NSW Act so can only be brought to the ADB

AHRC v ADB – some specifics

- If your complaint is against Centrelink or the ATO or another **federal department** you must go to the AHRC
- If your complaint is about sex discrimination in employment and it is against a NSW Government agency or department it must go to the ADB
- If your complaint is against a small business with fewer than six employees, you will have to go to the AHRC (unless your complaint is about race, age or sexual harassment)

AHRC v ADB – which one to choose?

If you can choose whether to bring your complaint to the AHRC or the ADB, one may be better than the other depending on what you want to get out of the complaint.

Case study

- Glenda works in a large shop
- Weekly team meetings are held at lunchtime
- Glenda has small children she drops at school on the way to work
- Suddenly, Glenda's manager tells the team the meetings will now be held at 8.00am
- And attendance is compulsory.
- On the face of it, it doesn't seem like that big a deal
- BUT – the practical effect of this blanket rule is that it disadvantages Glenda more than her colleagues who don't have kids and don't have to do the school drop off



How does it all work then?

- Glenda has the basis for a complaint under the Sex Discrimination Act (SDA) to the AHRC
- She appears to have been discriminated against on the basis of family responsibilities which are captured by section 7A of the SDA

What to do and where to go?

- The SDA is a federal Act
- It is administered by the AHRC
- Glenda can make a complaint to the AHRC
- Glenda could equally complain to the ADB using section 24 of the Anti-Discrimination Act NSW
- Glenda wants the option of having more systemic change introduced to the workplace
- She wouldn't mind some training to be introduced in the workplace
- She wouldn't mind keeping her options open in terms of the amount of damages she might want to pursue
- The AHRC is generally better at addressing systemic issues
- A complaint that is not resolved at the AHRC can go to the Federal Circuit Court where damages are unlimited
- A complaint with the ADB can go to the NSW Civil and Administrative Tribunal if it is not resolved
- Damages here however are capped
- Glenda decides to file with the AHRC

How does she do this and what happens?

- Glenda must make the complaint in writing – she can download the complaint form from the AHRC website or she can file it electronically
- She has to make the complaint within 12 months of the incident she is alleging is discriminatory
- Glenda can fill out the complaint form by herself or she can get some assistance – some Community Legal Centres can provide help with filling out the form
- She will need to write in the complaint form, what it is she is complaining about, when it happened and what happened
- If Glenda has any supporting information, she should include it
- She also needs to include information about how she thinks the complaint can be resolved
- The AHRC will review the complaint and see if they can investigate it
- It's likely Glenda's complaint falls within section 7A of the SDA
- The AHRC will then write to Glenda's management and ask for a response
- Once Glenda's manager responds, the AHRC is likely to call a conciliation conference
- This is an informal process
- Glenda can be legally represented if she wants or she could represent herself
- The conciliation is likely to be held within six months
- Glenda can go to the AHRC offices in Sydney to attend
- Conciliation can be done face-to-face with the assistance of a conciliator who is accredited
- Or it can be done via shuttle conciliation where Glenda will sit in one room and her manager in the other room
- The conciliator will move between the rooms and won't disclose information that she/he is authorised to disclose to the other party

Remedies – what can Glenda ask for?

- An apology
- Training to be introduced so other managers know what their obligations are
- General damages for hurt, humiliation and distress



Some exceptions?

- Just like all areas of law, exceptions or defences exist - it's important to mention what some of these are in discrimination law. They are contained in the legislation. Eg.
- Inherent requirements
 - vision impaired person refused a taxi license is not discrimination
- Unjustifiable hardship
 - It is going to cost the business too much to make the change/adjustment required
- **Other exceptions/exemptions in both the federal and state laws can include:**
 - Charities, religious bodies, voluntary bodies, accommodation for aged persons
 - Genuine occupational qualifications – race, sex, age
 - Special measures to ensure equal opportunities or to meet special needs

What happens if it doesn't resolve at conciliation?

- If Glenda attends the conciliation and there is no resolution, the President of the Australian Human Rights Commission will terminate the complaint
- She has 60 days from when the Commission terminates the complaint to make appeal to the Federal Court of Australia or the Federal Circuit Court of Australia
- Appealing may mean if you lost you must the other party's costs - the decision to appeal should only be taken after legal advice

And if she'd gone to the ADB?

- Still has to complain in writing
- Still has to complain within 12 months of the discriminatory incident
- Still has to be accepted and if it is, employer approached for response
- Still goes to conciliation

What happens if it doesn't resolve at conciliation?

- If the complaint is not resolved at the ADB it can go to NCAT
- Compensation amounts at NCAT are capped at \$100,000
- Appeal within 21 days
- As a rule of thumb, weaker cases are best run in the ADB
- The NCAT process is less formal than the Federal Circuit Court process
- It is less likely that costs are likely to be awarded against you if you lose in the NCAT

Key points to remember?

- It is free to make a complaint to the AHRC and the ADB
- Complaints to both bodies must be in writing
- You must file your complaint within 12 months of the discriminatory incident
- The AHRC might consider conduct outside the 12 months but there will still need to be a complaint within the 12 months time period
- ADB will only look at complaints within the 12 months
- You can't complain about the same matter to more than one body
- You can't complain to the AHRC and then go to the ADB or Fair Work Commission
- You can appeal from AHRC and ADB – but may be risky – get legal advice first!