Law Society of the Northern Territory

Discrimination, Harassment and Vilification: actions and remedies under federal law

Darwin, 5 April 2011

Federal Magistrate Toni Lucev*

(*The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrates Court or any other Federal Magistrate.)

Introduction

1. In this seminar I will outline two cases:

   a) a neighbourhood racial discrimination case; and

   b) an employment sex discrimination case,

   before going on to deal with the jurisdiction of the federal courts in relation to federal discrimination legislation, principally the:

   Racial Discrimination Act 1975 (Cth);[1]

   Sex Discrimination Act 1984 (Cth);[2]

   Disability Discrimination Act 1992 (Cth);[3]

   Age Discrimination Act 2004 (Cth);[4] and

   Australian Human Rights Commission Act 1986 (Cth).[5]

2. I will also examine, very generally, the nature of direct and indirect discrimination, and actions and remedies in relation to unlawful discrimination, harassment and vilification.

Campbell v Kirstenfeldt[6]

3. In *Kirstenfeldt* the Court introduced the Reasons for Judgment as follows:

   > *1. Kaye Campbell is an aboriginal Australian.*
   >
   > *2. In these proceedings Mrs Campbell complains about the conduct of her former neighbour, a white Australian, Mervyn Kirstenfeldt. Mrs Campbell's complaint is that Mr Kirstenfeldt abused her and called her names. The abuse and names included "niggers", "coons", "black mole",*

[1] "*RD Act*".
[2] "*SD Act*".
[3] "*DD Act*".
[4] "*AD Act*".
[5] "*AHRC Act*".
[6] (2008) EOC 93-515; [2008] FMCA 1356 ("*Kirstenfeldt*").

"black bastards" and "lying black mole cunt" amongst others.

4. Essentially this was a neighbourhood dispute between two neighbours in a town in a semi-rural area about 45 minutes from Perth. The dispute originally arose over cuttings from overhanging vines. That dispute led Mr Kirstenfeldt to call Mrs Campbell a "black mole". On Australia Day 2007 Mrs Campbell was standing outside watering while her son and some of his friends (some of whom were aboriginal and some of whom were not) were playing cricket. Mr Kirstenfeldt came out of his house and said to her "you nigger coon black bastard, go back where you belong in the scrub". There was a further oral altercation, in which Mr Campbell became involved, and during the course of which Mr Kirstenfeldt is alleged to have said "I'm Australian, all you niggers go back to the scrub where you belong".

5. Mr and Mrs Campbell referred the matter to the local police, and Mr Kirstenfeldt was charged with disorderly conduct, and some months later was convicted and fined $600 in the local Magistrates Court. Mrs Campbell was also granted a misconduct restraining order for a limited period of time. The abuse did not stop however, and four days after the Magistrates Court conviction, Mr Kirstenfeldt said to Mrs Campbell, with reference to the Magistrates Court matter, "you lying black mole, cunt".

6. Mrs Campbell alleged that other not dissimilar abuse occurred over a period of time, and that it also occurred in front of neighbours.

7. Section 18C of the *RD Act* was in issue in *Kirstenfeldt*. Section 18C provides as follows:

> *18C Offensive behaviour because of race, colour or national or ethnic origin*
>
> *(1) It is unlawful for a person to do an act, otherwise than in private, if:*
>
> *(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the Human Rights and Equal Opportunity Commission Act 1986 allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

***public place** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*

8. The civil wrong established by s.18C of the *RD Act* has four elements, as follows:

a) an act performed otherwise than in private;

b) an act by a person;

c) an act reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and

d) an act done because of the race, colour or national or ethnic origin of the other person or group of people.

9. The Court in *Kirstenfeldt* was satisfied that the relevant acts were performed otherwise than in private. That was because in relation to each of the incidents that were said to have occurred either:

a) over a neighbourhood fence; or

b) being shouted, or at least capable of being heard, between one property and another; or

c) being capable of being heard in public being said on one property to people either on a public footpath or in a public reserve across the road from the house; or

d) given that each of the houses faces directly onto a footpath and road that the acts complained of (being words spoken) in each case would have been capable of being heard in a public place, being either the footpath, or the road or the park reserve; and

e) were therefore not made in private,[7] and in any event, were not private exchanges, but exchanges heard by the complainant, and members of her family on some occasions, persons who were not members of her family on other occasions (including the neighbour who was with the respondent on at least two occasions), or generally capable of being heard in the neighbourhood.[8]

10. In relation to whether the acts complained of (that is, the words used) were reasonably likely to offend, insult, humiliate or intimidate and whether they were done because of the race or colour of Mrs Campbell, that was examined in *Kirstenfeldt* as follows:

> *31. Although the vine cutting incident arose in the context of a domestic or garden dispute between neighbours the description of Mrs Campbell as a "black mole" must, at the least, be reasonably likely to offend or insult her. The act is clearly done because of her race or colour because of the use of the word "black". Were the remark intended to be merely abusive in the context of a garden or domestic dispute the use of "black" would be unnecessary. Its use in conjunction with "mole" is, on any objective test, offensive or insulting, a mole being a colloquial expression for "moll", the meaning of which includes the girlfriend or mistress of a thief, or a prostitute.*[9]

[7] See *McMahon v Bowman* [2000] FMCA 3 ("*McMahon*"); *Chambers v Darley & Ors* [2002] FMCA 3.
[8] See cases referred to at previous footnote; also *McLeod v Power* (2003) 173 FLR 31; [2003] FMCA 2.
[9] The Macquarie Dictionary, 2nd Edition, page 1145.

32. In relation to the general derogatory comments made between late 2005 and Australia Day 2007 the use of the words "niggers", "coons", "black bastards", and an invitation to "go back to the scrub" because that was where Mrs Campbell belonged cannot be seen as anything other than words related to Mrs Campbell's race or colour. The word "nigger" is a derogatory term for an aborigine.[10] *It is also used as a derogatory term for a member of any dark skinned race.*[11] *"Coon" is a derogatory reference to a member of a dark skinned race (more often though an American negro).*[12] *Calling someone a "black bastard" is clearly just a general term of derogatory abuse, but nevertheless one which because of the use of the word "black" has, as its thrust, the race or colour of the person to whom it is directed. Again, viewed objectively, the use of those terms over a period of time, is reasonably likely to offend or insult a person, and in particular, a person in Mrs Campbell's circumstances, which, on the evidence, appears to be those of an aboriginal woman trying to lead an ordinary family life with her husband, children and extended family.*

33. The Australia Day 2007 incident is based on the use of the same terms (nigger, coon, black bastard) and a similar invitation from Mr Kirstenfeldt to Mrs Campbell to "go back where you belong in the scrub", and the same conclusions follow as in the previous paragraph.

34. The 6 November 2007 incident in which Mr Kirstenfeldt called Mrs Campbell "you lying black mole, cunt" requires no further exposition from this Court. Again, it is clearly based on race or colour, and objectively, reasonably likely to offend or insult.

35. The stick collecting incident with the use of the terms "nigger, coon" called out to Mrs Campbell whilst she was in a public reserve across from her home are again reasonably likely to offend or insult, and again acts done because of the race or colour of Mrs Campbell.

36. The footpath incident of 16 November 2007 where Mr Kirstenfeldt, from his front veranda, clearly said to Mrs Campbell (amongst others) "you lying cunts, you gin-tailing bastards, you'se (sic) are all a mob of bastards" is again a comment made because of Mrs Campbell's race or colour, a "gin" being an often

[10] The Macquarie Dictionary, 2nd Edition, page 1203.
[11] The Macquarie Dictionary, 2nd Edition, page 1203.
[12] The Macquarie Dictionary, 2nd Edition, page 393.

offensive term for an aboriginal woman.[13] *In this context, the other terms of abuse combined with the reference to "gin-tailing" are terms which are reasonably likely to "offend" or "insult".*

37. Insofar as any of the comments referred to above and found to be offensive or insulting were said to Mrs Campbell in front of family or friends the Court also considers that they were comments reasonably likely to cause Mrs Campbell to feel humiliated.

11. In all of the circumstances, the Court was satisfied that each of the incidents above contained all of the elements of the civil wrong established by s.18C of the *RD Act*.

12. In *Kirstenfeldt* the Court:

    a) made a declaration that Mr Kirstenfeldt had engaged in conduct rendered unlawful by s.18C of the *RD Act*;

    b) ordered that an apology be made;[14] and

    c) awarded damages by way of compensation in the sum of $7,500.

Employment Services Australia Pty Ltd v Poniatowska[15] **and** ***Poniatowska v Hickinbotham***[16]

13. Ms Poniatowska's employment was terminated on 21 February 2006 following the giving of formal warning notices by the employer, ostensibly, for unsatisfactory performance. The following events occurred prior to the termination of employment:

    a) Ms Poniatowska was given a written warning by the Contracts Manager, Renato Daminato by letter dated 18 November 2005 about the preparation and presentation of her files (the first warning letter);

    b) on 13 December 2005, she was given a further warning by letter under the hand of Mr M Hickinbotham, concerning her acceptance of a deposit from a client for a block of land against

[13] The Macquarie Dictionary, 2nd Edition, page 738.
[14] *HREOC Act*, s.46PO(4)(b); *Forbes v Commonwealth* [2003] FMCA 140; *Oberoi v HREOC* [2001] FMCA 34.
[15] [2010] FCAFC 92 ("*Poniatowska (No. 2)*").
[16] [2009] FCA 680 ("*Poniatowska (No. 1)*").

the instructions not to proceed with that sale, and her incorrect assurances to the client (the second warning letter);

c) a further warning in writing was given to Ms Poniatowska on 20 December 2005, again under the hand of Mr M Hickinbotham, concerning her acceptance of a deposit for a further block when she should not have done so (the third warning letter);

d) in early January 2006 she endeavoured to speak to Mr M Hickinbotham concerning those warnings, as she regarded them as unfair, but the warnings were not withdrawn;

e) on 10 February 2006 she was given a further letter from Mr M Hickinbotham, notifying her of her immediate suspension (the suspension letter). The letter referred to the first and second warning letters, to "further serious errors" in her documentation and file preparation and presentation and to a further complaint from a client, no detail of which was specified in the letter. The suspension letter notified her that an investigation was to be undertaken into that complaint and proposed a meeting on 15 February 2006 to "put the allegations to [her] and obtain [her] response"; and

f) that meeting subsequently took place on 21 February 2006, when Ms Poniatowska's employment was terminated. The termination was oral, but subsequently confirmed by letter from Mr Hickinbotham of 23 February 2006 (the termination letter).

14. The warning letters and suspension and termination must be viewed in the context of earlier matters relating to Ms Poniatowska's employment.

15. Ms Poniatowska, who was a building consultant, met with other building consultants each Monday morning, including Mr Flynn.

16. On 8 May 2005 Ms Poniatowska received an email from Mr Flynn inviting her to enter into a sexual relationship with him. She responded saying that she did not want a sexual relationship with him, and the Court found that Mr Flynn understood this but, nonetheless, two days later sent a further email, in explicit terms, containing another invitation for sexual relations. Ms Poniatowska did not respond to that

email. Two further SMS text messages to Ms Poniatowska from Mr Flynn followed, and a third email which was seen as an attempt to avoid Ms Poniatowska reporting the matter to the employer.

17. In June 2005 Ms Poniatowska was assigned to work with a Mr Lotito as a matter of routine. Ms Poniatowska expressed a concern about working with Mr Lotito. A female manager (team leader) then told Ms Poniatowska in the open office area in the presence of other staff "I told Remo [Mr Lotito] not to fuck my consultants" or words to that effect. The Court found that this was not meant as a joke, that it was inappropriate and caused Ms Poniatowska embarrassment and discomfort. In particular it was found to be an inappropriate response in circumstances where the female manager concerned was aware of the May 2005 allegations concerning Mr Flynn.

18. There were further allegations concerning Mr Lotito. Ms Poniatowska alleged that on 8 June 2005 she received on her mobile phone a photograph from Mr Lotito showing an act of oral sex by a woman on a man, with the text "U have 2 be better". There were subsequent phone calls from Mr Lotito asking Ms Poniatowska for sex, including requests for oral sex. There were five separate phone calls from Mr Lotito to Ms Poniatowska over a period of 12 days in June 2005.

19. The employer investigated the matter, but the Court did not consider the investigation to be a particularly satisfactory one. The Court observed that after Mr Lotito gave an apology to Ms Poniatowska concerning these matters, he was treated warmly and sympathetically by the female manager, but that Ms Poniatowska was not treated in the same way. Mr Lotito was said to have been "privately warned orally in a gentle way but no formal warnings given, nor was any formal record of any inappropriate conduct made" and that "at no time was any notice given to the staff about the inappropriateness of Mr Lotito's behaviour or more generally, of harassment in the workplace."[17]

20. The Court observed that the treatment of the Lotito allegations was dramatically different to the treatment that Ms Poniatowska received in the events leading up to her suspension and termination, and that the differential manner of treatment indicated an attitude on the part of the

[17] *Poniatowska (No. 2)* at para.35 per Stone and Bennett JJ.

employer which manifested itself in the Court's findings concerning the reasons for Ms Poniatowska being terminated. In short, Ms Poniatowska was not regarded by the employer as the victim, but as the problem, and a problem to be managed.

21. The Court's conclusions concerning the reasons for the termination of Ms Poniatowska are set out as follows:

> *282 In my judgment, Ms Poniatowska was not dismissed for the reasons stated in the termination letter. I also find, for the reasons indicated, that none of the first warning letter, the second warning letter, the third warning letter or the suspension letter set out accurately matters about which her employer was satisfied that she had conducted herself in her employment so as to warrant the giving of those letters. Put bluntly, I find that none of those warning letters, or the suspension or termination of her employment, were for her poor work performance.*
>
> *283 I find that there was a different, but consistent, motivation for those communications. It was to set the scene for the termination of, and ultimately to terminate, Ms Poniatowska's employment because she had, over a period of time, revealed by what she had done in relation to the May 2005 allegations, the June 2005 allegations and the Lotito allegations, a sensitivity to the conduct of the type to which those allegations related.*[18]

22. The Court found that the employer had discriminated against Ms Poniatowska on the ground of her sex, reasoning in the following way, as summarised on appeal in *Poniatowska (No. 2)*:

- *From about May 2005 to August 2005, ESA was confronted with a female who would not accept the behaviour of Mr Flynn and Mr Lotito, whose conduct amounted to sexual harassment, and of the robust work environment.*
- *The employer did not address her legitimate concerns.*
- *Ms Poniatowska was not treated as the victim of sexual harassment but as a problem to be dealt with.*
- *The employer then determined that she was a person who did not "fit" its work environment because she was a female who would not tolerate sexual harassment and the robust work environment.*

[18] *Poniatowska (No. 1)* at paras.282-283 per Mansfield J.

- *The employer then gave her the three warning letters and the suspension letter as a means of setting the scene for the termination of her employment.*

- *In those processes she was treated differently from the way the employer would have treated a male person.*

- *The way Ms Poniatowska was treated was less favourable than, in circumstances that were the same or not materially different, her employer would have treated male persons.*

- *Some other female persons might have been exposed to sexual harassment in that workplace and tolerated it without complaint but that was not to the point.*

- *Ms Poniatowska complained. Her complaints were treated dismissively or superficially addressed.*

- *The legitimate complainant was then identified as a person who it was desirable to terminate.*

- *No male persons complained. However, those engaging in the sexual harassment or the sexually explicit language were treated differently.*

- *How would a male employee who complained have been treated? The answer is theoretical but his Honour was satisfied "quite firmly" that such a male would have been treated differently.*

- *ESA viewed that Ms Poniatowska, as a complainant female, was a potential ongoing impediment and that the better solution was that her employment should not continue.*

- *ESA would not have taken the same approach to a male employee.*

- *Consequently, ESA acted unlawfully in discriminating against her on the ground of sex by dismissing her.*[19]

23. The Court observed that Ms Poniatowska needed to show that the discriminator (the employer) treated her less favourably than it treated a man or would have treated a man in circumstances that were the same or not materially different.[20]

[19] *Poniatowska (No. 2)* at para.69 per Stone and Bennett JJ.
[20] *Poniatowska (No. 2)* at para.108.

24. The Court considered that a male complainant was the relevant comparator, the question posed by s.5 of the *SD Act* being necessarily one to be answered on a theoretical basis, by reference to a male complainant.

25. Ms Poniatowska's characteristics were that she was a female:

- *who was sexually harassed; and*
- *subjected to a robust work environment that she could not tolerate; and*
- *had complained of each such treatment;*
- *such that she was considered an impediment to the smooth running of ESA's business.*[21]

26. The Court found that a male would not have been considered by the employer to have had those characteristics, and that it was necessarily because Ms Poniatowska was a female that she was in that position. The Court found that the employer would not have taken the same approach to a male who was sexually harassed and had complained. That is, the employer would not have considered that male to be an impediment to the smooth running of the business. It was these factors that resulted in the termination of Ms Poniatowska's employment, and that dismissal was by reason of those factors, all of which followed from her sex, and therefore constituted sex discrimination.[22]

Jurisdiction

27. The Federal Court of Australia and the Federal Magistrates Court of Australia[23] have concurrent jurisdiction to hear and determine a complaint terminated by the President of the Australian Human Rights Commission under ss.46PE or 46PH of the *Australian Human Rights Commission Act 1986* where the President has given a notice to any person under s.46PH(2) in relation to the termination.

[21] *Poniatowska (No. 2)* at para.113 per Stone and Bennett JJ.
[22] *Poniatowska (No. 2)* at para.114 per Stone and Bennett JJ.
[23] "the federal courts".

28. There is a 28 day time limit (which may be extended)[24] after the date of issue of the AHRC Notice of Termination.

29. Unlawful discrimination alleged in an application to the federal courts must in substance be the same as the unlawful discrimination that was the subject of the terminated complaint, or arise out of the same or substantially the same acts, omissions or practices that were the subject of the terminated complaint.

30. Section 46PO(3) of the *AHRC Act* provides as follows:

> *(3) The unlawful discrimination alleged in the application:*
>
> *(a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or*
>
> *(b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.*

31. In *Kirstenfeldt* the Court observed that:

> *15. By reason of s.46PO(3)(b) an applicant is permitted to allege in this Court facts different to those alleged in the terminated HREOC complaint, provided that the newly alleged facts are not different in substance from the formerly alleged facts. These provisions do not limit this Court to considering the initial complaint to HREOC, but rather the complaint ultimately considered by HREOC. No doubt difficulties may arise with a complaint generally expressed or lacking details. Given that complaints will often not be prepared by lawyers, and ought not be construed as if they were pleadings, this kind of difficulty will be for the Court to determine as to whether the evidence arises out of the same, or substantially the same, acts, omissions or practices that were the subject of the terminated complaint.*[25]

---

[24] On the usual principles: see *Cohen v Hunter Valley Developments* (1984) 3 FCR 344 per Wilcox J.
[25] *Kirstenfeldt* at para.15 per Lucev FM. See also *Portuguese Cultural and Welfare Centre Inc v AMCA* [2011] FMCA 144 at para.118 per Lucev FM; *Charles v Fuji Xerox Australia Pty Ltd* (2000) 105 FCR at 580-581 per Katz J; [2000] FCA 1531 at para.39 per Katz J; *Travers v New South Wales* [2000] FCA 1565 at para.8 per Lehane J; *Ho v Regulator Australia Pty Ltd* [2004] EOC 93-332; [2004] FMCA 62 at para.4 per Driver FM; *Hollingdale v Northern Rivers Area Health Service* [2004] FMCA 721 at para.10 per Driver FM; *Gama v Qantas Airways Limited* (2006) 195 FLR 475 at 480 per Raphael FM; [2006] FMCA 11 at para.9 per Raphael FM ("*Gama-FMC*"). The judgment in *Gama-FMC* was appealed, but not on point: see on appeal *Qantas Airways Limited v Gama* (2008) 167 FCR 537; [2008] FCAFC 69 ("*Gama Appeal*").

32. In *Caves v Chan & Ors (No. 2)*[26] an application against five individual respondents was dismissed because the complaint, as terminated by the AHRC, was against an association, and not the individual committee members or members of the association, and further, because matters occurring after the complaint before the AHRC had been terminated involving those individual members were irrelevant and inadmissible.[27]

33. The federal courts have broad powers to grant declaratory or injunctive relief, including orders having a mandatory effect, both on an interlocutory and final basis. It is not unusual for an injunction to be sought preventing termination of employment, where it has not occurred, in employment discrimination cases.[28]

34. The federal courts may award unlimited damages by way of compensation for both economic and non-economic loss.

35. Apologies may be ordered,[29] but may not be ordered if not freely given, or is lacking in utility.[30]

36. The federal courts do not have jurisdiction to make orders affecting the rights or obligations of a party in the absence of a finding of unlawful discrimination, and where no issue arises in the associated or accrued jurisdiction of the federal courts which allow them to deal with non-discrimination claims arising out of the same facts as a discrimination claim.[31]

37. The jurisdiction covers complaints of unlawful discrimination under the *RD Act*, *SD Act*, *DD Act*, *AD Act*, and the *AHRC Act*. Unlawful discrimination is defined in s.3(1) of the *AHRC Act*, but perhaps unhelpfully simply refers the reader on to the relevant parts of the other abovementioned Acts.

38. Unlawful discrimination relevantly means discrimination on the grounds of:

---

[26] [2010] FMCA 17 ("*Caves (No. 2)*").
[27] *Caves (No. 2)* at para.19 per Lucev FM; see also *Evidence Act 1995* (Cth), s.56(2).
[28] See, for example, *Harcourt v BHP Billiton Iron Ore Pty Ltd & Ors (No. 2)* (2008) EOC 93-503; [2008] FMCA 1100.
[29] See *Kirstenfeldt*, where the respondent agreed to apologise, and cases there cited.
[30] *Jones v Scully* (2002) 120 FCR 243; *Evans v NCA* [2003] FMCA 375.
[31] See, for example, *New South Wales Department of Housing v Moskalev* [2007] FCA 353. As to the associated jurisdiction of the Federal Magistrates Court see *Skipworth v State of Western Australia & Ors* (2008) 218 FLR 216; [2008] FMCA 544.

a) race, colour, descent or national or ethnic origin;

b) sex, marital status, pregnancy or potential pregnancy, or family responsibilities;

c) disability, possession of palliative or therapeutic devices or auxiliary aides, involvement of an interpreter, reader, assistant or carer, or being accompanied by a guide dog or an “assistance animal”; and

d) age.

39. Unlawful discrimination also includes:

a) offensive behaviour based on racial hatred;

b) sexual harassment; and

c) harassment of people with disabilities.

40. Discrimination does not exist in the abstract, or apply to all manner of things. Rather, discrimination extends to a specified range of matters, namely:

a) employment including recruitment, conditions of employment, promotion and training and dismissal;

b) access to goods, services and facilities;

c) education;

d) accommodation;

e) access to premises;

f) sale of land; and

g) administration of Commonwealth laws and programmes.

41. In making an application, or pleading a claim where pleadings are allowed, discrimination must be linked to one of these types of matters.

42. It is an offence to victimise a person who has made a complaint of unlawful discrimination.

Direct discrimination

43. Direct discrimination occurs where the discriminator treats or proposed to treat the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person without the relevant characteristic because of the relevant characteristic.

44. *Poniatowska (No. 1)*, together with the appeal in *Poniatowska (No. 2)*, is an example of direct discrimination on the basis of sex. In that case the Federal Court at first instance used a theoretical male comparator, a use which was approved on appeal.

45. Direct discrimination requires a comparison therefore between the aggrieved person and an actual or hypothetical comparator (but note that racial discrimination is different – see below). The concept of direct discrimination has proved a challenging one, particularly in the context of disabilities where the disabled person exhibits unacceptable behaviours.

46. In racial discrimination cases the discrimination is defined as any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of any human right or fundamental freedom in the political, economic, social, cultural, or other field of public life.[32] References to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the International Convention on the elimination of all forms of racial discrimination, which prescribes an extraordinarily wide range of circumstances including equal treatment before tribunals and other organs administering justice; political rights, in particular the rights to participate in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to the public service, and to other civil rights, notable the right to nationality, the right to freedom of thought, conscious and religion, the right to freedom of opinion and expression and the right to freedom of peaceful

[32] *RD Act*, s.9(1).

assembly and association. Economic, social and cultural rights are included, including the right to education and training and the right to equal participation in cultural activities. In *Portuguese Cultural and Welfare Centre* the Federal Magistrates Court held, in the context of an application for summary dismissal or strike-out, that certain acts of a public servant involved in consideration of the renewal of a community broadcast licence for a community cultural association were arguably such as to have the effect of nullifying or impairing a relevant right, and in particular, the right to have equal access to the public service and the right to equal participation in cultural activities, where the ultimate purpose of the broadcasting licence was to allow the community cultural association to broadcast in relation to, amongst other things, cultural activities for persons of Portuguese nationality, origin and descent.[33]

47. The difference between the *SD Act*, the *RD Act* and the *DD Act* was pointed out by the majority in *Purvis v State of New South Wales & Anor*:[34]

> *198 In so far as those instruments were said to bear upon the proper construction of the Act, however, it is necessary to notice an important respect in which the subject of disability discrimination differs from some other forms of discrimination. Central to the operation of the Sex Discrimination Act and the Racial Discrimination Act 1975 (Cth) is the requirement for equality of treatment. A central purpose of each of those Acts is to require that people not be treated differently on the ground of sex or race. Difference in sex or race is identified as a generally irrelevant consideration.*
>
> *199 By contrast, disability discrimination legislation necessarily focuses upon a criterion of admitted difference. The abilities of a disabled person differ in one or more respects from that range of abilities which is identified as falling within the band described as ‘‘normal’’. It follows that disability legislation must be understood from the premise that the criterion for its operation is difference. That has important consequences, not only for the lessons that may be learned from the way in which other legislatures or deliberative bodies have identified the problems that should be considered, but also for the proper understanding*

[33] *Portuguese Cultural and Welfare Centre* at para.23 per Lucev FM.
[34] (2003) 217 CLR 92; [2003] HCA 62 (“*Purvis*”).

of the solutions that have been devised by those other bodies to answer the problems identified.[35]

48. *Purvis* involved a young man who, as a consequence of brain damage, exhibited uninhibited behaviour and difficulty in communication, leading to frustration and behavioural problems. After a series of suspensions he was ultimately expelled from a New South Wales State high school which had made some efforts to accommodate his problems. The matter found its way to the High Court, and the High Court found that the disability was not confined to the underlying condition to the exclusion of the resulting behaviour. That is, the behaviour could form part of the disability. The majority in *Purvis*, in a long and difficult passage, said as follows:

> *223 In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, s 5(1) requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in those circumstances if the person concerned was not disabled. The appellant's argument depended upon an inversion of that order of examination. Instead of directing attention first to the actual circumstances in which a disabled person was, or would be, treated disadvantageously, it sought to direct attention to a wholly hypothetical set of circumstances defined by excluding all features of the disability.*
>
> *224 The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the "discriminator". It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability. There may be cases in which identifying the circumstances of intended treatment is not easy. But where it is alleged that a disabled person has been treated disadvantageously, those difficulties do not intrude. All of the circumstances of the impugned conduct can be identified and that is what s 5(1) requires. Once the circumstances of the treatment or intended treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in*

[35] *Purvis* CLR at 153-154 per Gummow, Hayne and Heydon JJ; HCA at para.198-199 per Gummow, Hayne and Heydon JJ.

> *circumstances that were the same or were not materially different.*
>
> *225 In the present case, the circumstances in which Daniel was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils. Section 5(1) then presented two questions:*
>
> *(i) How, in those circumstances, would the educational authority have treated a person without Daniel's disability?*
>
> *(ii) If Daniel's treatment was less favourable than the treatment that would be given to a person without the disability, was that because of Daniel's disability?*
>
> *Section 5(1) could be engaged in the application of s 22 only if it were found that Daniel was treated less favourably than a person without his disability would have been treated in circumstances that were the same as or were not materially different from the circumstances of Daniel's treatment.*[36]

49. There have been numerous applications of the *Purvis* principle in the federal courts.[37]

50. Extra-judicially one Federal Magistrate has commented that:

> *In none of these cases were the disabilities defined narrowly – on the contrary, the disabilities in the above cases were often defined quite broadly and in accordance with the principles outlined by the majority in* Purvis. *But the use of the comparator to include in the circumstances the physical manifestations of the disability means that the comparator is much closer in its characteristics to*

---

[36] *Purvis* CLR at 160-161 per Gummow, Hayne and Heydon JJ; HCA at paras.223-225 per Gummow, Hayne and Heydon JJ.

[37] See *Y v Human Rights and Equal Opportunity Commission* [2004] FCA 184 (menacing telephone call arising from obsessive-compulsive personality disorder causing person to exhibit anti-social behaviour at time, where Federal Court held that regard had to be had to the behaviour exhibited by the appellant as part of the factual circumstances); *Fetherston v Peninsula Health* [2004] FCA 485 (termination of employment of a medical practitioner with diabetes related vision impairment after refusal to provide the results of an examination by an eye specialist to his superiors); *Hollingdale v North Coast Area Health Service* [2006] FMCA 5 (in which the Federal Magistrates Court found that it was untenable for the relevant health service to have a mental health employee exhibiting behaviours which might stem from a mental disability and which adversely impact upon other employees at work); *Forbes v Australian Federal Police* [2004] FCAFC 95 (where the Full Court of the Federal Court found that where the AFP did not believe that the appellant claimed to have suffered from a serious depressive illness the appropriate comparator was an able bodied person who claimed to be disabled but who the AFP, correctly, did not believe had a disability).

the aggrieved party, making a case of direct discrimination harder to prove.[38]

Indirect discrimination

51. Indirect discrimination occurs where the discriminator imposes, or proposes to impose, a condition, requirement or practice which is not reasonable, which the aggrieved person cannot meet and which has, or is likely to have, the effect of disadvantaging persons with the relevant characteristic.

52. Indirect discrimination might include circumstances such as:

    a) the requirement for a female to work full-time following pregnancy;

    b) the requirement for an intellectually disabled person to complete an educational course in a particular timeframe; and

    c) the requirement for a divorced male with parental responsibility for five children under 8 years of age to work a particular shift pattern.

Sexual harassment

53. The *SD Act* specifically proscribes unwelcome sexual advances, unwelcome requests for sexual favours or other unwelcome conduct of a sexual nature in relation to the person harassed in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Racial hatred

54. The *RD Act* specifically proscribes offensive behaviour because of the race, colour or national or ethnic origin of the aggrieved person if the act is done "otherwise than in private" and is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate the

[38] Raphael FM, "The *Disability Discrimination Act 1992*: some reflections on the 'comparator'.

aggrieved person either as an individual or as a member of a group of people.[39]

55. The current case before the Federal Court in Melbourne involving the Herald and Weekly Times columnist Andrew Bolt and certain persons of aboriginal descent revolves around the question of whether it is reasonably likely, in all the circumstances, that those persons were offended, insulted or humiliated.

Vicarious liability

56. Bodies corporate are liable for the acts of their servants or agents undertaken within the scope of their authority. Employers are liable for the acts of their employees unless the employer took reasonable precautions and exercised due diligence to avoid the discrimination. In this regard it is not only necessary for employers to have policies, but to train their management staff in those policies, and implement those policies, and ensure that they are implemented by appropriate follow-up. Persons who instruct, induce, aid or permit discrimination are also liable. Permitting discrimination may include turning a "blind eye" to discrimination.

Exemptions

57. There are a range of exemptions under the different legislation including:

    a) positive discrimination or special measures;

    b) restrictions on insurance and superannuation having a proper actuarial or statistical basis;

    c) membership of voluntary bodies or acts or practices undertaken for a religious reason;

    d) acts done under statutory authority;

    e) competitive sporting activities; and

[39] See *Kirstenfeldt*.

f) unjustifiable hardship.

Evidence

58. Complainants bear the onus of proof. Interestingly, similar heads of discrimination related to termination of employment and adverse action under the provisions of the *Fair Work Act 2009* (Cth) contain provisions reversing the onus of proof. Lawyers advising clients to initiate proceedings, particularly involving termination of employment or in relation to matters within the scope of "adverse action" under the *FW Act* may need to give careful consideration to the relevant evidentiary requirements before determining under which legislation to bring an action.[40]

59. Depending on the seriousness of the allegations they may need to be proved to the standard set out in s.140(2) of the *Evidence Act 1995* (Cth).[41] Even though s.46PR of the *AHRC Act* provides that the federal courts are not bound by technicalities or legal forms, the rules of evidence still apply.

Representation

60. Section 46PQ of the *AHRC Act* permits a person to be represented by someone other than a legal practitioner, unless the relevant federal court is of the opinion that it is inappropriate for the representative to appear.[42]

[40] Because of the different requirements and timeframes for conciliation under the federal discrimination legislation and the *FW Act* it is probably not possible to bring a Fair Work and a terminated AHRC complaint as a single proceeding before the federal courts. Further, two separate complaints related to the same facts might give rise to abuse of process claims.
[41] *Gama Appeal*.
[42] See, for example, *Reynolds v Minister for Health* (2010) 247 FLR 425; [2010] FMCA 843 (person registered as an industrial agent under State industrial relations legislation denied right to appear in AHRC proceedings in the Federal Magistrates Court).