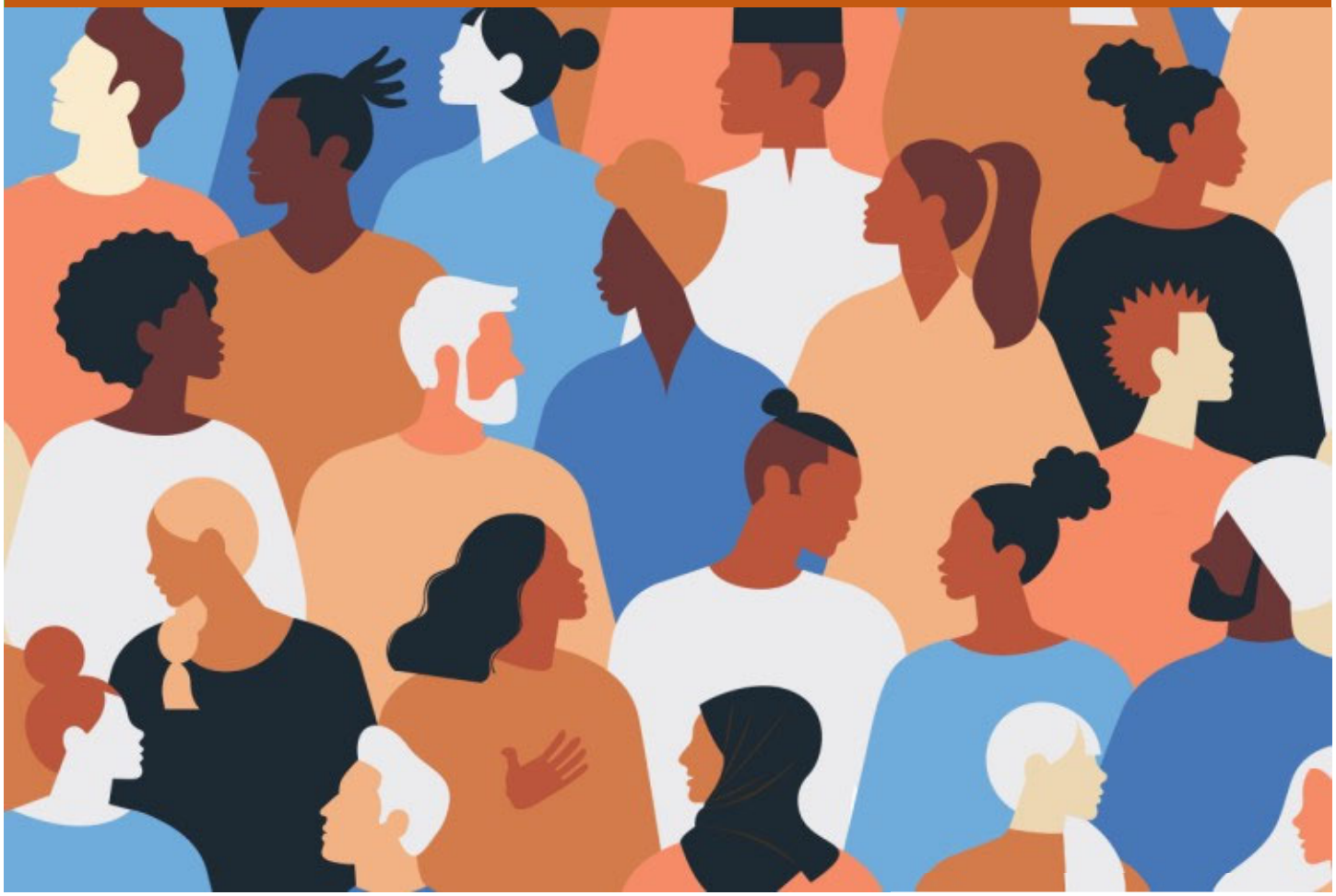
Review of NSW Anti-Discrimination Law

Joint submission to the NSW Law Reform Commission September 2023

Racial Justice Centre Ltd
info@racialjustice.au

62 659 851 699

Level 21/133 Castlereagh Street, Sydney NSW 2000



RJC

RACIAL JUSTICE CENTRE

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise these lands are and always will be First Nations land, we also acknowledge the sovereignty of First Nations Australians and their continuing connection not only to lands but also to waterways, language and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

The Racial Justice Centre is committed to providing legal services to racialised minorities, especially Aboriginal and Torres Strait Islander communities: the first raced Australians to pursue their rights on their own lands after sustained violence of racism and discrimination.

About the Racial Justice Centre

In 2022 the Racial Justice Centre (RJC) was established, an Australian first in providing an integrated organisation dedicated to eliminating racial discrimination in all forms, providing redress for those subject to racial discrimination and bringing about racial justice and racial equality for all ethnicities.

It is a not-for-profit incorporated legal entity that can give advice and take legal proceedings in relation to racial discrimination under existing legislative provisions which we know to be inadequate. It is supported by an executive and highly credential advisory committee of subject matter experts in anti-discrimination law in both academia and legal practice. It is assisted by pro-bono lawyers, along with volunteer students of law, other areas, IT and operations. It is governed by persons with lived experiences of race discrimination in Australia and abroad, and provides a necessary platform for elevating the marginalised voices of staff and clients alike.

The RJC strives to create a world where all people can live, thrive and enjoy life without racism or discrimination. It has a wide remit, including advocating for racial justice, influencing the discourse in relation to racism by way of community education and dialogue and, importantly, engaging with the Commonwealth and the states and territories to transform and enhance protections through the legislative process.

It is committed to using strategic litigation as a vehicle for spotlighting, the project of racial justice in the public domain. It is the first to use race scholars in the Tribunal process and seeks to remediate the judicial system's and the public's fragmented understanding of race discrimination and racism. By researching the harm that it creates for the individual and the collective, RJC strives to be knowledge-keepers on race discrimination cases in Australia to help hold governments, legal practitioners and industry to account. It aims to be an important stakeholder and force for change to reduce and eradicate racial injustice in our society.

Introduction

Race was the first 'protected attribute' of legal consequence in the whirlwind of 1970's Australian anti-discrimination reforms. Drawing its conceptual fervour, legal and moral imperative from the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Racial Discrimination Act 1975* (Cth) preceded the introduction of the then ground-breaking *Anti-Discrimination Act 1977* (NSW) by two years. Arguably inspired by the international covenant itself, of which Article 4 establishes the principle of racial non-discrimination, New South Wales was intended since 1977 to benefit from dual, simultaneously operating regimes designed to combat unlawful discrimination.[1]

For all its actual and perceived achievements, anti-discrimination statutes have been the subject of keen criticism and calls for reform. The majority of analysis has continued to spotlight issues of gender, sexuality and disability discrimination, while racial equality rights have suffered an incredible deficit in attention.[2] Swift strides have been made to fight sexual harassment and invest in Respect@Work – the federal government implemented a positive duty in the *Sex Discrimination Act* (Cth) within two years of the report's release.

By contrast, Australian federal and state governments have practiced silence over what has been termed the nation's shame by academic, legal and public representatives, with a scarcity of parliamentary speeches or social media campaigns centring the issue of race discrimination and racial violence– an issue which other Western democracies like Canada and the United States have accurately labelled 'genocide' or an 'epidemic'.[3] 60% of NSW and Victorian primary and secondary school students in 2017 reported that they had witnessed racism.[4] Alongside a high prevalence of racism still rampant but otherwise unspoken about in the general community, the situation is far more severe and life-threatening for our First Nations people.

First Nations women are **21.2 times** more likely to be imprisoned than non-indigenous women.	First Nations men are **14.7 times** more likely to be imprisoned than non-indigenous men.	First Nations women are murdered up to **12 times** the national average, **11 times** more likely to die due to an assault and **32 times** more likely to be hospitalized due to family violence, than non-indigenous women.

Every person's right to life, work and free pursuit of social and cultural development draws its lifeblood from the law's guarantee of equality of opportunity between all persons. In 1977, the NSW Government proclaimed that it was, "well aware that the elimination of intolerance prejudice, the promotion of equality and the complete eradication of unjust discrimination on grounds such as race, colour, sex and other grounds…will not be achieved overnight".[5] A reasonable time for necessary reforms to address the racism

---

[1] Jennifer Nielsen, 'Whiteness and anti-discrimination law – it's in the design' (2014) 10(2) *Critical Race and Whiteness Studies.*
[2] Nielsen, n 1.
[3] Brennan et al., 'The killings and disappearances of Indigenous women across Australia', *Australian Broadcasting Network* (online), 23 October 2022 <https://www.abc net.au/news/2022-10-24/murdered-and-missing-indigenous-women-four-corners/101546186>.
[4] Priest et al., Australian National University Centre for Social Research & Methods, *Findings from the 2017 Speak Out Against Racism (SOAR) Student and Staff Surveys* (2019).
[5] New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 1976, 3398 (Senator the Hon D. P. Landa).

continuing to permeate Australian public life has well and truly expired over the last 44 years. The Government has the opportunity to change that narrative and bring its anti-discrimination law into the 21st century.

Modernising Time Limits

Q1. Should time limits for race discrimination matters be extended/removed?

The President of ADNSW can currently disqualify a complaint "if whole or part of the conduct complained of occurred more than 12 months before the making of the complaint".[6]

The Racial Justice Centre provides services to clients who are racialised minorities, some clients are sophisticated and some are from non-English speaking backgrounds, have disabilities, have a low level of education and/or have experienced trauma. Given the lack of existing community legal services specialising in the area of race discrimination and nuances in the law, assistance from RJC is frequently the first time clients have sought legal advice about the mistreatment they have experienced. It is well-documented that clients find it extremely difficult to understand and evaluate all the benefits and disadvantages of taking a particular course of action amidst family, work and other everyday commitments, let alone after experiencing the demoralisation and/or humiliation of racial discrimination. It is well-established that the medical profiles of the average victim of race discrimination is characterised by general poor mental health, poor health perception, anxiety, depression, asthma, increased BMI, psychological distress and sleeping difficulties.[7] Also, the fact that many victims understand if they speak out at work, victimisation shall follow, and they risk losing their job. The exceptionally short time limit under the AD Act to lodge a race discrimination complaint not only compounds the stress and sense of powerlessness suffered by victims - it locks an enormous proportion of prospective complainants out of due legal redress.

In concert with financial and evidentiary barriers posed by costs considerations and a victim's burden of proof, time limits severely inhibit access to justice and create a disincentive for victims to raise concern or make complaints. They frustrate the foundational purpose of the AD Act to create an enforceable "right to be treated with equal dignity", "expect equal treatment in society" and confer victims with "the protection of the law…against unjust social pressure".[8]

Case Study – Kate*

Kate was a permanent full-time senior Indigenous employee at a NSW Government service agency who experienced racial discrimination over a period of years at the agency. Despite her clear seniority, Kate was not offered the opportunity to progress and do interesting work compared to her white male employees in the same role including many positions below her. She was subjected to a higher bar to maintain her transfer and asked many intrusive questions about her brother's disability, the age of her parents and what percentage of Aboriginal she was. While working there, she was subjected to many racial slurs from her colleagues about women and about Aboriginal people in general.

---

[6] Anti-Discrimination Act 1977 (NSW) s 89B(2)(b).
[7] Kairuz et al., 'Impact of racism and discrimination on physical and mental health among Aboriginal and Torres Strait islander peoples living in Australia: a systematic scoping review' (2021) 21(1) *BMC Public Health* 1302.
[8] New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 1976, 3390 (Senator the Hon D. P. Landa).

Kate was unable to lodge a complaint under the AD Act any earlier than she did due to fears of creating an unsafe and hostile work environment and the time expended in attempting to pursue non-legal remedies, including an internal complaint to the agency's Professional Standards Division. As a result, Anti-Discrimination NSW limited the ambit of the complaint to the last 12 months and excluded all acknowledgement and redress for an extended period of unacceptable and illegal race discrimination exacted by the agency and its employees.

This example was the same of another long-standing employee of a NSW Government agency, who complained about race discrimination over the course of years to Anti-Discrimination NSW but they would only consider the ambit of the complaint over the last 12 months, excluding many years of discrimination.

Shifting the Burden of Proof

Q2. Should the burden of proof be shifted away from victims of race discrimination?

The Australian Human Rights Commission (AHRC) has already identified a need to evaluate "whether there should be any change to discrimination laws regarding the evidentiary onus of proof".[9] Current victims of race discrimination bear the sole legal and evidentiary burden of proof in satisfying NCAT that it is 'fair and just' in the particular circumstances of the case to grant leave for the complaint to proceed.[10]

Victims must shoulder an even heavier burden of proof on appeal to the NSW Supreme Court. Allegations of discrimination are 'serious matters', thus the *Briginshaw* rule requires proof of a higher quantum or probative value to satisfy the normal civil standard of proof 'on the balance of probabilities'.[11]The success of anti-discrimination cases often hinges on causation, namely whether the protected attribute is a 'true basis' or 'real reason' for the discriminatory conduct. [12]

The preponderance of cases over decades has demonstrated that unless 'conduct is unequivocal', the burden of proof is almost insurmountable where proving complaints through inference. Australian tribunals are reluctant to draw inferences without cogent evidence.[13] Direct evidence of discrimination is scarce: "[f]ew employers will be prepared to admit such discrimination even to themselves" and only a "particularly obtuse" wrongdoer is likely to use explicit forms of discrimination.[14] The victim's capacity to point to 'unconscious reasons' in no way mitigates the extreme difficulty of furnishing proof.[15] Where most complaints are heard by a general civil tribunal rather than a specialist tribunal,[16] less experienced tribunals unfamiliar with the subtleties of discrimination are more inclined to accept the perpetrator's explanation at face value despite contrary evidence.[17]

---

[9] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (October 2019).
[10] *Ekermawi v Administrative Decisions Tribunal of New South Wales* [2009] NSWSC 143, [36]; *Jones v Ekermawi* [2009] NSWCA 388, [58].
[11] *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Qantas Airways Ltd v Gama* [2008] FCAFC 69, [113]-[119].
[12] *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176.
[13] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia (2009) 31(4) *Sydney Law Review* 579.
[14] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 182.
[15] *Purvis v New South Wales* (2003) 217 CLR 92, quoting *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48; *Hussein v Commonwealth of Australia Department of Human Services Centrelink* [2015] FCCA 1440 (29 May 2015).
[16] Colin Bourn and John Whitmore, *Race and Sex Discrimination* (2nd ed, 1993) 108.
[17] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia (2009) 31(4) *Sydney Law Review* 579.

The AD Act's express prohibition on direct (and indirect) discrimination has spawned increasingly subtle 'covert' forms of racism that the Act fails to account for and the applicant is invariably ill-equipped to substantiate. The whole process of seeking meaningful redress for race discrimination becomes void, or at least unacceptably prejudicial to the injured party, where the respondent is "likely to have a monopoly on knowledge" and "invariably controls all information essential to the complainant's case….[i]n the absence of a clear statement of bias or expression of discriminatory intention". [18]

For example, asymmetries in knowledge resources between the parties to indirect discrimination cases create structural unfairness particularly where there is a legal obligation to keep records of the ethnic demographics of employees in workplaces for example, unlike gender. A plaintiff who must prove that a substantially higher proportion of persons not of that race comply or are able to comply with a requirement is deprived of the ability to do so where the respondent institution guards the statistical information relevant to a specific workplace. While the United Kingdom has created a mandatory requirement for organisations with over 250 employees to make annual pay gap data publicly available, victims of race-based employment discrimination in Australia are left with no recourse in discharging the evidentiary onus.

The greatest expense of failing to shift the onus of proof will be born by the most vulnerable and those which the AD Act was designed to protect: those intersectionally disadvantaged, including women of colour and migrants with a disability, who are most likely to lack the time, administrative and social resources to locate evidence of causation. This is in addition to a power imbalance that often already exists between victims and perpetrators of discrimination. As Monash University Associate Professor Dominique Allen observes, "it all depends on someone who has gone through an awful experience, who often comes from a vulnerable or disadvantaged background, to name, blame and claim": "that places an incredible burden on the individual to try and tackle what is a societal issue".[19]

A NSW legislative provision to shift the burden of proof to respondents is consistent with calls for the same change in other state jurisdictions and codified anti-discrimination law in comparable international jurisdictions. In its submissions to the WA Law Reform Commission reviewing the Equal Opportunity Act 1984 (WA) and the Queensland Human Rights Commission reviewing the Anti-Discrimination Act, the Australian Discrimination Law Experts Group (ADLEG) identified "a rebuttable presumption based on section 136 of the Equality Act 2010 (UK)" as a necessary reform.[20] As in Canada, the US and the European Union, the Equality Act shifts the burden of proof to the respondent once the claimant has established a prima facie case:

> **136 Burden of proof**
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

[18] Jonathan Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535.
[19] Dominique Allen, ''Incredible burden' on the victim: The problem with Australia's anti-discrimination laws', *Monash Business School* (Web Page) https://www monash.edu/business/impact-acceleration-grant-scheme/incredible-burden-on-the-victim-the-problem-with-australias-anti-discrimination-laws.
[20] Australian Discrimination Law Experts Group, Submission to the Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (30 November 2021) 80; Australian Discrimination Law Experts Group, Submission to the Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (1 March 2022) 25.

With respect to indirect discrimination, the ADLEG's proposed amendment stipulated that, "The person who imposes, or proposes to impose, the requirement condition or practice has the burden of proving that the requirement, condition or practice is reasonable." As a leading nationwide body specialising in anti-discrimination law, due weight must be accorded to the ADLEG's conclusion that this measure would remove time-consuming, costly and preliminary technical issues that frequently obstruct access to justice (as below). It would allow the respondent to volunteer what they know about what they are alleged to have done.[21]

In response to the NT Consultation Draft Anti-Discrimination Amendment Bill 2022, ADLEG held that the reform was not only warranted but uncontroversial. The Federal Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act 2004 (Cth) all expressly provide that the burden to prove reasonableness in respect of indirect discrimination must fall on the respondent.[22] At the state level, Equal Opportunity Act 2010 (VIC) s 9(2) likewise shifts the burden for indirect discrimination to the defendant to prove reasonableness of a requirement or practice with the 'actual or likely effect of disadvantaging a person with a protected attribute'. In Australian industrial law, the Fair Work Act has long accommodated and cemented shifts in the onus of proof in ss 361 and 783.[23] This reverse burden of proof has not added a high number of claims to the caseload of the FW Commission nor federal courts, having minimal effect on efficiency and resources.[24] Further, a reverse burden of proof is unlikely to pose an unfair advantage for employees who are still required to present their case with sufficient clarity and particulars.[25]

As ADLEG rightly states, "Discrimination harms society as a whole and every member, not merely the identified aggrieved persons. For this reason, an obligation to address discrimination should be shared widely across society, and the identified aggrieved person should not bear an onerous burden in driving change", nor seeking relief for their own individual losses.[26]

Case Study: Paige*

Paige is an Aboriginal woman who sought the assistance and protection of NSW Police after suffering intimidation and property damage directed to her and her 16 month-old infant son at the hands of a bike rider. After attending the Police station to have her statement taken she was treated with suspicion, police did gather evidence of intimation and property damage, failed to provide an Aboriginal Liaison Officer at her request and issued her with an infringement notice for negligent driving (later dismissed with costs against the police). By contrast, the same officer took possession of photographs the bike rider had and made a decision not to accept that Paige was the victim of a crime and decided not to charge the bike rider with crimes that fit his conduct .

Paige's case is especially revealing of the inequities of the burden of proof, given that the Police who are the respondents were bound at all times by the government's Model Litigant Policy. By unnecessarily prolonging this case and retaining evidence pertinent to the case, the police breached duties under this policy to:

[21] Australian Discrimination Law Experts Group, n 13, 80.
[22] Australian Discrimination Law Experts Group, Submission to the NT Department of Attorney-General and Justice, *NT Consultation Draft Anti-Discrimination Amendment Bill 2022* (12 August 2022) 30.
[23] Australian Discrimination Law Experts Group, n 13, 9.
[24] Kingsford Legal Centre, *Submission to the Australian Human Rights Commission's Willing to Work Inquiry into employment discrimination against older Australians and Australians with disability* (4 December 2015) 6.
[25] *Fox v Stowe Australia Pty Ltd* (2012) 271 FLR 372, [27].
[26] Australian Discrimination Law Experts Group, n 13, 6.

1. Not take advantage of a claimant who lacks the resources to litigate a legitimate claim;
2. Deal with claims promptly and not cause unnecessary delay; and
3. Keep the costs of litigation to a minimum by not requiring the other party to prove a matter which the State or the agency knows to be true.[27]

In *IW v City of Perth* [1997] HCA 30, Justice Kirby noted that, "[t]here are strong reasons of principle why a higher, and not a lesser, standard should be expected of such bodies in the performance of functions that may be characterised as the provision of governmental 'services'. Where access to materials critical to validate an inference of causation are jealousy gatekept by respondents and especially public institutions like the police, race discrimination complainants like Paige are unfairly disadvantaged.

Case Study – Stephanie*

Stephanie, a woman of non-European descent, is a professional and held senior positions at a NSW Government agency over a period of 5 years. During her employment with the agency, Stephanie had sent multiple emails to the Executive and forwarded to the Human Resources Director requesting a meeting to discuss experiences of direct and indirect discrimination in the workplace. Numerous follow-up emails over six months were not replied to.

Before taking 12 months leave, Stephanie relinquished her permanent role and the agency's then CEO informed her that she would be subsequently assigned "to another ongoing role should she return". Upon seeking to return to work, the agency only offered her one role that was equal in pay but substantially different in status and responsibilities. The role was far away from her home, after Stephanie had informed the agency that she had carers responsibilities for young children via written correspondence. When Stephanie inquired as to why she was not offered a vacant legal role that was appropriate to her skill-set, the agency reasoned that she lacked the necessary specialised skills. When the agency was questioned on why a graduate was within the role on a temporary basis if it was so specialised, they later requested that she attend an interview for the role.

Stephanie's first step was to submit a complaint to ADNSW. ADNSW issued its decision without asking Stephanie further questions. Due to ADNSW's want of interest to investigate her victimisation further and lack of a direct pathway to a hearing on the merits of the case, Stephanie had no choice but to pursue a preliminary leave hearing at NCAT. Like most complainants who experience discrimination at the hands of a larger employer or institution, Stephanie lacked access to any of the internal communications or candid assessments held by the agency. This made to proving causation at the very first stage of the complaint process unfairly difficult. As it stands, the burden of proof is an unrealistically tall order for complainants even with legal representation in a process that purports to be designed for unrepresented complainants.

[27] Department of Communities and Justice (NSW), 'Model Litigant Policy for Civil Litigation' (Memorandum, 2016) < https://www.dcj nsw.gov.au/content/dam/dcj/dcj-website/documents/service-providers/out-of-home-care-and-permanency-support-program/contracts-funding-and-packages/barnados/ANNEXURE-B-Model-Litigant-Policy-for-Civil-Litigation.pdf>.

Positive duty to prevent racism at work

Q3. Should a positive duty to prevent racism at work be introduced for racial equality and to close the ethnic employment and pay gap?'

Over the 44 years of its enactment, NSW anti-discrimination law has failed to offer substantive solutions to race-based employment discrimination by overlooking structural and institutional racism that is the cause of such discrimination and the mischief the government seeks to eradicate. Race discrimination law limits the experience of Australians of non-European backgrounds in the employment process, from the stage of initial recruitment to promotion.

In 2009, an ANU study which sent over 4000 identical CVs to employers in Brisbane, Melbourne and Sydney revealed that Chinese, Middle Eastern and Indigenous applicants must respectively submit 68, 64% and 35% more applications to procure the same number of interviews as applicants with an Anglo-Saxon name.[28]

Statistics published by Monash University in 2023 uncovered that the same discriminatory barriers continue to plague promotion and talent pooling processes, with ethnic minorities receiving 57.4% and 54.3% fewer positive responses for leadership and non-leadership positions respectively than applicants with identical resumes and English names.[29]

A Southern Cross University study in 2020 provides first-hand accounts of highly skilled Black African professionals holding senior roles in medicine, academia, nursing, teaching, banking, finance, IT, engineering and social work, substantiating that employees of colour are often passed over for promotions or opportunities to backfill senior positions or if they are backfilling.[30] The Australian Human Rights Commission 2018 report *Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership Revisited* demonstrated the natural consequence of such barriers: 95% of senior leaders are of Anglo-Celtic or European background. In stark contrast, a suspiciously slender 0.9% of Australian senior executives in 2015 were culturally and linguistically diverse women.[31]

In *Abdulrahman v Toll Pty Ltd t/as Toll Express* [2006] NSWADT 221, a forklift driver of Lebanese descent was subjected to unlawful discrimination in the form of name-calling (eg 'bombchucker','Osama Bin Laden'). The Tribunal was satisfied that his workplace failed to properly implement an existing discrimination and harassment policy. Management and union delegates endorsed and condoned a discriminatory atmosphere in the workplace. Other employees engaged in the name-calling as a result. The plaintiff did not complain earlier due to fears of losing his job and responsibilities to his family.

The empirical and legal evidence provides no clearer indication that our current approach to legislating away racism at work is not fit for purpose. Racial minorities are not enjoying the same equality of opportunity to participate fully in public life, nor economic rights as non-racialised persons. Where

[28] Andrew Leigh, Alison Booth and Elena Varganova, 'Does racial and ethnic discrimination vary across minority groups? Evidence from a field experiment' (2009) *SSRN Electronic Journal.*
[29] Mladen Adamovic and Andreas Leibbrandt, 'Is there a glass ceiling for ethnic minorities to enter leadership positions? Evidence from a field experience with over 12,000 job applications' (2023) 34(2) *The Leadership Quarterly.*
[30] Kathomi Gatwiri, 'Racial Microaggressions at Work: Reflections from Black African Professionals in Australia' (2021) 51(2) *The British Journal of Social Work.*
[31] Women on Boards. Truth Be Told: Cultural Diversity on Australian Boards, Sydney, Women on Boards Australia, 2022.

financial access to justice barriers are preventing a substantial proportion of victims from vindicating their rights, a 'positive duty' on workplaces themselves to address discrimination is a necessary addendum to NSW anti-discrimination law. More specifically, a positive duty vindicates the basic rights of victims to litigate in the first place and seek protection.

In Victoria, the Equal Opportunity Act (VIC) s 15(2) (**EOA**) has imposed a positive duty on employers to take reasonable and proportionate measures to eliminate discrimination and victimisation as far as possible for over 10 years. The scope of the positive duty is given rational boundaries, taking into consideration the size of the employer organisation or business, the nature of its circumstances, operational priorities and the cost and practicability of the relevant measures (EOA s 15(6)(a)-(e)).

In the ACT earlier this year, the Discrimination Amendment Act 2023 (ACT) was passed, amending the Discrimination Act 1991 (ACT) (**DA**) to impose a positive duty to "take reasonable and proportionate steps to eliminate discrimination, sexual harassment and unlawful vilification"[32] on "an organisation or business, and any individual with organisational management responsibility for an organisation or business" from April 2024 onwards.[33] The amendment provides for a staggered commencement, requiring public authorities to implement protections within one year and other organisations to do so in three years "to provide duty holders with sufficient time to build their awareness and understanding of the positive duty and adjust their policies, procedures and processes as necessary".[34]

That the ACT government intended this positive duty to have full legal force, effect and potency is indicated by DA s 53DB which confers upon the ACAT a pro-active power to consider whether a positive duty has been met when considering a discrimination complaint. DA s 75(3) expresses the test for 'reasonable and proportionate steps' in identical terms to EOA s 15(6), indicating an existing project of standardising anti-discrimination law across jurisdictions. In its explanatory statement, the ACT government's rationale for implementing a positive duty aligns with the NSW Government's original inception of "an educative, rather than a punitive approach" as "the long-term answer to problems of discrimination":[35]

> "The purpose of the positive duty is to encourage duty holders to think proactively about their compliance obligations under the Discrimination Act and address instances of systematic discrimination within an organisation or business. It is envisioned that that this approach will facilitate greater respect for diversity and social inclusion in the community by: encouraging duty holders to prevent unlawful behaviour before it happens; making it clear that addressing unlawful conduct is a shared responsibility and that complainants should not bear the sole burden for enforcing the protections outlined in the Discrimination Act; encouraging organisations and other duty holders to consider the causes and impacts of discrimination."[36]

In the federal jurisdiction, the Commonwealth Government recently endorsed and legislated a positive duty into the Sex Discrimination Act 1984 (Cth) in December 2022 to address equivalent disparity of opportunity suffered by women in the workplace. This reform was motivated by the 2020 AHRC Respect@Work report which reasoned that a positive duty on employers to prevent sexual harassment was a corollary of a broader duty "to eliminate or manage hazards and risks to a worker's health, which includes psychological health".[37] In that same report which found that almost 40% of women had

---

[32] *Discrimination Act 1991* (ACT) s 75(2).
[33] *Discrimination Act 1991* (ACT) s 75(1).
[34] *Discrimination Act 1991* (ACT) s 75(4); Explanatory Statement, Discrimination Amendment Bill 2022 (ACT) 32.
[35] New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 1976, 3390 (Senator the Hon D. P. Landa).
[36] Explanatory Statement, Discrimination Amendment Bill 2022 (ACT) 33.
[37] Australian Law Reform Commission, *Respect@Work: National Inquiry Into Sexual Harassment in Australian Workplaces* (Report, 2020) 31.

experienced sexual harassment in the workplace in the last five years, the risk for indigenous women was even higher (53%, compared to 32% of non-indigenous women).[38] Racism presents a psychosocial risk of comparable gravity - it must be addressed with similar measures and equal force. The argument for remedial parity between different forms of discrimination is one strongly advanced in the American legislative context:

> "The manifestations of these various forms of intentional employment discrimination are the same: loss of employment opportunities; disparities in wages, employee benefits, and other forms of compensation; imposition of unequal working conditions; and harassment. Moreover, the harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same: humiliation, loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries. Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well. [Gender discrimination] is as reprehensible as race discrimination, and should be treated the same for purposes for making victims whole, encouraging private enforcement, and deterring future violations of federal law."[39]

We maintain that a positive duty is critical to modernising anti-discrimination law, overcoming overlooked and massively consequential 'access to justice' limitations posed by a reactive complaints-based discrimination framework and removing inequitable inconsistencies between different Australian jurisdictions and heads of employment discrimination.

However, if the government is truly committed to providing "far more effective remedies than does any other legislation introduced in this country" and re-assume the mantle of introducing "pioneering" reform as was its original intent,[40] we submit that the positive duty must extend beyond the Victorian and ACT provisions to create an independent cause of action for the victim.

In Victoria, *Collins v Smith* [2015] VCAT 1992 was the first and only action to be pursued under the EOA positive duty over the 13 years of its enactment. VCAT held that the respondent employer was obliged to comply with the positive duty, but that it lacked jurisdiction to assess whether the duty had been breached.

The only avenue for redress appears to be potential investigation instigated by the Victorian Equal Opportunity Human Rights Commission (**VEOHRC**) itself (and consequent discretionary action it sees fit to take), a VCAT referral or report to parliament or the Attorney-General. VEOHRC staff confirm that the primary use of the duty is currently confined to encouraging training and education. [41] Once again, this places the burden of discrimination back on the victim who lacks any meaningful, structured and enforceable avenue of complaint. The NSW Government must not only allow Tribunals the discretion to consider the positive duty in discrimination complaint as in the ACT, but provide a legal foot-hold for relief for the very individuals for whom the system was designed to be user-friendly.

Case Study – Kate*

[38] Australian Law Reform Commission, n 31, 10.
[39] H.R. Rep. No. 102-40, pt.2 at 24
[40] New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 1976, 3390 (Senator the Hon D. P. Landa).
[41] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act'(2020) 44(2) *Melbourne University Law Review* 459.

Kate was the direct subject of numerous racial slurs and offensive questioning about her genealogy over email and at cultural awareness training sessions over nearly a decade of service at a NSW Government agency. Furthermore, Kate's experience of racial discrimination as a permanent full-time senior Indigenous employee was mediated through and facilitated by specific workplace policies. For example, the agency prohibited early transfers between workplace locations unless the employee had 'compelling and/or compassionate' reasons. In an email to the area manager which included a corroborating email from her father, Kate applied for exigent circumstances and explained that she was required to assist her parents in caring for her brother with down syndrome due to reduced external care arrangements during the pandemic. Further, her current placement at a COVID-19 hotspot was apt to expose her vulnerable family to illness.

The area manager denied Kate's request on the grounds that she did not satisfy the criteria for exigent circumstances and further consideration of her application would be subject to the provision of additional documentation. Kate complied with this condition and provided information regarding the care needs of her elderly parents and disabled sibling, as well as a medical certificate from her GP. The area manager called Kate directly, asked her questions that no employee would be comfortable with and which made her feel intimidated (e.g. the age of her parents, the care arrangements of her family, how disabled her brother was) and ultimate denied her application. Later, Kate was forwarded an email chain in which the area manager described her as 'part indigenous' and stated that her 'Indigenous circumstances had only now come to light' (which was untrue). As a result of these racial aggressions, Kate did not attend work for four and a half months and has been attending frequent medical reviews with multiple professionals for insomnia, increased heart rate and anxiety.

Had the agency's workplace policies and cultural standards been subject to a statutory positive duty (e.g. requiring formal education and training of leaders, managers and staff, altering codes of conduct or performance review processes),[42] Kate would likely have been saved of the physical, emotional and psychological trauma that flows from workplace race discrimination over an extended period. The legislation would have compelled the agency to set up a risk management system, consider data relevant to the granting of transfers and consult staff like Kate whose interest would be protected by a positive duty.[43] The average person will spend a third of their lifetime in the workplace;[44] imposing a positive duty to protect racial minority Australians from discrimination is squarely tied to rights to economic security, health and life.

Case Study – Stephanie*

Stephanie was one of nearly twenty individuals at the NSW Government agency to report experiences of racism in the course of their employment. A positive duty was clearly a critical measure that could have protected the vast body of complainants who have not received any redress for their loss at this time. Many of the complainants were women of colour who would have been protected by the minimum standards imposed by a positive duty, namely for the agency to consider evidence of systemic and intersectional discrimination and assess information about the organisation's culture, policies and systems.[45] A positive duty that compelled the agency to raise awareness of and afford due support towards the complaint procedure would have allowed the multiple individuals who, unlike Stephanie, chose not to come forward publicly due to a lack of safety within the workplace.

---

[42] 'Positive duty', *Victorian Equal Opportunity & Human Rights Commission* (Web Page) < https://www humanrights.vic.gov.au/for-organisations/positive-duty/>.
[43] 'Positive duty', n 35.
[44] Gettysburg College, 'One third of your life is spent at work', *Gettysburg College* (Web Page) < https://www.gettysburg.edu/news/stories?id=79db7b34-630c-4f49-ad32-4ab9ea48e72b>.
[45] 'Positive duty', n 35.

An individual complaint lodged to ADNSW is limited to acts of discrimination that occur within the 12 months proceeding the date of the complaint,[46] confining the operation of the AD Act to discriminatory acts in the 'present', not systemic experiences of discrimination in the 'past'.[47] Stephanie sought redress for years of race-based discrimination and victimisation, but the ambit of her complaint was abridged and disregarded a sustained period of loss.

A positive duty is necessary in a case like Stephanie's where the need for an individual act or complaint does not align with the realities of systemic racism. Reporting to anti-discrimination experts, ADNSW staff have acknowledged that, "all we can do is act on individual complaints, then in theory, every single person in this area who is discriminated against by [this agency] has to make a complaint, and we deal with each of them individually, without recognising that it might be coming from one source".[48] Where the NSW Government opts not to introduce a positive duty, the net effect is to structurally define race discrimination as the victim's problem, not a workplace's.[49]

Case Study – Caroline*

Caroline is an Aboriginal elder and worked as an employee at an agency. Caroline had been the target of adverse comments in the workplace made by her direct manager over that time.

Caroline looked after a young female Indigenous client who had a background of childhood disadvantage and whom she encouraged to explore their First Nations identity and culture. In a conversation she had with the client, Caroline stated that she was going back to country. Her client expressed her interest in going with Caroline, to which Caroline replied that there would have to be many checks completed and would approach a senior employee to have a conversation about helping her client learn about the blackfella way. Caroline believed that providing her client with a connection to culture and country would help her on her healing journey.

Caroline was quickly suspended and interrogated. Upon being asked to a meeting, her supervisor did not take any notes or offer any guidance or advice. Caroline was summarily dismissed on purported grounds of 'dual roles' and 'conflict of interest' without any chance to respond. She was not afforded the opportunity to 'close the loop' with her clients and other agency employees became aware of her dismissal.

The agency despite citing the 'Code of Conduct' had no basis for terminating Caroline's employment where she had not pursued any hypothetical trip, nor would any such trip have been contrary to her primary employment duties of acting in the client's therapeutic interest. The agency's default position was to view Caroline through a lens of suspicion, and assume blackfella healing on country has no legitimacy. The speed with which they jumped to conclusions and mischaracterised Caroline's acts and motivations as misconduct is telling. Had the agency come under a positive duty to identify and analyse blindspots in cultural sensitivity embedded within their workplace policy and performance review processes, as well as consult staff members affected, Caroline would not have suffered consequent personal and interpersonal humiliation and health issues.

[46] *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).
[47] Nielsen, n 1, 7.
[48] Jennifer Nielsen, 'An Intractable Problem: The Endurance of Settled White Privilege in Mainstream Work Cultures' (2007), 34. Unpublished PhD Thesis. Melbourne: The Melbourne Law School.
[49] Nielsen, n 1, 8.

Modernising the test for direct discrimination

Removing the 'Comparator'

The Australian Human Rights Commission recently set out the three prevailing Australian models for defining direct discrimination:[50]

The comparator is currently the predominant means of determining causation in NSW anti-discrimination law. The test of an actual or hypothetical person who does not have a particular protected attribute (e.g. race, sex, disability) provides a standard against which the complainant's treatment is deemed 'less favourable' and was actually effected 'on the grounds of race'. This test has proven unworkable for complainants who seek to establish the comparison – oftentimes the lynchpin of their case.

In a recent Federal Court race discrimination case *Campbell v Northern Territory (No 3)* [2021] FCA 1089, an Indigenous applicant brought proceedings under the Racial Discrimination Act (Cth) s 9(1) in relation to a decision to transfer him to Don Dale Youth Detention Centre and a refusal to transfer him back to the Alice Springs Youth Detention Centre. The Court did not have to resolve whether his treatment involved a relevant distinction, exclusion or restriction because at the first test he failed to establish causation for want of a comparator. The applicant's case manager at Don Dale stated that he had never seen a transfer decision made on the basis of the detainee's race because "[a]lmost all of the detainees were Indigenous" and he could "only recall one or two non-Indigenous detainees".[51] This produces the highly distorted and inequitable result that a plaintiff 'did not experience' discrimination because "those suffering the disadvantage of discrimination may find themselves in circumstances quite unlike other more fortunate than they". [52] Actual and hypothetical comparators who are required to be in the same or similar factual situation as the plaintiff are not viable because the test does not allow them to exist – the very fact that they lack the protected attribute often precludes the possibility that they would find themselves in that situation in the first place.

For over two decades, the NSW Government has failed to heed the alarm raised by the NSW Law Reform Commission in its 1999 review of the AD Act which pinpointed "widespread dissatisfaction", "conceptual difficulties", "artificiality and resulting complexity" of the comparator test.[53] Its inaction likewise rebuffs the more recent pronouncement of the Australian Human Rights Commission in 2021 that, "the application of the comparator test" is frustrated by "significant difficulties, including complexity in interpretation and uncertainty of outcome".[54] Such reports necessarily reflect the tenor of influential judicial authority. High Court justices Kirby and McHugh JJ have long condemned the comparator test as 'conceptual shackles' placed on victims of discrimination.[55]

---

[50] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (December 2021) 280.
[51] *Campbell v Northern Territory (No 3)* [2021] FCA 1089, [733].
[52] *Baird v Queensland* [2006] FCAFC 162, [63] (Allsop J).
[53] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No. 92, 1999) [3.51].
[54] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 279.
[55] *Purvis v New South Wales* (2003) 217 CLR 92.

Modernising the test for discrimination by removing the comparator will bring NSW up to speed with the Equal Opportunity Act 2010 (VIC) s 8(1) which decisively replaced 'less favourable treatment' with 'unfavourable treatment' ('Detriment' test):

> "The intention of the new definition is to overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing whether direct discrimination has occurred."[56]

Although the comparator test is intended to produce the same policy outcome as the 'detriment' test, it remains significantly more complex and engenders divergent views between parties when identifying and constructing the relevant comparator.[57] We maintain that the comparator test must be removed in the vital interests of access to justice and the efficient administration of the court system. Victorian judicial authority has affirmed the change as a "purposeful…not an inadvertent one" and held that a comparator is a useful but not required consideration.[58] In the federal jurisdiction, the Federal Court has also endorsed the use of a comparator as merely one of a range of analytical devices that can be used to establish causation in anti-discrimination law. A more flexible form of 'comparative reasoning' is applicable to the Racial Discrimination Act (Cth) and has been favoured as "one that is not constrained by the complex comparator structure found in other federal anti-discrimination statutes".[59]

This alternative test has been successfully modelled in influential discrimination cases such as *Wotton v State of Queensland* (No 5) [2016] FCA 1457*, Qantas v Gama* [2008] FCAFC 69 and *Vata-Meyer v Commonwealth* [2015] FCAFC 139 which have compared the complainant's treatment with what was required by workplace policies for development and training. In *Wotton,* Mortimer J found a rational basis for discrimination by comparing actual police conduct with what was required by police policies in response to local protests

Intersectionality

The Australian Human Rights Commission defines 'Comprehensiveness' and 'Intersectionality' as essential parameters of anti-discrimination reform.[60] The AD Act should be modernised to prohibit discrimination on the basis of a combination of attributes (**Intersectional discrimination**) and affirm its statutory purpose: "the intention of the legislation is to regulate as widely as possible irrational discrimination".[61] Intersectional discrimination permeates all areas of public life, including employment. A 2023 Diversity Council of Australia Report announced that 65% of culturally and racially marginalised women enjoyed fewer career advancement opportunities and 42% were scrutinised more closely in their work than other women. An earlier study by MindTribes in 2019 had already publicised that women of colour, indigenous or mixed cultural heritage experience racism and discrimination at 2.6 times the rate of women of Anglo or European descent.[62]

In its present state, the AD Act requires complainants to demonstrate that mistreatment was caused by one specific protected attribute and treats discrimination based on each separately by establishing discrete Parts

---

[56] Explanatory Memorandum, Equal Opportunity Bill 2010 (VIC), 12-13.
[57] Australian Government Attorney-General's Department, Consolidation of Commonwealth AntiDiscrimination Laws: Discussion Paper (September 2011) [26], [28], [31], [32].
[58] *Slattery v Manningham City Council* [2013] VCAT 1869, [39], [53].
[59] *Wotton v State of Queensland* (No 5) [2016] FCA 1457, [540].
[60] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (October 2019).
[61] New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 1976, 3391 (Senator the Hon D. P. Landa).
[62] MindTribes, 'Safe Workplaces for Women of Colour' (Summary Report, 2019).

for each. This separation fails to capture discrimination based on multiple attributes or an attribute that falls in the gap between distinct categories such as race, sex, carer's responsibility, disability etc.

For example, direct discrimination based on imputed race (AD Act s 7(2)) and sex (AD Act s 24(2)) can only be based on a characteristic that is 'generally imputed' to a person of that 'race' or 'sex', not to a person of a particular 'race' and 'sex'. Where an attribute is not 'generally imputed' to most persons of a particular sex or of a particular race, and is specific to a sub-group of persons of a particular sex and race, plaintiffs already burdened by intersectional disadvantage will struggle to make out either claim which must be made separately. A modern law must necessarily provide for those who are most need of its protection.

The ACT *Discrimination Act 1991* provides a model for locating and addressing intersectional discrimination:

> **8 Meaning of Discrimination**
>
> (2) For this section, a person directly discriminates against someone else if the persons treats, or proposes to treat, another person unfavourably because the other person has *1 or more protected attributes.*
>
> (3) For this section, a person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have the effect of disadvantaging the other person because the other person has *1 or more protected attributes.*

In international law, *the Equality Act 2010 (*UK) has proscribed dual discrimination for over 10 years, using the following provision:

> **14 Combined Discrimination: Dual Characteristics**
>
> (1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.
> (2) For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

Case Study: Stephanie*

Stephanie's case is an example of intersectional discrimination. However, since anti-discrimination claims must be made with discrete reference to one specific protected attribute at a time, Stephanie has little to no scope to litigate the true gravity of her 'less favourable treatment' in comparison to a comparator who does not possess the same race, sex *and* carer's responsibility but also occupied a similar role. Were Stephanie's case to be litigated in ACT or the UK, she would not be so patently and unnecessarily disadvantaged in her claim and the risk of procuring redress that is disproportionate to the loss she suffered on multiple grounds would be greatly attenuated.

Case Study – Caroline*

Caroline, an Aboriginal Elder woman, encountered intersectional discrimination during her dismissal by her employer agency. The agency used the language of 'poaching' to describe Caroline's 'predatory' conduct and argue a breach of the 'Code of Conduct' that staff have not conflict between their private interests and their duties. At present, NSW anti-discrimination law will not permit Caroline to argue any possibility that her treatment resulted from a combination of race, sex and age discrimination, and that her consequent relief should reflect this compounded harm. Instead, Caroline is forced to "'pluck out' singular

aspects of [herself] by reference to a benchmark person and present it as 'the meaningful whole' that eclipses other parts of their being".[63]

The fact that Caroline can only compare herself separately to a Caucasian woman, an Aboriginal man or young Aboriginal woman erases recognition of the peculiar stereotypes attached to persons at the intersection of gender, Indigenous race and age. The law in this sense currently fails to acknowledge that Aboriginal and Torres Strait Islander women *specifically* are misidentified as 'offenders' rather than 'victims' and uniquely uncooperative or unwilling to work with authority figures;[64] this may differ from constructions of Aboriginal men who when speaking up may be less likely to 'buck the norm' of their gender. Similarly, courts should be able to take account of the possible effect of age in amplifying a pre-existing perception attached to Aboriginal womanhood. A positive duty must be imposed such that workplaces are not licensed to make decisions based on false assumptions drawn from a worker's multiple attributes, especially when such persons are routinely and structurally discriminated against in the job market.

[63] Nielsen, n 1, 7.
[64] Sisters Inside and the Institute for Collaborate Race Research, *'In no uncertain terms' the violence of criminalising coercive control* (17 May 2021) < https://sistersinside.com.au/in-no-uncertain-terms-the-violence-of-criminalising-coercive-control-joint-statement-sisters-inside-institute-for-collaborative-race-research/>.

Modernising standards of relief

Q5. Should the baseline quantum of damages be increased and/or the cap on damages in successful race discrimination matters to reflect the change in community expectations towards victims of racial discrimination?

Law sets the normative standard for public conduct and discourse.[65] Anti-discrimination law in particular must remain responsive to shifting community standards and expectations of what are no longer acceptable affronts to an individual's rights to bodily integrity, to work, to cultural, social and economic rights. In the original second reading speech for the AD Act, the government confirmed that, "[c]hanging societal attitudes to these matters are such that the law in this area, if it is to meet public opinion, should be capable of modification".[66]

Racism as spotlighted by the 2020 Black Lives Matter Movement has recently created a consensus of condemnation in mainstream Australian public discourse around police powers and how the State interacts and criminalises racialised peoples including highlighting Aboriginal deaths in custody that were preventable. The importance of the issue to the wider community at large was laid bare by the attendance of tens of thousands of people at nationwide BLM protests throughout Australian cities, towns and regional centres – all in spite of public health risks arising from COVID-19. Exemptions from COVID restrictions granted by state police commissioners for rallies to proceed reveals government awareness of a shift in community expectations and concerns. The state government omits to meet these community expectations when it fails to provide meaningful redress for the very issue it purports to challenge.

The ambit of protected attributes for which the law provides has progressed to reflect public awareness and concern for underprotected sectors of society. Australian state legislation must likewise move to assign the same inexcusability accorded to race discrimination as is accorded by the Australian people who are bound by that law and in comparable jurisdictions. Despite bookending the legal process of redress for race discrimination, the award of damages constitutes an initial access to justice issue. Prior to the last ten years, many actual or constructive awards have failed to exceed a few thousands of dollars. This has disincentivised deserving race discrimination claimants from vindicating their rights in court where legal costs are likely to deplete any remedy.

In *Demo v Scenic Rim Regional Council* [2014] FCCA 1623, a Federal Circuit Court held in obiter that the plaintiff would not have been entitled to more than $4000 in general damages for humiliation and the like, had his supervisor described him as a 'dumb wog' during a dispute as alleged.

Haider v Hawaiian Punch Pty Ltd [2015] FCA 37 was a successful race discrimination complaint made under the RDA by a nightclub employee of Indian or Pakistani appearance. For severe emotional distress, public humiliation and economic loss due to absences from work after a bouncer told him to go back to his own country, the Federal Court ordered $9000.

[65] Tim Soutphommasane, 'Has Racism in Contemporary Australia Entered the Political Mainstream?' (Speech, La Trobe University - Ideas and Society in 2019, 10 April 2019).
[66] New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 1976, 3393 (Senator the Hon D. P. Landa).

Around the same time, *Richardson v Oracle Corporation Pty Ltd* [2014] FCAFC 82 approved a long line of authority that breaches of the Sex Discrimination Act and equally the Race Discrimination Act should be assessed as tortious breaches and redressable by general, aggravated and exemplary damages. The Full Federal Court's decision to substitute a 'manifestly inadequate' award of $18,000 for $100,000 took account of a resulting psychological injury rather than general distress alone. However, Oracle importantly upheld that "community standards now afforded a higher level of damages for pain and suffering and the loss of the amenities of life (general damages)", taking necessary account of the effects on the plaintiff of findings of fact in sensitive matters of discrimination and harassment.

As a starting point, the Federal Court in the successful disability discrimination case *Cosma v Qantas Airways Ltd* [2002] FAC 640 awarded $25,000 in general damages for "natural distress and disappointment" resulting not from a medical condition, but "from a major life setback such as loss of valued employment" as a "central part of [the plaintiff's] life", "self-worth" and "satisfaction".

This month, *Kaplan v State of Victoria (No 8)* [2023] FCA 1092 awarded $60,000 and $80,000 in non-economic loss under the RDA for the racial abuse of former students of a Jewish secondary school. The $60,000 award was not explicitly based on the first applicant's diagnosed psychiatric injury, but rather his pre-mature departure from school, the prolonged period of the school's inaction, its legal and moral duty to protect children and impairment of his rights to be proud of his Jewish identity. The $80,000 award for the fourth applicant's distress, anxiety, ongoing bullying and harassment, combined with physical harm, was compounded by $30,000 in aggravated damages for the school's downplaying of harm.

In *Walker v Citigroup* [2006] FCAFC 101, $5000 for consequential 'distress and vexation' resulting from misleading and deceptive conduct was replaced with a $100,000 award. No expert medical evidence or other corroboration was necessary to find that the conduct causing a loss of employment, lack of income, sale of the plaintiff's family home and other personal difficulties created recoverable 'pain and suffering': damage to the plaintiff's domestic and social life including the breakup of his marriage, damage to his reputation and "considerable dislocation of his life with serious long-term effects". There was no finding of psychiatric injury.

The AD Act s 108(2) presently caps NCAT's discretion to award damages at $100,000 without a rational or legally tenable basis. The English Court of Appeal case *Alexander v Home Office* (1988) 1 WLR 968 has been approved by both *Wotton v Queensland (No 5)* [2016] FCA 1457 and *Stephenson v Human Rights and Equal Opportunity Commission* (1995) 61 FCR 134 as the appropriate basis for calculating damages for race discrimination.

> "For the injury to feelings…for the humiliation, for the insult….[a]wards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect".

In the United Kingdom, 'injury to feelings' has enjoyed a much higher baseline in awards. In *Vohra v Kader t/a Bombay Stores,* the claimant was awarded £14,000 and £11,000 ($26,716.13 and $20,991.24 AUD) for injury to feelings from sex and race discrimination respectively. During a three year period, she had been the subject of constant enquiries about when she was going to get married, racial insults from her line manager and frequently asked her to clean his desk. In *Browne v Central Manchester University NHS*

Foundation Trust, a senior NHS manager suffered race discrimination for two months prior to his termination and was awarded £20,000 or $38,165.89 AUD for injury to feelings and a sum for aggravated damages.[67] In *Virdi v The Commissioner of Police of the Metropolis* [2000] ET/2202774/98, a successful race discrimination claimant was issued £100,000 for injury to feelings and £25,000 for aggravated damages.

In the United States, general compensatory damages for 'pain, suffering, inconvenience, mental anguish' and 'loss of life enjoyment' in recent race discrimination cases are found deserving of millions. *In Yarbrough v Glow Networks Inc*, the Texan US District Court considered that the pain and suffering of nine male African-American tech engineer employees who had been variously denied promotions, demoted or terminated for reporting racial discrimination, replaced with non-African American hires with less company tenure and telecommunication experience and assigned to work in rooms with more cameras could only be adequately remediated if each were awarded $2 million USD for past harm and $1 million USD for future harm.

Similarly *in Harris v FedEx Corporation* (4:21-cv-01651), the distress of an African American district sales manager who had led one of the top sales teams nationally and had been promoted several times was found to merit $1.16 million USD ($120,000 for past and $1,040,000 for future compensatory damages) following harassment, demotion, negative evaluation and termination by her Caucasian manager. American statute does not cap damages for intentional, direct race discrimination. *Williams v Conagra Poultry Co.* – a successful US Court of Appeal race discrimination case provides the rationale:

> "In making the decision to limit damages in Title VII cases [on indirect discrimination], Congress made the implicit judgement not to limit damages in section 1981 cases [on intentional direct discrimination]…[E]xplicit legislative judgments of reprehensibility in analogous situations put parties on notice as to the order of magnitude of retributive sanctions that they can expect for reprehensible activity."

The American focus on 'reprehensibility' ought to be given due consideration in the Australian context where the awards for race discrimination must necessarily reflect and met prevailing community standards. The Australian baseline for damages in discrimination cases is clearly out of step with international standards of comparable advanced liberal democracies. Current anti-discrimination law effectively creates a right without a *meaningful* remedy.

[67] *Browne v Central Manchester University NHS Foundation Trust* (Manchester) (Case Nos 2407264/07, 2405865/08, 2408501/08) (8 December 2011, unreported).

Improving the accessibility of anti-discrimination protections

Q6. Should an 'equal access' costs model be introduced in discrimination matters?

Statute confers upon NSW Local, District and Supreme Courts 'full power' to determine by whom, to whom and to what extent costs are to be paid and on what basis.[68] As in other forms of litigation, costs generally "follow the event" and found a reasonable expectation on the part of a successful party of being awarded costs against the unsuccessful party in anti-discrimination cases.[69]

While the Tribunal is a no cost jurisdiction, this poses a fundamental access to justice issue for racial minority applicants – disincentivising and deterring meritorious complaints from being litigated. The Australian Human Rights Commission names 'Accessibility' an indispensable element in anti-discrimination law reform in the Free and Equal Report.[70] An 'equal access' or asymmetrical approach to costs will bring the state of the law into greater conformity with these principles than the 'hard' or 'soft costs neutrality' models.

An 'equal access' approach will ensure discrimination complainants immune from an adverse costs order, provided that they do not make frivolous, unreasonable or unfounded claims. Marginalised, financially vulnerable applicants will be afforded confidence to come forward, litigate meritorious cases and vindicate their right to protection under the AD Act.

'Equal access' costs regime overcomes many of the inequities in the proposed 'soft costs neutrality' model. 'Equal access' presumes that the respondent will pay the applicant's costs and circumvents any reluctance of legal representatives to take on cases where the default is bearing one's own. Reframing the adverse costs order as the exception, as opposed to the rule, provides the requisite certainty for vulnerable applicants to pursue litigation. At the same time, this makes room for pro bono cases that the 'hard costs neutrality' or 'no costs' model deters. We maintain that accommodating pro bono cases is particularly important in responding to the needs of intersectionally disadvantaged applicants and realising AHRC's principles of 'Accessibility' and 'Comprehensiveness'.

The 'Equal Access' approach constitutes an improvement from the 'hard costs neutrality' model. Where less-resourced respondents are disfavoured by the 'Equal access' model, we maintain that they are better suited to shouldering the potential risk of an adverse costs order. Respondents should not receive any financial benefit from breaking what is fundamentally human rights law.

[68] Civil Procedure Act 2005 (NSW) s 98.
[69] Uniform Civil Procedure Rules 2005 (NSW) r 42.1; Oshlack v Richmond River Council (1998) 193 CLR 72, [67].
[70] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (October 2019).

Conclusion

The proposed reforms to the *Anti-Discrimination Act* ensure an urgent need for consistency with other state jurisdictions. Critically, they give necessary effect to the UN *Declaration on the Elimination of All Forms of Racial Discrimination* adopted in 1965, '106 votes in favour, none against'.[71]

The current time limits on discrimination matters must be lifted to the maximum extent where respondent cannot establish that it would be prejudiced irreparably. The prolonging psychosocial and adverse health impacts of racism are uncontroversial in mainstream public, academic and legal debate. Accommodation of this reality must be made in order to reflect community standards. For the very same reason, limits on compensation awarded in successful discrimination cases must be made to conform with contemporary understandings of the reprehensibility of racism and allow litigants of limited means to come forward with their stories and seek relief.

The burden of proof and current costs model compounds the structural disadvantage already in place between complainants and often well-resourced respondents and mitigates against the very purpose of the statute to undo structural disadvantage. Rules which are not only inequitable, have no place in modern NSW legislation.

A positive duty on workplaces to eliminate racism and work towards racial equality, protects victims of discrimination where the reverse burden of proof only remediates the reactive side of anti-discrimination law. Where law functions as the arbitrator of societal norms, it cannot reasonably place the responsibility of irrational discrimination on the shoulders of its targets. The long and short-term efficacy of the legislation is null and void in the absence of addressing the root cause of the problem.

The Government cannot suspend reform of the antiquated and unworkable test for direct discrimination any longer. In a very literal and grave sense, 'comparison is the thief of joy' as well as of rights to protection under the law for racial minority complainants whose peculiar but by no means unique experience of discrimination have no immediate referent. This is most dire for those at the intersections of multiple forms of disadvantage who continue to lack descriptive visibility in public life and whose interests are most at stake in anti-discrimination law.

It is the prerogative and the prerequisite of legislative power that government be responsive to the needs and protection of the people, and the most vulnerable among us. The *Anti-Discrimination Act* can be the vessel through which this ideal is achieved.

Thank you for the opportunity to contribute our voices and stories.

Sarah Ibrahim

Executive Director
Racial Justice Centre Ltd

Olivia Lam

Paralegal
Racial Justice Centre Ltd

[71] Desmond Kennedy SC, 'Racial discrimination law, remedies, reform and the Racial Justice Centre', *Australian Lawyers Alliance* (25 May 2023) < https://www.lawyersalliance.com.au/opinion/racial-discrimination-law-remedies-reform-and-the-racial-justice-centre>.